



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO 32 OF 2005

WYCLIFFE MUKABANA.....1st APPELLANT

JEREMIAH KOTIA NGACHE.....2nd APPELLANT

VERSUS

LUMUMBA SINDIKHA.....RESPONDENT

[An appeal from the judgment and decree of in original Webuye SRMCC 172 of 1998

delivered on 28.05.1999 by Hon Hellen S. Wasilwa Resident Magistrate]

JUDGMENT

The appellants have moved this court on appeal seeking to have judgment and orders of Senior Resident Magistrate at Webuye in Civil Suit No. 172 of 1998 be set aside.

Briefly the evidence before the trial court was that Respondent Lumumba Sindikha was father of Ruth Khayundi. The 1st Appellant wcliffie Mukabana is the son of 2nd Appellant Jeremiah Kotia Ngache. In or about 1996, the 1st Appellant married the deceased Ruth as his wife. Ruth became pregnant by the 1st appellant and developed complication and died before dowry was paid at Miwani in Kisumu. As dowry had not been paid by the appellant, a meeting was held where the same was discussed and it was agreed that the appellant pay 5 heads of cattle and Kshs.13,000 as dowry. An agreement to that effect was written. The appellant did not pay the dowry as agreed. The Respondent then took the body of his daughter Ruth and buried her in his home. He then sued the appellant for the unpaid dowry.

The appellant in their defence while admitting to the marriage and agreement signed, they contend the that the Respondent breached the agreement by burying his daughter the deceased at his home and not allowing the husband the 1st appellant to bury her. The learned trial magistrate s in her Judgement dated 28.5.1999 stated;

“I have examined all the evidence on record. Traditionally the plaintiff is entitled to dowry claimed per exhibit 1 evidence by both in presence of the assistant chief. The agreement made by the parties herein. The defendants states that the head of cattle was taken but were chased away. First defendant does not say this. The boys who took the head of cattle and was chased were not called as witnesses. Evidence of DW3 is hear say as assistant chief was not called as a witness. I find plaintiff has established his case against the balance of probabilities. I find for the plaintiff and enter judgement against defendant jointly and severally for Kshs.10,000/=, 5 heads of cattle at rate of Kshs.5,000/= per head and cost of this suit”.

Aggrieved by the decision the appellants preferred this appeal faulting the judgement on the following grounds:

- i. That the learned trial magistrate erred in law and fact when she made a decision on customary law without any proof of the same.***
- ii. That learned trial magistrate erred in law and fact when she decided that the respondent was entitled to dowry even after he breached the agreement by burying his own daughter thereby effectively nullifying the deceased marriage to the Appellant;***
- iii. That learned trial magistrate erred in law and in fact in making a decision without giving reasons.***
- iv. That learned trial magistrate was biased as against the appellants.***

v. That learned trial magistrate erred in law and in fact when she decided against the appellants by relying on an alleged customary law that was obviously repugnant to justice and morality by deciding that a man can be condemned over actions of another where there is no vicarious liability.

By consent of the parties, this appeal was canvassed by way of written submissions.

Mrs. Chungu for the appellant briefly submitted that according to Luhya customary law when wife dies if there is any dowry paid it is supposed to be returned. It was wrong for trial court to award the respondent amount of dowry yet the wife of the appellant had passed away and buried by the father of the respondent.

Mr. Omukunda for the Respondent submitted that they support trial court decision, he submits that the parties entered into an agreement however one head of cattle that was to be paid before burial was never paid as agreed in the agreement. He also submitted that the appellants did not call any evidence to establish the customs that and no evidence was produced to show that burial by the respondent nullified the marriage under the customary law. He submitted that whoever relies on customary law must prove its existence.

This being the first appeal. As a first appellate court, I am required to consider the evidence on record afresh and come to my own conclusion and inferences as it was held in ***SELLE –VS- ASSOCIATED BOAT COMPANY LIMITED [1968] EA 122.***

This claim is premised on customary law. The place of customary law in Kenyan jurisdiction is restated in section 3(2) of the Judicature Act CAP 8 which provides;

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it, or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

In this appeal it is evident that the appellants are from Batsotso sub tribe and the respondent from Kabras subtribe of the Luhya tribe. Both parties were therefore subject to the Luhya Customary Law.

From evidence and submission of the counsels of the parties, I find that the following issues are not in dispute. First that the 1st appellant had not paid dowry then Ruth died from complications of pregnancy. That after death the parties agreed on payment of dowry and written agreement made to this effect. That the appellant did pay the dowry as agreed. That the appellant having failed to pay the dowry as agreed, the respondent buried his daughter and that there were no children in the marriage between Ruth and 1st appellant.

The main issue for determination in this appeal in my view is whether the Respondent is entitled to payment of dowry in view of the fact that Ruth was buried by the Respondent her father and not 1st Appellant the husband.

The basis of the Respondents claim is that the dowry was payable to him as per the agreement. This was a condition the appellants had to fulfill before they have the right to bury the deceased as his wife. The Respondents readily admitted that they did not fulfil the same and so he buried his daughter Ruth. By electing to bury deceased he treated her and buried her as unmarried daughter. Having done so, it demonstrated that he did not recognize that she was ever married to the 1st appellant.

The basis of payment of dowry is to cement and complete the relationship of marriage and marriage in customary law means the daughter leaving the home and being a member of the matrimonial family, whether in life or death. Where as in this case the father buried the daughter, then it means that marriage relationship was not recognized as existing. If it was not recognized then payment of dowry by the 1st appellant would not be necessary, unless there are children involved.

In this case I am satisfied that the trial Magistrate was in error to enter Judgment for payment of dowry when it was clear the Respondent had buried the daughter for whom dowry was to be paid.

In the result, I allow the appeal set aside the Judgment of the trial court. Each party to bear his own costs.

Dated and Delivered at BUNGOMA this 22nd day of July, 2019.

S.N. RIECHI

JUDGE