



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMABAY
CIVIL APPEAL 16 OF 2017

**(Appeal arising from the Judgment of the Honourable Principal Magistrate
SAMSON Ongeri, delivered on the 8th March, 2017 in Mbita PMCC No. 2 of 2017.)**

BETWEEN

G O A A.K.A A.....APPELLANT

AND

J O O.....RESPONDENT

JUDGMENT

1. **J O O** (Respondent) had sued **G O A** aka **A** in the magistrate's court seeking to be declared the lawful husband of **E A O** (deceased) and therefore entitled to bury her remains. He also sought orders restraining the appellant and/or his agents from collecting the body of the deceased for burial.
2. The respondent's case was that he had initially married the deceased under Luo custom in the year 2002 and he even paid the dowry comprising 3 heads of cattle. They later solemnized their union in church in the year 2005 and were blessed with four children.
3. However in the year 2011 the deceased abandoned the matrimonial home and went to live with the appellant until 7th February 2017 when she died and her body was taken to AKIDIVA hospital mortuary. The respondent learnt that the appellant and his wider family intended to collect the body on 08/02/2017 for burial. He objected to this, saying it would deprive him of the right to bury a wife for whom he had paid dowry
4. The appellant opposed this claim saying he married the deceased under Luo custom and paid 4 cows as bride price. It was his contention that since the Respondent and the deceased were not living together then they could not be deemed to be married and his claims to the right to interring the deceased's remains were misplaced.
5. The trial magistrate found that the first marriage had not been dissolved when the deceased purported to contract a second marriage under custom. The validity of the first marriage was found to have been proved by the payment of dowry and subsequent solemnization at a church wedding to which a marriage certificate was produced thus rendering the deceased incapable of contracting a sub. He held that the marital union is the closest chain of relationships touching on a deceased person and anyone who proved such legal proximity would have the first priority to bury.

6. The period that the appellant and the deceased lived together was described as cohabitation which did not result in a marriage. Consequently the appellant was restrained from collecting the deceased's remains for burial.

7. The Appellant having being aggrieved by that decision hereby prefers an appeal on the following grounds:-

- *The learned trial magistrate erred in law and in fact in making a finding that the deceased never made any wish to be buried in her home in Bondo.*
- *The learned trial magistrate erred in law and in fact in making a finding that the Appellant and his witnesses were unbelievable without any factual basis.*
- *The learned trial magistrate erred in law and in fact in wholly ignoring the evidence of the appellant and his witness.*
- *The learned trial magistrate erred in law and in fact in making a finding that there existed a valid marriage between the respondent and the deceased.*
- *The learned trial magistrate erred in law and in fact in failing to make finding that the deceased had lived with the appellant as husband and wife for over 7 years.*
- *The learned trail magistrate erred in law and in fact in failing to make a finding that the deceased had long moved on with her life and there existed no marriage between the deceased and the appellant*
- *The learned trial magistrate grossly misdirected himself in completely ignoring the submissions of the appellant and the authorities presented before him and thus arriving at a wrong decision.*

8. The appellant also filed written submission which I will consider in my Judgment.

ISSUES FOR DETERMINATION

1. *Whether the deceased was legally married to the appellant.*
2. *Whether the deceased was legally married to the respondent.*
3. *Whether the marriage certificate produced by the respondent was valid.*
4. *Who between the appellant and the respondent has the right to bury he deceased?*
5. *The legal validity of oral burial wishes.*

9. PW1 testified that he knew the deceased as his wife as they got married in the year 2002 and wedded in church in the year 2005 at **[Particulars withheld] ACK**. They stayed together and had 4 children namely **F A, M A, L L A AND L A**. However currently the respondent stays with two of them while the other two went with their mother (deceased). In the year 2011 the deceased left and went to their home. The Respondent tried pursuing her through her uncle and mother who advised him to present one more cow for dowry.

10. The respondent obliged and in the company of his uncle one **BABA O** he took Kshs. 6,000 to the deceased's home for them to buy a cow. The deceased mother after receiving the money later told PW1 via phone not to go and get the deceased since she wasn't at her home. Later the respondent met the deceased and they talked. Subsequently in December 2016 the deceased paid him a visit in hospital when he was sick and he requested her to come home and see the children. The deceased told him she will talk to her mother.

11. It was his contention that he paid 3 cows for dowry in the year 2007 which was never returned. So when he was informed on 7.02.2017 that **E** had passed on he came to court to be given the authority to bury his wife.

12. During cross examination the respondent had produced a marriage certificate was put to test since he stated that he was married at **[Particulars withheld]**. It also stated that the marriage was solemnized at **[Particulars withheld] A.C.K** church and **[Particulars withheld] A.C.K** church as well. He explained that the deceased left home on her own volition and nobody chased her away. He conceded that they had been separated for a period of 6 years although he used to communicate with the deceased via the phone.

13. **PW2 N O O** a farmer testified that he knew the respondent as his nephew. That he knew his nephew's in laws as well. That he was among the people who had gone to take dowry and there he met the deceased mother and 4 uncles. That they did not come back with the deceased and that the respondent had been warned not to go back to that home. They were not informed that the deceased had been married and that no dowry was returned.

14. During cross examination pw2 testified that the respondent had told him that the deceased had left in 2011. That before 2013 the respondent went to pursue the mother with his parents.

15. Pw3 **W A O** testified a clergy in the Anglican Church and the biological father of the respondent testified that he knew the deceased as the wife to his son. They were married in the year 2002 but in the year 2005 with the consent of their parents they had matrimonial at service at **[Particulars withheld] A.C.K**. He had several discussions with the deceased's mother but that he was unwilling to carry on with talks without a male figure from the deceased's family. He also admitted that no relative of the deceased attended the couple's wedding. He explained that there were several matrimonial disputes between the respondent and the deceased and that they tried settling those issues.

16. He was later informed that the deceased had left the matrimonial home and was not aware of any allegations about the deceased being chased away from home. It was his testimony that he made several attempts to get the deceased back; in the 1st instance he met the deceased at the burial of her father and she promised to come back. The 2nd instance they met in a funeral in **URIRI** of PW3's friend called **O** and she promised to come back. The 3rd instance they met when the respondent was sick. All through these instances she never indicated that she was married. The respondent went to negotiate for the deceased's return and was told to take one cow so that they can pick her with the children. He confirmed that although money was sent for a cow to be bought they were later warned not to step foot in that homestead again.

17. However no dowry has been returned and that the existence of the deceased's subsequent marriage was not known.

18. During cross examination PW3 testified that the deceased's mother did not attend the wedding and although they had been estranged for 6 years the respondent's marriage was not dead in 2011.

19. In his defence the appellant testified that he knew the deceased **E A O** as his wife whom he first knew in 2010. That the deceased used to be his customer and they knew each other for 7 years. In 2011 August he went to her home met her mother and 2 brothers and her uncle. They talked to and he informed them of his wish to marry the deceased. They accepted the dowry but informed him that she had children aged 2 and 7 whom he accepted.

20. They stayed together and were blessed with a child named **M A** aged 3 so in total they had 3 children. He had never met the respondent. It was his contention that the last wishes of the deceased were that she be buried at her new house in **BONDO**. When he met the deceased she did not tell him that she was married and he only knew that she got her first children while at home.

21. During cross examination appellant testified that they started staying together in November 2011. That the deceased did not tell him the name of the children's father. The deceased was his second wife since the first wife had passed on.

22. **DW2 A A** testified that the deceased was her daughter and she knew the appellant as her son in-law since the year 2010. She confirmed that he had one child with the deceased but found the deceased with 2

children. They stayed together peacefully for 7 years and her wish was that she be buried in **BONDO**. She disputed the claims that the appellant paid any dowry for the deceased nor was she aware of any church wedding and was adamant that there was no marriage between the deceased and the respondent. During cross examination DW2 admitted that there was some reconciliation but that she had rejected the man who came to reconcile them saying he should call the plaintiff but the plaintiff never came back. She also admitted that pw3 had visited her and spent a night at brother in law's house.

23. In his judgment the learned magistrate granted the respondent's prayers and allowed him the right to bury the deceased since he was the one officially married to the deceased and there was no objection whatsoever to marriage certificate that was produced in court validating the existence of marriage between him and the deceased. Court opined that the relationship between the appellant and then deceased was that of cohabitation and no matter the length of it could not alter the fact that the plaintiff was still the legally recognized husband to the deceased and that meant he was the closest possible person who could bury the deceased.

24. The appeal was disposed of through written submissions where Mr. Odongo on behalf of the appellant argued that the trial court ought to have given heed to the testimony of the deceased's mother that her daughter had expressed a wish to be buried in **BONDO** and respected that wish. It was his contention that a death wish should only be ignored if it is illegal, offensive or unenforceable-which was not the situation in the present case. In this regard he replied on the decision in **APELI vs. BULUKU Ksm CA No 12 of 1970** where it was held that:-

“the most important rule is that the wishes of the deceased person, though not binding, must, so far as possible be given effect to”

25. It was also argued that the trial magistrate misdirected himself in finding that the appellant and his witnesses were not credible since there was no basis for that. He pointed out that the trial magistrate erred in finding that for the seven years that the appellant and the deceased lived together he ought to have found out the truth about the deceased's past, and this observation unfairly influenced the outcome of the case.

26. Counsel also poked holes at the finding that the marriage certificate produced was proof that the respondent and the deceased had contracted a statutory marriage thus making any other subsequent union a nullity. The basis for this is that the marriage certificate made reference to two different churches i.e. the marriage being celebrated at [Particulars withheld] ACK and at [Particulars withheld] ACK.-were these two different churches? It was his contention that the evidence of the respondent's father (PW3), who was a member of the clergy at [Particulars withheld] ACK Kopololo indicated that the couple wedded at [Particulars withheld] ACK-which would suggest they were different churches. He now argued that the document should not have been admitted in evidence as it was not certified and the maker ought to have been called to produce it.- **MR ODONGO** submitted that the evidence demonstrated that the appellant and the deceased had lived together as husband and wife for 7 years and the trial court ought to have found that there was that this validated the relationship since the other relationship was virtually non-existent. He urged this court to be guided by the decision in **JACOB BLASTO OKUMU AND OTHERS VS CLARIS AUMA** where the court found that the marriage between the couple was nonexistent because the deceased had moved on with her life.

27. Would a death wish super-cede the legal position of a relationship? This is why it was important for the trial court to establish the status of the deceased visa visa the two men. The trial magistrate did take note that there was a dispute regarding the validity of the marriage certificate, but no other evidence was presented to the court to vitiate its contents. I take note that it was the content that was questioned and not its production. PW1 on cross examination explained that **[Particulars withheld] ACK KOPOLO** fell under the **[Particulars withheld] ACK** church. I think the clarification came from the clergyman (PW3) on cross examination to the effect that **[Particulars withheld] ACK** is within **[Particulars withheld] ACK** parish- so there is nothing dubious about that certificate.

28. Yet even if the appellant was to be given the benefit of doubt regarding that document, then the issue

would still remain as to whether the Luo customary marriage which the respondent and the deceased had contracted had been dissolved. It was a common ground by all parties that the dowry paid by the respondent had not been returned.

29. Under Luo custom what signifies the end of a marriage is not the fact that a woman gets married to another man while the first marriage has not been formally dissolved by the return of dowry and indeed the trial magistrate correctly observed that polyandry is not recognised in this community. Although technically the deceased kept two marriages, legally and traditionally, the first one was the recognised one because formalities towards dissolving it whether through the formal legal system or the traditional return of dowry had not been met. I cannot fault the trial magistrate's finding that the respondent was still married to deceased.

30. As for the purported wishes and the trial court's rejection of the credibility of the appellant's witnesses it was pointed out that the deceased's mother was untrustworthy because of her denial of facts which were even obvious such as receiving a cow intended for reconciliation from the respondent when she all along knew that her daughter would not return to the respondent. The appellant was also described as being economical with the truth on the basis that he was unaware of the deceased's initial marriage. I do not think this was an unfair assessment with regard to DW2. Infact it flows from the evidence of the appellant who told the trial court that when he inquired about the father of the deceased's children

“I asked my mother in-law about the children and she told me that the father of the children was not there”

31. However to be fair to the appellant I do not think his credibility would be faulted simply because he was not aware that his beloved was also another man's beloved- he could well have been a victim of a well orchestrated deceit since even in his testimony he stated that when he went to seek the deceased's hand in marriage, he inquired from the other family members who informed him that the deceased was single.

32. Having made these observations then the issue to consider is whether the deceased by her conduct ought to be buried in **BONDO** by the man whom she had chosen spend her later years with, or by the respondent whom she had abandoned seven years ago and refused to return despite all the attempts to woo her back.

33. I recognise the position stated by Achode J in the case of **MARTHA WANJIIRU KIMATA AND ANOR VS DORCAS WANJIRU AND ANOR(2015)eKLR** while citing the infamous case of **VIRGINIA EDITH WAMBUI OTIENO VS JOASH OCHIEN'G OUGO AND ANOR [1987]eKLR** which stated that:-

34. It is now settled law that where the issue of place of burial is to be decided by a court is a court of law; the court relies on customary law to establish the place of burial”.

35. This position was also amplified by Ojwang, J (as he then was, in the case of **RUTH WANJIRU NJOROGE VS JEMIMAH NJERI NJOROGE AND ANOTHER [2004] eKLR** that:

“In the social context prevailing in the country, the person who is first in line of duty in relation to the burial of any deceased person is the one closest to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore it is only natural that the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, head of any other claimant” [emphasis mine].

36. Interesting enough in the case of **EDWIN OTIENO OMBAGO VS MARTIN ODERA OKUMU Civil Appeal No 209 of 1996 (Nairobi) the Court of Appeal** observed that when a dispute arises as to whether one party should bury the deceased, the court must look beyond the fact of marriage, and consider the circumstances of the case, the conduct and attitude of the person claiming such rights,

towards the deceased, to determine whether such claim is deserved.

37. In the present situation certainly by conduct and by inclination, the deceased's heart and spirit was with the appellant. She had left the respondent 7 years ago and for all practical purposes she had moved on with her life, consorting with another man. Morally the right thing to do would be to allow the one person who gave her love and companionship, the right to lay her to her final rest and at a place where he can occasionally pay homage at his convenience.

38. However, the law is indeed an ass, and legally the marriage recognised by law and tradition is the first one with the respondent. This is where this case inches towards the **APELI VS BULUKU** case cited as in that matter the major concern was whether the deceased by his conduct, and declaration, governed by Bukusu tradition or the Christian principles in determining his place of burial. In this present case, the deceased by her conduct generally observed Luo custom and so it is that in Luo custom he who pays the piper calls the tune. The man who first married her was not given a return of the dowry, so he takes the centre stage. Despite the dowry payments by the appellant and the 7 year period of cohabitation, legally the deceased did not have capacity to contract another marriage. Whereas DW2 may have been untruthful in so many other things but I think on the proposition that her daughter wished to be buried where the Appellant was going to set up a home for her, there is a probability that it is true....going by her past conduct. The deceased did not want anything to do with respondent in life, so why take advantage in death?

39. So would a dead marriage now resuscitate simply so as to give life to the respondent's desire to bury a woman he had not lived with for 7 years? I am inclined to the Court of Appeal's view that there are instances where the court must look beyond the marriage and consider the conduct of the parties. To do otherwise would be placing the deceased in bondage which she had run away from, whether voluntarily or by the respondent's design. It is on account of this that I say the one who pays the piper may not always call the tune of the music, and the decision of the trial court be and is hereby quashed. It is only fair and just that the appellant be allowed to collect the remains of **E A O** for burial.

Delivered and dated this 21st day of July 2017 at Homa Bay

H. A. OMONDI

JUDGE