MORGAN RICHARD TSVANGIRAI

and

ELIZABERTH MACHEKA

versus

MUNAMATO MUTEVEDZI N.O

and

LOCADIA KARIMATSENGA

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 14 September 2012

Advocate *T Mpofu* assisted by *I Chagonda*, for the applicants

No appearance for the respondents

**Urgent *Exparte* Chamber Application**

BHUNU J: The melancholic drama unfolding in this case makes one wonder whether these are the wages of marrying during the sacred month of November in apparent violation of a well-established Shona custom prohibiting marriage during that month. The first applicant’s intended marriage to the second applicant is mired in perpetual controversy and acrimony as the couple continues to be hounded by the first applicant’s marriage to the second respondent allegedly contracted on 21 November 2011.

Both applicants intend to be joined in holy matrimony tomorrow 15 September 2012 in terms of the monogamous civil rights under the Marriage Act [*Cap5*:*11*]. The second respondent filed an objection with the first respondent in terms of s 19 of the Act, on the basis that she is married to the first applicant in terms of an unregistered customary law union. That being the case, the first applicant’s intended marriage to the second applicant has the adverse effect of nullifying her customary law marriage thereby depriving her of her rights acquired under customary law.

The first applicant flatly denied ever having been married to the second respondent as alleged or at all. This prompted the first respondent in his capacity as a magistrate to conduct an enquiry to determine whether in fact she was married to the first applicant in terms of customary law. The presiding magistrate ruled in favour of the second respondent and cancelled the marriage licence authorising the marriage.

Counsel for the applicants prevailed upon me to hear the matter as an *exparte application* on an urgent basis arguing that respondents’ legal practitioners were deliberately avoiding service by not answering their phones in order to sabotage the celebration of the marriage already set for tomorrow. Having regard to the urgency of the matter and that the determination being challenged was issued late this afternoon I reluctantly granted my indulgence.

A reading of the magistrate’s reasons for determination shows that he had regard to evidence laid before him in the form of affidavits and a video recording of the disputed marriage ceremony.

Having considered the evidence before him the magistrate had this to say at p 5 of his ruling:

“In that video recording it was clear that contrary to the unsubstantiated assertion by Mr Tsvangirai that he had only paid damages for impregnating Ms Karimatsenga out of wedlock, the ceremony was payment for roora which culminated in Mr Tsvangirai’s emissaries asking for their in-laws’ blessing to have a white wedding. The items tabulated on the list of roora tally exactly with the items mentioned in the video recording. On a balance of probabilities, the scale tips in the direction that for all intents and purposes, this was a marriage between Mr Tsvangirai and Ms Karimatsenga

After watching the video Advocate *Mpofu* returned with an additional affidavit from Mr Tsvangirai and in a bid to obtain the truth, I accepted that Mr *Samukange* and his learned colleagues consented to its admission. There are startling revelations in that statement.

Firstly Mr Tsvangirai (disowns his emissaries and alleges) that they did what he had not mandated them to do. In other words he alleges that they went and asked for Ms Karimatsenga’s hand in marriage without his consent. This is unfathomable. The delegation from his side was very big and joyous. There were large quantities of groceries that were bought and generally there was quite some merry making synonymous with a planned ceremony. I have no doubt that claiming otherwise is only a futile attempt by him to deny the obvious.”

Quite honestly I am unable to find any misdirection on the part of the magistrate’s well reasoned judgment based on sound logic and a careful analysis of the evidence before him. In the absence of the record of proceedings I am unable to ascribe any irregularity or fault in the manner in which the proceedings were conducted. The applicants having brought the matter to this court they had to provide this court with the record of proceedings in the Magistrates Court. Their failure to do so cannot be laid at the door of the respondents.

The application required the magistrate to determine the validity of the customary law union allegedly entered into between the first applicant and the second respondent. According to Story in his book *Customary Law In Practice* there are three essential characteristics for the creation of a valid customary law union. That is to say:

1. The consent of the woman, the woman’s guardian and the man.
2. The agreement as to the amount of *lobola.*
3. A formal handing over of the woman by the guardian.

I must hasten to point out in passing that since the enactment of the Legal Age of Majority Act 15/82 women who have attained the legal age of majority have since been emancipated by operation of law and no longer need a guardian. The consent of the guardian is therefore no longer a legal requirement for a valid customary law marriage or union. Thus the woman can now hand herself over normally accompanied by her aunt or relatives.

 The applicant however, only challenged one aspect of the alleged customary law union in which he denied having paid *lobola* or *roora* for the second respondent. The magistrate’s enquiry was therefore limited to establishing whether or not the applicant paid roora as alleged.

I now turn to consider the correctness or otherwise of the magistrate’s determination on that issue.

Counsel for the applicants sought to discredit the magistrate’s reliance on the video recording saying the viewing of the video was fraught with irregularities. The video recording was however a mere visual preservation of the events of that day. Apart from the video recording there is on record Annexture “A” which purports to be a list of the *roora* paid by Mr Tsvangirai’s emissaries for Ms Karimatsenga’s hand in marriage according to customary law. That list duly signed by all the parties concerned has not been challenged or repudiated by anyone. It reads:

“21 November 2011

**KuroorwakwaLocadia Karimatsengana Morgan Tsvangirai. (“The marriage of Locadia Karimatsenga by Morgan Tsvangirai”)**

1. Ndiro $ 100 Plate $ 100
2. Mbonano $ 150 Familiarisation $ 150
3. Musikana kunhonga $ 1 500 The girl’s share $ 1500
4. Atete $11 000 Aunt’s share $11 000
5. MuyaMusha $ 1 500 Damages $ 1 500
6. Gusvi $ 200 Clapping $ 200
7. Kupinda mumusha $ 300 Home entry $ 300
8. Makandinzwaani $ 150 Who told you $ 150
9. Kusunungura homwe $ 150 To open the purse $ 150
10. Mbariro $ 400 Brandering $ 400
11. Mushonga $ 400 Medicine $ 400
12. Mapfukudzadumbu $ 2 500 Trampling on the stomach $ 2 500
13. Rambi $ 400 Light $ 400
14. Tsigiraguyo $ 400 Balance the grinding stone $ 400
15. Bikiro $ 400 Cooking place $ 400
16. Chituru $ 150 Stool $ 150
17. Matekenyandebvu $ 200 Caressing the beard $ 200
18. Chemachinda $ 2 000 Court Fee $2 000
19. Rusambo $9 000 paid $600 Dowry $9000 paid $ 600
20. Mombedzinotsika 9 3 dzinotsikadzemari $250 each Cattle 9 3 live for cash $250 each
21. Yeumaiinotsika
22. Muchato - Wedding $ 150
23. Munyai – Go-between ………………… signed
24. Witness ………………… signed
25. Baba - Father ………….. ……..signed”

Undoubtedly the above payments constitute *roora* rather than payment of damages for impregnating a girl. While damages were inclusive in the payments the payments went far beyond mere payment of damages but *roora*. That being the case the presiding magistrate cannot be faulted for concluding that the first applicant is married to the second respondent according to customary law. What this means is that he cannot contract a civil marriage with any other woman without committing bigamy as defined in s 104 of the Criminal Law (Codification & Reform) Act [*Cap 9*:*23*]. That section provides that:

“104 Bigamy

(1) Any person who, being a party to:

(a) a monogamous marriage and, knowing that the marriage still subsists, intentionally purports to enter into another marriage, whether monogamous or polygamous, with a person other than his or her spouse by the first-mentioned marriage; or

(b) an actually polygamous marriage and, knowing that the marriage still subsists, intentionally purports to enter into a monogamous marriage with any person; or

(c) a potentially polygamous marriage and, knowing that the marriage still subsists, intentionally purports to enter into a monogamous marriage with any person other than his or her spouse by the potentially polygamous marriage;

shall be guilty of bigamy and liable, if convicted in terms of:

1. paragraph (a), to a fine not exceeding level six or imprisonment for a period not exceeding one year or both;
2. paragraph (b) or (c), to a fine not exceeding level five.

(2) Where a person is accused of bigamy in circumstances where he or she is alleged to have purportedly entered into a monogamous marriage while being a party to an unregistered customary law marriage with another person, and the accused denies that he or she is a party to the unregistered customary law marriage, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that he or she is a party to the unregistered customary law marriage.”

Thus unlike s 3 of the Customary Marriages Act [*Cap 5*:*7*] s 104 of the Criminal Code recognises an unregistered customary law union as a marriage for purposes of the prevention and prohibition of bigamy.

It is therefore, clear and beyond question that our law criminalises and prohibits a person married in terms of an unregistered customary law marriage or union from contracting a monogamous marriage with any person other than his spouse in terms of customary law. The mere fact that s 3 of the Customary Marriages Act [*Cap 5*:*07*] does not recognise an unregistered customary law marriage as valid marriage for the purposes of bigamy is irrelevant. This is because the two statutes are not in conflict in so far as none of them legalises bigamy. Thus the presiding magistrate did not misdirect himself in any way when he ruled that authorising the first applicant to marry the second applicant in the circumstances of this case was tantamount to authorising him to commit bigamy.

It is trite that our courts do not sanction the commission of a crime. There is no need to cite any authorities for this well established rule of law but if any be required, one need look no further than *CommercialFarmers Union & 9 Ors* v *The Minister of Lands and Rural Resettlement & 6 Ors* SC 31/10. In any case, there would be no point in authorising the celebration of a marriage that would be null and void *ab initio* for illegality on account of bigamy.

Apparently after having realised the futility and weakness of his case, the first applicant sought to divorce the second respondent in open court by offering a dollar note as ‘*gupuro*’ being a token or symbol of divorce in terms of customary law. This was ruled to be unprocedural and uncustomary. I have no doubt that the magistrate was again correct in his ruling. In any case no proof was tendered to the effect that the purported procedure for divorce was in accordance with customary law and practice.

Above all the magistrate had no jurisdiction to hear and determine the question of divorce because s 3 of the Customary Law Marriages Act does not recognise an unregistered customary law union as a marriage for purposes of divorce. In that case divorce could only take place extra-judiciary according to customary law practices and procedures as the formal courts had no role to play. This is in line with J. G. Story’s observations at p 54 of his book, *Customary Law in Practice,* where the learned author remarked that:

“In view of the provisions of s 3 of the African Marriages Act (Now the Customary Law Marriages Act) [*Cap 238*]a court has no jurisdiction to hear a divorce action in relation to an unregistered marriage because no marriage is recognised.”

Upon the lawful dissolution of an unregistered customary law union the courts can only recognise that the union has come to an end thereby releasing the couple from the shackles of s 3 of the Customary Law Marriages Act.

The court was however, not sitting to witness or determine any divorce between the two contestants but to determine whether the two were married in terms of customary law. The first applicant’s conduct in attempting to divorce the second respondent at the last minute in court in terms of customary law can only amount to an admission by conduct that he is in fact married to her in terms of customary law. For how else can a man seek to divorce a woman, unless the two are married?

It has been argued that the applicants cannot afford to have the intended marriage cancelled because the State President and other regional leaders are scheduled to attend the ceremony. It however, does not seem to matter to the judiciary that the State President and other regional dignitaries are scheduled to attend the illegal marriage ceremony. Our law is supreme; this is what the rule of law is all about. The first applicant is solely to blame for the mess he finds himself in. According to his affidavit he became aware of the disputed customary law marriage in November 2011 more than nine months ago. He had ample time to put his house in order before embarking on organising an illegal monogamous marriage ceremony with a different woman well knowing that there was another lady claiming to be married to him in terms of customary law.

In conclusion I must remark that it was remiss of counsel to refer this hopeless application to Court in the middle of the night without any prospects of success after the magistrate had delivered a water tight unassailable judgment. Had the application been opposed I would definitely have been inclined to award costs at the punitive scale upon request as an expression of this Court’s displeasure at this apparent abuse of legal process.

For the foregoing reasons the application to suspend the cancellation of the marriage licence issued to the applicants cannot succeed. It is accordingly ordered that the application be and is hereby dismissed.

*Atherstone* & *Cook*, applicant’s legal practitioners

*Venturas* & *Samukange*, 2nd respondent’s legal practitioners