**Sefu v Hamza**

**Division:** Court of Appeal at Arusha

**Date of judgment:** 1 April 1974

**Case Number:** 55/1973 (61/74)

**Before:** Sir William Duffus P, Law Ag V-P and Musoke JA

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**Appeal from:** High Court of Tanzania – Patel, Ag. J

*[1] Customary Law – Succession – Zigua custom of fyagio – Whether child can abandon rights.*

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**JUDGMENT**

The following considered judgments were read. **Musoke JA:** This is an appeal from the High Court of Tanzania at Arusha. The appellant was the defendant when the suit was instituted at Mswaki primary court, and judgment was given in his favour. The plaintiff successfully appealed to the district magistrate’s court of Handeni, but the defendant’s appeal to the High Court against the decision of the district court was dismissed. In a very short judgment the judge who heard the appeal adopted the judgment of the district court. This being a third appeal we are concerned only with points of law. In *Shah v. Aguto*, [1970] E.A. 263 at p. 265 this Court, after reviewing some of the principles governing the hearing of second and third appeals, held that where the first appellate court has reversed a finding of fact by the trial court, it is a question of law whether it has acted judicially in doing so; and this entails the examination and evaluation of the evidence. The appellant, a Zigua by tribe, is the father of the respondent, and the suit arose out of a claim by the respondent based on a Kizigua custom known as “fyagio”. Under this custom when a married woman dies and is survived by her husband and children of the marriage, the children are entitled to a share in their mother’s property which was jointly acquired and held by the parents. There were four issue of the marriage, the first and last being men. The respondent was the first child, and the property in question consisted of cattle. The respondent’s mother died in 1961 and in that very year the children claimed from their father their mother’s share of the cattle; but their claim was not seriously attended to until 1968 when tribal elders were summoned to settle the matter. On 26 December 1968, the elders held their meeting and ten head of cattle was set aside in satisfaction of the children’s claim under “fyagio”. At that meeting the respondent, on his own volition, publicly and unconditionally announced his abandonment of his claim; and it was the youngest child, Mkumbi Seffu who received the ten head of cattle. A written record of the proceedings and decision of the elders was made out and was signed by Mkumbi Seffu. However, on 16 September 1971 the respondent instituted these proceedings in the Mswaki primary court, claiming 33 head of cattle for himself and his two sisters, as their share of their mother’s property under “fyagio”. His main contention at the trial was that his abandonment of his claim before the elders had been previously induced by his father. He testified as follows: “The distributor of such property did not turn up on the day fixed, then my father approached me at my shamba and asked me not to accept a share out of the ten heads of cattle on grounds that father would give me more share than the current offer. I did not object to this.” The trial magistrate on the evidence before him, particularly that of Mkumbi Seffu and Adam Mkombozi and the written record of the proceedings of the elders, came to the conclusion that the respondent had failed to establish his claim. He found for the appellant. In the district magistrate’s court on appeal the respondent repeated his evidence before the primary court and, in addition, he disclosed that by 1969 he had found out that his father had given him a false promise, and further that it was within his knowledge that his father had disinherited him, as well as his younger brother, Mkumbi Seffu, in favour of other children by another wife. He called an additional witness, Bakari Athuman, whose evidence added nothing new. The district court magistrate in his judgment accepted the respondent’s contention that the abandonment of his claim was conditional as set out above and reversed the finding of the trial magistrate. When granting leave to appeal to this Court, Makame, J. restricted the appeal to two issues which he considered raised points of law, namely; 1.

“ Whether, if a person abandons his customary entitlement under “fyagio” by some private arrangement not brought out in the open he may go back on his customary right if the other party fails to carry out his part of the private deal. 2. W hat determines the quantum in ‘fyagio’.” In his submission Mr. Kapoor for the appellant, touched briefly on the importance of “fyagio” to the people concerned, but hardly addressed us on the first issue. On the second issue he relied on the letter of the village executive officer dated 5 December 1968. He did point out, however, that the district court magistrate had no evidence before him to reverse the finding of the primary court particularly as the alleged condition which induced the respondent to abandon his customary right was still capable of fulfilment by the appellant before his death. In my view this submission was sound. No time limit was set for the fulfilment of the condition, and in any event the alleged understanding between the respondent and his father was too vague to be taken seriously. The respondent having publicly and unconditionally abandoned his customary claim in clear terms and without disclosing any reasons for doing so, should not, in my view, be allowed afterwards to fall back on his customary right. As to the question of what determines the quantum in “fyagio” there was no clear evidence before the court on this issue. Some witnesses for the plaintiff indicated in their evidence that the wife would be entitled to one quarter of the property in question. No doubt this was based on the village executive officer’s letter, exhibit B, mentioned above, which contains the following passage: “Those were the cattle owned by them jointly and according to our customs if a wife and husband divide the property, the wife gets a quarter of it As against that view there was the evidence of Adam Mkombozi that their ancestors did not fix any proportion in which the spouses would share the property. With such evidence on record it is not open to this Court to decide what would be the proper proportion under “fyagio”. In my view the primary court magistrate wrote a well balanced judgment based on the evidence before him and reached a proper decision. I would allow this appeal, set aside the decision of the High Court and restore the decision of the primary court, with costs of the appeal here and in the High Court to the appellant. **Sir William Duffus P:** I have read and agree with the judgment of Musoke, J. A. and as Law, Ag. V.-P. also agrees, the appeal is allowed in accordance with the order set out in the judgment of Musoke, J. A. **Law Ag V-P:** I agree with the judgment of Musoke, J. A. and with the order proposed by him. The respondent Hamza Sefu, acting apparently on behalf of his sisters as well as himself, publicly and openly renounced his right to a share in his deceased mother’s cattle. The Primary Court magistrate and assessors held that he was bound by this renunciation. The evidence amply supported that finding, and I agree that the appeal should be allowed, and the judgment of the Primary Court restored. It is accordingly not necessary to decide the second point referred to us by the High Court as to the proper apportionment under the custom known as “fyagio”. That is a matter to be established by evidence, and the evidence adduced in these proceedings is inconclusive. *Appeal allowed.*

For the appellant:

*DN Kapoor* (instructed by *Vohora & Kapoor*, Arusha)

The respondent appeared in person