REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 45 OF 2019

DMK.....APPELLANT

VERSUS

IL.....RESPONDENT

(Being an appeal from the verdict of S.G Gatobu, the Deputy County Commissioner, Bungoma South Sub-County given on 2/5/2018)

JUDGMENT

The appeal herein relates to a dispute that arose between the parties herein after the respondent filed an objection against the appellant's and one SM's (hereinafter **'the Bride'**) intended marriage on the grounds that she is customarily married to the appellant.

The matter escalated to the Deputy County Commissioner Bungoma South who chaired a conciliatory meeting on 27th April, 2018 in the presence of the parties, their parents, elders and the bride. The Deputy County Commissioner after hearing both parties gave his verdict on 2nd May, 2018 where among other findings observed that the marriage between the DMK (Appelant) and IL (Respondent) is valid and the objection filed through her lawyer should remain permanent (sic).

It is the findings of the said Deputy County Commissioner which provoked this appeal. The appellant has raised 6 grounds of appeal.

> ***1. The registrar of marriage herein erred in law and fact by misdirecting himself by only treating the evidence and submissions of the respondent and consequently arriving at a biased decision against the appellant without any basis and grounds of the law and fact.***
>
> ***2. The registrar of marriage herein erred in law and fact by only weighing the respondent's case in isolation from the appelant's case and thus precluded himself from assessing and minuting the magnitude of the appelant's evidence and that of witnesses.***
>
> ***3. The registrar of marriage herein erred in law and fact by only accepting the respondent's case at the face value without considering the fact that the appelant herself did not testify in evidence that she is desirous to stop the appelants' solemnization of her intended marriage and thereby finding it in favour that the respondent was indeed a wife married to the appelant.***
>
> ***4. The registrar of marriage erred in law and fact by declaring that he does not have any power to issue a notice for the intended marriage to go on unless the objection of the respondent had been withdrawn.***
>
> ***5. The registrar of marriage herein erred in law and fact by failing to make a final decision over the objection by the respondent when indeed there was no customary marriage or whatever marriage between the appelant and the respondent.***
>
> ***6. That if there was a customary marriage as between the parties alleged then the Registrar of Marriage herein erred in law and fact by failing to make orders that the appelant's intended marriage was lawful by statute as his alleged marriage with the respondent is one that is potentially polygamous and that under the alleged customary law the respondent was enstopped from stopping the appelant's intended marriage.***

Parties appeared before this court for directions on 9/3/2020 where they agreed to dispose of the appeal by way of written submissions. The appellant filed his submissions on 7/7/2020 and the respondent on 15/7/2020. The appellant in his submissions reproduced the verdict which led to this appeal and a synopsis of the facts leading to the appeal. Counsel raised issues deemed central to the appeal as;-

> **a) Whether there was indeed a valid customary marriage between the appellant and the respondent**
>
> **b) Whether the respondent is enstopped (sic) from stopping the appelant's intended marriage**

c) Whether the decision and verdict of the registrar of marriage herein can be set aside, reviewed, dismissed and quashed.

d) Who pays the costs of the appeal

Counsel proceeded to analyze only 2 issues as follows;

On **whether there was a valid customary marriage;** counsel relied on the provisions of **Section 43,44 and 45** as read together with **Section 55** of the **Marriage Act No. 4 of 2014** (**hereinafter the Act**) for the proposition that there was no valid customary marriage as between the parties herein which could form the basis of the respondent's objection to the intended Christian marriage, that the respondent did not demonstrate that there was voluntary and free consent and written declarations in the presence of the witnesses who had played key cultural role in the celebration of the alleged marriage. He finally submits that the fact that the parties have children does not amount to a customary marriage.

As to whether the decision and verdict of the Registrar of Marriage can be set aside, reviewed, dismissed or quashed, the appellant submits that the Registrar fell into error legally and factually by declaring that he does not have any power to issue a notice for the appelant's intended marriage to proceed unless the objection of the respondent had been withdrawn.

The respondent on the other hand has raised 2 issues thus;-

1. The validity of the customary marriage and the intended Christian marriage

2. Whether the registrar of marriage erred in law and fact and acted beyond his mandate

On the validity of the customary marriage and the intended Christian marriage, counsel submitted that from the proceedings of 27/4/2017, the appellant and the respondent have cohabited for over 4 years as husband and wife and are blessed with 2 issues. The respondent argues that there is photographic evidence to prove this fact. She submits that customary marriages are celebrated within the confines of **Section 43(1) of the Act** and that the parties herein are Bukusu and therefore the marriage was celebrated under such customs.

That under **Section 9 of the Act**, Christian Marriages are strictly monogamous and therefore the appellant cannot validly enter into a Christian marriage without first obtaining divorce certificate from court.

The respondent further submitted that her consent to the intended marriage has not been obtained prior, contrary to the provisions of **Section 11(1)(c) and (e)** of **the Act**.

On **whether the registrar of marriage erred in law and fact and acted beyond his mandate,** the respondent argues that the registrar of marriage verdict was fair and well-reasoned, that both parties were given fair hearing and that the presence of the Bukusu elders who gave their views before the registrar assisted in arriving at a concise and conclusive verdict.

The main issue for determination in this appeal is whether there existed a customary marriage between the parties herein as at the date the respondent lodged her objection against the appellant's intended marriage.

It is not in dispute that both parties herein are from the Bukusu sub tribe of the Luhya tribe, that the appellant and respondent have 2 children named WDK and VMDK currently staying with the respondent and the appellant is remitting maintenance money, that they stayed together for **4 years**, that they initially lived in a rented house in Mashambani Area before moving into one of the appelant's family rental houses where they stayed until the respondent left for her parents' home.

The question then that must be answered is; do these circumstances and or set of facts point to an existence of marriage?

In answering this issue, it is important to find out what constitutes a customary marriage under the statute. **Section 3 of the Marriage Act, 2014**, **states marriage to be a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act**.

Customary marriages are provided for under **part V** of the marriage Act.

Section 43

(1) A marriage under this part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment for dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.

Secion 55 which has been cited by the appellant deals with registration of a Customary Marriage and the conditions therein that parties must meet.

The respondent in her submissions on this limb has referred to Section 9 which provides;

9. Subsisting marriages

Subject to section 8, a married person shall not, while-

(a) In a monogamous marriage, contract another marriage; or

(b) In a polygamous or potentially polygamous marriage, contract another marriage in any monogamous form.

Section **11** provides;

11.void marriages

(1) A union is not a marriage if at the time of the making of the union;

(c) either party is incompetent to marry by reason of a subsisting marriage;

(e) the consent of either party has not been freely given;

In ***Restatement of African Customary Law, The Law of marriage and Divorce Vol.1 E. Cotran*** at ***page 53*** outlines the essential ingredients of a Luhya Marriage as:-Capacity to marry, Consent by parties to the marriage and their respective families, Payment of dowry and cohabitation.

Cotran states;-

> ***there can be no valid Luhya marriage unless bukhwi (dowry) has been paid. The dowry has to be negotiated between the families and can be paid by cattle or by money and can be paid by installments commencing before the marriage and continue afterwards.***

In **BCC v JMG [2018] eKLR, Justice Majanja** held

> ***Both parties agree that there was a funeral for the deceased's uncle which was attended by the respondent and his relatives. The point of departure is whether the respondent and his family were introduced to the mourners as in-laws. In my view, I do not think that attendance of the funeral amounted to recognition of the marriage between the respondent and the deceased but it was evidence that they were cohabiting at the time and that they were in some relationship.***

There can never be doubt then that customary marriages are recognized by our laws.

In the instant case it is clear that the appelant attended the respondent's grandmother's burial. I am in agreement with **Justice Majanja** (**supra**) that the appellant attended the funeral as one who has been cohabiting with the respondent.

The appellant denies ever being married to the respondent but admits the fact that he stayed with the respondent for 4 years, distances himself from the alleged dowry of Kshs 2,000/= paid to the respondent's family but admits paternity of the 2 issues. The appellant's father admits the appellant impregnated a lady in 2015 and a child born, and that he offered a house to the two and the grandson to cut on costs. The appellant's mother SK confirmed that there was a bond between the families and that there was a meeting to solve a brewing family dispute.

The catechist states that she discovered a marriage dispute between the appellant and the respondent and Father Wanyonyi sent elders to settle the dispute but Mark expressed is desire to get into a polygamous marriage which proposal was outrightly rejected by the respondent and the priest is said to "have prayed for the dispute to end".

The appellant submits that there was no customary marriage for want of written declarations in the presence of the witnesses who had played key cultural role in the celebrations and their voluntary and free consent has not been demonstrated.

The court is alive to the fact that marriage is a very fundamental unit of the society and find guidance in the words of **Musyoka, J.** In ***NUFR vs MSC*** **(2013)eKLR** where he said;

> ***"I need to emphasize that marriage creates a family, a basic and fundamental unit in society. Family brings with it immense obligations on all the parties involved. Marriage is a serious matter, and issues touching on it must be approached with appropriate caution."***

After a careful consideration of the legal provisions, the evidence on record and case law, I find nothing dissuading me from a finding that there indeed exists a marriage.

This has further been confirmed by Moses Wanakawa, the area chief who happens to be the appellant's clansman who is captured at **Pg 5** of the record thus **"Mark and Irene stayed as wife and husband" (para 26).**

The elders who appeared before the Sub County commissioner were equally of the opinion that there is indeed a marriage.

ZS, the respondent's uncle informed the panel that there was a delegation from the appellant's relatives who visited the respondent's parents. It is clear from his testimony that he has all along participated in salvaging the union which was in turbulence by inviting Father Wanyonyi. In the church where both parties attended, they were known a s a husband and wife. This inference can only lead to a finding that the two are married.

The appellant preferred this appeal urging the court to set aside, review dismiss and quash the verdict of the Registrar of Marriage. The effect of this court setting aside the marriage Registrar's verdict is that the appellant will be at liberty to solemnize his marriage with the bride. It is notable also that as matters stand now, the marriage has not been dissolved.

For the reasons given above, the Marriage Registrar's verdict is upheld. The appeal is dismissed with costs to the respondent.

Orders accordingly.

DATED at BUNGOMA this 9th day of March, 2021

S. N RIECHI

JUDGE