Republic of Kenya

Court of Appeal, at Nairobi

Civil Appeal No 61 of 1984

Machani

v

Vernoor

(Appeal from the High Court at Nairobi, Porter J, Civil Case No 364 of 1981)

October 14, 1985, Platt Ag JA delivered the following

Judgment.

The circumstances which gave rise to the suit, and this subsequent appeal, are distressing and provoke anxiety that some solution to this fairly prevalent social problem should begin to emerge.

Mr Machani, the appellant, had sued Rosemary Moraa, the respondent for trespassing upon his property and committing acts of nuisance; during the year 1979. The particulars given were that:

a) on various dates the defendant/respondent, Rosemary brought her children, Thomas Orina and Anne Margaret Kwamboka and their belongings into the plaintiff's/appellant's residence, and refused to move out, although requested to do so;

b) on July 26, 1979, the defendant wrongfully seized the plaintiff's car (registration No KUG 693 and 4 airline miscellaneous charges order; keys for motor vehicle KRC 909, personal letters and documents and a land certificate of the plaintiff's shamba;

c) on February 12, 1980 the defendant insulted and abused guests and relatives of the plaintiff at his residence;

d) on February 16, 1980 the defendant brought two of her children to the plaintiff's premises and abandoned them.

So the plaintiff sought a perpetual injunction, order to remove the two children, orders to return the plaintiff's goods, general damages for detinue and nuisance, and the essential remedy of a declaration that the plaintiff is not the husband of the defendant. That remedy of course explains the real nature of the case, the plaintiff and defendant spent almost five years together, during which time the plaintiff fathered three children. It was, in fact in the course of the plaintiff ridding himself of the presence of the defendant, in order to consolidate a new female conquest, that these incidents took place.

The defence was that so far from trespass and nuisance, the defendant was the wife of the plaintiff, Thomas Orina and Anne Margaret being the issue of the marriage. I presume Emmanuel was also

included. The children were alleged to have been left with their father, the defendant taking them to the Buru Buru house in the family car KVG 693, which the defendant used as such. All that happened in February 1980, was that the defendant says that she took the children to stay with them between 12th and 16th of that month, returning them to their father. When they were returned there was no question of any insulting or abusive behaviour to the three relatives present. As to the plaintiff's property, the defendant thought it had been returned through the police.

There is a certain artificiality about the framework of either case, as the facts will reveal. The learned judge strove to place such weight on the evidence, that in his view indicated the real position between the parties. In the result, he held that the plaintiff's case was not sufficiently credit-worthy to assist him in finding that the presumption of marriage had been rebutted, and therefore presumed a marriage to exist between the plaintiff and the defendant on a customary basis. On that basis, all the actions of the defendant had been the actions of a wife trying to protect herself and her children's rights against wrongful rejection by the plaintiff. Accordingly there was no claim and the entire plaint was dismissed with costs.

If the learned judge was right that a marriage should be presumed, then the dismissal of the plaint would follow naturally on the facts of the case. If the learned judge was wrong in presuming a marriage, then the other claims would depend upon the relationship of the parties and how they had managed their affairs.

On the first issue concerning the presumption, the kernel of the appeal is to be found in grounds 11 and 13, namely:

"11 The learned trial judge erred in presuming, in the special circumstances of this present case, and, indeed, in the absence of compelling evidence, and in the face of evidence to the contrary, the existence of a marriage between the plaintiff and the defendant "on a customary basis."

13. The learned trial judge erred in failing to hold that, in view of the substance of the previous marriage between the defendant and one Vermoor, the presumption of essential validity of a marriage between her and the plaintiff could not be made in the face of the evidence and if made there was sufficient evidence to rebut it."

As against those contentions, Mr Kamau Kuria gave notice to confirm the decision on other grounds namely that there had been elopement in customary law.

As marriage was presumed it will be convenient to clarify what the nature of the presumption was. The learned judge found as a fact that the plaintiff and defendant lived together as a man and wife for five years from 1974 to 1979 during which time Thomas Orina and Anne Margaret Kwamboka were born. On the strength of Ngari v Getangi & Others HCCC 1460 of 1977 the learned judge would have found that there was a presumption of marriage. But due to the incapacity of the defendant, who had gone through a formal marriage in 1973 in a Nairobi Church with Alexander Vermoor, the question that arose was whether the operation of section 37 of the Marriage Act (cap 150) prevented the formation of a marriage on a customary basis. There is no doubt that until 1979 that it did, but the learned judge held that a presumption of a valid marriage could still be made even though the association started on adultery (and he cited Chesire HCC 4098 of 1982; and Hill v Hill (1959) 1 A11 ER 281). However, during the adulterous association, the parties had intended to marry in the learned judge's view. Their families approved of their association. The defendant obtained her decree nisi of divorce in February 1979, after which the learned judge held that the parties were free to continue with the original plan of getting married; but by that time the difficulty which arose over the fact that Thomas Orina was mentally retarded had crept in. Another girlfriend also featured prominently. On the other hand, the third child born on January 1, 1980 must have been conceived in February or March 1979 after the parties were free to marry. The association between the parties therefore continued, and consequently taking into account the previous association together with continued cohabitation, after the defendant was free to marry, the learned judge felt able to presume that there was a valid marriage on a customary basis. All the actions of the defendant had been the actions of a wife. The learned judge with commendable courage, presumed the marriage to safeguard the family unit, and his instinct in doing so echoed recent judgments in these

courts, as well as those in English and Commonwealth courts for over a century. It is undesirable to bastardise children or debar succession, after long periods of cohabitation and the birth of children.

But serious problems arose. Mr Muthoga very properly pointed out that this court must give a logical interpretation to section 37 of the Marriage Act (cap 150). To answer the spirit of this provision, it would be impossible to evade its unambiguous terms, and to hold that a marriage existed during the continuation of a previous monogamous marriage. It would not be right to acknowledge that existence by presuming that a marriage at customary law had been entered into. Indeed, if Fender v Mildmay (1938) AC 1, is considered, it would be wrong to "promise" to marry a third party before a decree nisi of divorce had been granted. Hence, if the adulterous association arose and ended during the continuance of a previous marriage, it would always be illegitimate association. The presumption covers two aspects, that the parties had the capacity to enter into a marriage, and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree of divorce; such as a decree absolute (see Rayden on Divorce 12th Edition volume 1 page 600 – the latest edition is to the same effect).

The defendant in this case did not treat her marriage to Mr Vermoor with the seriousness that section 37 of the Marriage Act requires. The main idea of the defendant was that as the marriage to Mr Vermoor was a sham marriage, there was no reason why she and the plaintiff should not start to live together, as it was common for such associations to spring up in Nairobi. It may well be that there is a certain fashion to commence illegitimate associations of one sort or another, but it is not within the province of this judgment to deal with that aspect of urban life. It is sufficient to say that this alleged fashion gives the defendant no comfort. Mr Kamau Kuria attempted to rescue the defendant by referring to the line of cases where a party is able to ignore a marriage which is null ab initio. Unfortunately that was not the defendant's position. It was no doubt a marriage with no soul in it. It was a matter of convenience. It was unnecessary to save the defendant's reputation and preserve her employment as Principal of Karen College, since she was pregnant. It was agreed to, formally arranged and witnessed. It is not suggested that it was not consummated. It was relied upon as a valid marriage in the divorce proceedings before the resident magistrate. It cannot be argued that the marriage was null and void ab initio, so that the defendant could walk out of it unscathed, avoiding section 37. The validity of the marriage is either or both a case of res judicata or estoppel.

The plaintiff knew that the defendant must be free of the Vermoor marriage. Proceedings were commenced and ended with a decree nisi of divorce on February 6, 1979. (The decree is dated January 6, 1979, but that is a typographical mistake as the recorded proceedings indicate). No steps were taken to shorten the statutory period which must elapse before a decree absolute could be obtained. The period would therefore be the full statutory period of three months and could not end before May 6, 1979. But it is not clear whether the decree absolute was applied for or granted; certainly no decree absolute was produced in evidence. The situation is therefore that the defendant could not enter into a marriage before May 1979 and may still be under a disability. Even if it is taken for the purpose of the argument, that the defendant was free after May 1979 the question will arise whether any transaction after that date could aid the presumption of marriage drawn by the trial court.

This is not a case which falls within the ambit of Hortensia Yawe v Public Trustee Misc Case No 16 of 1977, or Mary Njoki v John Mutheru & Others Civil Appeal No 71 of 1984. This case falls under Hill v Hill (1959) 1 All ER 281 if it is to be upheld at all. In view of the statutory prohibition, the most that the parties could achieve was a state where they intended to marry when free to do so. It would not be right to expect too formal a situation of ostensible marriage. But if it is clear that there was an intention, to marry later, and some transaction took place, illustrating that the parties had put that intention into practice, then Hill v Hill may assist to allow the court to presume a marriage. The intention to marry when free would no doubt be indicated by such evidence of cohabitation as man and wife even though adulterous and the birth of children. The further transaction may well be the exchange of bride price and the acceptance of the union by the families of the parties. But these illustrations are not intended to be exhaustive. A short word about Chesire v Chesire may be appropriate as it was referred to below. (HCCC 408 of 1982). It was not a final decision; but one given during the course of an injunction application. Hill v Hill was

relied upon to show that while section 37 of the Marriage Act would operate pending the continuance of a monogamous marriage, yet the adulterous association might be taken into account, when considering the presumption to be applied to an improperly carried out marriage ceremony, when the parties were free to marry. It was a decision, moreover, following the decision of Miller, J (as he then was), in Hinga v Hinga HCCC 12 of 1976, that no church marriage to a third party ought to be allowed to take place, until a possible customary marriage had been adjudicated upon. Therefore the proposed marriage of Mr Chesire was deferred until the marriage in dispute had been litigated upon.

The simple questions to be asked now are whether the parties continued to cohabit and took part in any transaction after the defendant became free to marry, so that the learned judge was right to presume a marriage. To answer these questions there is doubt whether the decree absolute was ever pronounced, which would formally end the marriage of the defendant to Mr Vermoor. (Fender v Mildmay) supra. But supposing that this court can rely upon the decree absolute as having been granted in May 1979, then the reasoning of the learned judge is unsound, even if cohabitation continued until at least March, 1979. He considered that the defendant was free to marry after the decree nisi granted on February 6, 1979. As Emmanuel had been conceived in February or March 1979, in order to be born on January 1, 1980, cohabitation continued, after the marriage to Mr Vermoor had ended. Unfortunately the marriage continues until the final decree and indeed while an appeal is pending. Acts before May were therefore not available for the learned judge's purpose. After May 1979 nothing can be especially pointed out to show that cohabitation continued; indeed it seems that the defendant felt frustrated by the plaintiff and his new woman. Therefore she resolved to call the family elders together. The family meeting of June 12, 1979 took place as a result, and instead of there being some further progress putting the alleged intention to marry into force, the plaintiff refused. But there was no clean break. The elders refused to contemplate one and left the parties to reconcile their differences. Unfortunately they could not, and the parties drifted into the troubles complained of in the plaint. There was no transaction or agreement after May when the defendant might be presumed to be free. That being so, the effect of the adulterous association, and acceptance by the family of the birth of the children Thomas, Kwamboka and Emmanuel as springing from this association which was expected to turn into marriage by the family of the plaintiff, came to nothing. It is certain that if the learned judge had considered that the decree absolute was the vital step freeing the defendant, he would have had that step proved, if it could indeed be proved.

In these circumstances, it cannot be said that there was a customary marriage by elopement after the defendant was free to marry.

It follows then that the appeal must be allowed on the first issue, I would grant the plaintiff his declaration that he was not married to the defendant, although this has a sad effect upon the children.

Turning then to the next issues; even if the defendant was not married to the plaintiff, nevertheless the children were the children of these parties. Consequently, there were relationships which had to be considered and provided for. The High Court did not make any finding of facts or come to any conclusions on the further claims of the plaintiff. Should this court then remit the record to the High Court to do so? The answer must be sought from an inquiry whether or not the High Court gave sufficient directions upon the evidence so that this court can decide for itself. In general the learned judge preferred the evidence of the defendant to the plaintiff.

Mr Muthoga was at pains to show that the learned judge was wrong to have trusted the defendant's word in preference to the plaintiff. Two salient issues were the defendant's attitude to her marriage to Mr Vermoor, and the judge's finding that the parties lived together as husband and wife.

On the first issue, it is quite clear that the defendant had been forced into a false position relating to her marriage with Mr Vermoor. She had to admit that she was prepared to lie to extricate herself from her difficult position. But she was not caught lying in court. She explained the story about her marriage to Mr Vermoor fully. Briefly, the defendant became pregnant by what she calls an accident. She was Principal of Karen College. She had discovered that she could not hold her position unless she married the father of the child. Mr Vermoor gallantly assisted her. This was before the association with the plaintiff and does not involve him. The marriage as the defendant explained was a sham marriage. There was no heart in it.

It was a marriage of convenience, since neither party was to move from his or her country to that of the other. To accept that explanation seems from the record at least to have been quite understandable. Of course it is true, that the defendant's position is one which should be considered with care in any event. But I can well understand the learned judge taking the view that the defendant had made a full statement about her difficulties.

Mr Muthoga also criticized the defence for raising the issue of nullity, when that issue had not first been taken before the resident magistrate. I have referred to this matter already. I do not think that it affects the issue of credibility. It was a legal argument.

The learned judge found that the plaintiff and defendant had lived together as man and wife from 1974 to 1979. Mr Muthoga listed some attributes which he expected to find in the association if that were true. As I have said, no finding on this point in relation to the presumption of marriage is necessary at this stage, but it is very clear from the evidence that the position was closely associated with three children born to them, for whom they were responsible. It was admitted that the plaintiff was their father. I should say from the evidence that the defendant was more than just a mistress to the plaintiff. It was a serious association which led other people around them to believe that the parties would eventually marry. If this had not been the position, the plaintiff's father would not have written as he did on November 30, 1978:

"My dear Daughter-in-law Mary Moraa, Lots of greetings from your father and mother-in-law. We are alright except your mother-in-law was sick but now she is alright.

Give best regards to my grand-children. My (people) children I have heard that you have a small problem in a form of a quarrel. You just ignore it and forget it. Don't worry about anything. My children even if you quarrel don't dislike one another. Continue to love one another as you were before.

That is all I have to say. May the almighty God look after all of you till we meet.

Your father

Matanu Obiri."

On March 1, 1979 Simeon Mauchi, the eldest son wrote as follows:

"My dear Sister-in-law Mary Moraa, Lots of greetings from me and from all the members of our family. They have sent their greetings to you and to the children.

Here at home we are quite alright except for a few colds here and there. Father said thank you for what you sent him. I explained to father all that has been happening with Machani. He has assured you that whatever the case you are his, you are his daughter-in-law. All the members of the family have said you are theirs and you will always belong to the family. Whatever the outcome of your quarrel will be. So don't worry about anything else in connection with the problems you are undergoing with Machani. All the members of the family get very concerned and disturbed when they hear about your problems.

Your brother-in-law

Simeon Mauchi."

The plaintiff described their reactions as over-enthusiastic. But despite that, it is unlikely that the plaintiff's father would react over-enthusiastically against his son's interest. Moreover this was the attitude of the family meeting on June 12, 1979. The parties were to find ways of reconciling their differences. It was even suggested that the plaintiff might have two wives at customary law. There is no escape from the finding that the parties had laid the foundation of a family, which they would legalise later, and while the learned judge may have been outspoken in his criticism of the plaintiff, the underlying facts found were based on the preponderance of evidence before the court. I would also agree that the learned judge's suggestion that the reasons for the plaintiff wishing to terminate the intended marriage,

namely the new girl friend and Thomas' handicap, did not reflect well on the plaintiff's moral character. I would say that the evidence showed that the plaintiff was shirking his responsibilities to Thomas. Thomas will always need the help of both his parents, as he is handicapped. On the whole I would say that the learned judge was entitled to prefer the evidence of the defendant.

There is no doubt that both parties needed the Buru Buru house. The lease of the Woodley house was expiring and the plaintiff had to find some other place. The defendant had been thinking of acquiring a better job and giving up her position at Karen. The Buru Buru house was more suitable for getting Thomas to Jacaranda school. It might well have formed a central feature of their lives. There is no doubt that the defendant and the children lived there from time to time with the plaintiff. The defendant did not in the end take up the new post and retained her place at Karen. The defendant and the children continued at the Buru Buru house on and off until July when the plaintiff says that he found that the defendant had moved back to her Karen house. There had been no clear break until this time. In July, the plaintiff decided to take the remaining child and the belongings of the defendant and children back to Karen house. He unloaded their belongings there. Of course there was trouble. The parties had already been to their lawyers. They should have arranged a separation not just a demand that the defendant and children should leave. There are two stories as to what happened.

The plaintiff said that he had been trying to move the defendant and the children away since January 1979 on and off. But they stayed under one pretext or another even after the family meeting. On June 13, 1979 he had demanded that the defendant should leave the plaintiff's house. On July 26, 1979, he found that the defendant had taken a child that was ill to her Karen house. So he took the other child there. He had hired a pick-up to carry about four cartons of things. As the defendant did not open her door for him, he unloaded the things on the verandah. He tried to give her the other child he had with him. He found a commotion starting when people prevented the pick-up he had hired from leaving. He saw the defendant walking towards him from the back door. He put the other child from the car on the verandah, and told the defendant that if there was anything she wanted she could sue him. The plaintiff entered his car, but he was prevented by people with stones who threatened him. He had to stop, one person snatched keys from the ignition lock, broke off the ignition key and left the plaintiff with the other bunch of keys. The plaintiff could not get the ignition key back. The plaintiff was saved by the men in the pick-up and in the end they got away, and reported to the police. The police were unable to contact the defendant at once. So the plaintiff returned home. There he found the two children and items he had delivered, but his car had gone. In the past, the parties had used each other's cars. In the brief case, was the plaintiff's personal documents. There were spare keys for a friend's car, airline miscellaneous charges orders in the form of the ticket of the same person, travellers cheques, land certificate and office keys. He got his car back after 10 days. It was packed at a place in 3rd lane in Karen. He had no ignition keys. The plaintiff's brother, who works at Karen gave back two sets of keys in early August. The other things he got back in September from the police station. But he did not get back his ignition key. He had to replace the ignition lock for Kshs 350.

Anew set of airline miscellaneous charges order was issued; and the documentation fees were Kshs 280. A duplicate land certificate cost Kshs 185.

A duplicate key for his friend's car cost Kshs 90. Because the children had been with the plaintiff he had additional expenses of Kshs 350 for an ayah and fullboard for one month. There is no evidence as to what happened in February 1980, so that particulars (c) and (d) were not proved. The defendant's case is that the plaintiff did not suffer damages. When the plaintiff returned the goods of the defendant and of the children, the defendant got into the plaintiff's car with the children and drove back to Buru Buru. No one came for a longtime. She left the children and returned to Karen. The plaintiff had reported to the police. Had he not done so, he would have got everything back, his belongings and keys. The police investigated and of course they left the car with the defendant. There was no criminal intent. Then the defendant sent the car to the neighbour. The plaintiff again reported to the police. The college driver showed the police where the car was. The car was returned to the defendant and she drove it back to the plaintiff. They went back to Buru Buru later and the plaintiff continued to telephone and visit the defendant; they continued to meet, talk and think. Emmanuel was born on January 1, 1980.

There is no great divergence. It is clear that the plaintiff attempted to force a separation on the defendant and get rid of the children, when the separation had not even been agreed by the family of the plaintiff. When a man has conducted himself as the plaintiff did, and led a woman to expect marriage, and having had three children with that woman, and having lived together with her and shared expenses, over some five years, that man cannot change his mind and force a separation. That must be accomplished by a settlement. The man's children always have a right to go to him, and while they are of tender years to be maintained by him, as well as by their mother. To whom shall the young children otherwise look? Should the plaintiff die intestate it would seem that those children of his by the defendant would have a right to inherit under Part V of the Law of Succession Act (cap 160).

The events of July 26, 1979 were the result of forcing a separation. The plaintiff got as good as he gave. Too bad. The responsibility lies on him as much as on the defendant. The plaintiff should be responsible for the cost as part of the break up of his cohabitation with the defendant. The plaintiff asks for an order for damages for what he paid for the children in board and ayah, charges. I would not countenance any such claim. It may be that no affiliation proceedings can be taken against him. But who shall the plaintiff sue for what he has spent on his own children? He has a moral duty towards his children which he discharged, in part at least, and that part is irrecoverable.

Similarly the plaintiff asks for an injunction directing the defendant to remove the children. It is the plaintiff's duty to look after his own children.

Neither would I grant a permanent injunction restricting the defendant from entering or remaining upon the plaintiff's residence. Whether the plaintiff likes it or not, he and the defendant are the parents of these children. They are both responsible for their welfare. Instead the plaintiff has withdrawn support for Thomas at Jacaranda School. Is the plaintiff shirking his responsibility again? After this time, it is clear that if the plaintiff acts sensibly and makes a suitable settlement he will get the defendant's co-operation. In principle, I would not grant the plaintiff any discretionary remedy which will help him to evade his responsibilities. For these reasons I would allow the appeal in part. I would set aside the judgment of the High Court, substituting therefore the following judgment:

i) a declaration in terms of prayer (d) of the plaint, declaring that the defendant is not the wife of the plaintiff;

ii) all other claims shall be dismissed, and ordering each party to bear his or her own costs of the trial. Each party will bear his or her own costs of this appeal.

Gachuhi Ag JA. The facts of this case are set out in the judgment of Platt Ag judge of appeal which I had the advantage of reading in draft and agree with it. However I would add that the onset of the relationship between the parties was merely casual friendship. The appellant was buying dresses for the respondent outside the country. As their relation continued, children were born. Respondent states that she informed the appellant that she had gone through a sham marriage with a Mr Vermoor and could not disclose the father of the children in their birth certificates till such time they were sure or have something to show that the Zambian man will not take him to court or have something to show that there was no marriage. It was after that that they would register the children under his name. Thereafter the respondent started taking step for dissolution of her marriage with Alexander Vermoor. Divorce proceedings were filed on February 11, 1977 as Divorce Cause No 6 of 1977. It does not clearly come out when they started living together as husband and wife.

From this evidence respondent was aware that she was under disability to enter into any form of marriage until the previous marriage was dissolved. In her defence she claims to have married the appellant under Kisii customary law and by common law presumption of marriage by virtue of long cohabitation since 1974.

On the presumption of marriage the court has to presume the existence of marriage where there has been a ceremony of any form followed by cohabitation Hill v Hill (1959) 1 A11 ER 281 or under the customary law. The respondent has to show that their marriage fits in any of the two. The common law

marriage by virtue of long cohabitation is not recognized here. Mary Njoki v John Kinyanjui Mutheru and Others CA No 71 of 1984 (unreported).

The respondent could not go through any form of marriage ceremony with the appellant under either the Marriage Act (cap 150) or African Christian Marriages and Divorce Act (cap 151) due to her marriage with Vermoor. She knew of this. She was under disability by virtue of section 37 of the Marriage Act cap 150. Doubts have already been expressed whether that marriage to Vermoor has been dissolved.

Mr Kamau for the respondent submits that a party could enter into a marriage under the Christian Marriages and Divorce Act (cap 151) and walk out of it. In fact the court of Review case No 11 of Omwoyo Mairura v Bosire Angida does not assist the respondent's claim. The case related to the claim of children. No act of a party to a marriage or a decision of the court can override the provisions of the legislation.

Presumption of marriage under the customary law has been considered and accepted by courts. In most cases there has been steps taken to comply with the customary requirement though not completed. These cases are mainly on successions. Examples are Hotensiah Wanjiku Yawe v Public Trustee CA No 13 of 1976 (unreported) and Duncan Gachiani Ngara v Joseph Gatengi and Others HCCC 1460 of 1977 (unreported) and others are under this category. The evidence before the court does not indicate any step having been taken toward the customary marriage, no payment of any gift or marriage consideration (Chiombe cho oboko).

Under the Kisii and Gusii customary law to which both parties belong, a woman may not enter into a subsequent marriage during the continuance of a prior marriage. See Restatement of African Law Kenya Volume 1 by Eugene Cotran at page 60.

The institution of marriage is a noble voluntary association and cannot be imposed on any party. Customary marriage by elopement is commonly to be where there is no consent by parents. When elopement takes place it is immediately formalized by performance of the customary requirement either in full or in part. There can never be any form of marriage between the appellant and the respondent during the subsistence of the marriage between the respondent and Vermoor.

Where there is no marriage but parties are living together in an association that could be seen as that of a husband and wife they are living so in a state of concubinage. The parties have moral obligation to each other. It is unfortunate that children are begotten from such association but no legal obligation that can be enforced against the father on behalf of these children in the absence of any legislation on the Affiliation Act having been repealed. It is only fair to state here that those who indulge in such adulterous association, without formalizing their marriages are doing so, at their own risks. The women folk will in the end be the sufferers when they are left with children to care for. Even on the death of a man, unless there has been a will, they may only be considered under the Succession Act (cap 160) for the purposes of maintenance.

In my view, this appeal should be allowed. I agree with the orders proposed by Platt Ag

Judge of Appeal.

Kneller JA.

I agree with the judgments of Platt Ag JA and Gachuhi Ag JA and do not wish to add a word save to say that the orders of the court are those proposed by Platt Ag JA.

October 14, 1985

Kneller, Platt & Gachuhi Ag JJA