

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

AT MBALE

HCT-04-CV-CA-0018/2001

[ORIGINAL TORORO MATRIMONIAL CAUSE NO 3 OF 2001]

IWOLIT DISMAS.....APPELLANT

VERSUS

IMWAMIT REBECCA.....RESPONDENT

BEFORE: THE HON. AG LADY JUSTICE F. MWONDHA

JUDGMENT

This is an appeal that brought before me by Counsel for the appellant, the appellant having been dissatisfied with the judgment and decision of His Worship Kwizera Magistrate Grade 1 at Tororo in a matrimonial cause No. 3/2001.

There were three grounds of appeal namely:

1. That the learned trial Magistrate erred in law when he found that there was no evidence of adultery.
2. That the learned trial Magistrate erred in law when he held that the case for the appellant lacked adequate proof.
3. That the decision of the learned Magistrate occasioned substantial miscarriage of justice as it was not based on the evidence as adduced.

He prayed that the appeal be allowed and the judgment be set aside.

The powers of the appellate Court are laid down in S. 81 of the Civil Procedure Act.

I have carefully studied the proceedings and judgment of the Lower Court and I have considered carefully the learned Counsels submissions (written) to support the grounds in the memorandum of appeal mentioned above. I find the following:

- (1) That on the issue whether there was a valid marriage, there was evidence of PW1, PW2 and PW3 who testified that, the marriage was contracted customarily by delivery of five heads of cattle and 30,000/= which was actually given by PW2 the father of the petitioner. PW3 said that a balance of 70,000/= remained.

This meant that the law applicable was the Customary marriages (Registration) Decree 16/73. The trial Magistrate in his judgment referred to the case of *Aya vs Aya* Divorce jurisdiction Cause 8/73 which stated that such marriage cant be valid unless and until dowry is paid. He consequently held that the marriage was legal and valid.

I differed in my findings from the learned Magistrates findings on this issue for the following reasons:

1. There was already an inconsistence in the petitioners case in that PW3 stated that there was a balance of shs 70,000/= which PW1 and PW2 never talked about in their testimony. There is no further evidence to show that customarily if dowry is paid in part the marriage remains valid.
2. There was no explanation given for that inconsistence and yet this was a case conducted exparte.
3. The Customary marriages (Registration) Decree 16/73 in Section. 9. It provides “A Certificate of a customary marriage issued under this Decree or a certified copy thereof shall be conclusive evidence of such marriage for all purposes in any written law.” There is nothing exhibited in court in light of the inconsistence pointed out in form of Certificate of Customary marriage to prove that this was a valid marriage.
4. The case relied on i.e *Aya v Aya* (Supra) by the learned Magistrate was decided in 1973 the very year that the decree was promulgated. The Decree provided that, the same shall come into force on such a day as the Minister may by Statutory order appoint, though the date of Publication was 3rd July, 1973. Its highly probable that the case cited was decided before the Decree came into force and makes it not applicable to the facts of the instant

case. The marriage is alleged to have been contracted in 1992 and for all purposes and intents, it had to be governed by the decree. So on the issue of the marriage being legal and valid, there was no proof on a balance of probability that it was legal and valid.

5. On the issue of whether there was adultery on part of the Respondent who didn't attend the trial, the evidence available was that sometime in 1994 after contracting marriage in 1992 the Respondent left their matrimonial home with the Petitioner and went to live with one Martin Oboye with whom she had a child. It's trite law that in divorce cases like this one for a petitioner to succeed on the ground of adultery, he has to prove the adultery to a standard that is closer to reasonable doubt (see Habyalimana v P. Habyalimana [190] HCB 139 cited with approval in Mushanga v Nossie Buchana High Court Divorce Cause No 5/99 (unreported) by Hon. Lady Justice C.A. Okello. This also need to corroborate adultery (see Ruhara v Ruhara [1977] HCB see also Nyakairu v Rose Nyakairu [1979] HCB 261 on circumstantial evidence as far as adultery in concerned.

Coming back to the instant case, there is no specific time or place when the adultery was stated to have been committed i.e. if there was a valid marriage. This issue has to be pleaded specifically and proved to the required standard which is higher than that of the ordinary civil case. It's the practice and a legal requirement that in a divorce petition the co-respondent has to be joined. Much as Oboye was mentioned there were no specific commissions of adultery. This brings me to learned counsel for the petitioner's submissions. He submitted in his written submissions that the birth of the child was a result of the respondent cohabitation with one Martin Oboye and that it was sufficient in the circumstances to prove adultery. He argued that, this was irresistible inference which could safely be drawn that adultery was committed. He cited the case of Khauxha v Aliet Yudesi Kyonanga [1972] ULR 66. Unfortunately this case was not availed to Court and I couldn't get my hand on it for careful study of it. However as I had stated earlier in this judgment there is great need to corroborate adultery when there is circumstantial evidence see Nyakairu v Rose Nyakairu cited (Supra). The inference has to be supported by very strong evidence not by mere mention as PW1 testified. PW2 was only testifying what PW1 told him. PW3 said that, he didn't know where the respondent was staying and went further to say that he didn't know the rest. It takes two a man and woman to have sexual intercourse in order to have a result of a baby. The inference therefore can't be safely drawn against only the Respondent when there is no co-respondent another party to the petition. As the learned

Magistrate correctly found, there was no leave of Court obtained to dispense with the co-respondent. Besides the would be co-respondent from the evidence was round so the Petitioner couldn't say, that he was unknown. The age of the child purportedly born out of the marriage was not given.

Mere assertion that the two cohabited and failed to stipulate specifics including, times of adultery could not prove adultery circumstantially. Mere delivery of a child couldn't satisfy me, because the petitioner said in his testimony that, when the respondent left his home she went to stay with one Oboye. He didn't say that when the respondent left she was pregnant or not. He didn't even state when he stopped seeing her to rule out the chances of him having impregnated her. From the evidence, it would appear the petitioner loved the respondent very much. To remove the doubt on a balance of probability which is higher than that of the other Civil matters, those points would have been brought out. And more importantly he ought to have joined the Martin Oboye as a co-respondent.

I would like to say that omission to join a co-respondent without leave of Court was irregular and on this ground alone the petitioner ought to have been dismissed as barred in law.

As far as the first ground is concerned I find that, there was no evidence adduced to the required standard as already mentioned in this judgment.

Having found the 1st ground that actually there was no evidence of adultery, ground 2 and 3 fall by the way side. I am therefore unable to upset the lower Courts final finding and I dismiss the appeal with no order as to costs.

F. Mwendha

Ag. Judge

22.5.2002.

22.5.2002: Appellant present

Respondent absent (case proceeded ex parte)

Judgment delivered in open Court.

F.Mwondha

Ag. Judge

22.5.2002

Right of appeal explained.