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ESSENTIALS OF AKAMBA CUSTOMARY MARRIAGE

By Kenya Law

Customary Law – Akamba customary law – Akamba customary marriages – existence of Akamba customary marriages – when was Akamba customary law marriages deemed to be in existence – ntheo ceremony - whether a woman whose ntheo had not been paid could receive ntheo for her daughter

Jurisdiction - jurisdiction of Magistrates Court - burial disputes - whether the magistrate Courts had the jurisdiction to hear and determine burial disputes - Magistrate's Court Act No. 26 of 2015 Section 7(3)(b)

Munyao Ndolo & 3 others v Mary Nduku Mutisya [2018] eKLR
HCCA No 134 of 2017
High Court at Makueni
C Kariuki, J
July 31, 2018
Reported by Safiya Awil Ibrahim

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Brief facts:

The Respondent instituted a suit in the Trial Court against the Appellants seeking a declaration that she was the right person to bury the Deceased, by virtue of being his widow. The Trial Court allowed the Suit and granted the orders for the deceased to be buried by the Respondent.

Aggrieved by the Trial Court's decision the Appellants lodged an appeal in the instant Court for exhumation of the body as the Respondent was not properly married under customary law and as such, she had lost her right to bury the deceased.

Issues:

1. When was Akamba customary law marriages deemed to be in existence?
2. Whether a woman whose *ntheo* had not been paid could receive *ntheo* for her daughter.
3. Whether the magistrate Courts had the jurisdiction to hear and determine burial disputes.

Relevant Provisions of the Law:

Judicature Act

Section 3(2)

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.

Magistrate's Court Act No. 26 of 2015

Section 7(3)(b)

A Magistrate's Court shall have jurisdiction in proceedings of a Civil nature concerning any of the following matters under African Customary Laws;

a) Land....

b) Marriage, divorce, maintenance & dowry

c) Seduction...



Held:

1. The duty of a first appellate court was to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses
2. The most essential step in a Akamba customary marriage was the *ntheo*. Once the *ntheo* ceremony had been performed, there existed a valid Akamba customary marriage. Where *ntheo* had been performed and one of the parties to the marriage died, the right to bury the deceased was with the surviving spouse. In case of a polygamous set up and the husband died, he was to be buried at the home of the first wife.
3. The evidence on record showed that the *ntheo* ceremony had been pre-planned with the consent of both families and that on the day of the ceremony, the important ingredients to wit, three goats were available.
4. The Appellants contended that the actual *ntheo* ceremony did not happen. DW2 and DW4 were present on the day of the *ntheo* but they gave conflicting accounts of why the *ntheo* ceremony did not happen. DW2 was blowing hot and cold in his evidence. On one hand, he was categorical that the ceremony actually happened. On the other hand, he said that it did not happen.
5. It was imperative for their accounts to tally as the Court was not in the business of selective re-evaluation of evidence. DW2 proceeded to say that they did not even drink water, hence trying to paint an acrimonious picture of the situation and then concluded by saying that they were given a place to sleep. That was intriguing because that was not how normal human beings behaved when confronted by unfriendly situations. If the Appellants evidence was anything to go by, the reception at the Respondent's home

was anything but friendly. However, the hostility notwithstanding, they were offered a place to sleep and they accepted.

6. When talking about the essentials of a valid marriage, the consent required was that of the bride. There were situations involving minors where the parent's consent was required, however, that was not what the Court was dealing with. In the instant case, the Respondent's consent was not in issue.
7. There was evidence to show that PW5, the Respondent's daughter had been married under the Kamba customary law and *ntheo* had been taken to her parent's home. DW1 and DW4 lamented about not being invited to the said marriage ceremony which clearly indicated that it was within their knowledge. There was nothing to show that they raised any objection with regard to the marriage. If a woman's *ntheo* had not been paid, she could not receive *ntheo* for her daughter. That position was further buttressed by the fact that some goats were returned to the Appellants, albeit by the Respondent's father. If no goats had been taken in the first place, there would have been none to return. From the evidence on record, the burden of proof with regard to the *ntheo* ceremony was discharged.
8. The evidence on record showed that indeed the land in which the Deceased was buried was purchased through the efforts of the Respondent's brother and PW5. It was also clear from the record that the Deceased was not a man of means. From DW4's evidence, it was discernible that the Deceased collaborated with the Respondent and stuck with her throughout the tribulations. It was unfathomable, that a widow should be denied the rights to bury her husband on the land where they had built a home just because the land was not bought with the husband's resources. If a couple decided to stay together and live their lives despite financial challenges, there was no reason why anyone else should have an opinion about their affairs.
9. There was no requirement under Kamba customary law that barred a widow from burying her husband on a land which he did not purchase. If indeed there was such a requirement, it was repugnant to justice and morality hence not applicable. In reaching that conclusion, the Court was guided by the provisions of section 3(2) of the Judicature Act.
10. It was very clear that the learned Trial Magistrate had already made a finding that the Respondent and deceased were married under Kamba customary law. The Trial Court was well within its right to give an *obiter dictum*. It had not in any way affected the conclusion that indeed the Respondent and Deceased were married under Kamba customary law.
11. There was no finding in the Trial Court's judgment that the wishes of the Deceased needed to be written. The alleged wishes of the Deceased did not meet the threshold of an oral will. There was no need for a million witnesses but the law prescribed certain requirements which had to be fulfilled before an oral will could be said to exist. In the instant case, there was absolutely no evidence to reach such a conclusion.
12. The case was filed in 2016 after the enactment of the Magistrate's Court Act hence putting the matter squarely within the jurisdiction of Magistrates Courts.
13. Having looked at the statements written by the Appellants' witnesses *vis a vis* the evidence on record, most of them adopted their witness statements and proceeded to testify further which essentially meant that they added information that was not in their statements. There was no indication of bias on record. The Court was at a loss on how

it was expected to verify the allegation that what was said in the Trial Court was not what was recorded.

Appeal dismissed

Consent Order recorded in settlement of the matter prevailed.

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