



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 109 of 2012

**ROSA ADISA MAGALA.....PAINTIFF**

**V E R S U S**

**BONIFACE AMWAYI.....DEFENDANT**

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

In her plaint dated 3rd May, 2012, the plaintiff is seeking judgment against the defendant for:

**(a) Injunction restraining the defendant by himself, his agents, servants, representatives or any person acting under his instructions from burying or interring the remains of EVERLYNE MWENESI MAKALA in Ikolomani Ebunasion village where the deceased had moved from.**

**(b) An order directing and or ordering the defendant by himself, his agents, servants, representative or any person acting under his instructions to bury and or inter the remains of EVERLYNE MWENESI MAKALA on Land Parcel No. Butsotso/Shikoti/627.**

**(c) Costs of this suit.**

Four witnesses testified for the plaintiff. The plaintiff testified as PW1. Her evidence is that her daughter, **EVERLYNE MWENESI**, died on the 24th of April 2012 in Mombasa. The defendant was a friend to her deceased daughter but the two were not married. The deceased bought her own land at Butsotso and had established her home there. It is the plaintiff's further evidence that the defendant had taken another woman and was living in Kilifi. The plaintiff would like to bury her deceased daughter at her plot at Butsotso or at her ancestral land at Makalech Sigalagala. The deceased had two children with the defendant.

It is the plaintiff's contention that her daughter had a hair salon and used to do tailoring. She also used to sell clothing material. After her death, she went to Mombasa to take the body but the defendant became violent. As far as she is concerned the defendant had not paid dowry to the deceased's family. The deceased committed suicide by taking poison as the defendant had left her and the children and was not providing for them.

**PW2, SAMUEL NJOMO MAKALA** is a brother to the deceased. His evidence is that the defendant was a boyfriend of his deceased sister – **Everlyne Mwenesi**. The deceased complained to him that her relationship with the defendant was not good. The defendant did not pay any dowry to their family. The deceased can be buried at her plot at Butsotso or at their ancestral home. After her death, he went to Mombasa. The deceased was living near Tononoka in Mombasa. She was a tailor and had a hair salon. It is PW2's further evidence that the deceased had two children with the defendant.

**PW3, LINUS ATITWA MULANWA**, is the deceased's relative. The plaintiff is his aunt. His evidence is that the defendant did not pay dowry to the deceased's family. He went to Mombasa to collect the body of the deceased and wanted to bury her at their home but the defendant refused.

**THOMAS BULINDA** testified as **PW4**. He is the deceased's uncle and a brother in-law to the plaintiff. He knew that there was no dowry paid to the deceased's family. His further evidence is that if a lady dies before dowry is paid, the family of the lady takes the body. The deceased had two children with the defendant.

The defendant's position is that the deceased was his first wife. He would like to be given the body of his wife to bury at his ancestral home at Ebunasio under his Idakho customs. His testimony is that he married the deceased in the year 2001 under Luhya traditions. He took the deceased from her parents. His home is about 2 km away from the deceased's ancestral home. When he took the deceased, he had no money but later got employment. He went to his in-laws with the deceased and he was received quite well. He later sent his delegation of elders to the deceased's family for discussions about dowry. A sum of **KShs.30,000/=** and **nine (9)** cattle was agreed upon as the dowry. At the date of the meeting he paid **KShs.10,000/=** and **five (5)** cattle.

The defendant's further evidence is that the deceased had a daughter before they got married. They got two children in the cause of their marriage, a son and a daughter. He narrated the events before her death. The deceased took poison and the defendant went to the hospital where he was asked to buy some medicine which he did. The defendant also testified on how the plot at Butso was bought. The deceased and the defendant lived together in a Government of Kenya house in Mombasa.

**DW2, BENEDICT MURUNGA YAPESA** is an uncle to the defendant. His evidence is that dowry was sent to the plaintiff's family in the year 2008. An agreement on the dowry was signed between the two families. **DW3, ALEXANDER INDAKWA** is the village elder, Shitochi sub-location. His evidence is that on the 5<sup>th</sup> of April 2008, the defendant's family went to the plaintiff's home and paid dowry. He was informed in advance by Samuel Njomo (PW2). Five cows were handed over to the deceased's family. He was notified as the village elder of the area where the deceased came from.

**DW4, LAURENT MULUKURWA** testified that he was present in 2008 when five cattle were sent to the homestead of the deceased's father. According to DW4, the cattle were taken on 5<sup>th</sup> April 2008. There were four cows and one bull. DW4 did not see any money changing hands as the visitors entered into the house. **DW5, ALFRED MUKAISI** is the Assistant Chief of Makhokho sub-location. His evidence is that in 2008 he wrote a letter for the defendant's family to transport cattle from his village to Shitochi village. The cattle were meant for dowry payment. He saw the cattle being taken to Shitochi village.

The main issues arising from this suit is whether the defendant paid dowry to the plaintiff's family, whether the defendant was married to the late **Everlyne Mwenesi Makala** and who should be given the responsibility to bury the remains of the deceased. From the evidence on record it is the plaintiff's contention that the deceased was not married to the defendant as no dowry was paid. The deceased and the defendant never lived in the defendant's ancestral home at Ebunasio in Ikolomani. Further, it is the plaintiff's position that the defendant and the deceased had separated. While the defendant was living in Kilifi the deceased lived in Mombasa. The deceased had her own hair salon and she also did tailoring work. It is the plaintiff's further position that the deceased bought a portion of land out of plot no. **BUTSOTSO/SHIKOTI/627** and put up her own home. The plaintiff would like to bury the deceased at her home or in the alternative bury the remains at the plaintiff's ancestral home at Sigalagala. On the other hand it is the defendant's position that the deceased was his wife and would like to bury her at his ancestral home at Ebunasio in Ikolomani.

From the evidence on record it is established that indeed the deceased was living with the defendant. The plaintiff's case does establish that the defendant and the deceased had two children, a son and a daughter. It is the defendant's evidence that before he married the deceased she had one daughter and they were living with that daughter too. The defendant has proved that he took dowry to the deceased's parents. There is the independent evidence of **DW3, DW4** and **DW5**. DW3, was the village elder of

Shitochi sub-location where the plaintiff comes from. It is his evidence that PW2 Samuel Njomo who is the plaintiff's son informed him about the payment of the dowry on the 4<sup>th</sup> of April 2008. DW3 was requested to attend the following day, 5<sup>th</sup> April 2008 when the cows meant for the deceased's dowry were to be received. It is DW3's further evidence that he attended the ceremony of receiving the dowry on the 5<sup>th</sup> of April 2008 at the homestead of the late **FRANCIS MAKALA** who is the plaintiff's husband. The witness remembers that there were five cattle (one bull and four cows). Similarly DW4, comes from the same village with the plaintiff and is from the same clan as the plaintiff's late husband. His evidence is that on the 5<sup>th</sup> of April 2008 he was present when five cattle were handed over to the plaintiff's family. There is also the evidence of **ALFRED MUKAISI (DW5)** who the Assistant Chief of the defendant. His evidence is that he gave the defendant's family a letter that allowed them to transport the cattle meant for the deceased's dowry to the plaintiff's home. He saw the cattle being transported on the 5<sup>th</sup> of April 2008. I do not see any reason as to why the three witnesses who are not related to the defendant would give false testimony to the court. I saw the witnesses testifying before me and I do not doubt the truthfulness of their respective evidence.

From the above evidence I am satisfied that the defendant paid dowry to the deceased's family. The defendant himself elaborately testified that he paid the dowry to the plaintiff and her late husband in accordance with the Luhya (Idakho dialect) customs. **Eugene Cotran in his book Restatement of African Law Vol. 1. The law of Marriage and Divorce** specifies the essentials of Luhya customary Marriage under the Idakho customs as follows:- *It all begins with a ceremony called Okhuselela. This is a feast that takes place at the bride's home. It is then followed by the bride accompanied by bridesmaids head to the husband's home where the marriage is consummated.* However, **Contran (Supra)** puts a disclaimer based on modern development that these ceremonies are eliminated or performed in modified or abbreviated form currently.

It is also the plaintiff's own pleadings that the deceased lived with the defendant as husband and wife before the deceased met her death. However, the plaintiff maintains that the defendant and the deceased were not living in harmony and led to the two separating (paragraphs 8a and b of the amended plaint). In her affidavit sworn on the 3<sup>rd</sup> May 2012, paragraph 4 states as follows:-

**“THAT I know of my own knowledge that Everlyne Mwenesi Makala's marriage was full of ups and downs. (see a copy of the diary marked RAM I)”**

I have carefully read the contents of the diary and for the sake of clarity I would reproduce part of it.

**“I hate marriage better be a single parent – never trust or fall in love with any man. Incase never trust him coz it can cost ur life.**

**- Charm is deceptive and beauty disareous, but a woman who honours the lord should be praised. I want to be out of this lonely life always desperate no one to turn to. It's so difficult to stay with a man who has no tyme with you always busy out their has no tyme with his wife”**

From the evidence on record I am satisfied that this court can presume that the deceased and the defendant were lawfully married. The doctrine of presumption of marriage is well settled in Kenya. In the case of **HOTTENSIAH WANJIRU YAWE VS PUBLIC TRUSTEE. Civil Appeal No. 13 of 1976** Madan J. stated the following:-

**“The concept of presumption of marriage is a an appreciation of the needs of the parties in life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage. That if a woman is left stranded either by her husband or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestow, the status of a woman to enable her to qualify for maintenance or share in the estate of the deceased husband.”**

The Court of Appeal in Nairobi in **BETH NYAMBURA KIMANI vs. JOYCE NYAKINYWA KIMANI**

*and others [2006] eKLR cited with authority the case of Veronica Rwambah Mbogoh v Margaret Rachel Muthoni and Another – Civil Appeal No. 31 of 2002 [ur]* and stated that:-

**“For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the Appellant’s favour. Such was the situation facing the predecessor of this court in Hottensiah Wanjiku Yaweh – versus- Public Trustee – Civil Appeal No. 13 of 1976. Mustafa J.A. in his leading judgment stated:**

***“I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption.”***

It is therefore my conclusion on the two issues of dowry and marriage that indeed the defendant paid dowry to the plaintiff’s family. The dowry was in form of **five cattle** and **KShs.30,000/=**. It is also concluded that the deceased and the defendant were married and they had two children. Even if their marriage had its own problems that is not a reason to find that the two were not married. According to the defendant the relationship started in 2001. Dowry was paid in 2008. Even if the entire dowry was not paid, that cannot stop the court from presuming that the deceased and the defendant were married.

The last issue is who should be given the deceased’s body for burial. Having found that the deceased was married to the defendant, it naturally follows that the defendant ranks higher in priority against the plaintiff. The defendant under the Law of Succession Act is given preference in issues relating to his wife. I hereby therefore order that the body of the late Everlyne Mwenesi Makala be released to the defendant for burial at his ancestral home at Eburnasio in Ikolomani Division or any place of his choice.

In the end I do find that the plaintiff’s suit lacks merit and the same is hereby dismissed. The defendant is at liberty to bury the remains of his late wife. Since parties are related there shall be no orders as to costs.

***Delivered, dated and signed at Kakamega this 1<sup>st</sup> day of November 2012***

**SAID J. CHITEMBWE**  
**J U D G E**