THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CA-0001/2001

(Original Mbale CS No. 180/1998)

JENIFER MUSAMALI…….APPELLANT

VERSUS

STEPHEN MUSAMALI……RESPONDENT

BEFORE THE HON. MR JUSTICE RUGADYA ATWOKI

JUDGEMENT

The appellant in this case filed this appeal against the judgment of the Ag. Chief Magistrate Mbale where he gave judgment in favour of the defendant/respondent.

Briefly the plaintiff/appellant herein referred to as the appellant and the defendant/respondent herein after the respondent, were at one time living together as man and wife. There were six children but the respondent denied being the father of the last born and sixth child Innocent Situma.

In December 1994 the two separated in circumstances which are disputed. The appellant brought this suit for orders that the defendant be directed to establish a residential home for the appellant and the children, make provision for her and the children's maintenance, an injunction restraining him from contracting any form of marriage before complying with the above orders, and costs of the suit.

The respondent argued that there was no marriage customary or otherwise between him and the appellant and therefore he was under no duty or obligation to build a residential house for her.

It was the appellants case that the respondent a police officer seduced her while she was a small girl, and promised to marry her customarily. They thereafter cohabited in various places and produced six children. The respondent paid dowry for her out of school. He however failed to

build a house for her in spite of her persistent requests, and an offer of land for the purpose from his father.

The respondent denied that he paid dowry for the appellant, or the full amount. In any event, the part of the dowry which was paid was so done by his mother without his involvement. There were no customary rituals which constitute payment of a full dowry. The appellant left the respondent on her own accord, and due to her guilty conscience for her adulterous behavior. She even produced a child Innocent Situma from outside their relationship.

At the trial two issues were framed for determination by court, first whether there was a customary marriage between the appellant and the respondent, and secondly whether the appellant was entitled to the remedies she sought.

Each party called witnesses and at the end of the trial the learned trial Chief Magistrate found that there was no proof that there was a customary marriage between the appellant and the respondent. She therefore was not entitled to the remedies she sought and he dismissed the suit, hence this appeal.

Five grounds were set down in the memorandum of appeal. But they all boil down to and can be conveniently paraphrased into the two issues which were set down for determination in the trial court. The submissions of both Counsel on appeal followed the same trend, and I intend to follow suit.

This is a first appeal. The approach to be followed by a first appellate court is that it ought to subject the evidence adduced before the trial court to a fresh and exhaustive scrutiny so that it weighs the conflicting evidence and draws its own conclusions. It is not enough for the appellate court to merely scrutinize the evidence to see if there was some evidence to support the findings and conclusions of the lower court, it must make its own findings and conclusions. Only then can it decide whether the findings of the trial court, it must make its own findings and conclusions. Only then can it decide whether the findings of the trial court should be supported. In so doing the appellate court must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. *Yosamu Kawule V. Erusania Kalule* [1977] HCB 135, *Sitefano Baraba V. Haji Edirisa Kimuli* [1977] HCB 137, *Ugachick Poultry Breeders Ltd. V. Tadjin Kara* C.A., Civil Appeal No.2 of 1997.

The issue whether or not there was a customary marriage between the appellant and the respondent revolved around whether or not dowry was fully paid by the respondent to the appellant's father in accordance with the Kigisu customs consequence upon which the customary marriage as accepted under those customs was entered into.

The evidence of the appellant Jennifer was that she cohabited from 1982 till 1994. On 28th December 1989 her father Akisoferi Wilberforce Kaboole PW3 sent her two brothers including Kaboole Karami Micheal PW2 to collect her dowry. The dowry was collected from the mother of the respondent Maria Nekesa DW2. An agreement was written down to this effect. Three cows and two goats were given to the emissaries of appellant's father, and they took these back home.

The agreement was tendered in evidence as P1. The LCI Chairperson of the area PW4 signed a movement permit allowing the animals to move, exhibit p2. It is to be noted that the exhibit P1 was in Lugisu language. It contained a statement which was translated and accepted by the trial Magistrate as follows, 'Whatever has remained unsettled shall be completed when performing the final ceremony.

PW3 Akisoferi Wilberforce admitted what was stated by his son PW2. He received the 3 cows and 2 goats from the mother of the respondent as dowry for the appellant. He told court that there was no balance of dowry to pay as far as he was concerned.

The respondent told court that indeed his mother paid to the father of the appellant 3 cows and 2 goats. At that time he was a way on a course apparently out of Mbale. This part of the dowry was paid only because when his second born child died while he was away, because of non payment of dowry for the mother of the dead child, it was buried in the mothers' ancestral home, rather than in his ancestral burial grounds.

This was unacceptable, hence the payment which would be evidence of recognition, pending full payment of the dowry including the ceremonies that go with the Gisu customary marriage.

The mother of the respondent testified similarly, she told court that she expected to take part in the final ceremonies of payment of the dowry when her son returned from his course. She told

court that there were no negotiations between her and her father of the girl concerning the amount of dowry to pay, nor were any celebrations held to commemorate payment of dowry.

There was no dispute that the family of the respondent paid the family of the appellant 3 cows and 2 goats. The dispute was whether this constituted full payment of the dowry. PW3 Akisoferi Kaboole the father of the appellant told court that he was not awed anything by way of dowry. He received the entire dowry from the mother of the respondent.

The mother of the respondent on the other hand told court that she could not arrange all the marriage ceremony alone. She had to wait for the son to return from his course abroad, and also for the father.

What then is the mode of ascertaining and paying the dowry under Gisu custom? PW2 Kaboole Micheal Karami told court that for dowry is normally set after negotiations. He was convinced that when his father instructed him to collect the cows and goats from the mother of the respondent, there must have been negotiations over the dowry. This witness told court that there would also be ceremonies to celebrate and bless the marriage. There must be an introduction ceremony.

This was confirmed by DW2 Maria Nekesa, She initiated the negotiations, so that when her son returned from the course, full dowry negotiations would proceed and full payment would be made. Other ceremonies for formalizing the customary marriage would take place.

I found that practical and reasonable. It would not make any sense to arrange and conclude the payment of dowry when her son was still abroad. There were too many imponderables which could happen in between.

It is clear that there was something to be done to complete the payment of the dowry. Counsel for the appellant tried to downplay the significance of the phrase in exhibit P1 to the effect that whatever was unsettled would be completed during the final ceremony. This cannot by any stretch be interpreted as meaning that only payment of a fine for elopement remained for payment.

If that was the intention, why not specifically state so. There was a final ceremony to this matter. No one explained to court what that final ceremony was. What comes out of the evidence on record is conflicting. What is clear is that there was a final ceremony to go through.

I find that the circumstances under which the cows and goats were paid tends to confirm that there was another and possibly the final step to be taken in this process of paying the dowry and formalizing the customary marriage. It obviously had to await the return of the respondet, and naturally so, since he was one of the two main actors in the process.

The main issue for determination as already indicated was whether or not there existed a customary marriage between the appellant and the respondent. The burden of proof was on the appellant who asserted that it existed. The standard of proof being on a balance of probabilities. In order to discharge that burden the appellant and to prove that there was payment of dowry followed by cohabitation. See *Wango v Manano* [1958] EA 124, *Francis v Boniface* [1959] EA 146, *Manaziya Aiya v Sabira Onziyo* Divorce Cause No.8 of 1973 (unreported)

In Uganda v. Kato Peter & An. [1976] HCB 204 it was held in determining whether the marriage was under customary law, it was important to ascertain whether the union was treated as a marriage by the customs of the nation, or race or sect to which the parties belong.

From the evidence on record, a Gisu customary marriage is preceded by a formal tradition ceremony, at which dowry or bride price is negotiated and agreed, and thereafter payment is effected. There is supposed to be a time of celebration and blessing of the marriage.

The cases have that for a valid customary marriage to exist, there must be payment of dowry or bride price in full. See *Uganda v. John Ekidu* [1975] HCB 359, *Amulan Ogwang v. Edward Ojok* [1971] HCB 11.

There was no evidence that any negotiations took place in respect of the dowry. There was no formal introduction ceremony between the parties. There was no celebration and or blessing of the marriage by the respective families.

Some animals were given to the family of the appellant. It was not shown what criteria was used to determine the amount. The father of the appellant only stated that there had been negotiations. He did not reveal where and with whom such negotiations took place.

This tends to confirm the evidence of Nekesa that she only because she did not want another catastrophe of the possibility of burying a grand child in some foreign place. But full and proper dowry negotiations had to await the return and presence of the appellant.

In *Ceaser Okumu v. Helen Dhugira & Ben Alex Opar* C.A. No. 1 of 1997 (unreported) Twinomujuni JA., held that since there was no evidence that there was any meeting of elders or relatives who witnessed the introduction of the boy to the girl's parents, cohabitation alone was not, in such a situation, not sufficient to constitute a customary marriage. The court was considering whether there was a customary marriage as recognized under the Alur customs between the appellant and the 1st respondent.

It was further held in the Ceaser Okumu case (supra) that there was no payment of bride price in full, in spite of the fact that the parties cohabited together for some time and even produced three children. The court decided that there was no customary marriage.

That case is not very different from the present case. While there was cohabitation, and children were produced out of the cohabitation, but the essential requirements of a customary marriage were not satisfied for the relationship to amount to a customary marriage. I accordingly answer the issue in the negative.

Having so held, I do not find it necessary to go into the issue whether the appellant was entitled to the remedies she sought. This follows my findings in the first issue, that there was no customary marriage between the appellant and the respondent.

Even if I had found differently in the first issue, I would not have granted the orders of maintenance. The appellant either deserted of was chased away from the matrimonial home more than four years prior to instituting this suit. She lives alone, and all the four children have since been living with the respondent. It was not proved that they would fare better living with the appellant. The concern of the appellant was to stop the impending marriage by the respondent to another woman, rather than any desire for maintenance and welfare of the children, which would be courts primary concern.

In the event, the appeal is dismissed with costs to the respondent in this court and in the courts below.

RUGADYA ATWOKI

JUDGE

04/04/06.

Court: The Registrar of the court shall read this judgment to the parties.

RUGADYA ATWOKI

JUDGE

04/04/06