



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Appeal 37 of 2010**

**MWANZO CHEMUSU ..... APPELLANT**

**VERSUS**

**FESTO LUYALE ..... RESPONDENT**

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

The appellant **MWANDO CHEMUSU** was the defendant in the case before the subordinate court. The respondent, **FESTO LUYALE** who was the plaintiff had sued the respondent claiming payment of four heads of cattle, Kshs.10,800/= plus costs. The claim was based on Luhya customary law for payment of dowry and funeral expenses.

The respondent case was that the appellant's son had married his daughter but the daughter passed away while delivering a child. The respondent's daughter was buried at her father's home following meetings held by the elders from the two clans where the parties came from. The respondent was to be paid the heads of cattle and the money as per the agreement reached by the elders.

In a statement of defence dated 6.8.09, the Appellant denied the claim. The appellant conceded that the elders entered into the agreement but he denied that he assumed personal responsibility to meet the terms of the agreement. The appellant averred in his statement of defence that he was under no personal obligation to indemnify the plaintiff of the funeral expenses. The appellant denied the claim and stated that his son who entered into the marriage was an adult.

The lower court entered judgment in favour of the respondent. Aggrieved by the judgment, the appellant appealed to this court on the following grounds:-

“1. That the learned magistrate erred in law and fact in finding that there was a valid contract between the respondent and the appellant contrary to the evidence placed before him.

2. That the learned magistrate erred in law and fact in finding that the appellant was bound by an agreement he was not party to.

3. That the learned magistrate erred in law and fact in failing to find that the agreement, if any was not enforceable against the appellant.

4. The learned magistrate erred in law and in fact in failing to appreciate that it was the responsibility of the husband to the respondent's daughter to pay dowry or any other related expenses.

5. The learned trial magistrate erred in law and in fact in failing to find that the agreement in issue could

not be enforced at the instance of the plaintiff/respondent herein as he had no *lucus standi* to bring this suit.”

Mr. Kundu advocate appeared for the appellant while Mr. Omukunda advocate appeared for the respondent. Mr. Kundu filed written submissions. The respondents did not file any submissions though duly served.

This being the 1<sup>st</sup> appellate court, I have borne in mind the principles applied by the Court of Appeal in the case of **Selle & Another v. Associated Motor Boat Company Ltd. & Others (1968) EA.**

***“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

During the trial before the lower court, three witnesses testified on the respondent’s side. The respondent, **FESTO LUVALE (PW1)** evidence was that the appellant’s son, **KENYATTA MWANZO** married his daughter, **DIANA**. The respondent said his daughter fell sick while pregnant and passed away. Both families hailed from the Kabras Sub-tribe of the Luhya tribe. The clan elders from both sides of the families met and reached an agreement that the respondent’s family was to be paid four heads of cattle as dowry and funeral expenses and the funeral expenses were to be shared out. According to the respondent, he incurred expenses of Kshs.3,000/= for the body to be transported home and a further Kshs.2,000/= to purchase sugar. He produced the receipts as exhibits.

The respondent’s evidence was corroborated by that of PW2, **JONATHAN**, a pastor of Friends Church. PW2 testified about the marriage and death and stated that he participated in the meeting held by the **BATALI** clan from the appellant’s side and the **BASONJE** clan from the respondent’s side and arrived at the decision that the appellant was to give four heads of cattle to the respondent and meet funeral expenses.

PW3, **NARULA SAISI** who was among the clan elders who held the meeting also gave a similar account of evidence. The respondent was to pay the appellant four heads of cattle and meet funeral expenses.

All the above witnesses identified the agreement which was signed by the elders and by the appellant.

The appellant, **MWANZO CHEMUSU** in his evidence conceded that his son married the respondent’s daughter. That during the funeral, his side of the family contributed one cow, sacks of maize and one sack of sugar and eight (8) chickens. During cross-examination, the appellant conceded that when a woman dies, the clan members meet and agree on issues.

DW2, **CHARLES MANG’ANG’A** in his evidence stated that the elders met after the death and it was agreed that burial would take place at the respondent’s home and it was agreed that the respondent be paid four heads of cattle but their side could not afford and took to the respondent one cow, two sacks of maize, eight chicken and one sack of sugar but the respondent’s family turned violent and chased them away, saying that they wanted four heads of cattle.

DW3, **CHARLES CHIKAMAI** also gave a similar account of evidence concerning the four heads of cattle but that they delivered one cow, two sacks of maize, one bag of sugarcane, eight chickens but were chased away by the respondent.

DW4, **LUCAS SINDANI SHIRANDULA** gave a similar account of evidence also regarding the four cows in the agreement but stated that because the four cows were not available, they took one cow, two

sacks of sugar and eight chickens, but the same were rejected by the respondent. The evidence of DW2, DW3, and DW4 brought in a new twist in the evidence that after the dowry payment, the body could be buried by the husband. The evidence by the appellant did not mention burial was to take place at his home. The evidence by DW1, DW2 and DW3 regarding the planned burial at the appellant's home cannot be correct as the same is against the thrust of the statement of defence.

However, from the evidence of all the witnesses from both sides, it is quite clear that the respondent was to be paid four heads of cattle and the funeral expenses were to be shared out between the two families.

It is also clear that the appellant participated in the meeting by the clan elders when the agreement was arrived at. The discussions by the clan elders were carried out under the customs and traditions of the Kabras sub-tribe of the Luhya tribe which both parties belonged to. Under the said traditions, the elders must have been aware that the appellant's son was an adult but arrived at that agreement with the appellant.

The ground of appeal that it was the responsibility of the husband whose wife had died to pay the dowry is not supported by any evidence.

The appellant cannot turn away from the agreement which he signed before the elders. Although the appellant has denied having signed the agreement, there is a signature against his name to the said agreement. It was not alleged that the said signature is a forgery. I agree with the finding of the trial magistrate that the agreement is binding against the appellant and is enforceable.

The upshot is that the appeal has no merits and is dismissed with costs.

***Delivered, dated and signed at Kakamega this 10<sup>th</sup> day of October, 2012***

**B. THURANIRA JADEN  
J U D G E**