IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC. MATRIMONIAL APPEAL NO. 16 OF 2022

(Arising from Civil Appeal No. 2/2022 of Meatu District Court, original Civil Case No. 34/2021)

TEMBO NHONDO..... APPELLANT

VERSUS

NSULWA GIZENGI..... RESPONDENT

JUDGMENT

07/12/2022

A. MATUMA, J:

At Mwandoya Primary Court within Meatu District in Simiyu Region, the Respondent sued the appellant claiming for seven Cows being a return of dowry after his marriage with the appellant's daughter one Kabula d/o Tembo got broken by a divorce decree.

The brief facts of the matter are that, the respondent married the said Kabula Tembo in 2011 by paying dowry of fifteen heads of cattle (cows). They got blessed with four issues but when it got September 2021, they divorced at Kisesa Primary Court.

After such a divorce, the respondent sued the appellant herein claiming to be refunded seven cows each valued at Tshs. 300,000/=. The trial Primary Court after a full trial held that the respondent is entitled to be refunded only six cows because eight cows would be for the inborn

four children, one cow for his divorced wife due to various activities she did during the existence of their marriage;

"Mdai amethibitisha sehemu ya madai yake dhidi ya mdaiwa hivyo kwa kuwa wadaawa wana Watoto wanne (4) kulingana na Mila, tamaduni na desturi za wadaawa na za eneo wanaloishi mdai anapaswa kuacha Ng'ombe nane (8) kwa ajili ya Watoto waliozaa lakini pia Ng'ombe mmoja (1) mdai amuache kwa ajili ya kazi mbalimbli alizokuwa akifanya binti wa mdaiwa kipindi cha uhai wa ndoa yake kabla ya kuvunjika. Hivyo mdaiwa arudishe Ng'ombe sita (6) zikiwa ni urudishaji wa mahari."

The appellant was dissatisfied. He thus appealed to the District Court but lost the appeal hence this second appeal with two grounds to the effect that;

i. *The respondent was the wrong doer and thus under the legal maxim Volent none fit injuria it was wrong for him to benefit from his own wrings.*
ii. *That the trial court erred to entertain the suit instead of the Court which entertained the suit for divorce and therefore brought a total confusion.*

At the hearing of this appeal the appellant was represented by Mr. Mvungi learned advocate while the respondent was present in person.

Mr.Mvungi learned advocate submitted that it was the respondent who was a problem maker causing for divorce between him and his wife. He further submitted that since the respondent stayed with the appellant's daughter for a long time and was blessed with four children, the dowry ought not to be refunded. He cited the case of ***Chacha Mwita versus Nyasanda Wambura, PC Civil Appeal no. 40*** of 2019 in the High Court at Mwanza.

In the second ground Mr. Mvungi doubted why the respondent instituted this case in a different Court from that which granted the divorce. He finally faulted the trial Court to invoke customary law while the respondent during trial did not state or explain under which law he married the appellant's daughter, under which law the couples lived, under which law they divorced and under which law his suit was based.

The respondent in his reply argued that the bride price is refundable in accordance to the number of children whereas each child is counted for two cows, the divorced wife is also estimated number of cows due to the length of time the marriage existed.

In the second ground the respondent submitted that at first he went to institute his suit to Kisesa Primary Court which previously granted the divorce but he was directed to go at Mwandoya Primary Court. He finally prayed for the dismissal of this appeal.

Having heard the parties for and against this appeal, I am of the settled mind that although each primary Court is established to exercise jurisdiction within the district under which the Primary Court is established as rightly held by the District Court, the principles of justice demanded that this particular suit should have been instituted in the primary court which initially granted the divorce. This is because this suit was not independent of the suit for the divorce between the parties. This one depended to the previous suit for divorce.

In that respect Kisesa Primary Court which was acquainted with the facts for divorce was better positioned than Mwandoya Primary Court to hear and determine the claims for the refund of dowry.

Thus for instance, in this suit neither the Primary Court nor the District Court and even this court had an opportunity to see the judgement for divorce so that to see what was the causative for divorce. The cause for divorce is relevant in the suit for refund of bride price see; ***Andrea Chilena vs. Kani Masaka (1992) TLR 346 (HC)***. We are not told nor the records speaks, as to who between the respondent and

the appellant's daughter petitioned for divorce and upon which ground. It was therefore wrong for Mwandoya Primary Court to entertain this suit blindly.

It should have at least called for the records of the divorce suit by either contacting Kisesa primary Court or even requiring the respondent to produce the proceedings and judgement of the divorce case. That would have helped it to avoid victimizing the innocent party.

Thus, for example if it was the appellant's daughter who petitioned for divorce on the ground of cruelty, desertion or adultery and successfully proved her allegations, the bride price would not be refundable because the said couple would have ben forced to divorce for unbecoming behavior of the other spouse.

Since in this case the facts are silent, the benefit of doubts is given to the appellant's daughter because it was the respondent who ought to prove in this case that their marriage was broken at the instances of the appellant's daughter. He did not do so and therefore we cannot blindly adjudge the appellant to refund the pride price which he received long time ago and was not given them to keep as a shepherd (mchungaji) so that he would return them to the Respondent in future.

On the ground that the respondent was a wrong doer and cause for divorce, it is true as rightly observed by the District Court that such

matter was not under discussion in the trial primary Court. It is however the fact that the appellant's daughter was not party to this suit who could have at least defend her innocence and thus backup the appellant's case.

In the absence of the Appellant's daughter as party in this case or the records of the Court which granted the divorce, both the primary Court and the District Court passed arbitrary decisions.

But again, even if all the facts above are to be ignored, the respondent was not entitled to the refund of any part of the dowry on the strength of the authority in the case of ***Chacha mwita*** supra. At Page two of that case my learned brother Justice Mruma held;

> *"Under paragraph 52 A and B of Customary Law (Law of persons) GN 279/1963, if there are any children to the marriage and the marriage has subsisted for long time, no bride price is refundable."*

In this case the marriage subsisted for ten years and four children were born. I find that this was a considerable long period of time lived together. The Primary Court estimated one cow for domestic works the appellant's daughter executed during her marriage. The respondent admitted at the hearing of this appeal that the divorced wife would as

well been estimated some cows to be reduced in the dowry due to the period she stayed in the marriage in accordance to their customs.

In the instant case, the appellant's daughter stayed with the respondent for ten years. At all this period, the appellant enjoyed conjugal rights. This was not counted for despite the fact that bride price is customarily paid for this. Should we let the respondent go freely without being responsible for the conjugal rights he enjoyed days and nights from the appellant's daughter? Should we leave the appellant empty handed in a total disregard of the respondent's disposition of the appellant's daughter for the period of ten years? All these questions drive a justice mind to find that it is unfair to order the refund of bride price without considering them. I therefore find that both the trial primary Court and the first appellate Court erred to order the refund of dowry. I do hereby quash such order and set aside the decree thereof.

I find that the respondent was not entitled to the refund of any dowry. He has already four children who cannot be equal to the fifteen cows he paid as dowry, he enjoyed carnal knowledge of the appellant's daughter for ten years, he enjoyed other potential domestic services from the appellant's daughter for ten years which would have other wise been rendered to the appellant.

Most important though not subject to this judgement, when I asked the respondent as to whether the appellant got any distribution of matrimonial properties after the divorce, he responded that she did not get anything. Very sad indeed!

In the up short this appeal is allowed with costs. Rights of further appeal is explained to the aggrieved party.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
07/12/2022