



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 8 OF 2016**

**(CORAM: J. A. MAKAU – J.)**

**JOK.....APPELLANT**

**VS**

**SAO.....RESPONDENT**

**J U D G M E N T**

1. The Appellant **JOK** was the Defendant at the Lower Court in which the Respondent was the Plaintiff. The Respondent had sued the appellant through a Plaint dated 12<sup>th</sup> June 2014 seeking the following orders: -

***(a) The plaintiff be given legal and actual custody of the minors, RB and AM with access and visitation rights to the Defendant.***

***(b) The Defendant be ordered to guarantee child maintenance to the above minors as prayed in paragraph 11 and to pay school fees for the minors including for ANGEL MICH as and when it falls due.***

***(c) The cost of this suit be borne by the Defendant.***

***(d) Any other relief that this Honourable Court may deem fit to grant.***

2. The Appellant filed a Statement of Defence through the firm of M/s Manwari & Co. Advocates denying the claim and praying the same be dismissed. The Respondent filed a reply to the defence dated 16<sup>th</sup> October 2014.

3. The Respondent gave evidence and called three witnesses in support of her claim whereas the Appellant gave evidence and called no witness. The Learned Trial Magistrate delivered judgment on 8<sup>th</sup> July 2014, granting the Respondent custody of the minors and ordering the Appellant to pay Kshs. 20,000/= per month for the welfare of the two minors and Respondent together with costs of the suit.

4. Aggrieved by the judgment in favour of the Respondent the appellant was provoked to file this appeal on 8<sup>th</sup> August 2016 setting out the following grounds of appeal:-

***(1) The Learned Magistrate erred in law and in fact in holding that the nature of the relationship between the Appellant and the Respondent satisfied an inference of a presumption of marriage between the two people.***

**(2) The Learned Magistrate erred in law and in fact in not finding that, on the evidence on record, no Customary Law Marriage existed between the Appellant and the Respondent.**

**(3) The Learned Trial Magistrate totally misapprehended the true status of the relationship between the Respondent and the Appellant.**

**(4) The Learned Trial Magistrate erred in his finding that the Respondent was the Appellant's wife and that consequently she was entitled to provision of maintenance by the Appellant.**

**(5) The Learned Magistrate was plainly wrong in his finding that the evidence on record supported the Respondent's elder child RB.**

**(6) The Learned Senior Resident Magistrate failed to appreciate the point that the evidence on record supported a finding that the relationship between the Appellant and the Respondent was a short casual affair in a lodging house that could not by any stretch of liberal interpretation be said to establish a wife and husband status.**

**(7) The Learned Senior Magistrate totally failed to take into account the actual financial status of the Appellant in ordering for a monthly payment of Kshs. 20,000/= from him.**

**(8) The judgment of the Learned Magistrate was unreasonable in all the circumstances of the case and wholly against the weight of the evidence on record.**

5. The Appellant under grounds nos 1, 2, 3, 4, 6 and 8 urges that the trial court was in error in finding and holding there was a valid Luo Customary Marriage between the Appellant and the Respondent. The Appellant urged there was no evidence on record on which and how the alleged Luo Customary Law and Practices were actually executed or effected. The Appellant urged the Respondent and her mother PW2 did not clearly state the customary rite or practice which would even remotely be said to constitute a marriage under Luo Customary Law rites and practices. He further urged PW3's evidence contributed absolutely nothing towards establishing a husband and wife relationship between the Appellant and the Respondent adding PW3, stated the Appellant did not take any cows, goats or sheep to the Respondent's parents' home. He urged the Respondent's parents had not even visited the Appellant's home. PW3 did not know whether dowry was ever paid. PW4 stated the Appellant paid only agreement fees but later brought the dowry. The Appellant urged the Respondent and her witnesses failed to prove there was customary marriage or remote presumption of the marriage between the Appellant and the Respondent. The Appellant urged in his evidence, what there was between the two was casual relationship and that they never stayed with the Respondent as husband and wife. He stated: -

***“Between 2011 and July 2012.....we had a casual relationship between us. I have never stayed with her as husband and wife. We used to meet at different lodges at Ugunja Township. I never took her to any of my homes. I have never paid rent for her..... I have never gone to her home for that purpose. I have never paid dowry to her parents or relatives. She has not enjoyed the status of wife to me. I am not under any obligation to maintain her”.***

6. The Respondent and her witnesses maintained she was married under Luo Customary Law to the Appellant. PW1 averred the Appellant married her on 10/8/2012 under Luo Customary Law and Practices. That Appellant was not alone but they did not bring any cow, goat, sheep; though cows and money are normally given. That the Appellant brought money but PW1 did not know how much he paid. She stated she stays at town and the Appellant at home and that they stay separately due to domestic issues after 2 years. PW2, mother to PW1, stated PW1 and the Appellant married on 10/8/2011; when Appellant went to PW2's home and left with the Respondent. That the Appellant paid Kshs. 4,000/= but their marriage broke down and the Appellant never went for her. PW3 testified the Appellant and the Respondent lived together as wife and husband. He stated when Appellant came to ask for hand of marriage of the Respondent, he had 3 other gentlemen and they handed Respondent to the Appellant. That there was verbal agreement to pay dowry later. He stated he is not aware whether any dowry has been paid. PW4 stated, the Appellant paid some money to the Respondent's mother as agreement money and

later brought dowry by paying animals thrice.

7. Under the **Marriage Act 2014, No. 4 of 2014**, under Part II “Marriage” is defined under **Section 3(1) of the Marriage Act, 2014** as follows: -

***“3(1) Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.”***

The above section therefore recognizes customary law marriage, and for the same to be valid, it requires to be registered in accordance with the **Marriage Act 2014, No. 4 of 2014**.

8. **Section 6(1) of the Marriage Act 2014, No. 4 of 2014** provides: -

***“6(1) A marriage may be registered under this Act if it is celebrated: -***

***(c) in accordance with the customary rites relating to any of the communities in Kenya”***

9. For valid customary marriage, the marriage has to be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage. That where payment of dowry is required to prove a marriage under customary law, payment of a token amount of dowry shall be sufficient to prove a customary marriage.

10. **Section 43(1) and (2) of the Marriage Act** provides: -

***“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 of 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.”***

11. In the instant case, the Respondent and her witnesses aver that the Appellant visited PW1’s parent, PW2, and in presence of PW3 and PW4, the Appellant sought hand of marriage of the Respondent, verbal agreement was reached, Appellant paid Kshs. 4,000/= as part of dowry and was allowed to leave with the Respondent. The Appellant did not expressly deny the allegations but countered the same by saying the Respondent was his fiancée/girlfriend between 2011 and July 2012. That they had casual relationship between them. That it was sexual relationship. The Appellant did not deny payment of a token to the Respondent’s mother. In accordance to Luo Customary Law, dowry is payable and not once but may be paid by small amounts over a long time. Under **Section 43(2)**, a payment of a token amount as a dowry is sufficient to prove a Customary Marriage.

12. **Section 44 of the Marriage Act 2014, No.4 of 2014** provides: -

***“44. The parties to a customary marriage shall notify the Registrar of such marriage within three months of completion of the relevant ceremonies or steps required to confer the status of marriage to the parties in the community concerned.”***

13. **Section 45(1)(a)(b) and (2), (3)(a)(b)(c): -**

***“45. (1) The notification under Section 25 shall: -***

***a) specify the customary law applied in the marriage of such parties; and***

***b) contain a written declaration by the parties, that the necessary customary requirements to prove the marriage have been undertaken.***

***(2) A declaration under subsection (1) shall contain the signatures or personal marks of two***

*adult witnesses and each witness shall have played a key cultural role in the celebrating the marriage.*

**(3) The notification under subsection (1) shall confirm: -**

- a) that the parties to the marriage were eighteen years of age at the time of the marriage;*
- b) that the marriage is between persons who are not within a prohibited marriage relationship; and*
- c) that the parties freely consent to the marriage. ”*

14. **Section 55(1)(2) of the Marriage Act 2014, No.4 of 2014** provides: -

*“55. (1) Where the parties to a marriage under Part V have completed the necessary rituals for their union to be recognized as a marriage under the customary law of any of the parties both shall apply to the Registrar within six months of their marriage for a certificate and both shall appear in person before the Registrar to be issued with the certificate of marriage.*

*(2) Where the Registrar is satisfied that the parties to a marriage under Part V have complied with the provisions of this Act, and the parties have appeared before him in person, the Registrar shall register the marriage and issue the parties with a certificate of marriage.”*

15. From the above-mentioned sections, I find the Appellant paid token amount towards dowry to the Respondent, and the two thereafter cohabited together and were blessed with one child, however, the Respondent did not adduce evidence demonstrating that they notified the Registrar of such a marriage within the period given or at any other time thereafter or took any steps required to confer themselves with the status of marriage to parties in the community concerned. No evidence has been tendered in this case that the necessary customary rituals to prove the marriage have been established since 10/8/2011. The parties to a marriage under customary law are required to complete the necessary rituals for their union to be recognized as a marriage under the customary law and both or any is required to apply to the Registrar of Marriages within six months of their marriage for certificate or both appear in person before the Registrar to be issued with certificate of marriage.

16. Under **Section 12(e) of the Marriage Act 2014, No 4 of 2014**, it is provided.

*“12. Subject to Section 50, a marriage is voidable if: -*

*(e) failure to register the marriage.”*

17. In the instant appeal, the parties did not comply with **Section 44, 45 and 55 of the Marriage Act 2014, No. 4 of 2014**. The failure to notify the Registrar under **Section 55 of the Marriage Act** to issue them with certificate of marriage is fatal to the Respondent’s case. I therefore find and hold due to the failure to produce marriage certificate as provided for under the **Marriage Act 2014**, the Respondent failed to prove that she was lawfully married to the Appellant under Luo Customary Law.

18. **Whether the Appellant had accepted parental responsibility to RB?** The Appellant contends there are two children involved in these proceedings, RB and AM. That there is no dispute with regards to the young child AM as the Appellant accepts paternity, only that he had proposed to be given custody of the child. That he disputes responsibility of RB who was born in 2004, 7 years before he met the Respondent. He stated the Respondent did not even pretend the child was fathered by the Appellant. The Respondent in her submission stated the Appellant acquired parental responsibility over the minor RB by virtue of **Section 25(2) of the Children’s Act**. The Appellant in her evidence stated they have two girls RB born on February 2004 and AM born on 17/4/2013. He never provided for the children. He does not pay school fees or pay for any of their needs. PW2 stated when the Appellant married PW1, she had a child, whom the Appellant agreed to take up. PW1 on cross-examination stated she gave birth of RB

while in school but can't tell who the father is. She said the Appellant used to pay school fees for the children but she does not have receipts.

19. **Section 25(2) of the Children Act** provides: -

***“25. (2) Where a child’s father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.”***

The Respondent in her submission seeks to rely on the above section, however from her evidence and that of PW2 as well as that of the Appellant, it is clear that the Appellant is not the biological father to RB, who was born before the Appellant and the Respondent came to know each other, and that even if, the two cohabited together for the period alleged to by the Respondent, though denied by the Appellant; I find that the Appellant has not acknowledged paternity of the child RB nor has he admitted having been maintaining the child, as PW1 also stated he has not been maintaining the children. I therefore find the Appellant, has not in view of the above, acquired parental responsibility for the child RB, as he is not father to the child and he has since 2013 not been cohabiting or staying with the Respondent.

20. **Whether the trial court totally failed to take into account the actual financial status of the Appellant in ordering for a monthly payment of Kshs. 20,000/= from him?** The appellant at the trial court did not file his statement of accounts nor did he fully disclose his earnings to the trial court but stated he earns Kshs. 35,000/= with a Net Salary of Kshs. 6,387/30. That he has a van which he uses for private purposes and denied having rental houses. That he has a welding machine which he manages on behalf of his mother offering to give Kshs. 1,000/= to take care of the child. The Respondent stated the two were doing business together and the Appellant had motor vehicle Reg. No. KBC 543L to which she had pumped Kshs. 20,000/=. She stated the Appellant has a welding business at Ugunja and that he is a landlord with rented houses of two blocks. She gave his earnings from TSC as Kshs. 28,000/= p.m; Kshs. 50,000/= from the vehicle; Kshs. 10,000/= from Rental premises. The Appellant did not challenge the Respondent’s evidence on his earnings through cross-examination. I therefore take the Appellant’s earnings as stated by the Respondent. I find if his earning was as he stated he could not afford to have bought a vehicle nor ran it, leave alone having time to be entertaining the Respondent and going to lodgings with her as he alleged. He did not disclose his earnings and what he told the Court as regards his earnings is not truthful. I therefore award payment of Kshs. 15,000/= per month for the welfare of AM, a minor child, from the time of delivery of judgment by the trial court thus (8/7/2016) payable by the Appellant. The Respondent to keep custody of minor AM and meet other responsibilities for the child AM.

21. **The Upshot is that the Appellant’s appeal partially succeeds and I order as follows: -**

***a) There is no valid Luo Customary Law Marriage established between the Appellant and the Respondent for failure to notify Registrar, register and obtain marriage certificate before Registrar as envisaged under Section 44, 45 and 55 of the Marriage Act 2014, No. 4 of 2014.***

***b) The Appellant has not acquired parental responsibility over child RB.***

***c) The Appellant and Respondent shall share parental responsibility over child AM. The Respondent shall continue to have custody and care of the child AM, provide the basic needs and shelter and the Appellant shall with effect from 8<sup>th</sup> July 2016, when judgment was delivered by the trial court, pay Kshs. 15,000/=per month as his share of responsibility for the welfare of child AM, and clear all arrears (if any).***

***d) As both parties have won in one way or the other, each party shall bear its own costs of this appeal but the Respondent shall get the costs and interest at the Lower Court.***

**DATED AND SIGNED AT SIAYA THIS 2ND DAY OF FEBRUARY 2018.**

**HON. J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT.**

**In the presence of:**

**Mr. Manwari:** for the Appellant

**Respondent:** In person – present

**Court Assistant:**

Kevin Odhiambo

**HON. J.A. MAKAU**

**JUDGE**