IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Shah & Waki JJ A)

CIVIL APPEAL NO 274 OF 2001

JOYCE ATEMO ……..…….... APPELLANT

VERSUS

MARY IPALI IMUJARO ……. RESPONDENT

(An appeal from the Ruling and Order of the High Court at Nairobi

(Ang'awa J) dated 14th October, 1999 in HC Succ Cause No 11 of 1999)

JUDGMENT

The late Alfred Imujaro Ipara alias Afred Injara, "the deceased" hereinafter, and who in his life-time was a police officer, passed away on 22nd October, 1998. He was fourty-seven years old when he died. Since the year 1993 or 1994, he had been cohabiting as man and wife with Joyce Atemo, the appellant herein. The evidence that the appellant cohabited with the deceased upto the time of his death was really not challenged. It was equally agreed that by the time he died, the deceased had not paid any dowry to the parents of the appellant as is required by Teso customary law to which the deceased and the appellant were subject.

Again, it was not seriously disputed that before the remains of the deceased could be interred, the relatives of the deceased took to the parents of the appellant some Shs 10,000/= as dowry. On this aspect of the matter, the learned judge whose ruling is now the subject of the appeal before us (Mary Ang'awa J) found as follows:-

"It seems that no valid marriage was undertaken during the life-time of the deceased. This was regularized by the deceased's clan when they took Kshs 10,000/= to the objector's [appellant's] home before the burial of the deceased. According to the elders this constituted marriage. (The cows will be taken to her home later on).

In all this, the deceased's clan strongly recognize the objector as the lawful wife".

Before the appellant came into the life of the deceased, the deceased had been married to Mary Ipali Imujaro, the respondent herein. Mary got married to the deceased either in 1974 or 1975. They lived as man and wife upto 1992. They had no children and, understandably, there were disputes between the deceased and the respondent. According to the respondent, the deceased brought in another lady called Juliana Wanjiru who had a son called Denis Ipara. The respondent left the deceased somewhere around

1992 or 1993. It was agreed on the evidence that the deceased and the respondent did not live together again until the deceased passed away. It was equally agreed on the recorded evidence that the marriage between the deceased and the respondent was never dissolved during the life-time of the deceased. Ms Guserwa who argued the appellant's appeal before us conceded that as the marriage between the respondent and the deceased was never dissolved during the life-time of the deceased, the respondent remained the wife of the deceased and is accordingly the deceased's widow and as such widow is entitled to a share of the estate of the deceased.

How did the matter end up in the Courts? On 6th January, 1999, less than three months after the passing away of the deceased, the respondent petitioned the High Court for a grant of letters of administration, intestate, to the estate of the deceased and in her said petition, the respondent asserted that she presented:

"this petition as widow of the deceased, having had no children with the deceased".

In her affidavit in support of her petition, the respondent swore in paragraph 4 thereof that:

"The deceased died intestate and left the following

person surviving him:

Mary Ipali Imujaro Widow aged 41 years of Post Office

Box Number 11, Amagoro".

The respondent did not say anything about the appellant despite the fact that she (respondent) had met the appellant during the funeral of the deceased and must have known that the appellant was being regarded by the clan as the widow of the deceased. It is not surprising that the appellant objected to the petition filed by the respondent, and in her "answer" to the petition, she described herself as the only widow of the deceased, and that the appellant had not sought her consent before filing the petition for the grant of letters of administration. That was the dispute that went for determination before Ang'awa J. The learned judge held that the respondent was the only widow of the deceased and that the appellant was not the wife of the deceased during his life-time and, therefore, could not be the widow, or even a dependant of the deceased. Accordingly, ruled the learned judge, the appellant was not entitled to any portion of the estate of the deceased and could not, therefore, be made a joint administratrix with the appellant. The appellant filed her appeal in this

Court to challenge these conclusions of the learned judge.

The appellant's memorandum of appeal has a total of nine grounds all of which were argued by Ms Guserwa but in our view only three of those grounds are necessary for the determination of the issues which were raised before us. Those grounds are, grounds 1, 2 and 6 and they are framed as follows:

"1. That the learned judge erred in Law and in fact in holding that there was no valid marriage between the appellant and the deceased.

2. That the learned judge erred in Law and in fact in holding that no marriage consideration was paid by the deceased's clan to the objector's family and hence no basis for the marriage.

6. That the learned judge erred in Law and in fact in failing to appreciate that under Teso customary law and practices, a marriage could be validated after death by payment of dowry by the husband's family". Ground two above can be easily disposed of. The learned judge did not really hold that no marriage consideration was paid by the deceased's clan to the appellant's family and hence no basis for a marriage.

As we pointed out at the beginning of the judgment, it was wholly agreed on the evidence that no marriage consideration or dowry was paid to the family of the appellant during the life-time of the deceased. It is a notorious fact which the High Court and this Court are entitled to, and can take judicial

notice of, that under the customary laws of all the African communities in Kenya, no valid marriage can be contracted without payment of marriage consideration. Upto the time of the demise of the deceased, no valid marriage under Teso customary law had come into existence. What, however, the appellant and the clan of the deceased alleged was that dowry was paid to the family of the appellant before the remains of the deceased were disposed of. We have already quoted a passage from the judgment of the trial judge in which she in fact found as a fact that dowry was paid to the family of the appellant before the remains of the deceased were disposed of. There is no cross-appeal before us on that aspect of the learned judge's conclusion and we must take that to be the correct position. What the learned judge did find was that despite that payment, it did not validate the union between the appellant and the deceased so as to elevate that union into a marriage after the death of the deceased. It is that issue which is squarely raised in ground six, and to a lesser extent, in ground one which challenges the learned judge's finding that there was no valid marriage between the appellant and the deceased.

It is to those grounds that we must now turn. The learned judge's reason for holding that the appellant was not a wife appears to be that though she (the judge) herself knows that a marriage can be formalized by the elders before burial yet she (ie the judge) could not find that position in Eugene Cotran's "*Restatement of African Customary Law*" dealing with the Teso. It appears that the learned judge's position on the matter was that what is not contained in Cotran's

"*Restatement*" cannot be a valid customary law. Is this the correct position for courts of this country to adopt? We would ourselves emphatically reject that proposition. It cannot and must not be taken that what is not recorded in any of Cotran's

"*Restatements*" cannot form part of the customary laws of the various communities in Kenya. We very much doubt whether Cotran himself would make or support any such claim.

We must, of course, start from the well know position that he who seeks to rely on any African customary law as the basis of his claim, must prove by evidence the existence of such custom – see *Ernest Kinyanjui Kimani v Muiru Gikanga & Another* [1965] EA 735 cited by Gicheru, JA (as he then was) in *Sakina Sote Kaittany & Another v Mary Wamaitha*, Civil Appeal No 108 of 1995 (unreported).

In the appeal before us, no witness, either from the appellant's side or from the respondent's side directly stated that under Teso customary law a marriage can be validated by payment of dowry before the burial of either the deceased husband or wife. This is a pity because witnesses such as John Murata (DW 2) who said he was 75 years old and Ronald Chargo Olurum (DW 3) who said he was 89 years old were not asked to tell the Court whether a Teso marriage is validated by payment of dowry upon the death of one of the parties to it. Such witnesses might reasonably be expected to know such matters. But as we have said, none of them was asked to address that issue.

But the witnesses, particularly those of the appellant, freely spoke of the appellant being a wife because dowry was paid before the deceased was buried. The appellant herself said, when crossed-examined:

"Dowry was paid when my husband died. He had plans to pay dowry. They met to fulfill what was to be done.

The clan paid. Money was taken of Kshs 10,000/=. I know the person who took the dowry. Stephen Imujaro and Benjamin Imujaro. They had plans to take the cows.

That is when the case was done. Only Kshs 10,000/= was taken. ...".

Appollo Indeche Imujaro (PW 2) who was a paternal uncle to the deceased testified as follows:

"Joyce Atemo Imujaro. She is known to me as the wife of Imujaro the deceased. They got married. He brought wife. He said to bring another wife. He brought this one. According to Teso(?) we marry by giving money and letters (sic). We took Kshs 10,000/= to Joyce's place. It was for dowry. This shows that it goes to say he married. Later we came to take cows. We took the money before the deceased died".

This witness was obviously not being truthful in saying the Shs 10,000/= was paid before the death of the deceased as that evidence was not supported by anyone and as we have seen the learned judge specifically found that the money was paid after the death of the deceased but before his burial. Elly Imujaro (PW3) the brother of the deceased told the judge in crossexamination.

"Joyce was married by deceased when we took the money after death".

Finally Francis Musyanga Kiama (PW4) who said he was a cousin to the appellant said in cross-examination:

"I and Joyce are Maragoli. The deceased was from Tesso. The Maragoli and Tesso tradition is almost similar. There is no difference". The evidence of the respondent and her witnesses was, naturally, directed to proving the validity and continued existence of her marriage to the deceased.

What is clear from the evidence of the appellant's witnesses is that they talked about the payment of the Shs 10,000/= after the death but before the burial of the deceased and that practice was obviously known to them.

They were clearly saying that the appellant became the wife of the deceased upon the payment being made. The learned judge herself says in her judgment:

"The conduct of the deceased was to have the objector [appellant] as his companion. Nonetheless this was formalized before burial by the elders. I have known this to occur but do not see this situation in the reinstatement [Restatement?] on Teso Law. I would accept that the clan wants her as their daughter-in-law".

So that the witnesses for the appellant were saying that the appellant became the wife of the deceased when the Shs 10,000/= was paid before the burial of the deceased. The learned judge herself says she knows a marriage can be formalized by the elders in the manner narrated by the witnesses. Nobody ever suggested to the witnesses that even if the Shs 10,000/= were paid in the circumstances stated by them, such payment could not validate the hitherto existing union between the deceased and the appellant. The only reason which made the judge reject that position was because Cotran did not say in his "*Restatement*" that a Teso union could be validated in that manner. In our view, the only inference which can be drawn from the evidence of the witnesses for the appellant, and which inference we now draw, is that where a Teso couple cohabit as a man and wife without formalizing their union into a marriage by payment of dowry, such a union can and is converted into a valid marriage upon the death of either the man or the woman if dowry is paid and accepted by the relatives of the woman. That must be why the witnesses for the appellant were aware of the position, spoke about it, and nobody contradicted them on that issue. Accordingly, the learned trial judge was in error in holding that the appellant was not a widow of the deceased.

She became a widow of the deceased when the clan of the deceased paid the Shs 10,000/= before the burial of the deceased and which was accepted by the clan of the appellant.

Grounds one and six of the appellant's grounds of appeal must accordingly succeed and that being our view of the matter, it is unnecessary to consider the other grounds in the memorandum of appeal.

What orders should we make in the matter? It is clear to us that both the appellant and the respondent are legitimate widows of the deceased and are, accordingly, jointly entitled to his estate, the claim by the appellant that she was the sole widow having been abandoned. In those circumstances, we allow the appeal, set aside the orders made by the learned trial judge and substitute them with an order that the appellant and the respondent be jointly granted letters of administration to the estate of their late husband Alfred Imujaro Ipara. Each party shall bear her own costs of this appeal and also the costs in the High Court. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 27th day of June, 2003

R.S.C OMOLO

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR