



**ANM v JMW (Family Appeal E132 of 2023)
[2024] KEHC 9661 (KLR) (Family) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E132 OF 2023
SN RIECHI, J
AUGUST 7, 2024**

BETWEEN

ANM APPELLANT

AND

JMW RESPONDENT

JUDGMENT

1. The appellant ANM filed the amended Petition dated 2.6.2023 seeking the following orders:
 - a. The Court be pleased to dissolve the marriage between the petitioner and the Respondent by allowing this divorce petition.
 - b. That this Court be pleased to order that the Petitioner is under no obligation to cohabit with the 1st respondent.
2. The Respondent JMW filed an answer to Further Amended Petition and Cross Petition dated 4.7.2023 denying the application assertion that they were married and in paragraph 4 stating:
3. The Respondent denies the contents of paragraph 4 of the further amended Petition in toto. The Respondent further contends that the Petitioner and the Respondent were in a relationship of a sexual nature with few stints of cohabitation which never culminated into any customary marriage.
4. The matter proceeded for full trial. The Petitioner adopted her witness statement dated 7.7.2023 as her evidence in chief. In the statement she averred that she got married to the Respondent in 1992 under Luhya Customary Law. They had 2 issues of the marriage:
 1. IW born in 1993
 2. IN born in 1995.



5. Both children are now adults. She testified that to confirm their marriage under Luhya Customary Law. She and the Respondent swore affidavit of marriage before Isaac Lenaola Advocate (as he then was) dated...
6. During the subsistence of the marriage the Respondent had treated her with cruelty, committed adultery and deserted the matrimonial home. She recited the particulars of cruelty in in paragraph 10 of the statement. She further testified that the Respondent has committed acts of breach of trust which included selling of Matrimonial Property, removing her as a director of a company. Due to this breach of trust she filed Petition for distribution of Matrimonial Property in Nairobi HFCC E 005/2023 between herself and the respondent.
7. On being cross examined by Kichweu for the respondent, she stated that she is from Narok and the Respondent visited her house for dowry negotiating in 2003 but had started cohabiting in 1992. She stated that the respondent was involved in 6 other women and was violent to her. She confirms she does not have a Certificate of marriage and that Respondent moved out of the house in 2018.
8. JMW the Respondent gave evidence. He adopted his answer to Amended Petition dated 4.7.2023 as his evidence in chief. The Respondent stated that before he met the Petitioner he was married to other wives and had children. He stated that he and the respondent were in a sexual relationship with few stints of cohabitation which never culminated into any customary marriage. Out of that relationship they had 2 issues of the marriage.
9. He stated that the Petitioner has had mental issues and was being attended by Doctor Okonyi. He avers that he is a polygamous man and cannot be said to be committing adultery with his wives. He denies the particulars of cruelty and stated that it is the appellant who was violent and a business. In his evidence he denies that there was any dowry negotiations and that there was no marriage. He stated that there can be no divorce if there was no marriage. On being cross-examined by Mr. Simiyu for appellant. He confirmed that his name was appearing on the affidavit but cannot confirm if the signature on the document is his. He confirmed he had lived together with Respondent for about 20 years and had 2 children.
10. Upon considering the evidence, the trial magistrate by Judgment dated 6.11.2024, stated:

I entertain strong doubt as to whether the question of presumption of marriage can be raised in a situation where a party is only seeking its dissolution. I hold the view that to invite a court of law to presume a marriage and by the same token urge the said court to dissolve such a marriage would 79) be contradiction in terms of absurdity.

I respectfully decline this invitation I determine that the doctrine of presumption of marriage does and cannot apply where the only relief sought is purely that of dissolution of marriage sought to be so presumed in the end. I agree with the respondent that there is no valid marriage for purpose of dissolution.

The entirety of the petition fails and that same is dismissed with no orders as to cost, this being a family matter. Each party to bear its costs.
11. Being aggrieved the above judgment the appellant filed an appeal through a Memorandum of Appeal dated 21st November, 2023 setting out eight (8) grounds of the appeal as follows:
 1. That the learned magistrate erred in fact in quoting the date of the petitioners further amended petition as 2nd June 2023 when it is actually dated 30th May 2023;



2. The learned trial magistrate erred in fact and law in holding that there was no marriage before him capable of dissolution as contemplated by the Marriage Act, 2014.
 3. That the learned magistrate erred in law and fact in failing to find in favor of overwhelming evidence on celebration and observance of the customary marriage rites and customs under Luhya Customary Law to legally prove a marriage under the Marriage Act.
 4. The learned trial magistrate erred in law and fact in failing to find that Petitioner had made out a case for dissolution of the marriage/ divorce.
 5. That the trial magistrate erred in law and fact in misapprehending the provisions of Section 96(2) while intentionally failing to apply his mind to the saving provisions of Section 98 (1) of the Marriage Act, 2014.
 6. That trial magistrate erred in law and fact in arriving at a judgment that is retrogressive to the gains made by the Constitution of Kenya 2010, The Marriage Act, 2014 and the Marriage (Matrimonial Proceedings) Rules 2020
 7. That the trial magistrate erred in law and fact in finding that the doctrine of presumption of marriage is not applicable in a purely divorce petition with no claim to matrimonial property. The court is aware that the petitioner originally filed this suit as a divorce and division of matrimonial property suit then withdrew the matrimonial part of the suit to file it in the high court after an objection was raised pertaining to the pecuniary jurisdiction of the matrimonial property exceeding Kshs.20 million. The trial court had previously issued orders preserving the matrimonial property pending division until the orders were vacated upon the withdrawal.
 8. That the trial magistrate erred in law and fact in finding that the doctrine of presumption of marriage is not applicable in a purely divorce petition with no claim to matrimonial property while aware of existence of High Court Family Cause No. HCFC NO. E005 of 2023 between the same parties for division of matrimonial property.
12. The Appellant prays that the appeal be allowed and;
- A. This Court be pleased to set aside the trial courts judgment dated and delivered on 6th November 2023.
 - B. This court be pleased to allow the further amended petition dated 30th May 2023 dissolving the marriage between the petitioner and the Respondent and declaring the petitioner under no obligation to cohabit with the respondent.
 - C. Costs of this appeal be borne by the respondent.
13. This appeal was canvassed by way of written submissions. Counsel for parties filed their respective Submissions. Mr. Wafula Counsel for the appellant submitted that the appellant contended that was married to the Respondent under Luhya Customary Law. He submits that the appellant produced affidavit signed by both parties to confirm the marriage in 1992 and that the fact that it had not been registered under Section 96(2) of the marriage Act 2014 does not mean that there was no valid marriage capable of dissolution. He submits that the appellant's submission for an alternative of finding of presumption of marriage did not affect the first prayer that it was a customary marriage.
14. Mr.for the respondent submits that marriage under Luhya customary law has activities which ought to be carried out and the appellant failed to prove all the elements of marriage under



Luhya Customary law. The appellant did not call evidence to show any of the close family members of the Respondent participated or were involved in the alleged Luhya customary marriage. Counsel further submits that even if there was such customary marriage Section 55 of the Marriage Act 2014 requires the same to be registered within 3 years of coming into force of the Act. This was not done as no certificate was produced.

15. On whether the relationship between the appellant and the Respondent gave rise to a presumption of marriage based on long cohabitation. Counsel submits that the evidence of respondent showed there was no long cohabitation since the respondent was polygamous and entered into other customary marriages over the years. From the submissions the issues distilled for determination are:
 1. Whether the parties were married under Luhya Customary Law.
 2. Whether the relation between the parties gave rise to presumption of marriage.
16. On whether the parties were married under Luhya Customary Law, the appellant in her Petition averred that they were married under Luhya Customary Law. She reiterated the same in her evidence in Court. She contended that dowry was paid and that the Respondent and herself swore an affidavit to that effect. She produced the affidavit to that effect. She produced the affidavit in her documents as marked ANM 1 as exhibit. The respondent on being asked about this affidavit admitted that it has his name but he stated he is not sure about the signature. The affidavit/statutory declaration states:
 - i. The onus of proving customary law marriage is generally on the party who claims it;
 - ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;
 - iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (*Mwagiru vs Mumbi*, [1967]EA 639, 642)
 - iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
 - v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson Vs Tate* (1937)
 - vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (*Sastry Veliader v Sembecutty_ Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch,456)
17. A perusal of Affidavit shows that the appellant and Respondent jointly swore that: They were adults That on 1st May 1992 they got married under Luhya Customary Law and traditions. They have 2 issues of the marriage. They are husband and wife for all purposes. Every person and authorities designate and recognize that as man and wife. The same is made under the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya. The same is and was commissioned before commission for oaths.
18. The trial magistrate identified in his judgment among the issue he vows to determine was whether there was a marriage under Luhya Customary Law. The issue of existence of a Customary marriage is a matter of fact which must be proved by evidence. In *Hotensiah Wanjiku Yawe* of the Public Trustee 1976 eKLR emphasized the principles of prove of existence of a Customary marriage as follows:
 - i. The onus of proving customary law marriage is generally on the party who claims it;
 - ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;



- iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (*Mwagiru vs Mumbi*, [1967]EA 639, 642)
 - iv. Lono cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
 - v. Only cogent evidence to the contrary can rebut the presumption(*Toplin Watson Vs Tate* (1937)
 - vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (*Sastry Veliader v Sembecutty_ Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thy*, [1904] 1 Ch,456)
19. It was therefore the appellant's duty to prove that there was a customary marriage under the Luhya Customary Law and rites. In her evidence she testified that they married under Luhya Customary Law. She produced a statutory declaration (Affidavit sworn by herself and Respondent before a Commissioner for Oaths. In the affidavit both swear that they were married under Luhya Customary Law and rites and were therefore husband and wife for all purposes. Based upon this status the applicant testifies that:
- 1. The applicants name on her ID Card was changed to include the Respondent's name Mutele
 - 2. He included the appellants in the NHIF Card as a spouse
 - 3. The applicant including Respondent on the UNHCR Medical Insurance plan as a primary spouse.
20. In all these employer-related documents, the bases upon which he was included is the affidavit of marriage they swore which is a primary requirement for proof of marriage where a marriage is conducted under customary law. At no time in the trial did the Respondent challenge the authenticity of these documents where her name was included as a beneficiary on the basis that he was a spouse.
21. Counsel for the Respondent submits that the appellant did not discharge her burden of proving the existence of marriage as she did not call evidence to show that dowry was paid. In my view she produced the affidavit sworn by both the appellant and Respondent which confirmed that:
- i. That on 1st May 1992. We got married under Luhya Customary laws and traditions at Suyaperi Narok District and we have children of the said marriage (underline mine).
22. I therefore find that the appellant having tendered evidence of the affidavit statutory declaration signed by her and the respondent confirming the marriage under Luhya Customary Law, she did not need to call further evidence to prove the same unless the authenticity of the affidavit was challenged by the Respondent which was not. I therefore find that there was a marriage between the appellant and Respondent conducted under Luhya Customary Law. At the time of divorce proceedings, the applicant and Respondent were man and wife. The applicant in the amended petition sought for judicial separated on grounds of cruelty, breach of trust and adultery. The respondent in answer to petition also claimed that the Petitioner has committed acts of cruelty to him. He stated incidences where the appellant beat his late wife, attacked the respondent injuring his manhood leaving him to hospitalization for 6 days at Nairobi Women Hospital.
23. It is due to these acts of cruelty and need to save himself that he moved out of the house. In her evidence the applicant testified that the Respondent was both emotionally and physically cruel to her. As a rescuer of this, she was referred to a Psychiatrist Doctor Okonyi by her employer. She



admitted to taking wine but denies being an alcoholic. She testified that due to the strained relationship the respondent left the matrimonial home in 2018. She admits that an occasion when there was violence but attributes the same to the respondent who had accused her of stealing documents. The Respondent in his evidence testified that the appellant had attacked him on several occasions including incident where she pulled his manhood. He was as a result admitted to Nairobi Women's hospital.

24. Considering the evidence of the Appellant and Respondent in the trial Court, there is evidence that it was a marriage characterized by violence and cruelty. Each of the parties accused the other of violence and cruelty. The appellant stated that the Respondent was emotionally abusive leading to her being referred to a Psychiatric management by Doctor Okonyi. The Respondent contends that the appellant violently attacked him leading to him being hospitalized at Nairobi Women's hospital for treatment. Considering all the evidence I find that this is a marriage that had irretrievably broken down. I therefore order that the marriage between the Appellant ANM and the Respondent JMW conducted under Luhya Customary Law be and is hereby dissolved.
25. Each party to bear his/her own costs. I note the issue of division of Matrimonial property is pending before the High Court. I make no finding on the same.

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2024.

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S. N. RIECHI

JUDGE

