



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 30 OF 2016**

**BETWEEN**

**WILLIAM SITUMA ..... FIRST APPELLANT**

**EDNA SITUMA .....SECOND APPELLANT**

**AND**

**MATHEW MABUSI ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Kitale (Githinji, J.) dated 28<sup>th</sup> October, 2015***

**in**

**H.C.C.C NO. 58 OF 2015)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. This judgment relates to a burial dispute between the respondent, who alleges to have married **Christine Nanjala Situma** (*deceased*) under Bukusu Customary Law, and the deceased's parents, the appellants. The respondent and the deceased had cohabited for about 12 years and had five children together. They had, however, not contracted any formal wedding ceremony, statutory or customary.

2. Following the death of the deceased, her parents contended that they were the ones who had the right to inter her remains.

The respondent contested that decision and filed a suit in the High Court of Kenya at Kitale, seeking a declaration that under the Bukusu customary law he was entitled to bury the deceased. The trial court held that under the Bukusu customary law the respondent had not married the deceased.

That notwithstanding, the court held that there was a presumption of marriage on account of the long cohabitation, and therefore the respondent had the right to bury the remains of the deceased. The appellants were aggrieved by that decision and preferred an appeal to this Court.

**SUMMARY OF PLEADINGS AND EVIDENCE BEFORE THE HIGH COURT**

3. This being a first appeal, we are duty bound to re-evaluate, re-assess and analyse the evidence tendered before the trial court and determine whether the conclusion reached by the trial judge was right or not. In **KENYA PORTS AUTHORITY v KUSTSON (KENYA) LIMITED [2009] 2 EA 212**, this Court held:

***“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear the witnesses and should make due allowance in that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”***

4. In his plaint, the respondent stated that in 2002 he got married to the deceased in accordance with the Bukusu customary law; they together established a matrimonial home at Kapkoi West Scheme in Kwanza sub-county, Trans-Nzoia; that together they were blessed with five children aged between 9 and 2 years; the deceased died on 17<sup>th</sup> April, 2015 while undergoing treatment at Cherangani Nursing Home, and that as he was making arrangements for the deceased’s burial, he learnt that the deceased’s parents (the appellants) were intending to remove the deceased’s body from the mortuary for burial at their home.

5. The respondent further stated that under the Bukusu customary law he was entitled to bury the deceased in accordance with the beliefs, traditions and practices of his **Bakhaweka** clan which are distinct from those of the appellants; the **Balunda** clan.

6. The respondent sought judgment against the appellants for:

***“(a) A declaration that by Bukusu Customary Law the plaintiff is entitled to bury the body of his deceased wife, Christine Nanjala Situma.***

***(b) Costs and interest thereon.***

***(c) Any other appropriate relief that the Honourable Court deems fit and just to grant.”***

7. In their joint statement of defence, the appellants denied that the respondent ever married their daughter in accordance with the Bukusu customary law; and that the respondent ever paid to them any dowry or performed any rites to formalize the alleged marriage. Consequently, the respondent had no legal right to bury the deceased’s body.

8. The appellants added that when the deceased fell ill, together with other family members, they took her to Kitale District Hospital and later to Cherangany Nursing Home where she died while undergoing treatment.

9. In his testimony before the trial court, the respondent said that he had paid dowry through providing school fees for the deceased’s brother, one Immanuel Situma, to the tune of Kshs.35,000/= and another Kshs.25,000/= which he paid by M-pesa (*electronic money transfer*) to the deceased’s brother on 26<sup>th</sup> June, 2013. He claimed that the deceased’s father was mentally ill and could not therefore be paid the dowry in person. The respondent said he could not pay dowry to the deceased’s mother because under the Bukusu customary law women do not receive dowry.

10. Apart from the respondent’s elder brother, one Philemon Munialo, the respondent also called a witness by the name William Wasike Wabufungu, (PW3), who was then 89 years old. The witness was conversant with the Bukusu customary law.

11. PW3 told the court that according to the Bukusu Culture, dowry, (**bukhwe**), was traditionally paid in the form of 13 head of cattle, but in the present days it may be paid in terms of money and other items. But before dowry is paid, the two clans/families must meet and discuss the proposed marriage, including the issue of dowry, in a ceremony known as **“eng’anana”**.

The witness added that **eng’anana** can even be held after the death of a wife, but before the burial of the

body, in which case the dowry has to be paid in cash.

12. The witness was categorical that in respect of the respondent and the deceased, no **eng'anana** had taken place, apparently because the deceased's elder brother had not done it.

13. The first appellant did not testify, he was said to be unwell. The second appellant, the deceased's mother, testified that the deceased ran away from home in 2002. She denied that the deceased was ever married to the respondent. She added that her deceased daughter gave birth to all her children at her parent's home.

14. **John Hakhaoya, DW3**, was a Bukusu elder, born in 1920. According to his witness statement that was adopted as his evidence in chief, under the Bukusu customary law, in the absence of "**eng'anana**" and "**bukhwe**" there cannot be a valid marriage and if a woman who was living with a man in such a relationship dies, it is her parents who are entitled to bury her remains. The witness said that **eng'anana** cannot be done if the "wife" is dead. He added that cohabitation between a man a woman that was not preceded by **eng'anana** and payment of **bukhwe** is a mere friendship relationship.

15. The parties filed written submissions, following which the learned judge delivered his judgment in favour of the respondent, not on the premise that under the Bukusu customary law there was a marriage between the respondent and the deceased, but under the common law doctrine of presumption of marriage.

#### **APPEAL BEFORE THIS COURT**

16. The appellants faulted the trial judge for disregarding the provisions of **section 3(2)** of the **Judicature Act** and the Bukusu customary law, which was the basis of the suit; for applying common law principles to a Bukusu customary law marriage claim; and for arriving at a conclusion that was not supported by the evidence on record and the applicable law.

17. Arguing the appeal, **Prof. Sifuna**, learned counsel for the appellants, submitted that the respondent's suit was entirely based on the Bukusu customary law, to which he, the deceased and the appellants belonged; and by dint of **section 3(2)** of the **Judicature Act**, the court ought to have been guided by the Bukusu customary law.

18. Counsel submitted that since the family of the deceased and that of the respondent never met to discuss the proposed marriage (**eng'anana**) and no dowry was ever paid, there could never have existed a valid Bukusu customary marriage and therefore the respondent had no right to bury the remains of the deceased.

19. Prof. Sifuna further argued that the learned judge, having found that there was no valid marriage under the Bukusu customary law, erred in applying the common law doctrine of presumption of marriage, in a case where the respondent had sought a specific declaration based on the Bukusu customary law.

20. **Mr. Wanyama**, learned counsel for the respondent, in opposing the appeal, submitted that even though there was no valid marriage between the deceased and the appellant in accordance with the Bukusu customary law, there was overwhelming evidence that the two had cohabited for about twelve years and got five children together. The learned judge was therefore right in finding that a presumption of marriage existed, counsel stated. In his view, the respondent did not require to plead presumption of marriage. Counsel cited several decisions of this Court where the doctrine of presumption of marriage has been upheld.

21. Mr. Wanyama further submitted that the last prayer in the plaint sought "any other appropriate relief that the Honourable Court deems fit and just to grant". On the basis of such prayer, the learned judge cannot be said to have granted prayers that had not been sought, counsel added.

#### **ANALYSIS OF THE GROUNDS OF APPEAL AND DETERMINATION**

22. From the plaint that was before the High Court, the main prayer was for a declaration that under the Bukusu customary law the respondent was entitled to bury the body of the deceased. The respondent's prayer was premised on the contention that the deceased was his wife. He stated that he had married the deceased in 2002 in accordance with the Bukusu customary law.

23. It is therefore necessary to consider the vital ingredients of a Bukusu customary marriage. Both the appellants and the respondent called experts in Bukusu customary law. The appellants called John Hakhaoya, aged 95 years, while the respondent called 89 year old William Wasike Wabufungu. The two experts were in agreement that “**eng'anana**” and “**bukhwi**” are essentials in a Bukusu customary marriage. In other words, negotiations between the two families must take place after which dowry must be paid. The dowry once agreed upon, need not be paid at once before the marriage, but a part of it has to be paid in advance.

24. From the evidence on record, there were no pre-marriage meetings and negotiations between the families of the respondent and that of the appellants, (**eng'anana**). There is also no evidence that dowry was ever paid, partly or wholly. The respondent may have paid Kshs.35,000/= as school fees for the deceased's brother, Immanuel Situma, but there was no advance agreement between the two families that such payment would be considered as party payment of dowry. There was also no evidence that the Kshs.25,000/= that the respondent sent to the deceased's brother by *m-pesa* on 26<sup>th</sup> June, 2013 was in part payment of dowry. That was nearly 11 years after commencement of the cohabitation between the respondent and the deceased.

25. Prof. Sifuna cited “**RESTATEMENT OF AFRICAN LAW**” by *Eugene Cotran* in support of his submissions, which is in line with what the two experts aforesaid told the court. Even Mr. Wanyama, the respondent's counsel, conceded that the evidence on record did not show that there was a valid Bukusu customary marriage.

26. From the foregoing, to the extent that the respondent's contention that he was entitled to the body of the deceased was premised on the alleged customary marriage, the respondent did not prove his case.

27. The next issue for our determination is whether the learned judge, having come to the right conclusion that there existed no valid Bukusu customary law marriage between the respondent and the deceased, erred in applying common law principles in deciding the dispute. With respect to the learned judge, we think that was a misdirection on his part. Parties are bound by their pleadings. The respondent's claim was entirely based on the Bukusu customary law, so was the evidence and his submissions. He did not advert to common law principles at all.

28. **Section 3(2) of the Judicature Act Cap 8 Laws of Kenya** states as follows:

**“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 it 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.”**

All the parties to the suit were of the Bukusu tribe and as stated earlier, the suit was premised on Bukusu customary law. The learned judge therefore erred in law in disregarding the provisions of **Section 3(2) of the Judicature Act** and instead applying common law principles to determine the dispute.

29. In the circumstances this appeal is allowed. We hereby set aside the High Court judgment in its entirety. The appellants are awarded the costs of this appeal as well as the costs in the High Court. It is so ordered.

**DATED and DELIVERED** at Kisumu this **16<sup>th</sup>** day of **November, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

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**DEPUTY REGISTRAR**