



Chelugui v Republic; Makori & another (Accused) (Criminal Case E4091 of 2020) [2023] KEMC 18 (KLR) (3 August 2023) (Ruling)

Neutral citation: [2023] KEMC 18 (KLR)

**REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)
CRIMINAL CASE E4091 OF 2020
E KIMILU, SPM
AUGUST 3, 2023**

BETWEEN

DENNIS CHELUGUI APPLICANT

AND

REPUBLIC PROSECUTION

AND

CAROL NYABOKE MAKORI ACCUSED

ROSE NYAMBEKI OSORO ACCUSED

RULING

1. The application for determination is brought under section 127 (2) (ii) *Evidence Act* cap 80 Laws of Kenya which provided as follows:-

“In every proceedings every person charged with an offence and the wife or husband of the person charged shall be a competent witness....at every stage of proceedings whether that person is charge alone or jointly with others provided that:

i.

ii. Save as provided by subsection 3 the wife or husband of such a person charged shall not be called as a witness except upon application of the person charged.”

2. Further section 127 (4) defines husband and wife and states:

“(4) In this section husband and wife mean respectively the husband and wife of a marriage whether or not monogamous, which is by law binding during



the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”

3. The first issue for determination under section 127 (2) of the *Evidence Act* is whether there exists a marriage between the applicant and the 1st accused. The *Marriage Act*, 2014 recognizes five (5) systems of Marriage, namely: Civil Marriages, Christian Marriages, Hindu Marriages, Customary Marriages and Islamic Marriages.

4. The applicant herein has averred that he had lived with the 1st accused for two years prior to the institution of the case at hand. They have not been married under the any of the five systems recognized by the Laws of Kenya, section 3 of the *Marriage Act* defines marriage as follows:-

“Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.”

5. From the above definition therefore it clear that any other kind of relationship that is not registered as a marriage under the Act, does not become a marriage.

To buttress this, section 2 of the Act defines

“cohabitation” as “...to live in an arrangement in which an unmarried couple lives together in a long term relationship that resembles a marriage.”

6. On the basis of statute, it is thus clear that a presumption of marriage does not create a marriage. It only presumes it.

7. Having considered the grounds on the face of the application and the supporting affidavit, the applicant is asking the court to make a presumption that there exists a marriage between him and the 1st accused by way of cohabitation and hence the exemption under section 127 of the *Evidence Act*.

8. Under section 119 of the *Evidence Act* states as follows:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”

9. Thus, from this provision of the law, we have two facts: The presumed fact (such as the presumption of marriage/innocence etc) and The actual facts in issue in a case (such as the question of inheritance). Under section 119 of the *Evidence Act* the applicant is called upon to prove the presumed facts which he wishes the court to adopt. The applicant attached a statement by Caroline Cheptoek and Investigating Officer Chief Inspector of Police Jane Kinyua of DCI –Children Protection Unit where they mention 1st accused as his wife. The applicant has invited the court to a statement by the investigating officer when the issue of paternity was raised. The 1st accused declined to the same as per page 1 of the statement of the said statement. The applicant personally has availed no evidence to demonstrate that 1st accused was his wife as a fact to be presumed by the court and the world.

10. It is on record that this case at hand has proceeded with several witnesses who have already testified and of importance was PW1 who was a close friend to the applicant and they even lived together. PW1 only termed 1st accused as applicant girlfriend and not a wife. Secondly, in his initial affidavit dated April 6, 2023, the applicant avers under paragraph 7 he was away in Eldoret Farming in his usual day to day business when the incidence occurred. This contradicts his averment that he had had long and continuous cohabitation with the 1st accused. In African set up father expecting baby delivery



cannot continue with his day to day farming business miles away. If 1st accused was a wife by way of cohabitation, the applicant could not have been miles away as he wishes the court to make a contrary finding under section 127 of the *Evidence Act*.

11. The application is opposed by the prosecution by way of a sworn affidavit by the investigating officer Corporal Monica Mueni. The averments by the applicant do not meet the threshold outlined by the Supreme Court. He has not mentioned payment of dowry or ownership of any property between them.
12. There having no any form of any marriages as the law establish, the applicant is pleading with the court to make a finding of presumption of marriage. *Halsbury's Laws of England*, 5th Edition, 2015, Matrimonial and Civil Partnership Law, Volume 72, defines a marriage by presumption in the following words:

“Where a man and a woman have cohabited for such a length of time in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can only be rebutted only by strong and weighty evidence to the contrary.”
13. Both applicant and the prosecution relied *Mary Nyambura Kangara Alias Mary Nyambura Paul vs Paul Ogari Mayaka* (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) where the Supreme Court of Kenya laid the strict parameters which a presumption of Marriage can be made. The Supreme Court of Kenya affirmed that the doctrine of presumption of marriage still exists in Kenya but insisted it is the exception rather than the rule and ought to be used sparingly and only when there is compelling evidence to support it. The court set out eight conditions that must be satisfied to presume a marriage and they are:
 1. The parties must have lived together for a long period of time.
 2. The parties must have the legal capacity to marry.
 3. The parties must have intended to marry.
 4. There must be consent by both parties.
 5. The parties must have held themselves out to the outside world as being a married couple.
 6. The onus of proving the presumption is on the party who alleges it.
 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
 8. The standard of proof is on a balance of probability.
14. The court also noted that society is changing, and more couples are living together for long periods, in interdependent relationships, without getting married. The court emphasized that in those kinds of situations, a presumption of marriage can never be made as the intention to marry does not exist.
15. Despite the court laying down the above parameters, it was of the view that the doctrine of presumption of marriage is on its deathbed, a view buttressed by the changes to the matrimonial laws in Kenya. The presumption should be used only sparingly where there is cogent evidence to reinforce it.
16. Further and whenever there is a defect in any form of marriage, by operation of law, a Court of law is obligated to consider the alternative which is whether considering the totality of evidence, a marriage can be presumed in the special circumstances of the case. A marriage by presumption or cohabitation



is thus a default fall-back and taking this road cannot be the rule, but rather the exception as per the recent case of MNK vs. POM (supra)

17. In the above connection, a common law marriage can still be inferred even where there was an attempt at customary marriage but it was not perfected, leaving a defect in the customary marriage. See *Mary Njoki vs. John Kinyanjui Mutheru & 3 Others* [1985] eKLR, where the Court of Appeal reasoned as follows: “In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR. To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”
18. In the case at hand the, the applicant allege they had cohabited with 1st accused for a period of two years. The common law and several decisions by superior court have not given a specific period when a long cohabitation can be presumed to be a marriage. The period is left to the discretion of the court to make a decision from one case to another depending on the facts of the case. The only evidence applicant relied on is a mention in a statement by one of the investigators and his cousin (PW2). No evidence presented on the period of cohabitation. The accused has not demonstrated their intention to marry. In African set up, it is a common practice that people in such relationship travel to rural areas together. They involve themselves in extended family activities and no such evidence has been presented. No evidence to the fact that the two carried themselves to the world as husband and wife.
19. The applicant since inception of this case in October, 2020 has always known he is a witness against the accused persons. He has waited until he gets to the dock to raise the issue of spouse. It might be too late in the day for such application.
20. In conclusion and given the evidence herein I find the parameters in the Supreme Court case *MNK vs. POM* case have not been met in the following ways. First, on a balance of probabilities and having considered the applicant submissions and averments and the evidence on record, the 1st accused was and ordinarily a visiting as opposed to an in situ girl-friend, this Court was unpersuaded that the applicant and the 1st accused lived together for two years and this puts the element of long cohabitation in considerable doubt. Second, there was no demonstration or evidence or markers that the applicant and the 1st accused ever held themselves out to the world as being a married couple, as no such evidence was called worsened by the fact that alleged children of the marriage are the subject of this trial. Reasons wherefore this Court draws a conclusion that the applicant averments have again failed the test of marriage by presumption. Application dated April 25, 2023 is hereby dismissed for lack of merit.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON THIS 3RD DAY OF AUGUST, 2023.



ESTHER K. KIMILU

SENIOR PRINCIPAL MAGISTRATE

Coram:

Magistrate: Hon. Esther K. Kimilu

Court Assistant:

State Counsel:

In the presence of parties/representative as follows:

