



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO. 3534 OF 1982

FRANCIS MBUGUA MAAGU.....PLAINTIFF

VERSUS

GASPAR WAWERU.....DEFENDANT

JUDGMENT

On August 5, 1968, both deceased, Zakaria Kamau and Ellen Wambui, went through a ceremony of marriage at Maragua Seventh-Day Adventist Church, Muranga District, under the African Christian Marriage Act (Cap151). On March 17, 1970, Zakaria died and on October 25, 1982, Ellen also died at Muranga. Zakaria was the son of the plaintiff, Francis Mbugua Maagu, and Ellen was the daughter of the first defendant, Gaspar Thuku Waweru. Ellen's bones have not been interred because a dispute arose as to who was to lay her to rest - her parents or her late husband's parents.

There is no dispute that the marriage was still subsisting at the time of Zakaria's death and Ellen never remarried, notwithstanding whatever association she might have had with men during her single life. She had four children all born post-humous Zakaria and out of whom only the first son, Martin Mbugua was with Zakaria, but that is not our concern now. One child died. There is also no dispute that some dowry - Francis said Kshs 3,445 but Gaspar admitted only Kshs 600, was paid and has not been returned to Zakaria's parents. Ellen was at the time of her death working in the Ministry of Works of the Government of Kenya.]

In my opinion, there is only one issue, namely, who, under the Kikuyu customary law, buries a deceased married woman whose marriage was subsisting when her husband predeceased her and who never remarried" Mrs Khaminwa for the first defendant contended that the death of Ellen's husband dissolved their marriage and she was free to remarry another man without any impediment. She said that this is in accordance with the Christian vows that Ellen and Zakaria took which say, *inter alia*, "until death do us part". That being the case, Ellen reverted to the status of a single woman upon Zakaria's death and she belonged once more to her natural father's family. She ceased to belong to her father-in-law's fold and her natural father, Gaspar, was the right person to lay the body of his daughter to rest.

Mr Gatuguta for the plaintiff submitted that what death does part in a marriage is the physical co-habitation between the spouses and not the deep love of their souls for each other and that death does not, therefore, automatically dissolve a marriage between two spouses of the Kikuyu ethnic group. In other words, his views were that the relationship created through marriage among the Kikuyus goes beyond the certificate of marriage and unless that relationship has been severed, a married woman predeceased by her husband does not cease to be a member of her husband's surviving family and on

her death, the husband's family are the right people to inter her body. Both Counsel have force in their arguments.

In the book of Genesis Chapter 2 verse 24 - The Bible Revised Standard Version, we read these words:

"Therefore a man leaves his father and his mother and cleaves to his wife and they become one flesh."

In his book, *Facing Mt Kenya*, Mzee Jomo Kenyatta writes as follows:

"In the Gikuyu Community marriage and its obligations occupy a position of great importance. One of the outstanding features in the Gikuyu system of marriage is the desire of every member of the tribe to build up his own family group and by this means to extend and prolong his father's *mbari* (clan) ... and therefore, a family is constituted by a permanent union between one man and one woman or several women ... On signing the matrimonial contract the marriage ceases to be merely a personal matter, for the contract binds not only the bride and bridegroom, but also their kinsfolk."

If I may say this: among Africans, the Kikuyus included, marriage has certain lasting effects, which go beyond the effect of a marriage certificate issued under the law. For example, marriage among Africans creates lifetime relationships between the spouses; between each spouse and parents of the other spouse and between the spouses' parents. It gives each spouse a new status of the married man or woman which carries much respect in our society. It confers upon the woman a new title of respect namely "*nyina wa ...*" ie "the mother of" even when she has no child or ("Mrs so and so"). Even when her husband dies, the relationship is still perpetuated by referring to her in the vernacular as "*mutumia wa ndigwa*" (a widow or a lady who has lost the husband).

Death is an act within God's power and he alone puts asunder what he has joined. I, with respect, agree with Mrs Khaminwa that death terminates a marriage for it brings about the physical separation of the spouses. On the other hand, and again with respect, I agree with Mr Gatuguta, that there are other relationships which are created by marriage and which death does not automatically determine. For example, the death of a husband does not stop his widow from using his name and under most African systems of customary law eg Kikuyu, Luhya and Kamba, a widow is entitled to a portion of her husband's land for use for her life or until she remarries. Unless she elects to return to her parents or remarries a widow is entitled to the matrimonial home for her life. Such relationship of affinity is severed by certain ceremonies and not only by word of mouth. For example, if the widow remarries or returns to her parents and they return the dowry (*ruracio*) paid by her deceased husband, it is accepted that the special relationship created between the widow's and her deceased husband's families has been terminated. Burial of the deceased is a matter of a social custom of a people and not a question of law. In other words, how one is to be buried when one is dead and who buries one depends on the social custom of one's tribe and does not depend on the law under which one was married if one was a female. In this case, therefore, we shall not look at how Ellen was married ie whether she had a church wedding, customary law marriage or statutory law marriage. We shall look at how the Kikuyus bury a woman of Ellen's status and that alone shall determine who will lay her to rest.

Mbugua Kimani (PW 5), who guessed his age as 71 years, but whose age I estimated to be eighty years plus, is a Kikuyu elder. He said:

"I know the Kikuyu customary law. When a husband dies and leaves a wife, that wife is looked after by the father of the husband who paid the bride price ... If she dies, she is buried where she is married. That is according to custom." I

On cross-examination, this witness said:

“A widow is looked after by her father-in-law. Even if the widow goes and lives on her own, it is still maintained that she belongs to that home, the home of the man who married her. Even if she stays with her parents and no dowry is returned, still it is maintained that she belongs to her husband’s home. I know *ruracio* and even money is paid. It is not only animals or goats.”

The deceased’s father, Gaspar Waweru, whose age I estimated to be sixty years and who too is a Kikuyu said this:

“Under the Kikuyu customary law even if the marriage relationship is not cut, a married woman is not buried at the home where she was married.”

In the case of *Mwangi Njoroge Mugwe v James Mwangi Kihara* HC Misc CC No 255 of 1982 (unreported) this court constituted as it is said:

“The position under the Kikuyu Customary Law is this: If the applicant was legally married to the deceased then he is entitled to lay her body to rest, but if the deceased was not married to him, regardless of how long they co-habited the deceased’s relatives are entitled to bury her body.”

In that case the deceased was a Kikuyu woman. I accept Mbugua Kimani’s statement as correct and of the Kikuyu custom of burying a married woman. Gaspar Waweru did not tell the truth on that point. When a Kikuyu woman dies and her marriage was never terminated through a divorce or if her husband predeceased her when the marriage was not dissolved during her husband’s lifetime and she did not remarry nor was the affinity relationship terminated by return of the *ruracio*, she is buried at her husband’s home by his kin. If there was a divorce or, after being predeceased by her husband, she either remarried or severed the relationship with the husband’s family and *ruracio* was returned, she is buried by her parents or relatives at their home.

Whether the relationship is severed or not is a question of fact determined with evidence. In the instant case although Gaspar later in cross-examination said that he was never paid any *ruracio* in his evidence in chief he said he was paid Kshs 600 only. He said:

“The deceased son of the plaintiff gave me Kshs 600. It was ‘*ruracio*’.”

He then added:

“I was not satisfied with the dowry I was given because it was only Kshs 600.”

He attempted to change his story the following day when he was cross-examined and said that the Kshs 600 was not *ruracio* but the money was given so as to allow the wedding to proceed. That had not been put to Francis, the plaintiff, when he testified that he paid Kshs 3,445. Gaspar must have had a restless night and on an afterthought decided to deny receiving any *ruracio*. He was being untruthful. His son, Paul Kamau, (DW 2) said that it was he and his mother who received the Kshs 600 with which he bought gifts for Zakaria and Ellen. Paul had been in the courtroom throughout the trial. He did not impress me as a truthful witness and I was unable to believe him. I find that *ruracio* of not less than Kshs 600 was paid and it has not been returned to the plaintiff.

That *ruracio* was not necessary for the validity of the marriage in question, but its return would be evidence of the severance of the marital relationship. It is not in dispute that after the death of Zakaria,

Gaspar trained Ellen in Bookkeeping, Accounts and Typewriting, but that did not interfere with Ellen's relationship with her parents-in-law. After the training, it is apparent that Ellen lived independently when she joined the Government and worked in Mombasa, Nyeri and Murang'a. Ellen's use of the title "Miss" and of her father's name is no derogation from her relationship with her in-laws. No advantage can be derived from it by the defendant.

Francis' and Samuel Ndungu's evidence that Ellen maintained close contact with them was not contradicted by the defence. Gaspar himself remained close to the plaintiff's family. Early this year he went to see Francis to discuss the continuance of their relationship. He could not have gone to discuss the continuance of the relationship unless it was still subsisting. I find that there is ample evidence that the customary relationship created by a marriage, which was created by the marriage between Zakaria and Ellen, survived Zakaria and had not been terminated by the surviving spouse, Ellen, at the time of her death. Her alleged desire to remarry had not materialized and so an unimplemented intention could not have affected that relationship. In the result, Ellen died while she was still a member of the plaintiff's family and clan and according to the Kikuyu customary law, her husband's (the plaintiff's) family is entitled to inter her body and so it shall be. The defendant is restrained from taking away the deceased's body for burial and the officer-in-charge of mortuary where the body of Ellen is resting shall deliver it to the plaintiff for burial. Each party shall bear its own costs of this suit.

Order accordingly.

Dated and delivered at Nairobi this 29th day of November, 1982.

Z.R CHESONI

JUDGE



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