**Kamau v Wanja and another**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 17 December 1973

**Case Number:** 8/1973 (75/74)

**Before:** Kneller J

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*[1] Customary Law – Kikuyu custom erasing marriage with deceased – Whether repugnant to justice*

*and morality – Judicature Act* (*Cap.* 8) *s.* 3 (2) (*K.*)*.*

**JUDGMENT**

**Kneller J:** The appellant was the defendant in an action in the court of the resident magistrate at Nairobi brought by two minors who are now the respondents sueing by their next friend, the mother. This lady married the son of the appellant or at any rate lived with him and bore him two children. One was born before this son died and the other was born six months later. The plaint was filed on 22 December and in it each young plaintiff claimed from the defendant Shs. 804/95. These sums were kept in separate accounts, in the separate names of the plaintiffs in the Commercial Bank of Africa, according to the plaint, in Wabera Street, Nairobi. It was alleged that the appellant, without the consent of the plaintiff or their mother, took out these sums and put them in another account in his name in the same bank on 24 November 1971. The appellant filed a defence, claiming that he was entitled to the balance of those two accounts under Kikuyu customary law because the mother had decided to leave his home and his family and return to the care of her father and his house together with the children. Moreover, the appellant had been handed back the consideration for the marriage of the mother to his son who had died and he had paid her father compensation for her pregnancy. The elders who ordered this had been paid their fees. The magistrate recorded evidence from the mother, the manager of the Standard Bank, Westlands Branch, Nairobi, the Chief Accountant of the Commercial Bank of Africa and the Executive Officer in charge of the Kiambu District Registry which would be in the office of the District Commissioner there. He also took the evidence of the appellant and an office messenger, who was related to the mother, and a copy typist. The evidence from all these revealed that the infants were the fruit of the union between the mother and Patrick, the son of the appellant. When the son died there was a fairly large sum of money left in his account at the Standard Bank. It was about Shs. 4,452/-. The manager of the Standard Bank paid it over to the District Commissioner at Kiambu. The son left no will. The District Commissioner distributed it to the mother and the two children in the following proportion: 60 per cent to mother and 20 per cent to each child. The executive officer says this was according to Kikuyu custom and was agreed upon by the appellant and the mother. The children’s sums were these Shs. 804/95 and these were put in separate accounts in the name of these children, and the mother and the appellant agreed that the appellant was to be the trustee of those sums of money for these children. Later on there was some dispute between the appellant and the mother of the respondents and they fell out with one another. The upshot was that the mother decided to return to her father. The children went with her. Each party says that the other one insisted this was the way the children should go. This was on or about 21 February 1971. The appellant says this was all against his wishes as was the removal of the children and followed allegations by him that the mother had stolen his property. The mother says it was not like this at all. She went away because the appellant’s wife and her brother-in-law and some lady that had been staying with them threatened her and when the mother offered to leave her two children with appellant he told her to take them with her. She has ceased to be a housewife, for the moment, and is training at Kiganjo to be a policewoman. The matter was referred to various elders and the consequence was that on 17 November 1971 the father of the mother agreed with the appellant that he would refund Shs. 1,421/55 which was the value of the cash and other elements of the marriage consideration together with a ram and a further Shs. 110/- to pay off the whole dowry. The appellant had to be given by the father a ram for destroying her house. The appellant was to pay the father of the mother Shs. 730/- together with the four billy-goats worth Shs. 4/- as something called “pregnancy compensation”. The appellant claims that as a consequence of that arrangement the marriage, or marriage to be, or union, or whatever it was, between his son Patrick and the mother of these infants was erased. She chose to go back to her father together with her children and now she cannot look to the appellant or the estate of Patrick again for herself or for her children. The matter is one of Kikuyu customary law. The mother’s argument was that the marriage cannot be erased by agreement after the death of her husband if it subsisted till then and that she and the children are entitled to inherit his residuary estate on his intestacy. Moreover, she points out the appellant agreed to be the trustee of these sums until they came of age which he agreed to them when they did. She harps on the agreement and she harps on the trust. She says she is now plagued by one of the children who refuses to take her contribution to his schooling saying his father must pay for it. She asks the court, “to whom should my son look in future?” She is really arguing in this homely way that the appellant either has misquoted the Kikuyu customary law or it does not apply in these circumstances or, if it does, it is over-ridden by the provisions of statute, namely, those of the Trustee Act (Cap. 167). One further matter of evidence: “How did the father Patrick get this money in his account”? The appellant says he put Shs. 6,000/- in that account as a loan, or he and Patrick did so together. The mother says she frankly does not know how there was this sum in the account. Her husband Patrick was a thief. The account details produced by the Standard Bank do not show Shs. 6,000/- being put in the account at any one time. It begins on 10 March 1969 and ends on 7 March 1970. There are three credits between 10 March and 20 March 1969. The first issue was whether or not there was a marriage between Patrick and the mother according to Kikuyu customary law? The evidence on the balance of probabilities reveals that the whole dowry had not been paid and no final ceremony had taken place. The next issue was what effect the agreement of 17 November 1971 had on the relationship of the mother and the appellant? It is clear on the evidence that, for one reason and another, this lady on the death of Patrick returned to her father’s home and severed her relations with the appellant and his family. The children went with her. The marriage consideration was returned or would be returned. The consequence is that, according to Kikuyu customary law, she cannot look to the appellant or to the estate of Patrick for any help for herself or her children. The third issue was what effect the action of the Kiambu District Commissioner with regard to the residuary estate of Patrick had on all this? On the death of a Kikuyu father all minor children have two co-guardians: first, the mother who feeds them and looks after them; and secondly, a male guardian who is responsible for administering their property until they come of age, paying school fees, paying for matters connected with their health and welfare and generally supervising and advising them. Now the male co-trustee will be the “Muramati” where the widow remains at the home of her dead husband. She has the option of entry into a union with one of his brothers. It will be, however, her father or, if he is dead, his eldest brother, where she returns to the home of her father taking the children with her. When she subsequently re-marries the new husband becomes the male co-guardian. All this would have been so, of course, if the mother had not gone back to her father taking the children with her, or the children gone with her. The consequence is that she will have to tell her children their real father died and she now is responsible for some of these matters and her father, until she remarries, is their male guardian who has to pay for their school fees and deal with all the other matters I have already set out. The next issue was whose money was it in the residuary estate of Patrick? His father’s or his? The evidence is thin and does not, on balance of probabilities, support the version of the appellant that it was he alone and not Patrick who put the money in the bank. It rather looks as if Patrick did so from time to time during that part of March 1969. Now, if this is so, and it was the result of his work as a thief, that money is tainted and this court cannot help the mother to recover it, even for her children. The last issue was whether or not these rules of Kikuyu customary law are repugnant to justice, morality or cause any injustice? The mother has gone back to her father and the father now becomes male co-guardian of the infants. There is a dispute as to what sums of the money in each account was spent on whom, with the appellant saying it went on exactly what the Kikuyu “Muramati” co-guardian should spend the money on and the mother saying, if she ran away from the co-guardian, what was there for the appellant to spend the money on from these two accounts save himself? This court did not have the advantage of seeing the parties give evidence. There is an impression from the proceedings before the magistrate and in this court that the appellant is a representative of his generation and the mother of hers. She is one who goes the modern way. In a larger sense it appears the appellant, however, did his duty by the children as a male co-guardian and spent the money on them and their mother for them from time to time. The mother entered into a formal marriage willingly under Kikuyu customary law and appears to have decided to sever her relationship later with the other family and return to her own, or she had acquiesced in all this. She still offers the children back to the appellant. She has this new career ahead of her. She has every appearance of probably being remarried soon. The Kikuyu customary law provides for the “blotting out” of such a marriage or marriage-to-be and has rules for the return of the marriage dowry, payment of pregnancy compensation and the provision of co-guardians for minor children. There is nothing, in the judgment of this court, that offends natural justice, morality or anything else. The magistrate did not set out these parts of the Kikuyu customary law as recorded by Mr. Cotran in his *Restatement of African Law*, Volume 1, *Marriage and Divorce*, pp. 13, 20 and 21 and volume 2 *Succession*, pp. 17 and 18. She did not take into account the fact that the money in the residuary estate, on the balance of probabilities, was tainted. She held there was a binding trust on the appellant and that the effect of the provisions of the Trustee Act over-ruled the provisions of Kikuyu customary law. Furthermore, the magistrate found that the customary law departs from morality. It disregards natural justice. Unfortunately, this court, with respect, differs. The consequence is that this appeal is allowed with costs. The order of the magistrate that the appellant must repay the amount to the mother for and on behalf of the infant children within thirty days of the date of the judgment is now set aside. *Order accordingly.* For the appellant:

*SMW Kinuthia* (instructed by *Kamere & Co*, Nairobi)

The respondents appeared by their next friend