



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. 15 OF 1982

1. N.O

2. J.O.....APPELANTS

VERSUS

1.R.A

2.J.O.....RESPONDENTS

JUDGMENT

N O and J O have appealed against a decision of the district magistrate, Rongo, ordering the return of R A and her three children to J O (the respondents).

N O (appellant No 1) is the father of, and J O (appellant No 2) is the former husband of, R A.

The appellant No 2 married R in 1963 and they lived together until 1973. She bore him one child. In 1973 there were matrimonial differences and sometime during that year R A left the second appellant. The respondent said that he married R in April 1973 and it is not disputed that they had been living together as man and wife until October 22, 1981 when the second appellant together with three police constables took R back to her father. R has had two further children by the respondent and she was ordered to take all three children along with her to her father's home.

There is a dispute between the respondent and defendant No 1 over whether dowry had been paid and the learned magistrate in his judgment apparently considered that insufficient dowry had been paid, if any at all, because he included in his order an order that the respondent give R's father more dowry.

The learned magistrate rightly pointed that the respondent and R had been living together as man and wife for nine years and that they had during that period produced two children and had looked after those two children and R's child by her former union, together. The learned magistrate ordered the return of R and three children to the respondent and it is against that order that the appellant now appeals.

The merits of the case were urged before me, but I do not need to consider the question of who R A is married to, or whether dowry was properly paid by the respondent. More fundamental questions are involved requiring consideration of the fundamental rights and personal liberty of a wife. My researches have revealed one case in which was considered the issues involved in this case: *Republic v Kadhi Kisumu Ex parte Bazreen* [1973] EA 153. I need only to quote the head note:

The interested party and the applicant were muslims and husband and wife.

The interested party applied in the Kadhi's court for an order for restitution of conjugal rights which was granted. Thereafter on his application the applicant was arrested and brought before the resident magistrate.

The applicant then applied for an order for certiorari to quash the order of the Kadhi's court on the grounds, firstly that the Kadhi's courts have no powers of enforcement, that there is no power to order the return of a wife to her husband, that the order infringed the applicant's constitutional right to personal liberty and freedom of movement and finally had the effect of unconstitutionally holding her in servitude.

Held:

- (i) the power of enforcement of an order given in the Civil Procedure Rules apply to Kadhi's courts;
- (ii) a person may be deprived of his personal liberty in the execution of the order of a court made to secure the fulfilment of an obligation imposed by law;
- (iii) there is no obligation on a wife to remaining with her husband (*The Queen v Jackson*)(1) followed;
- (iv) accordingly the order unconstitutionally deprived the applicant of her liberty;
- (v) the applicant's right of freedom of movement was in this case coterminous with her right to liberty and was also infringed by the order;
- (vi) The effect of the order was to hold the applicant in servitude;

Judgment for the applicant.

Of course the present case does not involve Muslims governed by Mohamedan Law. The learned magistrate was dealing with Jaluos and his order was purported to be made in accordance with Luo Customary Law.

Section 3(2) of the Judicature Act (cap 8) reads: "The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

The order of the learned magistrate was repugnant to justice in that the decision affected a person who was not made a party to the proceedings. It is contrary to natural justice, for a decision to be made adversely affecting the rights of an individual without that individual being given the opportunity to be heard by the court.

Furthermore, following *Republic v Kadhi Kisumu Ex Parte Nazreen (supra)*, the decision of the learned magistrate was inconsistent with the written law in that it contravened Rose Akeyo's rights which are cited in chapter V of the Constitution.

It is right and proper for Rose Akeyo to reside with the man she has lived with for nine years and by whom she had had two children, if she wishes to reside with him. That is her fundamental right, as granted by the Constitution, and it is not within the courts jurisdiction to make an order which determines where an adult should reside, in such circumstances as these. Rose Akeyo is free to come and go, and to reside where she pleases.

The order of the magistrate also related to three children. It seems that that part of the order was not separately considered taking the interests of the children as the paramount consideration.

For the above reasons the appeal is allowed and the orders of the district magistrate are set aside.

This does not mean that N O and J O have a right to detain R A. It appears from the proceedings in the lower court that she wants to live with J O whom she regards as her husband. She is free to do so in accordance with her constitutional rights. I do not know what powers the police or the second appellant were purporting to exercise when they forcibly removed R from the home of the respondent. I understand that R is once again staying with the respondent and if either of the appellants or the police seek to forcibly remove her from the place where she chooses to stay then they may render themselves liable to criminal charges.

Appeal allowed. In the circumstances I will make no order as to costs.

D.SCHOFIELD

JUDGE