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**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Civil Appeal 116 of 2009**

***(Appeal from PM's Court Maseno in Civil Suit No. 186 of 2009)***

**ANDREA ONYANGO ADUDA ..... PLAINTIFF**

**-VERSUS-**

**JOHN OKINDA ODHIAMBO ..... RESPONDENT**

**Coram:**

**Mwera, Judge**

**Oyuko for the Appellant**

**Ogonda for Respondent**

**George CC.**

**JUDGMENT**

On 17.7.2009 the lower court at Maseno delivered a decision in a burial dispute – hence this appeal. Mr. Oyuko put up grounds 1 (a-f), 2, 3 and 4, abandoning ground (119) at the time of hearing the appeal, and arguing the rest together. The learned trial magistrate issued a permanent injunction against the appellant/defendant not to interfere with the remains of one Catherine Adhiambo Aduda and those of the two children Mary Anne Atieno Okinda and John Omondi Okinda. The court heard that the late Catherine was the daughter of the respondent. She with her 2 children (Mary and John) died in a road accident. While the appellant was disposed to bury the three, the respondent/plaintiff resisted such a move claiming that Catherine was his wife and the two children were theirs. So he had the right to bury them. Since these proceedings started, the bodies remained at a hospital mortuary.

Mr. Oyuko posited that while the respondent pleaded that he married Catherine under Luo customary law w.e.f 7.10.2005 and they had the two children, the learned trial magistrate was in error when, while correctly finding that the customary marriage was not proved, he nonetheless went on to find that the couple cohabited for such a time that they were presumed to be married. That once the respondent did not prove the customary law marriage he pleaded, the learned trial magistrate had no alternative but to dismiss his claim and in no way find another form of marriage which was not pleaded.

The court heard that the 2 children (Mary, John) did not belong to the respondent because according to the appellant, Catherine never married the respondent. He did not lead e.g DNA evidence to establish that he, the respondent, was the father of the 2 children or that by virtue of S. 23 (1) of the Children's Act, the respondent qualified as the father of Mary and John.

On the respondent's part Mr. Ogonda's stand was that all their evidence demonstrated that the respondent and Catherine married in 2005 under Luo customary law but before it was perfected by paying dowry, Catherine died. Thus the learned trial magistrate rightly found that their cohabitation amounted to a marriage by presumption – i.e long acknowledged cohabitation of a man and a woman. In this regard the case of MBOGOH –VS- MUTHONI & ANR [2008] KLR 357 was cited. Counsel then sought refuge under S. 25 of the Children's Act in that even if the respondent may not have been the biological father of Mary and John, he took them on along with the mother, lived with them for over twelve months and so legally assumed paternity thereof. Therefore on evidence and cited authorities the learned trial magistrate arrived at a sound decision that should be left undisturbed. Even recourse was had to the evidence of the appellant and his son to the effect that in essence or fact, Catherine lived /cohabited with the respondent. The children were theirs.

This court now turns to the evidence in the lower court to reach its own conclusion, despite the fact that it neither had the advantage to see nor hear the witnesses.

The respondent/plaintiff (DW1) testified that he had lived in Luanda Township. He knew the deceased Catherine in December 2004 while she was at Sagam Primary School, as a teacher. He also knew Mary Auma Okinda and John Omondi Okinda – the 2 children already mentioned, whose names appear elsewhere in a varied way but said to be referring to the same children in this matter. The respondent and Catherine started living together in October 2005 – as husband and wife at his Ahono home, until 2007 when they moved to rented premises at Luanda. They cohabited there until her demise on 11.6.2009. PW1 claimed that the couple had 2 children (Mary, John). He was about to produce their health cards but this was opposed by the appellant's counsel. They were only marked for production. The respondent continued that he knew the parents of Catherine: Andrew Onyango Aduda, the appellant – father, Mary Onyango, her mother and brothers Nobert, Mark and sisters Susan, Beatrice and Rose. He also knew and visited their home at Karadolo village, Ukwala. He formally visited that home in September 2008 where Catherine introduced him. He was received and treated as a son-in-law by family members. On the second trip he was given authority to visit that home any time. On this visit he gave token of appreciation and dowry was discussed. When Catherine fell sick in December 2008 while at the home of her parents, her mother called PW1 to take him to hospital and also take with him their children. Accompanied with a brother as per the local custom, PW1 went to Catherine's home on 28/12/2008 in the presence of the appellant, his sons, a daughter and Catherine's uncles.

As PW1 left with his wife and children he gave his "father-in-law" the appellant, Ksh 5000/=, Catherine's mother, Ksh 2000/= and Ksh 1000/= to each brother. He took Catherine first to a health centre at Ukwala and later to Jalaram Hospital, Kisumu. All this time the respondent was keen to pay dowry for Catherine. On 30.4.2009 a visit for that was arranged but at a very short notice as per the appellant. Therefore the visit was postponed and it never took place as Catherine later died. The couple with their children lived happily and was on cordial terms with the parents-in-law until the death. Then the respondent's family members visited Catherine's home but moves to formalize the marriage were not accepted.

In cross – examination the respondent, a Luo tribesman, acknowledged that he had to follow the community's customs. He went over the stages of formalizing a Luo customary marriage, ending with payment of dowry. If those steps were not followed, there was no marriage. He went through all the stages as best he could but had not paid dowry as at the time of Catherine's death:

**“ Under the unfortunate circumstances customary law was not complied with.”**

He never threw Catherine out of their house even when she went to an uncle's funeral. The respondent

maintained that he was the biological father of Mary and John. He had started the process of obtaining birth certificates for them. The respondent was shown some birth documents including one for Mary where one Andrew Kizito was named the father. He seemed to have no idea about those documents some of which seemed to bear changes. It was his mother-in-law who called PW1 to report that Catherine was ill and he had to go and take her to hospital. She did not reprimand him for neglecting his wife. He took her, all in good spirit to Jalaram Hospital and paid the bills. All the time the respondent was keen to complete the process of a customary marriage to Catherine. He was not in court in order to benefit from her estate at all. He lived with his late wife and children for some 5 years and so he was justified to sue in this matter. When disagreements arose following the death, PW1 in seeking peaceful solution, he proposed to Nobert (Catherine's brother) that her family could bury her while he buried the children. He then added in re-examination:

**“ It is not true that I am only interested in the benefits of the deceased. I would not stop the family if they are interested in the estate of the deceased.”**

The next witness was Joseph Okinda (PW1), the father of the respondent (PW2). He knew the deceased Catherine (with the 2 children, Mary and John). He referred to them as his daughter-in-law and grand-children respectively. The respondent married the deceased Catherine in 2005 and brought her home to announce the marriage. First the couple lived at PW2's home and later at Luanda market. Catherine was a teacher in a local primary school – Sagam. Then in 2009, the respondent informed his father (PW2) that he had contacted and arranged to go and meet Catherine's parents on 30.4.2009. PW2 agreed and involved his brothers in the intended visit – to meet and know Catherine's parents and discuss dowry. However, Catherine's parents thought the notice for the visit was short and the visit did not take place. Then the accident in issue occurred. PW2 with Edward Okinda, Albert Opiyo, Gilbert Oriedi and Zachary Onyango went to the home of his daughter-in-law, Catherine. They went to talk about pending issues. The group met Catherine's mother with a group of people. She became hostile because her daughter had died and no issue was settled. Once, the witness recollected, the respondent went to collect Catherine from her home when she was sick – to take her to hospital. Her parents had called him as a husband. To PW2, Catherine was the respondent's wife. They had 2 children. He had no other wife. Now that Catherine had died before dowry was paid the respondent could still pay it before or after her burial. He wanted the learned trial magistrate to allow the respondent to bury Catherine so that he PW2 could complete the traditions in Luo customs.

He said in cross – examination that he was versed in those customs. PW2 went over Luo rites involved in a customary marriage to the point where death occurred as it was in the present case. Catherine's parents should give consent to the marriage in issue, accept a cow from PW2, and let burial take place as was pleaded. He himself requested that the marriage of Catherine to the respondent be formalized and that could still be done even in the circumstances, so that PW2's family bury the deceased.

Fredrick Owuor Ondiek (PW3), an 88 year old elder and conversant with types of Luo customary marriages narrated them to learned trial magistrate. One type was by elopement or one paid dowry and went through a wedding ceremony or simply carried the girl away by force and she became a wife. Dowry is paid (cows), meat and chicken is given to the visitors (who brought the dowry) and the husband's side is given respect. In case the girl dies the husband pays dowry before she is buried and he is given the body to go and bury. He should be allowed this as per the Luo customs. If he does not pay dowry, the girl's father buries her.

The next witness was Albert Opiyo (PW4) of Ahono village. He knew the respondent from birth – a nephew. The respondent married Catherine in October 2005. PW4 knew her even before her marriage.

She was a teacher at Sagam Primary School where the witness once taught. The couple first lived in the village and by the time of her death they were living in a rental house at Luanda market. PW4 was informed that they would, on an appointed day, go and pay dowry. But that did not come to pass because Catherine's death intervened. When it occurred, two people J. T. Okinda and J. M. Okinda went to Catherine's home but her father did not give them audience. Then on 12.6.2009 another delegation of five people including this witness made a visit to Catherine's home – to discuss and pay dowry. Catherine's mother and other family members received PW4's delegation poorly and it was not given a hearing. Catherine's mother told that delegation that she would be buried in her parents' home and the respondent's people could go to court if they wished. The respondent's side was still trying to resolve the issue even as they had gone to court. The couple were married in 2005 according to PW4 but he did not know under what system. To PW4, the respondent had been given consent to marry Catherine. He had paid what was referred to as "AYIE" (meaning a token for/of consent) and told that a date to pay dowry would be communicated later.

Peter Onyango Awuor (PW5), the head teacher Sagam Primary School, knew the respondent very well. He also knew Catherine who reported for duty at Sagam on 6.5.2003. She was a spinster. In 2005 she told the witness that she had a boy friend, with whom she moved to live in his Ahono village (the respondent) some 200 m from the school. In 2006 PW5 met Catherine's father. He introduced himself as her head teacher and also introduced him to one Sophia Okinda – Catherine's mother-in-law. The witness knew that the respondents with Catherine were married. He visited them severally in their house. Catherine took maternity leave twice and he brought forth 2 children – a daughter and son. She died with them. When this happened, the respondent reported it to the witness, and all including both families began to make funeral arrangements. Then a court injunction was issued.

The couple married in 2005, lived at Ahono village of the respondent and later moved to live at Luanda market. Catherine had not changed records with the Teachers Service Commission when she married. They still showed that she was single.

The lower court then heard Sylvester Opiyo (PW6) of Ahono village. He told the court that Catherine was his sister-in-law having married the respondent in 2005. In December 2008, Catherine was sick at her home. The witness in accompany of the respondent visited her there and they were well received. The respondent gave her father Ksh 5000/=, her mother Ksh 2000/= and to each brother Ksh 1000/= . They took Catherine first to a local medical facility then to a hospital in Kisumu. The couple had 2 children – a boy and a girl and initially it cohabited at Ahono village. They then moved to Luanda market.

In cross – examination the learned trial magistrate heard that when the respondent and Catherine married in 2005, she did not have a child at all – Joseph and Anne. When PW6 with the respondent visited Catherine's home he met and was introduced by the respondent to her family members – father, mother, brothers and sisters. They left with a brother and sister to take Catherine to hospital. The respondent paid the medical bills. That brought to a close the respondent's case. The defence then opened.

Brian Aduda Onyango (DW1), Catherine's brother was heard first. Catherine was his sister while Mary and John the 2 children herein were his nephews. All 3 died in a road accident.

DW1 left the country in 2005 and he did not know whether his sister (Catherine) was married. His other sisters were married under Luo customary law with due rites but he did not remember the same having taken place with Catherine. DW1 did not know if their father received anything (dowry). So to him Catherine was never married. The witness continued:

**“ I have never met John Okinda but I knew him in court. I communicated with him when they had disagreements with my sister and she moved to stay with my sisters in Kisumu. I asked him she was a boy friend (sic). I called him after Catherine complained that John doesn't perform his responsibilities. I asked him why he does not visit my parents. I physically met him in court on 26.6.2009.”**

In cross – examination DW1 said that if Catherine got children when he was out of the country, he could have heard of it:

**“ She disagreed with someone she lived with. I knew him as J. M. Okinda who lived with my sister. She told me that he was not paying rent --- I confirm that my sister stayed with J. M. Okinda.”**

And DW1 had sent her financial support when she was staying at Luanda.

Mary Atieno Onyango (DW2), the wife of Andrew Onyango (the appellant) and the mother of the deceased Catherine, saw the respondent once in mid – 2008. DW2 was never aware of his marriage to Catherine; she never consented to that and never received any dowry from him. She never welcomed him in her home on any account. In September 2008 the respondent visited DW2 home and introduced himself as one who had come with Catherine. He did not enter the homestead where many other people were. At no time did DW2 call the respondent to report that Catherine was sick. When she visited and suffered a headache, DW2 called her daughter Susan who had a car to take Catherine to hospital. A car came with a driver who remained outside the house as Catherine was put in the car. She was taken to Matibabu Hospital but since she did not improve, she was taken to a hospital in Kisumu. No hen was cooked for the respondent to eat and he never gave Ksh 2000/= to DW2. After Catherine died some gentlemen visited DW2's home. She thought they were mourners for her brother-in-law who had been buried on 13.6.2009 or for Catherine. Instead they were people from the respondent's home; they asked to be given Catherine to go and bury. The witness told these people that she could not handle such a matter in absence of her husband (the appellant) who was in Kisumu. She did not chase them away. DW2 never had a date for dowry to be paid for Catherine and no “ayie” ceremony ever took place and Catherine herself never told her mother that she was married.

In cross – examination, the court heard that Catherine never told her mother the father of her daughter (Mary) and John was born in 2007:

**“ When John Okinda visited me and told me that Catherine was disturbing him traveling with the children to Kisumu oftenly --- I was wondering about his concern about the children. I dismissed him because my daughter was complaining about the man beating her ---.”**

Then later DW2 learned that this man Okinda, was just a friend who was following her at her place.

The appellant (DW3)told the learned trial magistrate that he met the respondent at the Yala Sub – district Hospital on 14.6.2009 in company of a certain head teacher who introduced the two. DW3 was not aware that the respondent married Catherine under Luo customary law. His other daughters had married under that system with due ceremonies being performed e.g payment of “ayie” and dowry. None of these took place involving Catherine. The respondent never gave him Ksh 5000/= and no dowry. A delegation was sent to him after she died. His daughter was never married to the respondent and DW3 could not allow them to perform the rites they desired. Then they sued him without consulting first. The respondent's people never came to him twice. DW3 did not know the biological father of his grand-children. Catherine was never married and so DW3 wants to bury her.

Susan Aduda (DW4), the late Catherine's elder sister stated that she was never married to the respondent who was only introduced to the witness on 28/12/2008 by her husband. John Okinda told DW4 that he was Catherine's friend. When the witness went to her home on 27.12.2008 to pick up Catherine who was sick, the respondent offered to drive her. He took other people along. At Catherine's home all these people remained outside the house as Catherine was collected from her brother's house. Then the respondent drove them to Matibabu Health Centre and later to a hospital at Kisumu. The respondent did do all that as a brother-in-law of the witness and he gave no money to her mother, herself or her brother. Catherine was never married and she did not tell DW4 that she was living with a man at Luanda. DW4 did not know the father of Catherine's children whom she got when teaching at Sagam Primary School. And no chicken was cooked on the day they went to pick up Catherine.

Bill Peter Bach (DW5), DW4'S husband once met the respondent at Kenya Commercial Bank (KSU) where Catherine introduced him. He did not inform DW5 that he married Catherine under Luo customary law – a system he knew well having married Susan under it. To him there were no customary ceremonies to symbolize marriage between the respondent and Catherine. Then on 28/12/2008 the respondent came to the house of DW4 and 5, and the latter gave him his vehicle to drive to Catherine's home, she was unwell, to pick her up.

Fred Juma Aduda (DW6), the brother of the appellant knew all his 9 children including Catherine. He did not know the respondent and the witness did not participate in any Luo customary ceremony to symbolize marriage of the respondent and Catherine. DW6 learnt that Catherine was living at Luanda but he did not know with who. That closed the trial and each side submitted. The learned trial magistrate then drafted the judgment – subject of this appeal.

In this court's assessment of the evidence it is its view that the respondent and the deceased Catherine cohabited as husband and wife since 2005, starting at Ahono village of the respondent with his relatives. There is the evidence of Peter Onyango Awuor (PW5) a head teacher at Sagam Primary School where the late Catherine was a teacher. PW5 knew both the respondent and Catherine as husband and wife and he used to visit them at Ahono village. Even the evidence of Brian Aduda Onyango (DW1) and Mary Atieno Onyango (DW2) points to such cohabitation. They knew it. Catherine complained to them about the respondent not paying rent, not performing family responsibilities and even beating her. This could only be between 2 people who lived together.

And having so cohabited for 4 years what system of marriage led to that" The respondent claimed that he married the deceased under Luo customary law. Consent was given and "ayie" was paid. But dowry was still pending when Catherine died. The appellant's side vigorously denied all this. As the lower court found the Luo customary law marriage had not been perfected by the time Catherine died. Dowry had yet to be paid. But after reviewing some of the authorities cited and appreciated by the learned trial magistrate e.g Mbogoh –vs- Muthoni & Anr (2008) 1 KLR (G & F) 357, and Njau & Anr –vs- Wahito (2008) 1 KLR (G & F) 385, and on evidence tendered this court is satisfied that the respondent and Catherine were properly found to have been husband and wife due to long cohabitation, which had led the witnesses here to consider the two as husband and wife. It was marriage by presumption and the learned trial magistrate cannot be faulted to have found that evidence tendered adduced proved such a marriage. He was bound to do so. He was right to do so even if it was not so pleaded because the learned trial magistrate was bound to and indeed inclined to do substantial justice in the matter before him. That is a bounden duty of any court, entertaining a given case before it and the parties involved. Courts always endeavour to lean towards what is positive and meaningful to society.

Coming to the issue of the 2 deceased children – Mary and John, the appellant's side did not appear

to know who their father was. They maintained that it was not the respondent. Agreed, DNA tests were not carried out as Mr. Oyuko submitted but no one asked for them. But the respondent's side firmly claimed that the 2 children were his. So this court like the lower one must find that the 2 children's parents were the respondent with Catherine, who have been found to have been husband and wife by virtue of presumption of marriage lasting over 5 years. They were living with their children. With that no recourse need be had to the Children's Act especially SS. 23, 25 thereof as counsel posited.

All in all this appeal is dismissed. The rest of the orders remain as made by the learned trial magistrate on sharing mortuary fees. Each side also to bear its costs here and in the court below.

Judgement accordingly.

Delivered on 2.12.2009.

**J. W. MWERA**

**JUDGE**

*JWM/hao*



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