**OSAMWONYI**

**V.**

**OSAMWONYI**

SUPREME COURT OF NIGERIA

6TH OCTOBER, 1972.

SUIT NO. SC 295169.

**LEX (1972) - SC 295169.**

**OTHER CITATIONS**

3PLR/1972/130 (SC)

(1972) All N.L.R 792

**BEFORE THEIR LORDSHIPS:**

GEORGE BAPTIST A. COKER, J.S.C.

ATANDA FATAI-WILLIAMS, J.S.C.

GEORGE SODEINDE SOWEMIMO, J.S.C.

**BETWEEN**

DR. OSADIAYE OSAMWONYI

**AND**

ITOHAN OSARIERE OSAMWONYI (Otherwise known as MERCY ERABOR)

**ORIGINATING COURT(S)**

BENIN HIGH COURT

**REPRESENTATION**

MR. G. M. BOYO for the Appellant.

MR. S. O. EDEMA-SILLO for the Respondent.

**SUBSTANTIVE LEGAL AND POLICY ISSUES**

CUSTOMARY LAW:- Benin Customary law regarding marriage – Whether payment of dowry without subsequent cohabitation and consummation is enough to constitute a marriage – whether consent of prospective bride is required

FAMILY LAW:- Matrimonial causes – Petition for divorce on ground of subsisting customary law marriage – Need to prove customary law marriage strictly – Relevant considerations

EDUCATION AND LAW:- Young educated women and customary law marriage – Whether education of prospective bride is relevant consideration in determining whether her consent is required before her father can accept bride price from a suitor

CHILDREN AND WOMEN LAW: Women and Divorce – Women and Customary Law – Women and Education – Women and Justice Administration - Husband’s petition for divorce on ground of subsisting customary law marriage between wife and a third party – Whether receipt of dowry from suitor by father of an educated young woman without her consent constitutes a marriage without more – How treated

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE:– admitted facts and Judgment of a prior suit – Whether conclusive proof of facts in a subsequent suit between third parties not party to prior one

EVIDENCE:- Customary law divorce proceedings brought against a statutorily married woman by a third party to recover bride price paid to her father without her consent – Whether admissions made by father therein can be used against her in divorce proceedings subsequently instituted by husband

**MAIN JUDGMENT**

**FATAI-WILLIAMS, J.S.C.** (Delivering the Judgment of the Court):

On 21st June, 1967, the petitioner, a Surgeon, went through a form or ceremony of marriage with the respondent at the Marriage Registry at Lagos. After the said ceremony, the parties lived and cohabited together at the petitioner’s flat on the Lagos University Teaching Hospital Campus, Surulere, Lagos, until 28th June, 1967, when the respondent left for London where she stayed for three months to undergo an in-service training course arranged for her by the Nigerian Prison Service. She returned to Nigeria on 27th September, 1967, and a male child by name Osadebamwen was born by her on 18th January, 1968. The child is still living.

On 6th July, 1968, the petitioner filed a divorce petition in the Benin High Court (Suit No. 13/22/68) praying -

(1) that the marriage in fact celebrated between him and the respondent might be declared null and void;

(2) that the petitioner be granted custody of the said child of the marriage; and

(3) that the respondent may be condemned in the costs of the suit.

The grounds on which the petition was based are stated in the petition as fol­lows:­

“3. That in 1964 the respondent then Mercy Erabor, spinster, was lawfully married to Patrick Omosiogho Goubadia in Benin City in the Midwestern State according to Benin native law and custom and that the said marriage was not dissolved until the 14th day of August, 1967, by the Customary Court No. 2, Benin, by an order for a refund of £60 dowry to the said Patrick Omo­sogho Goubadia, according to Benin native law and custom.

4. That at the time when the petitioner went through the said form or ceremony of marriage with the respondent, she was already married according to na­tive law and custom to the said Patrick Omosiogho Goubadia in Benin City in the Midwestern State and the said marriage was subsisting according to Benin native law and custom.

5. That the petitioner was ignorant of the facts alleged in paragraph 3 and 4 hereof in that the respondent described herself to him and was known gener­ally as a spinster when the petitioner first met her in Lagos in March, 1967, and at the date of the said form or ceremony of marriage.”

In her reply to the petition filed on 20th August, 1968, the respondent denied being married to the said Patrick Omosiogho Goubadia in Benin City or in any other place according to Benin native law and custom either in 1964 or at any other time. She also denied the marriage under native law and custom alleged in the pe­tition and explained what happened further as follows. In contemplation of a legal marriage under the Marriage Act some time before 1966, the said Patrick Gouba­dia, unknown to the respondent at the time, went to the respondent’s father and paid him a sum of sixty pounds as dowry. On learning about the payment, the re­spondent in September, 1966, rejected any proposal by the said Patrick Gouba­dia for marriage with her and told him so. Whereupon the said Patrick Goubadia, after some abortive efforts to persuade the Respondent, abandoned the idea. At no time was the payment of the dowry to the respondent’s father accompanied by any Benin customary marriage rights. The said Patrick Goubadia knew that the re­spondent was not his wife. With respect to the dissolution of the alleged marriage under native law and custom in August, 1967, the respondent averred as follows:­

“(e) That at no time either before or at the time of the alleged refund of dowry was there any form of marriage subsisting between the said Patrick Omosiogho Goubadia and the respondent and that on the said 14th of August, 1967, the Respondent was away in the United Kingdom.

Finally the respondent averred that the petitioner knew all the facts about Patrick Goubadia before they were married on 21st June, 1967.

The only evidence of the marriage under Benin native law and custom on which the petition was based is to be found in Exhibit “B”, the proceedings in suit 89/97 - Gabriel Erabor v. Patrick Omosiogho Goubadia instituted in the Benin City Customary court No. 2 on 14th August, 1967. The respondent was not a party to the proceedings in which her father’s claim against Patrick Goubadia was as follows:­

‘The plaintiff’s claim is for the dissolution of the marriage between defendant and plaintiff’s daughter Miss Mercy Erhabor on refund of £60 (sixty pounds) dowry paid by the defendant on the plaintiff’s daughter since 1964.”

At the hearing in the Benin Customary Court, the respondent’s father testified as follows:­

“I am the father of the defendant’s wife. The defendant approached me to marry my daughter Mercy Erabor and after consultation with my daughter by the de­fendant, I approved the marriage between the two of them. The defendant after paying £60 dowry also agreed to marry my daughter legally in the church which the defendant fails to do.” (The italics are ours).

In his own defence, Patrick Goubadia testified as follows:­

“I met the plaintiff’s daughter at Ibadan and I promise to marry her and she told me to come and see the father at Benin City, and afterwards I met, the father to discuss the daughter’s marriage. The plaintiff agreed to my wishes to marry his daughter and he said he knew all my family to be good. The plaintiff said if you and my daughter agree to see me. After some time I came to Benin and paid dowry of £65 to the parents of my wife excluding drinks.” (The italics are ours).

The above extracts from the proceedings in the customary court are particu­larly relevant when considering the testimony of the two experts on Benin native law and custom called by the petitioner and the respondent in the present pro­ceedings.

For the petitioner, Hawdon Omoroghe Uwaifo (2nd PI/W), a retired civil ser­vant and the President of the Udo Customary Court until May, 1968, testified as to the Benin customary law of marriage. Uwaifo claimed to be ‘Versed” in Benin cus­tomary law.” He also claimed to have published in 1967 a pamphlet entitled “Benin Custom and Law regarding Land, Burial Rites and Inheritance”. In his testimony, Uwaifo stated that under Benin customary law, the consent of a daughter need not be sought and/or obtained before her marriage to any husband by the father. Under cross- examination, he explained that in recent times, enlightened Benin fathers sought and obtained the consent of their daughters before giving them away in marriage under native law and custom. When pressed further on the point, Uwai­fo replied as follows:-

“If as enlightened as I am, I had a daughter with a University background, I would not accept any dowry on her from an obscure illiterate, but would give her the opportunity of telling me what her choice is. If my daughter insisted on marriage under the Ordinance without the payment of dowry as dictated by cus­tom, I would insist on receiving the dowry before allowing her to proceed with marriage under the Ordinance.”

Dr. J. U. Egharevba (2nd D/W), who also claimed to be an expert on Benin customary law, testified for the respondent. He is the curator of the Benin museum. He also stated that he had published several books on Benin native law and custom. One of these books, published in 1946, and which he said has been in use in several courts of law in Benin Division, is entitled “Benin Law and Custom.” (Ex. “k’). He testified as to marriage under native law and custom of the Benin people as follows:­

‘The payment of dowry is not all that is required to render a marriage valid under Benin custom. The bridegroom must also perform all other necessary ceremonies. If a father in Benin City accepts dowry in respect of his daughter who is in Lagos from the daughter’s future husband who had come to Benin for the purpose of paying the said dowry and there is no evidence that the daughter was later at any time escorted to the house of the husband as pres­cribed by Benin custom, such an arrangement is not a marriage under Benin custom but merely concubinage. If I had a daughter at a University working to­wards her first degree and any Bini person sought her hand in marriage, I would send for her to come home for consultation. If, having consulted with her, she agrees to marry the person concerned, then and only then would “I give my consent to the prospective husband. I can never consent, if my daughter does not in the first instance give me her consent.

......................

Every Benin cus­tomary marriage must be followed by cohabitation. There can be no Benin cus­tomary marriage without the parties living together. The living together must commence from the inception of the marriage. After the parties shall have lived together, the wife may obtain leave to visit her parents for a short period.” (The italics are ours).

In the course of his judgment in this case the learned trial Judge found that the requirement of consent by the bride-to-be to a proposal marriage under native law and custom does not only accord with common sense, but is in conformity with the law of the land. On the evidence in particular, he observed as follows:­

I reject the evidence given by the petitioner’s second witness, Uwaifo, under examination-in-chief and find as established that the consent of a daughter of her father in respect of the customary marriage contemplated is an essential condition to the validity of marriage under Benin native law and custom

In my view consent is not only basic but fundamental to either a potentially polygamous union such as a customary marriage or a monogamous union such as marriage under the Act. Special provisions for obtaining consent are inserted in the Marriage Act (Cap. 115).

I also find as established on the evidence before me that there can be no valid marriage under Benin native law and custom without the parties to it living together right from the very inception thereof.

There is evidence as to the above, which I accept, in paragraph 24 of Dr. Egharevba’s publication on Benin Law and custom (Ex. “k’) and in the testimony of Dr. Egharevba himself before me.”

After considering the testimony of the respondent and after looking at the sub­stance of the proceeding in Ex. “B”, the learned trial Judge found that the consent, if any, which the respondent gave to Patrick Goubadia was in respect of marriage under the Marriage Act that she did not at any time give her consent to her father as prescribed by Benin custom in respect of the purported customary marriage. In this connection, the learned trial Judge referred to a letter (Ex. “G”) dated 20th January, 1965, written by Patrick Goubadia to the respondent in which he (Patrick Goubadia) made the following observation about the Respondent’s father:­

“Any way go soft with the situation until we get our legal marriage through ......................... Tell him that after your marriage, you cannot give him any help without the prior approval of your husband ................. Since you want legal marriage, it is very necessary for us to comply with all the clearly defined terms in the Marriage Ordinance. (The italics are ours).

The learned Trial Judge also pointed out that, as late as 27th March, Patrick Goubadia, wrote a letter (Ex. “H”) to the respondent in which he said -

Further to my last discussion with you, I have tentatively fixed our marriage for September 23rd, 1967. This date as you know coincides with my birthday.”

Finally, the learned trial Judge found that there was not a shred of evidence that the respondent ever lived with Patrick Goubadia as man and wife at any time. Hav­ing thus found against the marriage celebrated by the parties under the Mar­riage Act (Cap. 115) valid and dismissed the petition.

The petitioner has now appealed against this decision. A number of grounds of appeal were argued by the main submission, and indeed the only one worthy of any serious consideration, made by the learned counsel for the petitioner/ap­pellant, was that the learned trial Judge was in error in holding that the marriage between the respondent and Patrick Goubadia under Benin native law and custom was not proved. It was contended in this connection that the proceedings (Ex. “B”) in which the Benin Customary Court granted a divorce to the respondent’s father in respect of the said marriage under native law and custom was conclusive as to the existence of the said marriage because of the provisions of Section 49(1) of the Evidence Act (Cap. 63).

For the respondent, it was submitted that the petitioner/appellant did not rely solely on Ex. “B” and that the proceedings which were for divorce and in which the issue of the legality of the subsequent marriage under the Marriage Act was never raised could not be conclusive. At the hearing in Ex “B”, learned counsel further submitted, there was no conclusive evidence as to the marriage under Benin na­tive law and custom, none about the date of the said marriage and none what­soever about its consummation which is a condition precedent to the validity of such marriage. The court in that case merely considered and decided the claim for di­vorce and refund of dowry.

The petitioner/appellant’s petition that the marriage be declared null and void and presumably brought following the provisions of Section 33(1) of the Marriage Act (Cap. 115) which read:­

“A marriage may be lawfully celebrated under this Ordinance between a man and the sister or niece of his deceased wife, but, save as aforesaid, no mar­riage in Nigeria shall be valid which, if celebrated in England, would be null and void on the ground of kindred or affinity, or where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such is had.”

Therefore, in order to succeed, the petitioner/appellant must prove that, at the time of the celebration of his marriage with the respondent, she was already mar­ried under Benin native law and custom to Patrick Goubadia. The learned trial Judge held that she was not so married. The point to decide in this appeal is, suc­cinctly put, whether the learned trial Judge erred in his finding.

As the law stands, in order to invalidate a marriage celebrated under the Mar­riage Act on the ground that, at the time of the aforesaid marriage, there was a marriage under native law and custom by one of the parties still subsisting, that marriage under native law and custom must be proved with high degree of cer­tainty. (See Abisogun v. Abisogun and Ors. (1963) 1 All N.L.R. 237).

In the instant case, the learned trial Judge, quite rightly in our view, had found, and this was amply supported by the evidence which he had accepted, that under Benin native law and custom, a daughter could not be married off to a man by her parents without her consent.

Moreover, the learned trial Judge had the power, and indeed the duty, of de­ciding in the case in hand which of the two versions of Benin native law and cus­tom, in respect of which evidence was given before him, is more consistent with the principles of natural justice, equity and good conscience. Having considered the totality of the testimony before him, he came to the conclusion that the consent of the bride-to-be was a condition precedent to a marriage under Benin native law and custom. As this is a straight issue of fact, we see no reason to disagree with his findings on this issue. The learned trial Judge, rightly in our view, also found that the respondent, at no time, gave her consent to any marriage under native law and custom with Patrick Goubadia and that unless there was cohabitation as well, payment of dowry alone does not constitute marriage under such native law and custom. These findings cannot also be successfully challenged.

In the face of all these findings of fact, we are unable to see any force in the submission that the learned trial Judge was in error in finding as he was entitled to do, that the marriage of the respondent to Patrick Goubadia under Benin native law and custom was not proved.

We see no merit in the appeal which is accordingly dismissed with costs as­sessed at 55 guineas to the respondent.

Appeal dismissed.