

HIGH COURT OF SWAZILAND

CIV. CASE NO. 2385/95

BAGEZILE KUNENE

PLAINTIFF

V

CHICCO KUNENE                      1ST DEFENDANT

NONO KUNENE                      2nd DEFENDANT

Coram                                      S.B. MAPHALALA – J

For the Plaintiff                      MR. P. DUNSEITH

For the Defendant                      MR. L MAMBA

JUDGEMENT (10/08/99)

Maphalala J:

An order by consent was granted by this court in the following terms:

1. That the application referred to oral evidence on a date to be arranged with the Registrar of the High Court on the following issues only:

1.1 Whether the late David Mfuneni Kunene entered into a valid marriage with the applicant according to Swazi Law and Custom;

1.2 Whether the parents of the late David Mfuneni Kunene entered into valid marriage according to civil rites.

This consent order came in the wake of an application brought by the plaintiff by way of motion for an order inter alia declaring that the estate of the late David Mfuneni Kunene hereby be wound up in terms of the civil law, declaring that the Estate Succession Act No. 3/1953 hereby applies in the estate, and that the applicant and her minor child

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Mandlenkosi Njabulo Kunene are the sole heirs in the estate, costs and further and/or alternative relief.

When the matter came for arguments Mr. Dunseith informed the court that plaintiff is prepared to concede that the parents were not married according to civil law, thus item 1.2 in the consent order automatically fell away. He further submitted to the court that leaves item 1.1. of the consent order. Defendant concedes that she was smeared with the red ochre but Mr. Mamba for the defendant raised a point that this did not constitute a valid marriage in terms of Swazi law and custom. Mr. Mamba's contention is that the smearing with red ochre is in most cases done without the consent of the other party. The marriage between the parties was void in that all the essential requirements of a valid customary marriage were not complied with. No consent can be given after the groom has died. It would be inconsistent with morality and human rights. To buttress his position Mr. Mamba directed the court's attention to a textbook by Dr. Thandabantu Nhlapho titled Marriage and Divorce in Swazi Law and Custom (1991).

Mr. Dunseith on the other hand is of the view that marriage in terms of Swazi law and custom is a

process. As lawyers we have to come to a point where we can say the marriage has been concluded. To this effect he cited a number of textbooks and cases decided by this court in this connection. He referred the court to Family in Transition -The Experience of Swaziland (a publication of the Women and Law in Southern Africa Research Trust (1998 publication) at page 103. Mr. Dunseith submitted that when a woman has been smeared with the red ochre no other man can take her as a wife (see Dr. Thandabantu Nhlapho (supra) at page 63). He further cited the cases of R vs Fakudze and another 1970 - 76 S. L. R 422 at 423, Rex vs Timothy Mabuza and another 1979 -81 S. L. R. 8 and the case of Dlamini vs Thwala 1979 - 81 S. L. R 17.

Mr. Dunseith further submitted that it is conceded that the bride in casu was smeared with a red ochre and a goat was slaughtered and a goat bracelet was placed around her wrist and she was sent to her parental home with an "umgijimi" (chief's runner). Mr. Dunseith finally submitted that in the instant case it is not necessary to call expert witnesses in the face of such clear and abundant authorities. He applied that the court makes a declaration that the deceased entered a valid marriage with the bride in accordance with Swazi law and custom.

On points of law in reply Mr. Mamba submitted that he has no problem with the cases cited by Mr. Dunseith. His gripe is that the smearing with red ochre is not enough there are other essentials of a Swazi customary marriage which have not been complied with. There was no valid marriage. He urged the court to dismiss the application with costs in the winding up of the estate.

This is the issue before court for determination. The crisp point to be decided is whether the smearing with a red ochre of a woman constitutes a legally binding marriage in terms of Swazi law and custom or whether a legally binding Swazi marriage is when all the essential requirements have all been complied with. It is common cause that in the case under examination the bride was smeared with red ochre and a goat was slaughtered in

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accordance with custom. She was then dispatched to her parental home accompanied by "Umgijimi" (chiefs runner).

It appears from authorities by this court over the years that the smearing of the bride with the red ochre is the single most legally significant event in the formation of a marriage in accordance with Swazi law and custom. In the case of R vs Fakudze 1970 - 76 S. L. R. 422. The judge in that case sitting with assessors approved the rule as stated in the report of the Swazi Law Panel (1964). In that report at page 10, the rule is stated thus:

"There are a number of ceremonies performed at the wedding, but the legally significant one is anointing of the bride with the red ochre (libovu) unless and until this has been done, she is regarded as having been married (his lordship's emphasis).

The court again expressed itself on the issue in the case of R vs Timothy Mabuza and another 1979 - 81 S. L. R. 8 holding that if the smearing with the red ochre had been done, though not at the proper place, the woman smeared will nonetheless "be considered as married under Swazi customary law, even if no lobolo has been paid".

It appears to me that these decisions have decided a rather confusing situation beyond any doubt.

That as it may, the question which still begs an answer as in the case in casu, is granted the smearing with the red ochre in our law constitutes a valid Swazi marriage, what of a situation like the present one where consent from the groom has not been obtained? Can one say there was a valid marriage? This in my view is the issue to be referred to oral evidence for experts in Swazi law and custom to enlighten the court on these questions. To me it would appear prima facie that consent of the groom is essential otherwise such a marriage would tend to offend on morality and makes a mockery of Swazi law marriages.

It is for this reason that I come to the conclusion that the matter be referred to oral evidence to determine the aforementioned issues.

The Registrar of this court is to arrange as a matter of urgency that a date is set for such determination.

Costs to be costs in the cause.

S. B. MAPHALALA J