

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY**

AT MWANZA

CIVIL APPEAL NO. 90 / 2005

*(From Tarime District Civil Appeal No. 9/ 2005. Original
Civil case No. 40/2004 Nyaburongo Primary Court.)*

CHARLES ONDIGOAPPELLANT

Versus

JOHN YAMO..... RESPONDENT

JUDGEMENT

20th/3 & 6/7/2007

Sumari, J.

The appellant Charles Ondigo is appealing against the decision of Tarime District Court Civil appeal no. 9 of 2005. In Nyaburongo. Primary court civil case no. 40/2004 respondent (Plaintiff) John Yamo successfully claimed refund of the dowry to the tune of eight herds of cattle and cash amounting Tshs. 40,000/= paid for appellant's daughter. In the trial court appellant (defendant) admitted in court to have received the dowry as claimed by the respondent. Appellant further promised to refund back in full the dowry as claimed by the respondent. The trial court therefore entered judgement infavour of the respondent. Appellant was dissatisfied by the whole judgement and unsuccessfully appealed to the District Court of Tarime which held up the trial court's decision. He is now coming for a second appeal to this court.

Briefly the facts giving rise to the claim can be summarized as follows; - That the son of the respondent by the name Jacob John got married to Wilkista Charles the daughter of the appellant. The respondent John Yamo paid dowry to a tune of ten herds of cattle and cash 40,000/=. The two children of the parties namely Jacob John and Wilkista Charles stayed as husband and wife till 26/02/2003 when got divorced vide Civ. Case no.64/2002. That after divorce Wilkista Charles returned to his parents (appellant) together with her son Kennedy an issue of their dissolved marriage and has been with his parents ever since. Unfortunately Jacob John, son of the respondent John Yamo died on 13/06/2003 before the institution of these proceedings, (Civ. Case no. 40/2004). The guist of the proceedings instituted by the respondent is that since the daughter of the appellant is no longer a wife of his son vide a divorce and that she is not living in his residency, he is entitled to refund of part of dowry he paid to the appellant which is to a tune of 8 herds of cattle out of 10 herds of cattle paid and Tshs. 40,000/=.

Respondent in the trial proved the claim by his own evidence. At the earliest stage when appellant was called upon to respond on the claim, he denied the claim. Therefore full trial took place and respondent was called upon to prove his case. Respondent gave his evidence and when defendant called upon to give his defence, he admitted the claim in full. The whole defence was just brief and can be reduced down for easy of reference as follows **'Mimi nina kazi ya kulima naishi Sudi Kamageta (w) Tarime. Haya madai ya kumrudishia mdai mahari ya ng'ombe nane (8) na shilingi**

elfu arobaini ninayakubali mimi niko tayari kumrudishia mara tu nitakapopata. Ni kweli kijana wake marehemu Jacob Yamo alikuwa ameoana na binti wangu Wilkista Charles na walizaa mtoto mmoja jina Kennedy na yuko kwa mamaye kule Tarime.

Waliachana kabla ya kijana wa mdai kufariki katika mwaka 2003 (kesi nambari 64/2002 ya mahakama ya Riagoro). Sina zaidi. (Emphasis is mine).

The trial court was satisfied that the claim was founded and the fact that appellant admitted the whole of it, granted it in full as prayed. The appellant was dissatisfied and appealed to the District Court which upheld the trial court's decision and dismissed the appeal on ground that the claim was admitted in full by the appellant and no reasonable ground of complaint advanced by the appellant.

In this appeal appellant came up with four grounds of appeal in the first instance, which respondent responded to them and put to strict proof the appellant to his grounds of appeal; and prayed this court to dismiss the appeal with costs. It was fixed for hearing on 06/06/2006 before Hon. Rweyamamu, J. and on that date appellant sought to amend his memorandum of appeal. The respondent however, informed the court that had already made his reply. The court then informed the parties that leave to amend also gives right to file reply and therefore respondent had no objection for the prayer to amend his memorandum of appeal.

Appellant filed his amended petition of appeal titling it 'Additional amended petition of appeal no.10/2005.' I have noted that what ordered by this court on 06/06/2006 was for amended memorandum of appeal and not additional amended petition of appeal as filed by the respondent.

I have purposely noted this as I'm bound to consider grounds of appeal filed by the appellant. When thinking of this I had to clear my mind as to which grounds among the filed grounds in this appeal to deal with. I think I am right that grounds of appeal filed in this court on 25/07/2005 are the ones amended by those filed on 15/6/2006. I would therefore ignore the wording titled Additional amended petition of appeal and treat the same as amended petition of appeal (memorandum of appeal). This is so as I see no where in the proceedings that appellant had filed amended petition of appeal and that the additional amended appeal was sought for. There exist only one occasion when the amendment was sought and granted as per order of 06/06/2006. What I will therefore consider in this appeal is what raised as grounds of appeal in the so called Additional Amended petition of appeal of 15/06/06 which amendment vitiates the first memorandum of appeal filed on 25/07/2005.

In the said amended petition of appeal the appellant raised two grounds;

1. That the appellate District magistrate on 06/08/2003 had declared the proceedings and judgement in the former divorce case in the Riagoro Primary court Civ. Case no.64/2002, a

nullity for want of legal requirement, in civil revision no. 35/2003, erred in law in accepting the decision of the primary court which was against the Luo customary law for repayment of bride wealth or dowry, as the respondent's son passed away without divorce to appellant's daughter.

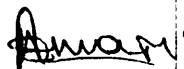
2. That in the alternative but without prejudice to the above stated ground, the appellate District Magistrate failed in law in not observing that the appellant's family was entitled to remain with the dowry having regard to length of the appellant's daughter marriage with the deceased son of respondent which was seven (7) years and the offspring of the marriage aged 8 years now.

Both grounds of appeal (supra) are raising issues which were not raised during trial. As I pointed earlier appellant in the first instance denied the claim and in so doing the trial magistrate went into full trial so that the respondent proves his case and appellant had an opportunity to cross examine the respondent and later gave his defence. There is no where during proceedings appellant challenged the said divorce. What he told the court as far as divorce is concerned is as I quoted (supra) '**Waliachana kabla kijana wa mdai kufariki katika mwaka 2003 (kesi**

nambari 64/2002 ya mahakama ya Riagoro). It is evident therefore that appellant had full knowledge of the Civil case no.64/2002 and he admitted that his daughter was no longer living with the deceased son of the respondent even prior the deceased's death; and that his daughter was staying with her mother at Tarime (appellant's home). Appellant's ground of appeal that the appellate district magistrate erred in law in accepting the decision of the primary court which was against the Luo customary law for repayment of bride wealth or dowry, as the respondent's son passed away without a divorce to the appellant's daughter, is unfounded as to me is nothing but an after thought. An after thought because the same was not an issue during trial or even in the first appeal. In the trial this fact was not disputed either.

Again as to the question regarding the length of the marriage and the age of the offspring of the marriage, the same is an afterthought also. And it can not be entertained at this stage of a second appeal.

I see no reasons for reversing the decisions of both lower courts which seems well founded. The appeal is dismissed with costs.



A.N.M. Sumari

Judge

At Mwanza,

6/7/2007

Delivered in presence of both parties.