



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 48 OF 2016

(Being an appeal from the original judgment and decree of Hon. Jacinta A. Owiti,

Principal Magistrate, dated 3rd May 2016 in Vihiga PMCCC No. 102 of 2013)

RICHARD CHASIA MUYINZI.....APPELLANT

VERSUS

FREDERICK ONGADI.....RESPONDENT

JUDGMENT

1. The suit at the trial court was filed by the appellant against the respondent seeking that the body of Violet Navalva Chasia be exhumed, and released to him for reburial on his land, known as Kakamega/Bukulunya/692 or wherever else the trial court considered appropriate. The respondent filed a defence, in which he asserted his right to bury the deceased on account of her being his wife. The trial conducted a hearing, at the end of which it found that the appellant had failed to prove his case against the respondent on a balance of probability. The suit was dismissed.

2. Being aggrieved by that outcome, the appellant brought the instant appeal. He would like the judgment and decree of the lower court vacated and substituted by an order allowing his claim in entirety as pleaded in the plaint, and specifically that the body of the deceased be exhumed from Chugi village and reburied on his land, Kakamega/Bukulunya/692, in Munoywa of Vihiga County.

3. The appeal is based on grounds, among others, that:

- a) The trial court proceeded with and delivered a judgment in a manner that was irregular by reason of non-compliance with the legal requirements for *de novo* hearing;
- b) The trial court reviewed and relied on evidence that it had already dismissed as irregular;
- c) The trial failed to take into account that the burial was carried out in contempt of a court order;
- d) The judgment was inconsistent with Maragoli customary law;
- e) The trial court wrongly applied the doctrine of presumption of marriage to the facts of the case;
- f) The trial court applied the common law to a dispute where the applicable law ought to have been customary law; and
- g) The judgment was against the weight of the evidence on record.

4. Directions were given for disposal of the appeal by way of written submissions. Only the appellant herein filed written submissions, which I have read through and noted the arguments made therein.

5. From the record of the trial court, the memorandum of appeal and the written submissions, the following are the issues for determination:

- (a) Whether the trial court breached the legal requirements of a hearing *de novo*;

(b) Whether the respondent had acted in contempt of court orders; and

(c) Whether the body of the deceased ought to be exhumed from Chugi village for reburial on Kakamega/Bukulunya/692 in Munoywa, Vihiga County.

6. On the first issue, the appellant submitted that substantive justice could only be served had the appellant testified afresh. He faulted the trial court for not finding out whether the appellant was available to testify afresh, adding that a party should not suffer for the mistakes of his or her advocate. He further contended that there was no law that required a plaintiff to testify for their claim to succeed.

7. The court had cited *Kenya Anti-Corruption Commission vs. Michael K. Gituto* [2015] eKLR, where it had been held that:

“It will suffice for me to recall the provisions of order 18 Rule 8 (1) of the Civil Procedure Rules, 2010 which provides for the power of the court to deal with evidence taken before another judge. The said Rule provides as follows:-

“8 (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”

Section 1A of the Civil Procedure Act [1] provides that:-

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.”

8. Order 18 Rule 10 of the Civil Procedure Rules, 2010 provides as follows:

“10. Court may recall and examine witness [Order 18, rule 10.]

The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”

9. The trial record for 24th June 2014 reads as follows:

“Coram: Hon. G.A Mmasi –SPM

CC: Eunice

Plaintiff: by Musiega, Langat holding brief

Defendant: by Wekesa – present

Langat: I propose that directions be taken to the effect that matter proceeds from where it had reached

Wekesa: There are many witnesses. I propose the matter starts De novo

Langat: Since it is only one witness that has testified we may start the matter De novo

Order: By consent of both counsel on record matter to start De novo case fixed for hearing on 19/8/14.”

10. The hearing scheduled for 19th August 2014 did not happen, and it was not until 6th January 2015 that the matter proceeded. It would appear from the record that the matter did not start *de novo*, contrary to the earlier directions and order of the trial court. It was Peter Munialo Sumba, PW2, who testified and not the appellant who had in the initial trial testified as PW1. The appellant was represented by Mr. Musiega, advocate, at the hearing. Mr. Musiega was conducting the case for the appellant. It was he who was calling the persons who testified, it was not the court that directed which witnesses testified and which one not to testify. Mr. Musiega called the witnesses who testified to support the appellant’s case, and, eventually, he closed the appellant’s case.

11. The record of 14th April 2015 indicates that there was an oral application by Mr. Wekesa, the advocate for the respondent, to have the appellant recalled, to give further testimony and evidence. The application was vehemently opposed by Mr. Musiega, for the appellant, who stated that they had already closed their case. The court then granted leave to the respondent to file a formal application.

12. On 11th August 2015 the matter was placed before a new magistrate, Hon. JA Orwa, principal Magistrate and Mr. Musiega, for the appellant, suggested that the matter proceeds from where the previous trial magistrate had left it, which was at hearing of the case for the respondent. That was granted, and the matter was fixed for continuation of the hearing of the case for the respondent, on 6th October 2015. After the close of the case for the respondent, and before judgment was delivered, the trial court, *suo moto*, noted an apparent error on the face of record, in that the directions given on 24th June 2014, for the matter to start *de novo*, had not been complied with. The court sought the opinion of the advocates on record for both parties on the way forward. Mr. Musiega, for the appellant, insisted that the said directions had been complied with prior to the case for the appellant being closed, and he invited the court to schedule a date for judgment. Ms. Pandit, advocate, holding brief for Mr. Kahi, for the respondent, sought an adjournment to enable the respondent respond. Mr. Musiega again insisted that a judgment be delivered. The trial court then went on to schedule a date for judgment.

13. Clearly, the appellant has no one else to blame but his advocate. The trial court did everything to ensure that justice was dispensed, and it cannot be faulted for the matter not starting *de novo*. The matter was being conducted by the advocate for the appellant, and it was he who was making decisions on which witnesses to call. It is to be presumed that an advocate is always under the instructions of his client and this appeared to be so in this case. The appellant cannot now make an about-turn, and claim that his advocate had gone rogue when he had been comfortable with him all through the trial.

14. Additionally, I do not see how the appellant was prejudiced by him not testifying afresh because the provisions of order 18 Rule 8 (1) of the Civil Procedure Rules, 2010 provide that the succeeding magistrate can deal with the evidence as taken down by her predecessor as though she was the one who took it. The evidence of the appellant was never expunged from the record just because his evidence was taken by a different magistrate. The succeeding magistrate had the discretion of either taking the evidence as was recorded by her predecessor or recalling the appellant as per Order 18 Rule 10 of the Civil Procedure Rules, 2010. A careful look at the impugned judgment in totality would reveal that the trial court did consider the evidence of the appellant in determining the case.

15. On the second issue, the appellant submitted that the respondent was in contempt of court orders when he went ahead, and interred the remains of deceased even after being served with the said court order. From the record, the appellant had filed an application by way of a Motion dated 29th November 2013, seeking injunctive orders to restrain the respondent and his agents from disposing the body of the deceased pending hearing and determination of the application. On 2nd December 2013, the trial court ordered the appellant to serve the respondent with the application for hearing *inter partes* on 11th December 2013. It would appear that the remains of the deceased were buried at some point before the *inter partes* hearing happened, which prompted the appellant to amend his pleadings. The application was thereafter heard *inter partes*, and a determination made on 12th February 2014. From the record of the trial court that is before me, there was no order barring the respondent from burying the body of the deceased pending hearing and determination of the application as was prayed for by the appellant. It is, therefore, incorrect for the appellant to claim that the respondent went ahead and interred or buried the body of the deceased when there was an existing court order when clearly there was none. To this end, I find that the respondent was not in contempt of any court order.

16. The third issue is the crux of the matter. What the appellant was seeking from the trial court was an order for exhumation of the body of the deceased for reburial on his own land in Vihiga County. It was common ground that the appellant was the father of the deceased. What was in dispute was whether the respondent had married the deceased. The appellant argued that he had never received any dowry for the deceased from the respondent, and, therefore, the deceased remained unmarried, and, according to Maragoli customary law, her parents were the ones entitled to bury her remains of their unmarried daughter. In his testimony, the appellant denied agreeing with the respondent that the respondent would give him two cows and Kshs. 20,000.00 as dowry. He further testified that they met at the respondent's home for burial preparations, where it was agreed that the body would go to the appellant's home for burial. However, Peter Munialo Sumba, PW2, a family friend of the appellant, testified that in as much as they held a meeting at the respondent's house, they never discussed the issue of the place of burial. However, on cross-examination, he changed his stance and stated that they had agreed that the body be buried at Bukhulunya village. He also stated that the deceased was never married, and that he did not know who the respondent was.

17. The deceased's brother, Kenneth Ndeva Chasia, PW3, similarly stated that the deceased was never married, and that he also did not know the respondent. Both PW2 and PW3 stated that the deceased was in the appellant's homestead while she was ailing, with PW3 adding that she was staying in the appellant's homestead with her child. PW3 denied the contents of his statement saying that the deceased was living with the respondent. PW3 stated that it was the appellant who took the deceased to hospital, at the time she died, adding that he did not understand why the deceased was buried in the respondent's homestead. PW3 denied PW2's testimony that he accompanied him and the appellant to Nairobi to get the body of the deceased, stating that he, the appellant, and their mother, remained at home. The deceased's sister, Jane Mmboga Chasia, PW4, testified that the deceased was never married, and that it was her other sister, Joyce Olesia Chasia, who took her to Aga Khan Hospital, when she fell ill. PW4 added that the deceased used to stay with the appellant and that she did not know the respondent, and that he never paid dowry. PW4 stated that the body of the deceased was being transported to their homestead from Nairobi, when it was hijacked by persons, who included the respondent. PW4 stated that the appellant did not accompany her to Nairobi to collect the body of the deceased and that it was the respondent who ordered for the body of the deceased to be taken to Chugi.

18. Symon Akaranga, PW5, an uncle of the deceased, stated that the deceased was not married, and reiterated that according to Maragoli customs, an unmarried girl was buried at her father's place. PW5 denied knowing the respondent and added that the burial permit given to the respondent was obtained fraudulently, as the respondent claimed to be the deceased's husband when he was not. PW5 added that dowry can only be paid when the woman was still alive. Phillip Lincoln Malenge, PW6, a clan cousin of the appellant, testified that the deceased was never married and that she was staying with the appellant prior to her death. PW6 stated that he was aware that the deceased had a relationship with someone and that they had a child together but he said that he did not know the respondent. PW6 added that according to their tradition, the deceased was wrongly buried as she was not married and that no one ever came to the appellant's home to ask for the deceased's hand in marriage and that no dowry was paid. PW6 stated that the body of the deceased was hijacked in the hospital in Nairobi, and that he was not aware that PW5 had said that the deceased's body was hijacked at Chugi by the respondent's people. He clarified that he was not present at the scene of the hijack, and he had only been told about it by the sister to the deceased.

19. On his part the respondent, testified that he had cohabited with the deceased since 2006, and that she was his wife. He stated that the deceased lived with him in Tassia Estate, Nairobi, after she relocated from Munoywa Sub-Location, and even taught briefly at Tassia Primary School in 2007. He added that they had one child together in 2009, who underwent initiation rites in accordance with their customs.

The respondent stated that the deceased came to live at his rural home in Chugi in 2010, and she was employed by Munoywa Primary School. The respondent stated that the family of the deceased knew that they were living together as husband and wife, and that after the rites were performed on their baby, what is known as the shaving of the head, the deceased could not go back to her parents' home. He stated that the deceased was diagnosed with cancer, and that she was treated at several hospitals, including Aga Khan Hospital. He further stated that he took care of the deceased as she underwent chemotherapy sessions at Kenyatta National Hospital, and that in 2013 the deceased's sister, Joyce, escorted her to Nairobi, where he resided, and that was when the respondent took her to Aga Khan Hospital. The respondent stated that PW4 was staying with them to assist the deceased as the deceased's other sister, Joyce, had gone back to her place of work.

20. He testified that the deceased died in his house in Nairobi, in the company of her sisters. He conceded that he did not pay any dowry to the parents of the deceased prior to her demise. He also said that there was a time the deceased lived at her paternal home after surgery, for smooth healing process, while she was a teacher at Munoywa Primary School, which was nearer to her parent's home than his. The respondent stated that there were negotiations between his parents and the deceased's parents after the deceased's death, and that the appellant came to his house when the deceased died as his father-in law.

21. Sau Chiluka Migoka, DW2, the appellant's cousin, testified that the deceased used to reside in Mulundu, at the respondent's home, whom he knew after the deceased passed on. He added that even after the demise of the deceased, there were plans to call for dowry from the respondent in as much as they cohabited as husband and wife. DW2 stated that as per Maragoli customs, dowry had to be paid, and two members of the family of the appellant went to the respondent's home and met their clan members, and they signed an agreement. He stated that a man who had not paid dowry cannot bury the deceased woman he claimed to be his wife, and that the respondent had since not paid the dowry.

22. Keiza Mutange, DW3, a neighbour of the respondent, testified that he understood the deceased to be the respondent's wife and that both of them used to attend the church where he used to preside. He admitted that no dowry had been paid to the deceased's family by the respondent. He further stated that after the death of the deceased, he was part of the clan members who relayed the information to the appellant's family. He added that he was also part of the team that negotiated with the family of the deceased on dowry and that he was the one who reduced the agreement they arrived at into writing. The agreement was that the respondent was to pay Kshs. 20,000.00 and two cows prior to the burial. The appellant failed to come for the dowry, even though he was the one who had called for the same prior to burial. DW3 stated that a person who had not paid dowry should not bury the deceased in accordance with Luhya customs and rites.

23. From the evidence, it was not in dispute that no dowry was ever paid by the respondent to the deceased's family. Additionally, the respondent never married the deceased under any statutory regime, and that his claim as husband of the deceased was based on cohabitation. This means that there was no Maragoli customary marriage between the deceased and the respondent. What is to be determined then, is, whether the respondent and the deceased cohabited together in circumstances under which a marriage could be presumed.

24. In *BCC vs. JMG* [2018] eKLR, it was held:

"... The fact that there was no customary marriage between the deceased and respondent does not preclude the court from finding that the parties cohabited for a period of time and conducted themselves in such a manner that a marriage could be presumed. This principle has been upheld in several cases from our courts."

25. In the case of *SO vs. CMM & another* [2016] eKLR, it was held as follows:

"Back to the facts of this case. I find that there was long cohabitation between the appellant and the deceased in which there was a child and the people they dealt with considered them as husband and wife. These facts gave rise to a presumption of marriage in favour of the appellant. I find that, on this basis, the appellant and the deceased were married. It follows that the lower court fell into error when it found that there was no valid marriage. I further find that the appellant was the one entitled to bury the remains of the deceased who was his wife."

26. From the evidence, and the authorities above, I find that a presumption that a marriage existed between the respondent and the deceased. They lived together between 2006 and 2013, and they got one child together in 2009. I do not believe that the appellant and his family never knew the respondent. That can be deduced from the appellant's testimony, when he stated that the respondent was just a boyfriend of the deceased and that he attended meetings at the respondent's house for preparations for the burial the deceased. Surely, a father cannot go to plan the burial of his own daughter in a strange man's house. That admission by the appellant showed that the deceased and the respondent had a relationship in as much as the appellant never termed it a marriage. The fact that the respondent never paid dowry to the deceased's family did not mean that a marriage could not be presumed between the deceased and the respondent. On a balance of probabilities, a marriage did exist and could be presumed between the respondent and the deceased.

27. That being it is, common practice on burials that priority is given to the spouse of the deceased, and more so if they had a close relationship or connection. There is nothing to show that the respondent was estranged from his wife and that he did not deserve to bury her or that the deceased was buried contrary to Maragoli customary law.

28. I am in agreement with the decision of the trial court, that there was a marriage that existed between the respondent and the deceased, and being entitled to bury her as his spouse, there was no compelling reason to warrant exhumation of the deceased's remains for reburial at the appellant's home.

29. It is my finding that the appeal herein lacks merit and I hereby dismiss it in its entirety. Each party shall bear their own costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF FEBRUARY 2020

W MUSYOKA

JUDGE