

MAAGWI KIMITO v GIBENO WEREMA 1985 TLR 132 (CA)

Court Court of Appeal of Tanzania - Mwanza

Judge Nyalali CJ, Mustafa CJ, Kisanga, JJA

[zFNz]Flynote

C Customary Law - Its status vis-a-vis other law - Section 9 Judicature and Application of Laws Ordinance, Cap. 453.

Customary Law - Kuria customary laws - Whether widow, sole heir of her deceased D husband's estate, is liable to pay the debts of her late husband.

Customary Law - Kuria customary law - Liability of a widow, sole heir, to refund bride price received by her deceased husband - Whether such liability extends beyond the assets which she actually received in the estate of her deceased husband. E

[zHNz]Headnote

The appellant instituted a suit in a Primary Court for refund of thirty six head of cattle which he had paid in respect of his marriage to one Nyamohanga d/o Makongo which marriage was subsequently dissolved. The cattle were received by her brother. By the F time of the suit the brother had died, so that suit was filed against the respondent, widow and sole heir of the deceased estate in accordance with Kuria customary law. The appellant was successful in both the Primary and District Courts though the latter court reduced the number of refundable cattle from 36 to 20. On appeal to the High G Court both decisions of the two lower courts were overturned on the ground that the payment, receiving and refunding of bride price is a clan affair and should not be saddled on a poor widow. On further appeal the Court of Appeal of Tanzania considered the place of customary laws in Tanzania generally and the propriety of the High Court decision. H

Held : (i) The customary laws of this country now have the same status in our courts as any other law subject only to the Constitution and any statutory law that may provide to the contrary;

(ii) since under Kuria customs the respondent was the sole heir to her deceased I husband's property and nobody else, likewise she was

Judgment

Nyalali, C.J. delivered the following considered judgment of the Court:- This case demonstrates how certain principles and rules of African customary law still operate in D what may be termed as the indigenous and majority African sector of the community in

this country to the exclusion of principles and rules derived from English Law. The appellant Maagwi Kimito instituted a suit in the Primary Court at Nyanwigwa in Tarime district for refund of thirty six head of cattle which he had paid in respect of his marriage E to Nyamohanga d/o Makongo. The cattle were received by her brother, that is, one Werema s/o Makongo, who is the late husband of the respondent, namely Gibeno w/o Werema. The marriage between the Appellant and Nyamohanga d/o Werema was dissolved in court sometime in 1978, after the death of the respondent's husband. Under F the relevant customary law, the respondent became her husband's sole heir. So the appellant sued her in her capacity as such sole heir. He was successful in the trial Primary Court. The respondent appealed to the District Court at Tarime which upheld the decision of the Primary Court, though it reduced the number of refundable cattle from thirty six to twenty (20). She further appealed to the High Court at Mwanza which G overturned both decisions of the two courts below and gave judgment for the respondent. The appellant was aggrieved by the decision of the High Court hence this appeal to this court on a point of law certified under section 4(2)(c) of the Appellate Jurisdiction Act, 1979. In certifying the matter for appeal to this Court, Munyera, J. H stated, *inter alia* :

Under Kuria customs she was the sole heir to her deceased's husband's property and nobody else is allowed to inherit anything. Likewise she was liable to pay the deceased's I debts. But the learned appellate judge decided against this established Kuria 1985 TLR p134

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custom and ruled that the payment of the deceased's debts was a clan affair. The A applicant was not satisfied and seeks to appeal to C.A.T. I find that there is a question to be considered by the C.A.T. whether the respondent should be absolved from meeting the deceased's debts while she is the sole heir of the deceased's estate. I certify that the intended appeal raises a point of law.... B

In overturning the decisions of the two courts below, the High Court, Mfalila, J. stated:

The most important point is the question of the appellant's liability in her capacity as the wife of C the late Werema. The Primary Court as well as the District Court accepted the advice of the assessors that the appellant was rightly sued for the return of bride price for under Kuria customary law a widow is responsible for her husband's debts if she has taken over his D properties. I also agree for it only makes good sense. But this rule surely must be referring to the debts existing at the time of death. It cannot include unknown future events, i.e. refund of bride price. The payment, receiving, and refunding of bride price is a clan affair. Suppose there was another sister in the late Werema's family and she was to get married, would the E family allow the appellant to collect the bride price simply because she took Werema's properties at his death? or would people like her brother-in-law (D.W.2) Werema's elder brother claim the booly? I cannot imagine the family allowing her to collect the bride price for F any of the daughters. If she has no right to receive the bride price for the daughters, why should she have the duty to refund the bride price of the divorced daughter? Those who would receive the bride price in Werema's place, should be the people to have the duty to refund the bride price in Werema's place. This poor widow should not be saddled with payment of family G debt.

Undoubtedly the Learned Judge expressed very strong views and sentiments on the issue but do these strong views and sentiments reflect the correct legal position on the H matter? Although it is apparent that the Learned Judge appreciated that this matter was governed by the customary law of the Kuria community to which the parties belong, it is not quite clear whether his views and sentiments were derived from or guided by Kuria customary law and practice.

It must be firmly stated at this juncture that customary law, where applicable, has the I same status in the courts of this country as any other
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law. It is so stated under section 9 of the Judicature and Application of Laws A Ordinance, Chapter 453 of the Revised Laws which needs to be quoted hereunder in extenso:

(1) Customary law shall be applicable to, and courts shall exercise jurisdiction in accordance therewith in matters of a civil nature: B

(a) between members of a community in which rules of customary law relevant to the matter are established and accepted, or between a member of one community and a member of another community if the rules of customary law of both communities make C similar provision for the matter; or

(b) relating to any matter of status of, or succession to, a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted; or D

(c) in any other case in which, by reason of the connection of any relevant issue with any customary right or obligation, it is appropriate that when defendant be treated as a E member of the community in which such right or obligation obtains and it is fitting and just that the matter be dealt with in accordance with customary law instead of the law that would otherwise be applicable; F

except in any case where it is apparent, from the nature of any relevant act or transaction, manner of life or business, that the matter is or was to be regulated otherwise than by customary law: G

Provided that:

(i) where, in accordance with paragraph (a), (b) or (c) of this subsection customary law is applicable to any matter, it shall not cease to be applicable on account of any act or H transaction designed to avoid, for an unjust purpose, the applicability of customary law; and

(ii) nothing in this subsection shall preclude any court from applying the rules of Islamic law in matters of marriage, divorce, guardianship, inheritance, waqf and similar I matters in relation to members of a community which follows that law.

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(2) It is hereby declared for the avoidance of doubts that: A

(a) a person may become a member of such a community as is referred to in subsection (1), notwithstanding he was hitherto a member of some other community (and whether B or not any customary law is established or accepted in such other community), by his adoption of the way of life of the first-mentioned community as one of themselves, and such adoption or acceptance may have effect either generally or for particular purposes;

(b) a person may cease to be a member of a community by reason of his adoption of the C way of life of some other community (whether or not any customary law is established or accepted in such other community) as one of themselves, but shall not be treated as having ceased to be a member of a community solely by his absence therefrom.
D

(3) In any proceedings where the law applicable is customary law, the court shall apply the customary law prevailing within the area of its local jurisdiction, or if there is more than one such law, the law applicable in the area in which the act, transaction or matter E occurred or arose, unless it is satisfied that customary law to be applied is some other law:

Provided that the court shall not apply any rule or practice of customary law which is F abolished, prohibited, punishable, declared unlawful or expressly or impliedly dis-applied or superseded by any Ordinance or Act of Tanzania or Act of the Common-services/Organization.

(3A) Notwithstanding the provisions of this Act the rules of customary law and the rules of G Islamic Law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971.

(4) For the avoidance of doubts it is hereby declared that the reference to an Ordinance or H Act of Tanzania in subsection (3) shall not include any law or practice (other than any such Ordinance or Act or Act of the Common Services Organization) applied to, or I enforceable in, Tanzania in accordance with the provisions of section 2 of the Indian 1985 TLR p137

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Acts (Application) Ordinance, of subsection (1) of section 2 of the Land (Law of Property and A Conveyancing) Ordinance, or of subsection (2) of section 2 or section 7 of this Ordinance, or any English Act declared to be in force by order made under section 10 of the Land (Law of Property and Conveyancing) Ordinance.

When this appeal came before us for the first time, we called for additional evidence to B be taken on various pertinent points involved in the main issue as we were under the impression that the relevant customary law remained uncoded and undeclared. We were at the time unaware of the Customary Law Declaration, 1963 as well as The Local C Customary Law (Declaration (No.4) of 1963 which are contained in Government Notice No. 279 of 1963 and Government Notice No. 436 of 1963 respectively. These customary law declarations or statements were made applicable to members of African Communities in the locality where the parties belong by Government Notice No. 604 of D 1963 and Government Notice No. 130 of 1964.

Obviously the rules dealing with refund of bride price and those dealing with inheritance

are the ones that concern us here, since the suit is for recovery or refund of bride price and it was brought against the respondent in her capacity, not as a widow but as the sole heir of the man to whom the bride price was paid. The relevant rule of the issue is Rule 37B of the First Schedule to the Local Customary Law (Declaration) Order, 1963 which states in Kiswahili:

*Mtu anayeweza kudaiwa kurudisha mahari ni yule aliyepokea mahari au mrithi wake.*F

Translated into English, it reads "the person liable to be sued for refund of bride price is either the person who received it or his heir". It must be pointed out that this rule is not superseded by any provision of the Law of Marriage Act, 1971 or any other statute.

In the case before us, the respondent Gibeno w/o Warema is the sole heir of her husband who received the bride price in question. She was clearly liable under the rule to be sued as it was done by the appellant. However, an important point arises, and that is whether her liability to refund the bride price extends beyond the assets which she actually received in the estate of her deceased husband. Under principles and rules derived from English Law an heir's liabilities are limited to the assets of the estate which he or she received from the deceased. I

What is the position under customary law?
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The relevant rules are found in the Second Schedule to the Local Customary Law A (Declaration)(No.4) Order, 1963. The relevant rules are reproduced in English translations by R.W. James and G.M. Fimbo in their book titled Customary Land Law of Tanzania, First Edition at page 166. These are rules 11, 12 and 13 and they read: B

11. If the intestate's property is not sufficient to pay the deceased's debts important debts will be paid first and the rest will be paid proportionately.
12. The rest of the debt is satisfied by the heirs from their own property.
13. Claims and debts are inheritable. C

It is clear from these rules, especially rule 12 that an heir is liable to pay in full the debts where the deceased's estate are insufficient to pay all the debts in full. It is clear from the provisions of rules 11, 12 and 13 that a three - stages procedure will be involved in satisfying the liabilities. Firstly, payment in full is made in respect of important debts. Secondly, if the important debts are fully discharged from the assets, the remainder of the debts are paid out proportionately. Thirdly, in any event, the balance of the debts are paid out in full by the heirs from their own property. This position is undoubtedly startling to anyone used to the English system. It happened to Spry, J. in the case of *Abdallah Kombe v Said s/o Leverri* in Local Court Civil Appeal No. 47 of 1962 reported in A Digest of Appeals from Local Court (1962) Vol.IX at page 11. He was dealing with a similar matter among members of the Wapare Community.

He stated: F

The assessors who sat with me expressed the opinion that under Pare customary law, an heir is liable for the debts of his predecessor even though he inherits no property; and that such debts will pass from one generation to another Under the provisions of section 15 of the Local Courts Ordinance (Cap 299) the law to be applied is the customary law prevailing in the area, so far as it is not repugnant to natural justice or morality. The customary laws to which I have referred are certainly not repugnant to morality, indeed, I am much impressed by the high sense of obligation which they reflect. I think, however, that it is repugnant to justice that a person should be saddled with a debt which he has not himself incurred, the incurring of which he may not have approved and from which he had derived no benefit. I think it is utterly wrong
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that a child may be born with a burden of debt which he may never be able to discharge. I hold therefore, that this customary law is one which the Court will not enforce.

At the time of this decision by Spry, J. the Courts had power to disregard any customary law which was considered "repugnant to natural justice or morality". What that meant in fact was any customary law which was incompatible with the prevailing English sense of justice or morality. Such power of the Court no longer exists by virtue of the provisions of section 9 of the Judicature and Application of Laws Ordinance. The customary laws of this country now have the same status in our courts as any other law, subject only to the Constitution and any statutory law that may provide to the contrary. As James and Fimbo properly point out on page 173 of their book cited above, our codified customary law now constitutes the indigenous common law of the African communities concerned. D

The principle behind "the high sense of obligation" which much impressed Spry, J. in *Abdalla Kombe's* case is one which the people of indigenous African culture of this country (and perhaps elsewhere in Africa) have always had towards their predecessors. It is a principle which reflects their need to take care of the interests and reputations of their predecessors, not only when the latter are disabled by old age and when in other cultures of the world such people are regarded only as a burden fit for old people's homes, but even long after their death. If, according to Spry, J., it is considered "repugnant to justice that a person should be saddled with a debt which he had not himself incurred, the incurring of which he may not have approved and from which he had derived no benefit", why, one may ask, is it justified for a person to inherit a fortune from his predecessor for which he may have done absolutely nothing towards its acquisition?

What justification is there for the world wide practice by which governments incur national debts which are inherited by the next generation of their citizens? Surely, the inheritability of debts under African customary law cannot be considered to be a human aberration. However, a person is not compelled to become an heir to a deceased. But once

the person accepts to be an heir, the responsibility described above devolves upon that person. H

In the present case therefore, it is not only correct in law but proper in principle that the respondent, who is the sole heir of her deceased husband be liable to refund the bride price which her husband received in respect of the marriage of his sister to the appellant. The trial Primary Court found that thirty six head of cattle were refundable, but the I District Court, on appeal, reduced the number to twenty, after making allowance for the 1985 TLR p140

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duration of the marriage in accordance with customary rules. We are bound to interfere A with the judgment of the High Court by allowing the appeal and setting it aside and restoring the judgment of the District Court.

B Order accordingly.

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