Masitsa v Mwashi & another (Civil Appeal 32 of 2023)
[2024] KEHC 2875 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2875 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL 32 OF 2023

JN KAMAU, J

MARCH 18, 2024

BETWEEN

ESAO MASITSA ..... APPELLANT

AND

NORAH OLESI MWASHI ..... 1ST RESPONDENT

ALFRED MWASHI ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M. Ochieng (PM) delivered at Hamisi in Principal Magistrate's Court Case No E28 of 2023 on 10th November 2023)

JUDGMENT

Introduction

1. In her decision of 10th November 2023, the Learned Trial Magistrate, Hon M. Ochieng, Principal Magistrate, dismissed the Appellant's suit against the Respondents and ordered each party to bear its own costs.

2. Being aggrieved by the said decision, on 20th November 2023, the Appellant herein filed a Memorandum of Appeal of even date. He relied on fourteen (14) grounds of appeal.

3. His Written Submissions were dated 15th January 2024 and filed on 16th January 2024 while those of the 1st Respondent were dated 18th December 2023 and filed on 19th December 2023.

4. When this matter was mentioned on 13th February 2024 to confirm whether the parties had filed their Written Submissions, the 2nd Respondent indicated that he would not file Written Submissions as he was supporting the Appellant's case.

5. The Judgment herein is therefore based on the aforesaid Written Submissions which parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

8. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the following issues had been placed before it for consideration:-

    a. whether or not the deceased was married to the Appellant in accordance to the Maragoli customary law; and

    b. Who had the right to bury the deceased.

9. As a preliminary issue, this court found it prudent to first ascertain and determine the question as to whether the Appeal herein as filed was competent. Although the 1st Respondent did not raise the issue, this court found that it could not ignore it as it went to the root of the said Appeal.

I. Competence or otherwise of the Appeal herein

10. This court noted that the Appellant was represented by the firm of M/S Wekesa S. Sammy & Co Advocates during the trial. He was being represented by the firm of A.B. L. Musiega & Co Advocates in the Appeal herein.

11. The said firm of M/S A.B.L. Musiega & Co Advocates filed a Notice of Motion application 21st November 2023 on even date. The said application did not have a prayer for the said advocates to be granted leave to come on record for the Appellant herein.

12. There was also no indication that the said firm of M/S A.B. L. Musiega & Co Advocates filed a consent duly executed by the firm of M/S Wekesa S. Sammy & Co Advocates consenting to it coming on record for the Appellant herein in the place of the previous advocates.

13. In a nutshell, there was no evidence that the firm of M/S A.B.L. Musiega & Co Advocates obtained leave to come on record for the Appellant or that it had filed a consent as provided in Order 9 Rule 9 of the Civil Procedure Rules, 2010 which states that:-

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall (emphasis court) not be effected without an order of the court—
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

14. Indeed, after judgment had been rendered, the advocate who had filed proceedings in the lower court remained on record in the appeal matter unless a consent had been filed allowing him or her to come

on record and/or until he or she had been granted leave to come on recorded for the party who had filed the suit in the lower court by the court.

15. In the absence of proof of such leave and/or consent, it was clear that the firm of M/S Wekesa S. Sammy & Co Advocates were still on record for the Appellant herein. The lack of proper representation herein was not a procedural technicality as was envisaged by Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates court to administer justice without undue regard to procedural technicalities. It was a defect that went to the root of the appeal as Order 9 Rule 9 of the Civil Procedure Rules was couched in mandatory terms. It was therefore the finding and holding of this court that the Appeal herein was incompetent, defective and null and void ab initio and lent it to being dismissed forthwith.

16. Having said so, this court found it prudent to address itself to the merits or otherwise of the Appeal herein to expeditiously dispose this matter to avoid wastage of time in the process of filing a fresh appeal out of time on facts which were already before the courts as Irine Mmbone (hereinafter referred to as "the deceased") herein had been lying in a mortuary since 29th March 2023.

II. PROOF OF THE APPELLANT'S CASE

17. In determining whether or not the Trial Court arrived at a correct determination, this court found the issue of her age and capacity to marry to have been pertinent issues herein. This court dealt with all the grounds of appeal except Ground of Appeal No (11) in the separate and distinct headings shown hereinbelow. Notably, the Appellant indicated that he had abandoned Ground of Appeal No (11) of the Memorandum of Appeal.

A. Relevance of the Deceased's Age

18. Grounds of Appeal Nos (1), (2) and (3) of the Memorandum of Appeal were dealt with together as they were related.

19. The Appellant submitted that the Trial Court erred in having considered the deceased's age, a fact he asserted was not in question hence occasioning him injustice. He denied that it was consistently mentioned during trial that he started cohabiting with her in the year 2010 which meant that she was a minor at the time having been born on 11th November 1993 thus incapacitating her from contracting any type of marriage.

20. He pointed out that in fact the 1st Respondent testified that she did not know if the deceased lived with him in 2010 and that DW 2 (sic) mentioned two (2) different dates when she (sic) stated that the deceased disappeared in 2010 and October 2021 (sic). A Village Elder, David Akisanji actually testified as "DW 2". The Appellant may have been referring to the deceased's sister, Jane Muhonja Mwashai (hereinafter referred to as "PW 3") as it was she and not DW 2 was the one who gave the Trial Court that information.

21. He contended that his pleadings did not disclose a defence to the effect that his marriage with the deceased was invalid on account of her age. He pointed out that the rationale of making a determination on a matter that was never pleaded and of which parties never sought out to prove was an error of fact and law on the part of the Trial Court.

22. He submitted that the Trial Court stated in its decision that it had been indicated that the deceased was born on 11th November 1993 without proof. He faulted the Trial Court for relying on her birth notification to prove her age and asserted that courts have held that the only proof of age of a person in Kenya was the birth certificate which was never produced in this case.

23. He asserted that the effect of the Trial Court's decision was that he was convicted of the criminal offence of defilement that was suspected to have been committed thirteen (13) years ago within civil proceedings without a complainant and charges against him. He was emphatic that civil cases were decided on a balance of probability and the overriding objective in Section 1A & B of the Civil Procedure Act.

24. It did not appear to this court that the Appellant had disputed the deceased's age. He seemed to object to the Trial Court having considered the same in concluding that she did not have capacity to contract a marriage.

25. The 1st Respondent tendered in evidence a Birth Dedication Card No 12339 dated 18th March 1994 from African Divine Church (E.A). The same showed that the deceased was born on 11th November 1993. This was the same Church that had issued the Birth Certificates of the Appellant's and deceased's children Nos 62434 and 62435 both dated 5th August 2018, which Birth Certificates, the Appellant had relied upon to prove that the children were born out of his union and the deceased.

26. The Appellant could not rely on documents from the said Church to prove that he had children with the deceased and ask the court not to rely on documents from the same Church to prove the deceased's age. In other words, he could not approbate and reprobate at the same time.

27. The Appellant testified that he married the deceased in the year 2010.When he was cross-examined, he admitted that the deceased was aged seventeen (17) years at the time they got married in 2021(sic) having been born on 11th November 1993. The indication of 2021 in the proceedings appeared to have been a typographical error.

28. During trial, the 1st Respondent tendered in evidence a Birth Dedication Card showing the deceased's age. It was listed in her List of Documents dated 18th September 2023 and filed on 20th September 2023. She produced the same as an exhibit in support of her case. In her Written Submissions dated 29th September 2023 and filed on 2nd October 2023, she submitted on the deceased's age by asserting that the she (deceased) did not have capacity to contract a marriage as she was a minor as a result of which the Appellant was actually guilty of defilement

29. It was evident that the Trial Court did not consider extraneous issues as the same had been placed before it for determination and did not misdirect itself when it pronounced itself on the deceased's age and its relevance to her capacity to contract a marriage. The Appellant's argument that the Trial Court considered the issue of the deceased's age which was not pleaded on plaint or defence was therefore devoid of merit and the same fell by the wayside.

30. The Appellant's assertions that the age of a person could only be proved by a Birth Certificate was not entirely correct as there was emerging jurisprudence, which this court fully associated itself with, that the age of a person and particularly that of a child could be proven by other means and not only by a birth certificate.

31. Notably, in the case of Joseph Kieti Seet vs Republic [2014] eKLR, it was held that age of a child could be proved by medical evidence, a birth certificate or by the evidence of a parent or guardian or by common sense.

32. The early Christian Churches were known to keep very accurate details of their parishioners'. In fact, the birth date given in baptism cards issued by missionaries before birth certificates came into play was an almost accurate way of ascertaining our forefather's ages.

33. In the absence of any other evidence to the contrary, this court found and held that the Baptism Dedication Card in respect of the deceased herein was sufficient to prove her age and hence the Trial Court did not err when it relied on the same for purposes of determining her age with a view to ascertaining whether or not she had capacity to contract a marriage as minors could not contract valid marriages in Kenya.

34. In the premises foregoing, this court found and held that Grounds of Appeal Nos (1), (2) and (3) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

B. Validity or otherwise of the marriage

AA. Maragoli Customary Law

35. Grounds of Appeal Nos (4), (5), (6), (7), (8) and (9) of the Memorandum of Appeal were dealt with under this head as they were all related.

36. The Appellant contended that the Trial Court admitted the 2nd Respondent's evidence only to reject it on account of probative value hence occasioning an injustice on his part. He pointed out that the 2nd Respondent was cross-examined by his own advocate and he confirmed that two (2) cows were paid to him as dowry on 15th January 2019 which would have been proof of a valid marriage under Maragoli customary law. He pointed out that he (the 2nd Respondent herein) was not declared a hostile witness. He asserted that lack of probative value did not render his evidence worthless.

37. In this regard, he placed reliance on the case of T.M.M vs Republic [2018] eKLR where it was held that unsworn statement was not strictly speaking evidence and the rules of evidence could not be applied to unsworn statement as it had no probative value but that it should be considered in relation to the whole evidence.

38. He asserted that the Trial Court did not refer to any evidence of a Maragoli customary law expert, legislative or judicial authority which indicated that payment procedure in the said customs was a sign of an intention to create ties between the two (2) families. He faulted the Trial Court for interpreting the giving of the two (2) cows as a sign on intention to create ties between his family and that of the deceased which was alien to the Maragoli culture instead of considering it as dowry payment.

39. He pointed out that writing of agreements in dowry negotiations and payments could not be said to be custom oriented but rather modern development and that their absence could not therefore invalidate a Maragoli customary law or negate dowry payment and/or its acknowledgment.

40. In this regard, he relied on the case of RLA vs FO & Another [2015] eKLR where it was held that dowry could still be negotiated and paid under Maragoli customary after the death of a woman and the case of Richard Chasia Muyinzi vs Fredrick Ongandi [2020] eKLR where it was held that absence of proof of payment of dowry could not invalidate a Maragoli Customary Law Marriage.

41. It was his case that the Trial Court failed to address itself to the plight of the three (3) minor children of his marriage with the deceased. He asserted that the place of burial of their deceased mother would have a long term effect on them. He was categorical that the burden of proof in civil cases lay on the plaintiff and was on a balance of probabilities.

42. On her part, the 1st Respondent's case was that the Trial Court's decision was sound in law, supported by precedent and thus should be upheld by this appellate court. She submitted that as the Appellant had asserted marital status under Maragoli customary law, the burden of proof lay on him to prove the

existence of Maragoli customary laws of marriage which in turn would entitle him to bury the deceased in his homestead.

43. She invoked Section 51 and 107 of the Evidence Act and argued that all the parties being Luhyas subscribed to the general Luhya custom pertaining to marriage and burial. She was emphatic that it was common ground that proof of a customary law of marriage would entitle a spouse to bury his or her dead spouse.

44. She submitted that a valid marriage under Maragoli/Tiriki customs was based on a negotiated dowry or bride price known as "Bukwi" or "Bukhwi" preceded by the introduction of the man to the parents of the bride in a ceremony involving both sides of relatives of the two (2) families. She added that negotiation of dowry was followed by a dowry agreement in writing signed by the negotiating parties from the two (2) sides.

45. She contended that once parties agreed to the aforesaid common grounds, the Appellant ought to have presented evidence in support of the same. She was categorical that although the Appellant alleged that dowry was paid, he failed to prove that fact as the evidence adduced was contrary to Maragoli customary laws.

46. She further argued that the deceased's age when she purportedly got married to the Appellant was a material fact in proving the legal capacity to contract a marriage as our laws did not permit minors to contract a marriage, a fact she asserted the Trial Court was alive to.

47. She pointed out that the 2nd Respondent did not plead any particulars of fraud or make a formal application to deny his pleadings and thus was bound by his own acts. It was her argument that the Trial Court was justified to cast doubt on his evidence having given contradictory statements during trial.

48. She asserted that the Appellant's argument that the Trial Court did not consider the plight of his minor children should be dismissed as he was only advancing that evidence on appeal which was never presented during trial.

49. The Appellant conceded that according to Maragoli culture, one had to be married to a grown up. He denied having interfered with the deceased's education. He testified that in the year 2019, he paid part of the dowry (emphasis court) in the form of two (2) cows as per the letter of 14th January 2019 which he tendered in evidence in support of his case. It was his assertion that the cows were taken by Wilfred Lundu and Shaba Amani (deceased) and received by his father-in-law and one Chief Kasisi Tom Omuzi.

50. He informed he gave the deceased three (3) thousand shillings on 8th January 2019 to cater for the visitors and that when she returned on 16th January 2019, she came with a cock and that since then, they continued to live as husband and wife in Nairobi where he worked and took care of her when she became ill.

51. He told the Trial Court that he had made arrangements to do introduction but the same did not materialise as his father-in-law was sickly. He added that during his father-in-law's funeral, he was the one who dressed him and at the time, he introduced himself as one of the son-in-laws of the family.

52. He emphasised that he paid dowry but pointed out that he did not have a Dowry Agreement to produce in court. He denied abandoning the deceased when she was unwell and at the time of her death. His evidence was that the 1st Respondent requested that the deceased go back home to seek traditional treatment which explained how the 1st Respondent got custody of their children.

53. Edward Lundu (hereinafter referred to as "PW 2") was the Appellant's father. He stated that he was aware that his son had married under Maragoli culture. He pointed out that no dowry negotiation was done and that there was no dowry agreement in existence. He admitted that according to Maragoli customary law, dowry was negotiated by both families and that there had to be witnesses for it to be valid.

54. He testified that the deceased's father visited him and told him to give him anything that was available as he was elderly and that an agreement was to be done when the Appellant visited him. He pointed out that he was the one who gave the two (2) cows on behalf of the Appellant and that he was given two (2) cocks by the deceased's father and one Chief Kasisi Tom Omuzi.

55. He said that the Appellant lived in Nairobi with the deceased until January 2023 when the 1st Respondent picked her up with a promise that she was going to seek further treatment for her.

56. Winfred Lundu (hereinafter referred to as "PW 3") testified that he was the one who delivered the two (2) cows at the deceased's home accompanied by one Shaban (deceased). He pointed out that it was a black white-spotted bull and a black heifer. He stated that he was given a letter by the Sub-Chief, one Mr Lukase for transit of the aforesaid cows. It was his contention that it the 1st Respondent served them food and that they were given a cock which they took back to PW 2.

57. The 1st Respondent testified that the deceased got married at a time she was supposed to join Form 3. She stated that she reported to the Assistant Chief that her daughter was a minor when she got married. However, she did not have proof of such report.

58. She admitted that the deceased lived with the Appellant and that they were blessed with three (3) children. However, she asserted that it was a troubled relationship. She denied ever having seen two (2) cows being brought to her homestead or giving out chicken to anyone.

59. Charles Akisanji (hereinafter referred to as "DW 2") was a Village Elder where the deceased hailed from. He was emphatic that there was no short cut to marriage. He stated that as a village elder, he was always involved in affairs of families. He asserted that whenever dowry was paid, he would be called upon to sign and stamp the copies of the letter. He explained that he would retain a copy of the letter while the homestead that had received the dowry would be left with the other copy.

60. He denied ever having been called to witness any dowry payment by the Appellant herein for the deceased herein.

61. Jane Muhonja Mwashi (hereinafter referred to as "DW 3") was a younger sister to the deceased. She stated that when the deceased started cohabiting with the Appellant, she was seventeen (17) years. She denied ever having seen cows being brought to her parents' homestead. She said that she accompanied DW 1 to the Appellant's home where they found the deceased unwell and that her mother-in-law informed them to pick the deceased and her children and leave her homestead.

62. She was categorical that the deceased and the Appellant lived together as friends and not as husband and wife. She asserted that washing clothes and cleaning dishes did not satisfy the Maragoli customary law on marriage.

63. In his testimony, the 2nd Respondent denied having signed the Statement of defence dated 31st March 2023. He asserted that the Appellant paid dowry of two (2) cows and Kshs 2500/=. He testified that a white and black bull that were brought by the Appellant had been sold. He took the view that the Appellant should be given his wife to bury.

64. He stated that when a man and a woman stayed together for twelve (12) years and had children, they were considered as husband and wife. He, however, pointed out that the Maragoli culture did not allow that. He was emphatic that when the cows were brought to their homestead, a letter was also brought. He, however, conceded that no dowry negotiations were done and that dowry was not done between two (2) people. It had to be done officially.

65. Notably, no expert Maragoli witness was called to give evidence as to the precepts of marriage under the Maragoli Customary Law. However, the witnesses who testified in this case propounded the ingredients of a Maragoli marriage which this court was able to follow.

66. It was evident that before a marriage under Maragoli Customary marriage could be deemed to have been valid, several steps had to be taken. When a man was interested in a woman, he was required to first visit the parents of the lady and introduce himself to the parents. Dowry payment had to be preceded by dowry negotiations between the families of the two (2) parties and that dowry agreed upon would be written down. Witnesses were also required to be present during the payment of dowry.

67. Although the Appellant contended that the two (2) cows he gave the deceased's parents was dowry, there was no evidence that dowry negotiations were done. He admitted that no dowry agreement was made because his father-in-law was sickly.

68. From the Appellant's evidence, it was also not clear if the first step of introductions was done. He testified that during his father-in- law's funeral, he introduced himself as a son-in-law of the family.

69. Dowry could not be paid before negotiations had taken place. However, if indeed, the two (2) cows were dowry payment, the persons who witnessed the same ought to have been called as witnesses. They were crucial witnesses as the question of whether the deceased was married to the Appellant or not as the same was viciously contested and had a bearing on the question who had the right to bury her.

70. This court could not verify the authenticity of the letter dated 14th January 2019 from the Chief of Ivola Sub-location showing that two (2) cows were delivered to a Samson Mwashi of Vojo Village. This is because the Chief who was author of the same was not called as a witness to confirm the fact. The 1st Respondent had denied in the Witness Statement that she filed on 31st March 2023 that she hailed from Vojo or that her husband was called Samson Mwashi.

71. She was emphatic that she came from Kipsigori Village and that her husband was known as Haron Ligare Mwashi. The Appellant was put on notice that the letter was contested but failed to counter it by calling the maker thereof.

72. Nonetheless, if any cows were paid, then as the Trial Court held, it could only have been an intention to create ties between the two (2) families but did not amount to dowry as dowry negotiations had not taken place.

73. All in all, this court found and held that the Trial Court was correct in having held that as the Appellant did not pay dowry to the deceased's family, there was no marriage between the Appellant and the deceased under the Maragoli Customary Law.

BB. Presumption of Marriage

74. The Appellant had alleged that having cohabited with the deceased for more than ten (10) years with the knowledge of the 1st Respondent and other family members who did not raise any ground and the fact that three (3) children born were out of the cohabitation, it was sufficient to declare existence of a presumption of marriage between them.

75. He also placed reliance on the case of Esther Mmbone vs Willis Muhatia[2007]eKLR where it was held that once there existed facts that proved a presumption of marriage under customary law, the burden lay on the person alleging that there was no marriage to prove that indeed there was no such marriage.

76. He faulted the Trial Court for allegedly misinterpreting the Supreme Court case of MNK vs POM, Initiative for Strategic Litigation in Africa (ISLA)(Amicus Curiae) Petition No 9 of 2021)(eKLR citation not given) and argued that other than the age of the deceased which was placed by the Trial Court as seventeen (17) years, his marriage with the deceased fully satisfied the parameters specified by the Supreme Court in the aforesaid case. He asserted that the Trial Court misdirected itself as to the correct principles of the law applicable to a Maragoli customary law marriage and to a presumption of marriage in his case.

77. On her part, the 1st Respondent was emphatic that the Trial Court considered the Evidence Act and case law alongside the evidence adduced by parties and made a justified conclusion. She added that the Supreme Court decision referred to by the Appellant set out the principles applicable in determining presumption of marriage and was a binding decision of the highest court unless a distinction was made which the Appellant had to demonstrate to the satisfaction of this court. It was her contention that the Trial Court correctly applied the said decision to the facts of the case.

78. The question of whether marriage between the Appellant and the Respondent herein could be presumed was critical.

79. Although PW 2 testified that he knew that the Appellant and the deceased were husband and wife, that alone was not sufficient to presume marriage on their part. A marriage could also not be presumed merely because several children had been born in the union between a man and woman. This is because children could be born outside a marriage.

80. Long cohabitation between a man and woman was also not a guarantee to presume marriage under Maragoli customary law. Indeed, the 2nd Respondent agreed that Maragoli customary did not permit cohabitation without marriage.

81. Notably, despite being bound by his pleadings, the 2nd Respondent recanted averments in his Statement of Defence that was dated and filed on 31st March 2023 in which he and the 1st Respondent herein had asserted that the deceased and the Appellant were not married. Just like in the lower court, he had averred that the Appellant should be given his wife to bury.

82. The 2nd Respondent's oral evidence and the averments in his Statement of Defence were inconsistent. The Trial Court could not therefore have been faulted for having found that his evidence lacked probative value as he disowned his Statement of Defence. Indeed, it would have been difficult for the Trial Court to ascertain what was the correct position regarding the relationship between the Appellant and the deceased from his testimony. This court found itself in the same difficulties.

83. Whereas marriage could ordinarily be presumed as was held in the case of MNK vs POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR) and as was envisaged in the case of Richard Chasia Muyinzi vs Fredrick Ongadi [2020] eKLR, it was not so for this particular case.

84. This court had due regard to the case of Mary Wanjiru Githatu vs Esther Wanjiru Kiarie, C.A. Civil Case No.20 of 2009 (Eldoret) cited in Milena Bora vs Liana Tamburelli [2016] eKLR, where it was held that:-

> " In the circumstances where parties do not lack capacity to marry, a marriage may be presumed if the fact and circumstances show the parties by long cohabitation or other circumstances evidenced an intention of living together as husband and wife." (emphasis court)

85. Notably, Section 2 of the Age of Majority Act Cap 33 (Laws of Kenya) provides as follows:-

> " A person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years."

86. Further, Article 45(2) of the Constitution of Kenya, 2010 provides that:-

> " Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties."

87. In this particular case, the deceased entered the impugned marriage at the age of seventeen (17) years of age. As the Appellant did not deny and/or adduce any evidence to show that the deceased was eighteen (18) years and above at the time he started co-habiting with her, this court could therefore not fault the Trial Court for having found that the deceased had no capacity to contract any type of marriage.

88. The deceased was under disability by reason of not having attained the age of majority rendering their purported marriage invalid and void ab initio and outside the ambit of Article 45(2) of the Constitution of Kenya that stipulated who could enter into a marriage in Kenya.

89. As no marriage could be presumed between the Appellant and the deceased on account of the invalidity of marriage in the first instance, the Trial Court did not therefore err in having dismissed the Appellant's case despite the long cohabitation and the birth of three (3) children out of the union.

90. In the premises foregoing, Grounds of Appeal Nos (4), (5), (6), (7), (8) and (9) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

C. Right to bury the Deceased

91. Ground of Appeal No (10) of the Memorandum of Appeal was dealt with under this head.

92. The next question was who between the Appellant and the 1st Respondent herein, who was the deceased's biological mother, had a right to bury the deceased.

93. The Appellant pointed out that parties were bound by pleadings and faulted the Trial Magistrate for having granted the Respondents the power to bury the deceased when the same had not been pleaded by the said Respondents. He asserted that the 1st Respondent never pleaded a counter-claim to take the deceased's body for burial.

94. On her part, the 1st Respondent pointed out that the Judgment did not make any orders granting her the deceased's body for burial but that the natural consequence of the decision was that since the Appellant had failed to prove his case, the right of burial fell on the Respondents.

95. She was categorical that the Trial Court advised parties to reconcile in order to accord the deceased person a befitting and dignified farewell. She urged this court to uphold the Trial Court's decision and

dismiss the appeal with costs to her and that she be allowed to bury the deceased as based on earlier arrangements.

96. She also prayed that the Appellant be condemned to pay all mortuary fees accrued being Kshs 193,500/= for one hundred and forty seven (147) days as computed by White Crescent Hospital where the remains of the deceased had been kept.

97. This court had due regard to the case of Ruth Wanjiru Njoroge vs Jemimah Njeri Njoroge & Another (2004) eKLR where it was held that:-

> " In social context prevailing in this country, the person who is in the first line in relation to the burial of any deceased person, is the one who is close to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."

98. Under the Maragoli Customary law, it was evident that it was the parents who had a right to bury a daughter for whom dowry had not been paid as was held in the case of RLA vs FO & Another (Supra) unless the parties agreed that the dowry could be paid after her death.

99. In the case of Richard Chasia Muyinzi vs Fredrick Ongadi [2020] eKLR, the issue of the husband of the deceased paying Kshs 20,000/= and two (2) cows as dowry prior to the burial of his deceased wife came up.

100. As this court found and held that the Appellant had not paid any dowry for the deceased and was incapacitated from regularising the same as the deceased was a minor at the time she started cohabiting with the deceased and hence had no capacity to contract a marriage in the first instance, whether under the Maragoli Customary law or statutory law, it was the 1st Respondent who had a right to bury her.

101. The Appellant's claim at the lower court was hinged on a permanent injunction to restrain both the Respondents herein, their agents, representatives and/or anyone working at their behest from burying her. This court agreed with the 1st Respondent that when the Appellant's case was dismissed, she automatically accrued the right to bury the deceased.

102. Notably, the 2nd Respondent did not get that right as he was not the deceased's next to kin and he had in fact supported the Appellant's case.

103. In the premises foregoing, Ground of Appeal No (10) of the Memorandum of Appeal was not merited and the same be and is hereby dismissed.

III. Court Annexed Mediation

104. Grounds of Appeal Nos (12), (13) and (14) were dealt with under this head as they were all related.

105. The Appellant invoked Part VI of the Civil Procedure Act on special proceedings which provides for the procedures on alternative dispute resolution including arbitration, mediation and other alternative dispute resolution methods provided in Section 59C of the Act and argued that there was no evidence on record which showed that the Trial Court made attempts to reconcile the parties.

106. He, however, agreed that the matter had been referred to Court Annexed Mediation (CAM) and that the Mediator reported back that they had failed to agree thus paving way for the hearing of the suit. He urged the court to allow his appeal and grant him costs.

107. A perusal of the court record showed that the dispute was referred to Court-Annexed Mediation (CAM) on 6th April 2023 but parties did not agree. A Mediator's Report dated 24th April 2023 was filed in court to that effect.

108. Listing assertions of the Trial Court on the several attempts to reconcile the parties as a ground of appeal put this court in some difficulties. This is because referral of disputing parties to CAM or asking them to negotiate out of court was not mandatory. A trial court could exercise its discretion to refer parties to CAM or to seek an out of court settlement. In addition, it was not clear to this court whether reconciling the parties only meant referring the parties to CAM or the same were verbal proposals.

109. In the premises foregoing, this court found and held that Grounds of Appeal Nos (12), (13) and (14) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

Disposition

110. For the foregoing reasons, the upshot of this decision was that the Appellant's appeal that was lodged on 20th November 2023 was not merited and the same be and is hereby dismissed. As this was a family matter each party to bear its own cost.

111. For the avoidance of doubt, the 1st Respondent be and is hereby granted an order for the body of the deceased to be released to her so that can she can bury her forthwith.

112. It was time to give the deceased a dignified send off for the sake of her young children and bring closure to all who were affected by her death. As an obiter, this court recommended that the Appellant and the 1st Respondent explore ways to mend their relationship pre- and post the deceased's burial as it was clear that the Appellant and the deceased had three (3) children out of their union and he still wished to maintain ties with her family.

113. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF MARCH 2024

J. KAMAU

JUDGE