



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AKIWUMI & SHAH, J.J.A & BOSIRE, AG. J.A.)

CIVIL APPEAL NO. 209 OF 1996

BETWEEN

EDWIN OTIENO OMBAJO APPELLANT

AND

MARTIN ODERA OKUMU RESPONDENT

(An appeal from the Judgment/Decree of the High Court of
Kenya (Justice Khamoni) dated 6th August, 1996

in

H.C.C.C. No.947 of 1996)

REASONS FOR JUDGMENT

On 4th November, 1996, we allowed the appellant's appeal against the decision of the superior court (Khamoni., J) granting the right to bury his deceased daughter, Florence Grace Atieno Odera, to the respondent, Martin Odera Okumu, and reserved the reasons thereof, which we now give.

In his appeal the appellant, Edwin Otieno Ombajo, challenged the superior court's decision, principally, on the ground that it did not consider and take into account, sufficiently or at all, the relevant law regarding burial matters, to wit customary law as it was required to do by the provisions of S.3 (2) of the Judicature Act, Cap 8 Laws of Kenya. His counsel, Mr Nowrojee, argued that the section confers discretionary jurisdiction on the court to apply customary law so as to ensure that substantial justice is done between the parties. That would only be possible, he argued, if the court takes into account the peculiar circumstances of each case and to depart from the law if found not to accord with the present circumstances. In his view the learned trial Judge in this matter failed to appreciate the special discretion under the above section, with the result that he overlooked numerous and important matters relevant to the exercise of that jurisdiction. He consequently reached a wrong decision.

On the other hand, the respondent, who is an advocate of the High Court of Kenya, argued that under Luo customary law once a man has fulfilled all the necessary conditions for a valid Luo customary law marriage, he has an absolute right to bury the body of his wife. In his view he had properly married the deceased in accordance with both Luo customary law and the Marriage Act, and should therefore, be permitted to bury her body.

The facts on which this appeal is based are not so much in dispute. The respondent and the deceased went through a ceremony of marriage at the office of the Registrar of Marriages, at Nairobi, on 8th January, 1988. Thereafter, the two cohabited as husband and wife at Nairobi. Their marriage was not, however, smooth. The deceased often complained to her father that the respondent and his family often insulted her and that the respondent was neither providing her and the children of their marriage with necessaries of life, nor was he interested in their general welfare. When she thought she could not bear it any more, the deceased ceased cohabitation, on 29th November 1991, left the matrimonial home and went to live with her father at Langata - Jambo Estate. She lived there until 30th March, 1996, when, due to illness, she succumbed to death. Thereafter, a dispute arose as to who, between the appellant as the father, and the respondent as the husband, had the right to bury the deceased. We have no evidence that before suit was filed there were attempts made to resolve the dispute out of court.

The respondent is the one who filed suit. The suit was commenced by a plaint in which the respondent claimed two reliefs. Firstly, an interim order of injunction to restrain the appellant by himself, his servants or agents from collecting the body of the deceased from the private wing of City Mortuary, where it was lying, for burial, until the final determination of the suit. Secondly, that he be permitted to collect the body of the deceased for burial at Kandaria village, East Asembo Location. Filed with the plaint was an application by Chamber Summons under O.XXXIX rule 1(a) and 2(1) Civil Procedure Rules, and S.3A Civil Procedure Act, for the same reliefs as in the plaint. We notice from the record that the application was placed before Mbitio, J., on the same day it was filed for orders. He granted, ex parte, orders in terms of the application, "pending inter partes, hearing of the application." We observe that the learned Judge did not consider the effect of his orders, namely that he was granting final orders, on an ex-parte application, without considering the provision in order XXXIX rule 3(2) of Civil Procedure Rules.

The application was never heard. The order made by Mbitio, J., remains in situ, except that subsequently Aluoch J., granted stay of the order, and directed that the suit, not the application, proceed to hearing notwithstanding that all the preliminary procedures to a hearing had not been complied with or dispensed with. To accord with our decision in this matter we set aside that order. The suit was eventually heard by Khamoni, J., who then pronounced the judgment against which this appeal relates.

The respondent's case in the superior court, as pleaded and presented, was simple. The deceased was his wife having married her under the Marriage Act and later fulfilled all the essential preconditions for a valid Luo customary law marriage, one of which is the payment of dowry. It was his case that he paid dowry on 13th February, 1996, to the deceased's father's family, which was duly accepted. Consequently, under Luo customary law, he was entitled to and had the absolute right to bury the deceased in his home. Also, that although as at the date of her death, the deceased was judicially separated from him, the fact that the marriage between them had not been dissolved, did not divest him of that right. He called witnesses to testify in that regard.

The appellant, on the other hand, while admitting that the respondent had married his deceased daughter under The Marriage Act, denied any dowry was paid, either to him personally or to his family, as the respondent had alleged. His case was that the respondent neither loved nor cared for his daughter during her lifetime. He adduced evidence to show that before cohabitation ceased the deceased often went to him for financial assistance because the respondent was not providing for her and their two daughters. Also, to meet expenses for her masters programme in a local university.

The appellant also testified, and produced documentary evidence in support, that because the respondent did not much care for the deceased and their children, she was constrained to apply to court for and obtained, ex parte, an order of judicial separation and maintenance under the Subordinate Courts (Separation and Maintenance) Act, Cap 153 Laws of Kenya, the respondent having failed to defend the cause despite the fact that he had been duly served with all necessary processes. By that order, the respondent was required to pay to the deceased, for her maintenance and that of the children of the marriage, a monthly sum of Kshs.5000/=, which he rarely paid, and whenever he did so, not the full amount. Cheques he sometimes made to the deceased in that regard were dishonoured either for want of funds or because the respondent stopped payment.

The appellant, also, testified that the respondent's attitude towards the deceased prior to and after cohabitation had ceased, was negative. He did not care to take her to hospital whenever she was ill, deliberately failed to visit her in hospital whenever she was admitted there and never at all, met the medical bills incurred by her both as an inpatient and as an out-patient for the whole period after cohabitation had ceased, a period of about five years, and even after her death, although the appellant notified him of it, the respondent was slow to take any steps to plan for the burial of her body. We were told from the bar that as at the date of death Kshs.164,900/= was outstanding from the respondent on maintenance. Also, that the appellant had 4 incurred well over Kshs.438,000/= in medical bills on the deceased and embalment expenses. The respondent had not by then agreed to meet any part of those expenses.

It was the appellant's case, therefore, that the respondent having demonstrated that he did not have anything to do with the deceased during her lifetime, he had considered his marriage to her as at an end, and his claim for her body cannot, therefore, be justified, either under law or custom, as would entitle him to be permitted to bury her.

In addition the appellant relied on what he said was the deceased's last will and testament in which she has expressed her wish to be buried either at the appellant's home, failing which she should be buried at Langata cemetery, in Nairobi. A copy of the alleged will was tendered in evidence. By then, and even on the date this appeal came for a hearing no grant of probate had been made. That being the case, we do not wish to express any opinion on its effect in this matter.

The trial Judge after a lengthy rehash of the evidence rejected the appellant's case which was to the effect that whatever marriage relationship that may have existed between the respondent and the deceased, it was, in effect, dissolved by the conduct of the parties, both general and specific, which under Luo custom are construed as terminating a marriage relationship. He then proceeded to hold, inter alia, that such conduct would not validly dissolve a statutory marriage which would only be dissolved as provided under the Matrimonial Causes Act, Cap 152 Laws of Kenya. Further, that as at the 30th March, 1996, when the deceased died, the marriage between her and the respondent was still in existence as entitled the latter, as of right, to bury the former. He did not think that the deceased's wishes expressed in her alleged will were absolute. The learned Judge then proceeded to order that the respondent be permitted to collect the deceased's body from the city mortuary for burial at Kandaria village, East Gem Location, Siaya District. The effect of that was the dismissal of the appellant's prayer in his statement of defence, that the body of his deceased daughter be handed over to the executors of her will for burial in accordance with her wishes, expressed therein. This appeal was thereby provoked.

The memorandum of appeal has several grounds of appeal. However, counsel for the appellant Messrs. Nowrojee and Anyango Ogutu argued them en bloc. Having earlier set out the gist of their submissions and those of the respondent, we do not consider it desirable to rehash them here. Suffice it to state that the central question, on which determination of this appeal depends is whether or not a right under customary law may be impugned by unbecoming conduct on the part of the person on whom it rests.

The starting point in considering the issue is S.3 (2) of The Judicature Act, Cap 8 Laws of Kenya, which provides as follows:

"The High Court, the Court of Appeal, and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

The authors of the book Public Law and Political Change in Kenya, Y.P. Ghai and J.P.W.B. McAuslan, have commented on the requirement of that sub-section that courts shall be guided by African Customary Law.

Their view is expressed as follows:

"The courts already have a discretion to decline to be guided by customary law if it is repugnant to justice or morality but this new discretion might permit a court to depart from customary law on the grounds that it considered the particular rule old fashioned or out of date."

Mr Nowrojee cited the above passage and, also, a passage from the book *New Essays in African Law*, by prof. Allot at P.132, in support of his submission that the trial Judge should have considered certain factors and circumstances in this matter which, in his view, would probably have affected his discretion in the application of the Luo customary law on the right of the respondent to bury the deceased. However, in the precedent setting case of *Virginia Wamboi Otieno .v. Ochieng Ougo and Omolo Siranga*, [1982 - 88]1KAR 1049, contrary to what Mr Nowrojee stated, this court, held that, subject to the qualifications stated in S.3(2) above, a court may only not apply customary law if there are circumstances pertaining to a case to which African Customary Law does not apply, in which event then the court should feel free to apply common or statutory law. The court stated as follows:

"The word 'guided' which is not an altogether easy term to understand in our judgment means led by something and so courts must have in mind as the guiding light, as the principal law, African Customary Law. If, however, there are circumstances pertaining to a case to which African Customary Law does not apply, a court should feel free to apply common or statutory law. The court having been guided by African Customary law and having been satisfied about the other elements of the sub-section is mandated:-

'to decide such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.' That is a pointer to the necessity to be 'guided' substantially by African Customary Law."

We share the same view. If African Customary Law is not caught up by the qualifications under S.3 (2), above, then it must be given effect by the courts and must be applied in deciding cases before it but according to "substantial justice." We are, also, of the view that the manner in which S.3(2), of The Judicature Act, is worded gives flexibility to the administration of justice, as courts are thus empowered to weigh all the circumstances of a case before coming to a decision, without whittling down the place of customary law in the administration of justice in Kenya. So the discretion the courts have is not whether to apply customary law or not, but the discretion is to consider whether to enforce a right, which under that law vests in a particular person, or not.

The right to bury the body of a married woman under Luo Customary Law, ordinarily vests in her husband. The right is not, however, absolute. We say so advisedly. Cotran, in his book, *Restatement of African Law Vol. 1*, at P.179, sets out grounds upon which divorce may be granted, under Luo Customary Law. One of those grounds is wilful desertion. The term desertion as therein used must mean desertion in the legal sense. The other, among those, is a failure by the husband to maintain his wife and children. Both grounds, above, were established against the respondent in this matter but the trial Judge did not consider whether or not they were sufficient to divest the respondent of the right to bury the deceased.

If, in this matter, the respondent did not lay claim to the body of the deceased, the question that we pose is, what would have happened to that body. Certainly, the deceased's father, and in his absence her close relatives, would have taken steps to have it buried.

Odhiambo Gor Juma (P.W.6) who described himself as a publisher and a researcher on Luo Customary Law, testified in the court below, that there are instances when other people may bury the body of a deceased Luo woman during the lifetime of her husband. Although he did not enumerate such instances, we think that those will depend on the peculiar circumstances of each case.

We, therefore, agree with Mr Nowrojee, that the trial court had a discretion under S.3(2), above, to consider whether, in the circumstances of this case, a person other than the respondent could bury the deceased.

The trial Judge having confined his decision, basically, on the issue of marriage misdirected himself on

the question of the jurisdiction of the court under S.3(2), above.

We wish to observe here that customary law, like all other laws, is dynamic. Because it is not codified, its application is left to the good sense of the Judge or Judges who are called upon to apply it. That is why, as we stated earlier, S.3(2), above, is worded the way it is to allow for the consideration of individual circumstances of each case. So the conduct of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here. The matters the appellant raised against the respondent should not have been viewed as intended to show that no marriage existed between the deceased and the respondent, but to show that, although he was the deceased's husband, he was undeserving to bury her.

The facts of this matter are clear that the respondent appears to have lost all interest in the deceased and their two children of the marriage as soon as the deceased left the matrimonial home. Although the respondent stated in the superior court that the deceased used to visit him at his chambers, the surrounding circumstances suggest otherwise. If the deceased indeed, used to visit the respondent as he alleged, and he used to give her some money, it is not clear why the respondent was not regularly remitting to her the maintenance money. Nor is it clear to us why he was not meeting her medical bills and those of the children. Evidence was adduced in the superior court to the effect that the respondent was so hostile to the deceased and the children of their marriage that sometime in 1992, when the deceased wrote to him to request for money for the medical expenses of the children, he refused to pay arguing that the children were not sick when she left the matrimonial home with them. That is how callous the respondent was to the plight of the deceased and the children.

It is, also, noteworthy that no specific efforts were made by the respondent to urge the deceased to resume cohabitation.

Luo customary law recognizes reconciliation hence the customary cleansing ritual called "Manyasi". The superior court was told that the ritual is normally performed during the lifetime of both spouses who are separated to facilitate a reconciliation. The deceased ceased cohabitation for a reason which she gave in the separation and maintenance cause she filed against the respondent. The respondent having not challenged the deceased's complaint in that cause is in itself conduct reminiscent of a person who did not care, at all, which way the decision would go. He depicted himself as a person who had no feelings for the deceased. That perhaps will explain why as claimed by him, he never paid dowry until a month or so before the deceased died. The circumstances which suddenly spurred the respondent to pay the dowry were not stated, and we reckon the respondent may have had some premonition that the deceased would not live long and the payment of dowry would entitle him to certain rights or it would obviate certain dangers. Otherwise, there is no telling why the respondent behaved the way he did when previously he was shirking all his obligations to both the deceased and the children of their marriage.

The relationship between the respondent and the deceased before the latter died had degenerated to such an extent that there was no apparent possibility of the same being revived. The deceased had petitioned for divorce. She is said to have made a will directing that upon death, she should be buried by the executors of her will at her father's home or at Langata Cemetery. Her conduct suggested that she had lost all hope in reconciliation. She considered her marriage with the respondent as having come to an end and out of the question. Her behaviour cannot be explained in any other way. That coupled with the respondent's behaviour should have constrained the trial Judge to look beyond the fact of marriage.

It is for the foregoing reasons that we allowed the appellant's appeal.

Dated and delivered at Nairobi this 29th day of November 1996.

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this a true copy of the original

DEPUTY REGISTRAR