



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

**CIVIL CASE NO 77 OF 1992**

**M F M.....APPELLANT**

**VERSUS**

**F M.....DEFENDANT**

**JUDGMENT**

The late **P M** , deceased hereinafter, died on the 13th January, 1991 and since then his body has been lying at the Provincial General Hospital Mortuary, Mombasa. The mother of the deceased was one **A W** who herself died at Kakamega Provincial Hospital on the 3rd January 1976, following a road traffic accident on the 1st January, 1976. The remains of the late **A W** were buried at the Eldoret Christian Cemetery. At the time of her death, **A W** was living in Eldoret with **F M**, the defendant herein. They were living as man and wife and had been so living in Eldoret since 1966. The defendant contends **A W** was his lawful wife. **M F M**, the plaintiff herein, is also a son to **A W**. The defendant agrees that when he first met **A W**, she had eight children of her own, among them the plaintiff. The children in this group are:-

1. N G.
2. A M G.
3. F M G.
4. A G.
5. W H G.

In addition to these six, there were two other girls, **C** (PW 6) and **E**. There is no dispute on the evidence and I find and hold that **A W**'s first husband was one **M W**. Out of the union between **M W** and **A W** were born the first two girls **E** and **C** . **M W** then died. The plaintiff's case is that after the death of **M W**, **A W** was married by one **S N G** who died in Kilifi in 1987. The plaintiff contends that he himself and the other five children already listed herein were born to **A W** and **S N G**. The defendant does not contest this; he himself does not seem to know who the father of the plaintiff and the other children was. The dispute herein centres over who the father of the deceased was. The plaintiff contends the deceased was the son of **S N G** and **A W** and that therefore, he (plaintiff), as the brother of the deceased, has the right to bury his remains in Kilifi. The defendant, on the other hand contends that he sired the deceased with **A W** who, as I have said, he claims, was his lawful wife. He took care of the deceased, maintained him, paid his school fees and generally looked after the deceased until he got a job and started living on his own in Nakuru. The defendant says that as the natural father of the deceased, it is his right to have his remains and carry the same for burial in Bungoma District. The defendant says he met **A W** in 1964 and he started

to live with her as man and wife in March of the same year. She thereafter conceived the deceased and the latter was born in 1965. After the birth of the deceased, he went to the parents or relatives of **A W** and paid to them Shs 2,300/- as dowry. No one, not even **A W** herself told him that she had been married to anybody before. In 1966, he was transferred to Eldoret and he moved there with **A W** and her children. No one came to claim **A W** from him while he was living with her in Mombasa. No one did so for all the period he stayed with her in Eldoret – some ten years in all. The defendant says that apart from the deceased, he had five other children with **A W**.

It is agreed on the evidence that the defendant and **A W** got the following children:-

1. S O
2. D N
3. J S
4. P C
5. H N

There is really no dispute on the evidence that from 1966 the defendant lived with **A W** at Eldoret as man and wife upto the death of **A W** and that these latter five children listed above were born to them during their union. As I have repeatedly stated, the defendant contends that union was a lawful marriage.

If I understood the plaintiff correctly, and I hope I did, his contention is that the defendant could not have lawfully married **A W**. When the defendant first met **A W**, she was still lawfully married to the late **S N G**, the plaintiff's father. **S N G** originally married **A W** in accordance with Giriama customary law. According to **A W**'s sister Catherine (PW 2) this was in 1953. **S N G** brought money enough to purchase seven goats and three cows. **A W** then became **S N G**'s wife. In 1955, two years after the customary marriage, **A W** and **S N G** converted their union into a Christian one at the Makupa Catholic Church, Mombasa. To support his claim on this the plaintiff brought as a witness Josephat (PW 8), a clerk at the Makupa Catholic Church Mombasa. This witness produced a register of marriages for the relevant period and entry No [Particulars withheld] in a register (Exh 1) shows that on the 10th July, 1955, **S N G** and **A W** were married in the church. According to the plaintiff and his witnesses, that marriage was never lawfully dissolved and was in existence upto the time of **A W**'s death. If the marriage was never dissolved, contends the plaintiff, then **A W** could not have lawfully married the defendant because she had no capacity to marry him or anyone else. This statutory marriage was never pleaded by the plaintiff but it was brought up in the agreed issues and evidence was freely led on it without objection from anyone. I must accordingly deal with it and I must say that its importance in the matter cannot be overstressed. For his part the defendant did not say that there was in fact no church marriage or any marriage at all as alleged between **A W** and **S N G**. The defendant's contention was that he was not aware of the church marriage when he met **A W**; he asked her about the children she had. She told him that she had got the children with some Giriama man who had been staying with her, apparently as a boy-friend. They then started to live together as man and wife and she became conceived of a baby who was to be the deceased. According to Bukusu customs he could not pay dowry until **A W** was delivered of her child and soon after the birth of the deceased he went and paid the Shs 2,300/- as dowry. He was, accordingly, not aware of any marriage between **A W** and **S N G** or anyone else.

Issue No 4 in the statement of issues asks:-

Did **A W** and **S N G** formalize their marriage in the Makupa Catholic Church on the 10th July, 1955?

There is the evidence of Catherine (PW 2) that **A W** and **S N G** got married in accordance with Giriama customary law in 1953. PW 2 says dowry was paid. She was supported by G M T (PW 3) who also says that **A W** and **S N G** first met in 1952 and that **S N G** paid dowry in 1953. These two witnesses say that

the marriage was on the 10th July, 1955 converted into a Christian one and on this aspect they are fully supported by the register (Exh 1) which clearly shows that **S N G** and **A W** married in the church on that date. No suggestion was made that anyone could have falsified the register. The defendant, as I have said does not swear, and indeed, could not have sworn, that these things, ie the customary marriage and then the statutory one, never took place. All the defendant said is that he was not aware of them **A W** not having told him anything about them. There is absolutely no reason which can make me disbelieve the cogent evidence of PW 2 and PW 3 that there was both a customary and then a church marriage between **A W** and **S N G**. The church aspect of the marriage is fully proved by the register. Accordingly, I find and hold that **A W** and **S N G** were first married in accordance with Giriama customary law (issues No 1 to 3 ) and that on the 10th July, 1955, that marriage was converted into a Christian union under the provisions of section 9 of the African Christian Marriage and Divorce Act, cap 151 Laws of Kenya. This took place at the Makupa Catholic Church on the 10th July, 1955. The church marriage, in the words of section 9 (3) of the Act,

“cannot be dissolved during your lifetime, except by a valid judgment of divorce  
.....”

It is the plaintiff’s contention that there was no valid judgment of divorce during their lifetime dissolving the marriage between **A W** and **S N G**. The defendant has not himself brought any evidence to show that the marriage was ever dissolved. It would be a dangerous presumption for the Court to make to say that because **A W** stopped living with **S N G** either in 1963 or 1964 and they lived apart until 1976 when **A W** died, one of them must have obtained a judgment of divorce. There is no basis upon which the Court can make such a presumption. That leaves me in the position that the plaintiff has proved his mother and father were married in the church on 10th July, 1955 and there is absolutely no evidence that that marriage was lawfully dissolved. I find and hold that the church marriage in 1955 was never dissolved during the lifetime of Anorlda and it was only dissolved by her death on 3rd January 1976.

Much as I sympathise with the defendant, his position is painfully obvious. Even if he paid dowry in 1965 as he contends he did, the simple truth is that **A W**, being married, had no capacity to contract another marriage with anyone else. The long cohabitation between the defendant and **A W** was accordingly not a marriage recognised under Kenyan law. Even the numerous customary laws we have in this Country do not allow a woman to have a second husband before her first marriage is dissolved in accordance with custom. In this case **A W** was barred by statute from contracting another marriage during the subsistence of the church marriage. She was, accordingly never the wife of the defendant upto the time of her death. I do not find any relish in coming to that conclusion, but it is the duty of these Courts to faithfully administer the law as it is.

Where does that leave us in relation to the question of who, as between the plaintiff and defendant, should bury the remains of the deceased?

That question cannot be determined under or by reference to the African Christian Marriage and Divorce Act, which as was recognised in the case of *Virginia Edith Wambui Otieno v Joash Ougo & Omolo Siranga* (1982 – 1988) I KAR 1049 does not deal with the issue of burial or succession to property. The issue of who is to bury the remains of the deceased must be decided in accordance with the customs of the parties involved.

The defendant’s claim to bury the deceased is based on the sole fact that he is the father of the deceased. He says he is the natural father of the deceased, lived with him during his lifetime, paid for his education and all that. The plaintiff’s side on the other hand contends that the defendant is not the natural father of the deceased and PW 2 in particular gave a very cogent explanation as to why she thought the defendant could not have been the natural father of the deceased. According to her when the deceased was born, **A W** was still living alone and that at the baptism of the deceased, there was a problem of naming the deceased as the mother had no husband. It was decided to give the deceased the name **J M**, the latter name having some connection with the relatives of **A W**. The defendant himself said when the deceased was being baptized he was not there as he had gone on a *safari*. I was very favourably impressed by PW 2, her memory and narration of the events were clear and she gave her evidence in a very forthright

manner. She gave details which she could not have possibly made up. There is, for example, the question of the man Ramadhan from Seychelles who stayed with the deceased as a boy-friend for sometime. There would be no reason for PW 2 to invent that kind of story. I definitely prefer the evidence of PW 2 to that of the defendant, particularly on this issue, and I am inclined to the view that when the defendant met **A W**, she had already conceived the deceased and that the defendant is not the natural father of the deceased.

But even if I was to be found wrong on this point, I really do not think that it matters very much. As I have said the defendant's claim to the remains of the deceased is based on the fact that **A W** was his lawful wife and the deceased was born out of a lawful wedlock. I have already held that throughout her lifetime, **A W** remained the lawful wife of **S N G** and was never at any time lawfully married to the defendant. Old Paul Jefwa (PW 4) gave evidence that in Giriama customary law, children born to a married woman are the children of the husband even if they be sired by another man. That is almost a universal practice with most of the Kenyan African communities and I do not think that the practice is unknown to the defendant; his community has the same sort of custom. I do not wish to say anything regarding the other children who admittedly were born to the defendant and **A W**. There is at the moment no dispute concerning them. They are adults and would probably know what they want and to arrange their lives accordingly. The plaintiff claims the body of the deceased in his capacity as a brother of the deceased. The defendant's basis of claim, ie fatherhood, is false and in the circumstances, the plaintiff's claim is superior to that of the defendant.

The plaintiff, is accordingly, entitled to have the remains of his brother and to have the same interred at Kilifi in the *boma* of the late **S N G**. Mr Ngombo, with the approval of Mr Ngare, drew up and filed in Court a list of "Agreed Issues" of nearly thirty such issues. I have not found that list of much help and I have certainly not found it necessary to answer each individual issue. I hope that they have each been generally answered in my judgment. Accordingly I now enter judgment for the plaintiff and order that the body of the late **P M** now lying at the mortuary of the Coast General Hospital be released to the plaintiff for burial in Kilifi District. Taking into account the circumstances of the case, I refuse to make any order as to the costs of the suit with the result that each party shall bear his own costs. These shall be my orders in the matter.

**Dated and delivered at Mombasa this 17th day of March 1992.**

**R.S.C OMOLO**

**JUDGE**