



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 10 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

B C C APPELLANT

AND

J M G RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. Onjoro, SRM dated 19th January 2018 at the Chief Magistrates Court at Kisii in Civil Case No.257 of 2017)

JUDGMENT

1. The deceased, L C, died on 10th June 2017 at Hema Hospital in Kisii. She has not been buried to date as there is a dispute between the respondent, who asserts that he is the husband and the appellant, her mother over who should bury her. The subordinate court, by the judgment dated 19th January 2018, held that the respondent was the husband of the deceased and had a superior right to bury her over the respondent.

2. The appellant appeals against the judgment based on the grounds of memorandum of appeal dated 29th January 2018. In summary, she complains that the trial magistrate erred in finding that the respondent was the deceased's husband when in fact the deceased did not confer that status on him. That the court erred in relying on the fact that the deceased and respondent had a child therefore the relationship evolved into a marriage. She complained that the respondent did not prove, on the balance of probabilities, that there were sufficient grounds to presume a marriage. The appellant asserted that the trial magistrate erred in relying on documents whose makers were not called.

3. Before I consider the facts of the case and the parties' respective arguments, it is important to recall the principle that governs the exercise of this court's appellate jurisdiction. The duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see *Selle v Associated Motor Boat Co. [1968] EA 123*). Further, an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles (see *Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278*).

4. As is apparent from the memorandum of appeal the matter in issue is whether the trial court could presume a marriage since it is accepted by both parties that the parties did not undergo a ceremony of marriage. Both sides called witnesses and the evidence was as follows.

5. The respondent (PW 1) testified that he was an officer in the Prisons Service working at [particulars withheld]. He started cohabiting with the deceased in May 2011 and since the Prisons did not permit officers of different sexes to live together, they committed in writing that they were married. They were allocated a house and started living together. The deceased had a daughter, RC, prior to their cohabitation and when they started living together, they were blessed with two children; BK born on 27th August 2014 and GKM born on 18th May 2017. He told the court that the last child bore the names of their respective fathers. He recalled that on 7th March 2017, he and the deceased attended the funeral of her uncle where his family were recognised as the in-laws from Kisii and that they were in fact given an opportunity to address the mourners. Among those who came were his mother, J M (PW 2), his elder brother's wife, his sister and uncle. He also recalled that the deceased's twin sister and other sisters were present. CP Richard Langat (DW 2), a Prison's officer at Kericho, also attended the funeral.

6. PW 1 also told the court that the deceased was baptised at SDA Garissa on 29th October 2016. He produced the baptism certificate and photographs of him, the deceased, their daughter at the baptism. He also produced other photographs that showed him and the deceased at his sister's burial and another where he was photographed with the deceased's cousin at her graduation on 18th May 2015. The photograph taken at Nyingwe Adventist College included the respondent and other members of the family.

7. During her lifetime, the deceased took out insurance policies. PW 1 produced a copy of a Dependants Funeral Cover and Nomination of Beneficiary Form from Pioneer Insurance Company Ltd dated 26th February 2015 in which she named the respondent and daughters, RC and BK, as dependants. He also produced his own Dependants Funeral Cover and Nomination of Beneficiary Form dated 26th February 2015 in which he named the deceased as his wife as one of the beneficiaries including his daughters and a letter dated 27th June 2017 which showed that the deceased named him as her husband. PW 1 further produced her personal documents including her certificate of appointment from the Kenya Prisons Service, Certificate of Good Conduct, the letter of appointment, her Co-operative Bank ATM Card, NHIF Card, AON Medical Card and the certificates from Kenya Prison Service and Kericho Institute of Business Studies and Technology. PW 1 told the court that that the deceased was his wife and his neighbours knew them as such and their parents also recognised them.

8. J M M (PW 2), the respondent's mother, testified that she knew the deceased in 2011 when she came to her home with the respondent. She recalled that the respondent and deceased cohabited together and that they were blessed with children. She stated that the deceased would come to visit twice a year. She testified that she attended the funeral of the deceased's uncle when they were recognised and even allowed to speak. She told the court that she would like the deceased to be buried in their homestead.

9. The appellant (DW 1) testified that the deceased was her daughter and that she started working for the Prison Service at [particulars withheld] in 2011. She accepted that the deceased had three children but that they were not married. She further stated that the deceased never told her that she had married the respondent and that the respondent never came to her home to ask to marry the deceased. She referred to the Prison personnel records which were produced pursuant to a court order and which showed that the deceased was single. She told the court that she went to see the deceased when she was admitted at Hema Hospital and that she told her that she was escorted to hospital by a colleague. The appellant told the court that she would never have accepted the deceased to be married as she had asked her not to get married.

10. Richard Langat (DW 2), a Prison Officer from Kericho Main Prison, denied that he had introduced or identified the respondent as husband to the deceased although he knew the respondent as his colleague. He told the court that he did not know that the respondent and the deceased were cohabiting. A Kipsigis elder, Thomas Sigei (DW 3) gave an account of the marriage under Kipsigis custom and in his view the fact that parties reside together is not recognised as a marriage.

11. Mr Swaka, counsel for the appellant, submitted that the appellant and her family were not aware of any existing relationship between the respondent and the deceased and even though the respondent appeared at some funeral, he urged that this did not constitute a marriage or recognition of their relationship. Counsel further contended that there was no evidence that the respondent was introduced to the deceased's family. Counsel submitted that the deceased's parents did not know she was married and that no other persons including the neighbours were called to prove that she was indeed married. In his view, the fact that the respondent and the deceased had children did not confer on their relationship the badge of a marriage. The appellant also complained that the respondent produced and the trial magistrate relied upon documents whose makers were not called. He pointed to a letter dated 14th June 2017 issued by the Chief, Gesakabwa Location which stated that the parties were married under customary law. He also complained that some of the letters relied on by the appellant were written when the dispute began hence could not be relied upon.

12. The respondent's case was urged by Mr Begi. He supported the findings of the trial court and submitted that there was sufficient evidence to show that the respondent and deceased had consented to enter into a relationship of marriage. He pointed to the provisions of **Article 45(2)** of the Constitution which states that every adult of the opposite sex is free to marry based on the consent of the parties. He further submitted that there was a long period of cohabitation which gave rise to children and that introduction to the parents was not a prerequisite for the court to presume a marriage. He urged that based on the evidence, the respondent had a superior right to bury the deceased.

13. As a preliminary issue, I agree with the appellant's contention that there was no customary marriage between the respondent and deceased under Kipsigis customary law as explained by DW 3. There was a suggestion in a letter dated 14th June 2017 issued by the Chief, Gesakabwa Location which stated that the parties were married under customary law. I find that there is no evidence of an Abagusii customary marriage. But 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. In **Hortensiah Wanjiku Yawe v Public Trustee CA Civil Appeal No.13 of 1976 (UR)** the Court of Appeal for East Africa held that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it. Mustafa JA., held as follows:

I find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising out of long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...

14. In **Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR**, Bosire JA., summarized the position thus:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

15. The Court of Appeal in **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR**, held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held that:

Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

16. The question then for consideration before the trial court and before this court is whether the respondent proved that on the balance of probabilities there was a marriage between him and the deceased. For if indeed he proved this fact, he would be the person entitled to bury his wife. Before I consider the evidence, I wish to deal with the complaint by the appellant that some documents were produced in evidence without calling the makers. I have gone through the evidence and I note that the documentary evidence was produced without objection. In other words, the documents surmounted any objection of admissibility by consent hence I reject this ground of argument. In my view, since the maker was not called, the court is entitled to consider this factor in assessing the weight to put on the documents.

17. On the other hand, the respondent was shown documents which were part of the appellant's list of documents filed before the trial court. These documents were marked for identification and were ultimately not produced by the respondent. The effect of documents marked for identification and not produced was considered by the Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta and Others NRB CA Civil Appeal No. 140 of 2008 [2015] eKLR** where the Court stated that;

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

18. The first issue I have to consider is whether there was cohabitation. PW 1 stated on oath that he started living with the deceased in 2011 when they were both employed at [particulars withheld]. By an order dated 10th July 2017, the trial magistrate ordered the Prisons Service to provide the deceased's personnel records to the court. These records show that at the time of employment the deceased was single. The leave records show that in 2014, 2015 and 2016 when she took her annual leave, it was indicated that she was proceeding to Bureti, her parents' home suggesting that she never cohabited with the appellant. The appellant also denied that the respondent was cohabiting with the deceased and that the deceased had never told her of the relationship.

19. On the other side, the uncontested evidence is that the respondent and deceased had two children together while both of them were working at [particulars withheld]. If indeed the two were not cohabiting, would they have had two children? The other evidence in favour of the respondent is the deceased's own declaration that the respondent was her husband and in fact the respondent and the deceased each recognised and signified their commitment to each other as husband and wife in their respective insurance policy covers from Pioneer Insurance. Another important piece of evidence that points to the deceased's and respondent's union is the fact that they gave BKM the names of their respective fathers.

20. 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.

21. DW 1 testified that she never knew the respondent and that she only got to know him in court. I find this inconsistent with the tenor of the evidence. Given that the deceased had two children with the respondent, it is unlikely that the appellant would not have known the respondent. Further, the fact that the deceased recorded that she went on leave to her parents' home in Bureti was not inconsistent with her visiting PW 2 during her leave days.

22. The appellant submitted that the respondent did not call any neighbours or other people who would have confirmed that the respondent and deceased were cohabiting hence he did not prove his case. This court is entitled to draw inferences from the primary facts established to determine whether the respondent proved his case. There is sufficient evidence to support the trial court's conclusion that the respondent and deceased cohabited to the extent that a marriage would be presumed. In addition to the evidence I have set out, there is also evidence that the deceased was baptised in the respondent's church, she and her relatives attended each other's family functions as evidenced by the photographs produced in evidence and ultimately when the deceased was sick, he brought her close to his rural home in Kisii for treatment.

23. The totality of the evidence supports the respondent's case and I therefore find and hold that the respondent proved on the balance of probabilities that he cohabited with the deceased, had children with her and that they recognised each other as husband and wife and represented themselves as such. I therefore uphold the decision of the trial magistrate and dismiss the appeal.

24. Following the dismissal of the appeal, it follows that the deceased's spouse is the proper person to bury the deceased. Ojwang J., (as he then was) stated in **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge NRB HCCC No. 330 of 2005[2004] eKLR** that, "***In Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms.***" The same point was made by Mabeya J., in **John Omondi Olenj and Another v Sueflan Radal [2012] eKLR** that, "... *When it comes to the disposal of the body of a married man or woman the spouse should play a leading role. It would be better if the relatives of the deceased can sit down and agree on how to give their loved one a dignified exit. When they fail to agree and approach the Court for solution, the court has no option but to step in...*"

25. It is my hope that the relatives of the deceased can sit down with the respondent and agree to give the deceased a dignified and worthy burial.

26. I dismiss the appeal but given the nature of the matter, the parties shall bear their own costs.

DATED and DELIVERED at KISHI this 3rd day of July 2018.

D.S. MAJANJA

JUDGE

Mr Swaka instructed by Swaka Advocates for the appellant.

Mr Begi instructed by Aboki Begi and Company Advocates for the respondent.