



**ANW v MAWM (Family Cause E002 of 2021)
[2024] KEHC 16085 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
FAMILY CAUSE E002 OF 2021
AC MRIMA, J
DECEMBER 11, 2024**

BETWEEN

ANW PLAINTIFF

AND

MAWM DEFENDANT

JUDGMENT

Background:

1. The dispute before this Court revolves around the question on what constitutes matrimonial property and how such property is apportioned between spouses upon dissolution of marriage.
2. The matter was vehemently opposed by the Defendant and was fully heard by way of oral evidence thereby resulting to this judgment.

The Plaintiff’s case:

4. Through the Complaint dated 11th March 2021, Anna Nanyama Wanjala, the Plaintiff herein, sought to have the property known as Waitaluk/Kapkoi Block10/Kapkoi Sisal/152 measuring 4.039Ha (hereinafter referred to as ‘the suit property’) situate in Trans-Nzoia County, shared between her and Maurice Anthony Wanjala Muse the Respondent herein.
5. The Plaintiff pleaded that she got married to the Defendant in 1968 under the Luhya customs and that their marriage was blessed with 8 children. Further, through their joint effort, the parties acquired the suit property.
6. It was the Plaintiff’s case that their marriage later hit the rocks and that she sought divorce through Divorce Cause No. 8 of 2015 where a Decree Nisi was issued on 6th March 2020 and was subsequently made absolute on 2nd September 2020.



7. It was the Plaintiff's position that she was eventually evicted by the Defendant from the suit property which was their matrimonial home. Aggrieved, she lodged the instant case to preserve the suit property and for other necessary reliefs.
8. The Plaintiff averred that at some point, she rescued the property from being auctioned by Agricultural Finance Cooperation (AFC) when the Defendant defaulted in making payments. As the Defendant did not relent in his pursuit to dispose of the suit property, the instant proceedings became necessary.
9. On the foregoing backdrop, the Plaintiff prayed for the following reliefs: -
 1. That a declaration be made to the effect that property referred to as No. Waitaluk/Kapkoi Block 10/Kapkoi Sisal/152 measuring 4.039 Ha and situate in Trans-Nzoia County be deemed as matrimonial property between the Plaintiff and the Defendant and the same be shared between them.
 2. Costs of the suit be to the Plaintiff.
 3. Any other relief that this Honourable Court may deem fit to grant.
10. The suit was heard. The Plaintiff testified as PW1. She reiterated what she had pleaded. In essence, she stated that she initially worked as a Teacher, but later joined the Ministry of Health in 1976 where she worked until retirement. She stated that he and the Defendant got married in 1968 and bought the suit property in 1973. She averred that both of them used to work, that she cultivated the suit property and that the Children's' school fees were shared. She also contended that she repaid a loan over the suit property to the AFC.
11. It was her testimony that she was evicted by the Defendant from the suit property in 1994 a result of which she instituted proceedings before the then Land Dispute Tribunal where the land was split into half with each party getting 5 acres. By then, she lived with all her children and the Plaintiff failed to assist them in any way. According to the Plaintiff, the Defendant, however, refused to allow her back into the land. That, the Defendant successfully appealed the Tribunal's decision to the High Court and the decision was set aside.
12. The Plaintiff testified that she sold 3½ acres to cater for the family's upkeep and educational needs and had to move to and live with her youngest child who bought a piece of land for her in a bid to mitigate the harsh realities of life more so since two of the children were mentally-handicapped and required specialist care and attention.
13. The Plaintiff urged the Court to divide the suit property into two. She claimed that she has 1½ acres remaining. It was her case that the portion of land she sold is occupied by the purchasers. She also admitted that the Defendant filed Kitale ELC Case No. 17 of 2011 where he challenged the sale and occupation of 11 purchasers who bought part of the suit property from the Plaintiff. That, a judgment was delivered where the purchasers were ordered to vacate, but some lodged appeals against the decision.
14. Nancy Wanjala Muse, the disputants' daughter testified in support of the Plaintiff's case. She affirmed that there were a family of 3 girls and 5 boys and two of her bothers are mentally challenged. She further stated that her parents separated in 1994 and the Plaintiff went away with all the children and that none remained with the Defendant.
15. In further support of her case, the Plaintiff filed written submissions dated 2nd May 2024.



The Defendant's case:

16. Maurice Anthony Wanjala Muse challenged Plaintiff through the Defence dated 6th May 2021. He generally denied all the averments therein.
17. Without prejudice to the denials, the Defendant pleaded that if the Plaintiff claimed contribution, if any, it was negated by her reckless disposal of a substantial portion of the suit property to third parties without his consent.
18. The Defendant pleaded that to date, the people who illegally purchased the suit property are still in occupation despite the decision in Environment and Land Court that determined that the land belongs to him. He claimed that he will have to incur a lot of expense in evicting the trespassers.
19. He posited that the Plaintiff is estopped from claiming any entitlement since she benefitted exclusively from its illegal sale. He urged the Court to dismiss the suit.
20. It was his testimony that the Plaintiff was his wife and she is the one who sold the portion of the suit land to 11 people. He claimed that he filed Tribunal Dispute No. 123 of 2006 which was determined and filed an eviction cause in Kitale ELC (High Court) No. 17 of 2011 that was determined in the Judgment of 31st July 2019, a decision that has never been appealed against by the Plaintiff.
21. The Defendant stated further that his children were all grown up, had finished schools and there was no need of any money for educating them. He, however, admitted marrying the Plaintiff in 1968 and that they acquired the suit property in 1970; after their marriage. He also affirmed that they lived thereon until 1994 when the Plaintiff deserted him.
22. It was his evidence that as he worked on several parts of the Country he left the Plaintiff at home with the family. He claimed that he used to take leave to go work on the land. He testified that he used to take some of the children to where he worked as the rest would remain with the Plaintiff.
23. The Defendant admitted that it is indeed true the Plaintiff cleared the loan on the suit property at AFC. He claimed that she solely used the proceeds of the portion of land she sold.
24. The Defendant denied the claim that two of his children were mentally challenged.
25. The Defendant filed written submissions dated 6th December 2023.

Analysis:

26. The disputants neither contest the existence of marriage nor the fact that the suit property was acquired after their marriage. What stands out in contestation is the manner in which the property ought to be shared, if at all.
27. In the circumstances, the appropriate starting point is an appreciation of the applicable law on matrimonial property and how Courts of superior record have pronounced themselves on the subject.
28. As the suit herein was instituted in 2021, the applicable legislation, for purposes of distribution of the matrimonial property, is the *Matrimonial Property Act* No. 49 of 2013 and *the Constitution*.
29. The longstanding quagmire on how matrimonial property is to be shared in the event spouses can no longer sustain their marriages and are unable to mutually agree on the distribution, has now been settled by the law and the superior Courts.



31. The position is simple. It is that distribution of matrimonial property depends on the spouses' individual contributions in the acquisition of the properties. Contribution may be direct monetary contribution or otherwise.
32. Section 7 of the Act has the following to say: -
7. Ownership of matrimonial property:
- Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
33. Section 9 of the Act also provides as under: -
9. Acquisition of interest in property by contribution:
- Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.
34. Section 2 of the Act defines 'contribution' as follows: -
- "contribution" means monetary and non-monetary contribution and includes-
- (a) domestic work and management of the matrimonial home;
 - (b) child care;
 - (c) companionship;
 - (d) management of family business or property; and
 - (e) farm work;
35. It is imperative to note that the non-monetary contribution in law is not limited or exclusive to the five categories listed above, but it is rather inclusive. It, therefore, means that a Court in determining a party's non-monetary contribution may consider other inputs by that party.
36. Addressing itself to the above issue, the Court of Appeal in PNN vs. ZWN [2017] eKLR looked into Article 45(3) of *the Constitution* which provides that "Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage" and expressed itself as follows:
- Thus, it is that *the Constitution*, thankfully, does not say equal rights 'including half of the property.' And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.
37. The foregoing was affirmed by the Supreme Court in JOO vs. MBO case (*supra*). The said case remains the locus classicus in family law for it addressed three pertinent issues of great public interest. The issues are as follows: -



- i. What is the applicable law in the division of matrimonial property where causes were filed prior to the current matrimonial property regime being *the Constitution* and the *Matrimonial Property Act*, 2013?
 - ii. Should a matrimonial property cause filed prior to the promulgation of the Kenyan Constitution, 2010 be determined under section 17 of the Married Women's Property Act, 1882 and in accordance with the principles espoused in *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR or should courts follow the new regime as at the time of determination by applying the provisions of article 45(3) of *the Constitution* and the *Matrimonial Property Act* 2013 which underpin the principles of equality?
 - iii. Whether article 45(3) provides for proprietary rights and whether the said article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.
38. On the interpretation of Article 45(3) of *the Constitution*, the Supreme Court variously stated thus: -
97. In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married....
 104. Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyott, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.
39. The Apex Court also stated as under: -
81. the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of *the Constitution* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language.
 82. While therefore reiterating the finding in *Echaria*, we also find that article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.



40. On the aspect of non-monetary contribution, the Supreme Court held as follows: -

It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.

41. Further, the Supreme Court rendered itself on the constitutional principle of equity as follows: -

93. Article 45(3) of *the Constitution* underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party's contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.

94. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.

42. In applying the maxim of equity, equality is equity, in which equity is now a constitutional principle in Article 10(2)(b) of *the Constitution* the Apex Court stated as follows: -

95. As was pointed out by the Court in the English case of *Gissing v Gissing* [1971] AC 886, the maxim 'equality is equity' has never been truer. To our minds, equity is an important principle when it comes to matrimonial property since what is fair as it relates to equity is not a question of the quantitative contribution by each party but rather the contribution by any party in any form, whether direct or indirect. Any substantial contribution by a party to a marriage that led to acquisition of matrimonial property, even though such contribution is indirect, but nevertheless has in one way or another, enabled the acquisition of such property amounts to significant contribution. Such direct or indirect acts as was discussed by Lord Justice Fox in *Burns v Burns* [1984] 1 All ER 244 may include: -

- i. Paying part of the purchase price of the matrimonial property.
- ii. Contributing regularly to the monthly payments in the acquisition of such property.
- iii. Making a substantial financial contribution to the family expenses so as to enable the mortgage instalments to be paid.



- iv. Contributing to the running of and welfare of the home and easing the burden of the spouse paying for the property.
- v. Caring for children and the family at large as the other spouse works to earn money to pay for the property.

43. The Court further stated as follows: -

96. These considerations are in line with the finding of the court in the English case of *White v White* [2001] 1 AC 596 where Lord Nicholls of Birkenhead held that the court should always ensure a fair outcome in considering the contribution of spouses by stating:

Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely ... But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contribution."

This is implicit in the very language of paragraph (f):

"the contributions which each ... has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family."

If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

44. Based on the foregoing guidance and parameters on the monetary and non-monetary contributions, this Court will now apply such to the case at hand.

45. Since contribution is an issue of fact, it calls for evidence. The conduct of this civil matter is guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to civil matters and affidavits in Section 2 thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

46. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows: -

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- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

47. Therefore, the burden of proof squarely lies on the Plaintiff. Depending on the nature of the evidence adduced, the evidential burden of proof may shift to the Defendant and vice versa whereas the legal burden of proof remains static upon the Plaintiff.
48. The standard of proof in this matter is on a balance of probabilities.
49. The parties' marriage spanned from 1963 through to 1994; a period of around 31 years. They also acquired the suit property in their early years of the marriage. There is essentially no dispute on the manner in which the parties variously contributed to the acquisition and development of the suit property. Both were formally employed; whereas the Defendant traversed the country in the course of duty, the Plaintiff remained on the suit property. When the suit property faced eminent sale by AFC out of non-satisfaction of a loan over it, it was the Plaintiff who rescued it by paying off that loan.
50. The family also has 8 children. There is credible evidence that when the parties could no longer stay together, the Defendant evicted the Plaintiff from the suit property and that the Plaintiff left with all the children. The Plaintiff had to single-handedly take care of the children and in the process, she sold 3.5 acres of the suit land to fend for the family. There is around 6.5 acres remaining. The Plaintiff had to live with her youngest child who then bought a piece of land for her in a bid to mitigate the harsh realities of life on the family. That is where the Plaintiff lives to date. There is also the truism that two of the parties' children are mentally-handicapped. Although the Defendant denied, the evidence of the Plaintiff and the parties' daughter settled the issue in the affirmative. It was quite unfortunate that the Defendant would take such a stand against his ailing children, a sure sign that he did not associate himself with their medical needs and care; just as alleged by the Plaintiff.
51. The Defendant held to the submission that since the Plaintiff sold off part of the land, then she was not entitled to any further share. In other words, the Defendant posits that the remainder of the land, being 6.5 acres, be allocated to him even as he still holds to evicting the persons who bought from the Plaintiff. In essence, the Defendant is claiming the entire suit property.
52. Having carefully considered the parties' positions, the law and various decisions, this Court is of the very considered position that this is not such a case where the Plaintiff ought not to get any share of the suit property. The Court takes such a position since there is evidence that the Plaintiff was forced to sell off part of the land in a bid to bring up the 8 children, two of which were mentally-challenged. These are the children which the Defendant had abandoned.
53. This Court is under a duty to defend, uphold and respect *the Constitution*. That is the calling in Article 3 thereof. In doing so, the Court is bound in Article 10 of *the Constitution* by the national values and principles of governance whenever it applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements public policy decisions.



54. Among the national values and principles of governance in Article 10 of *the Constitution* include human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination. All these are now raised to the cadre of constitutional principles.
55. Chapter 4 of *the Constitution* provides for the Bill of Rights. Article 53 of *the Constitution* provides for Children. *The Constitution* places upon parents and/or those having parental responsibilities over children an unwavering constitutional duty to ensure that the child's best interests are of paramount importance in every matter concerning the child. They are to ensure that children have names, nationalities, are educated, well fed, sheltered, access health care, are protected from abuse, neglect, harmful cultural practices, from all forms of violence, inhuman treatment, punishment and hazardous or exploitative labour. Children are also not to be detained except within the confines of *the Constitution* and the law.
56. With such carefully-guarded environment, children are, therefore, enabled to pursue their life goals. In this case, the Defendant failed to fully take up and discharge a serious constitutional duty over his children. Refusal to provide for one's children is the worst act of cruelty on the children. This Court must, therefore, stand firm and denounce such actions. It is high time parents know that despite any differences between them, the best interests of the children must always be upheld. In this case, there is no justification as to why the Defendant failed to provide for the children thereby forcing the Plaintiff to sell part of the property. In such a case, it would be most remiss for this Court to attempt to side with the Defendant and find the Plaintiff's actions wanting.
57. Having found as such, this Court is alive to the decision rendered by the Environment and Land Court over the sale of the 3.5 acres to some purchasers in Kitale Land Case No. 17 of 2021. The case succeeded on the basis that the Plaintiff (then 1st Defendant) did not pass any good title to the purchasers. The position has now changed. This Court has found that since the Defendant failed to discharge his constitutional obligations over his family, the Plaintiff was justified in the actions she undertook. Therefore, what follows is for the parties to regularize the said sales.
58. In other words, since the Defendant admitted that the suit property was acquired and developed during the currency of the marriage with the Plaintiff, then a constructive trust must be imported as to defeat the alleged Defendant's sole ownership of the land. [See the Supreme Court of Kenya on whether a constructive trust can be imported into a land sale agreement to defeat a registered title as discussed in *Shah & 7 Others vs. Mombasa Bricks & Tiles Limited & 5 Others* (Petition 18 [E020] of 2022 [28 December 2023] [Judgment]). The Plaintiff cannot, therefore, be regarded as a foreigner in affairs over the suit property. In the unique circumstances of this case, the Plaintiff was, indeed, entitled to deal, as she did, to protect the children and the family at large. *The Constitution*, hence, comes to aid of the Plaintiff and the provisions of any other law must, as of necessity, bow to *the Constitution*.
61. The foregoing position, hence, settles the issue of the 3.5 acres of the suit property. What is now under consideration is the remaining 6.5 acres. Going by the nature of the matters in this case coupled with the parties' contributions, this Court finds that the fairest order is for the parties to equally share the remaining 6.5 acres of the suit property.
62. In the end, this Court finds and hold that the remainder of the parcel of land known as L.R. No. Waitaluk/Kakoi/Block 10/152 shall be equally shared by the parties herein after curving out the 3.5 acres sold to the 11 persons who are now in occupation.
63. However, in the unlikely event the Defendant parted with the possession of the suit property, he shall pay the Plaintiff one-half of the value of the 6.5 acres which value shall be determined by a valuer.
64. With the above finding, suffice to bring this matter to an end.



Disposition

65. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
66. Deriving from the foregoing, this Court hereby makes the following final orders: -
- a. The Plaintiff's case hereby succeeds.
 - b. A Declaration hereby issue that the parcel of land known as L.R. No. Waitaluk/Kakoi/Block 10/152 is the parties' matrimonial property.
 - c. The property known as L.R. No. Waitaluk/Kakoi/Block 10/152 shall be divided as follows: -
 - i. 3.5 acres to the 11 purchasers currently in occupation.
 - ii. The remainder, which is approximately 6.5 acres, to be shared equally between the Plaintiff and the Defendant.
 - d. In the event the Defendant parted with the possession of the parcel of the land known as L.R. No. Waitaluk/Kakoi/Block 10/152, he shall then pay the Plaintiff the value of 3.25 acres thereof upon undertaking a valuation.
 - e. In case of need, the OCS Kitale Police Station or any other OCS and/or police officers, as the case may be, who shall be so directed by the Trans Nzoia Kenya Police Service County Commander, shall provide security during the time of the valuation and sub-division of the land in issue.
 - f. The cost of the valuation and/or sub-division and registration shall be equally shared by the parties and in case of unwillingness by any party to pay, the other party shall so pay and the other party's share shall be summarily recovered by the party that made the payment by way of execution.
 - g. Given the nature of this matter, each party shall bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF DECEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Mukamo, Counsel for the Plaintiff.

Mr. Kimani for Miss. Mwemeke, Counsel for the Defendant.

Chemosop/Duke – Court Assistants.

