IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 64/2014**

HOLDEN AT LUSAKA **SCZ/8/41/2014**

(Civil Jurisdiction)

BETWEEN:

LAMECK TEMBO MALEMA APPELLANT

AND

MITRICE NYONDO RESPONDENT

CORAM: **Mwanamwambwa, D.C.J, Mutuna, Chinyama, J.J.S.**

On the 5th of October, 2016 and 28th March, 2017

For the Appellant: *Mr Bota of William Nyirenda and Company*
For the Respondents: *No appearance*

J U D G M E N T

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

1. **Fenias Mafemba v. Esther Stali (2007) ZR 215**
2. **Attorney-General V. Marcus Achiume (1983) ZR 1.**
3. **Esther Ngula Sitali V. Fenias Mafemba (2006) ZR 143 (HC)**
4. **Lieutenant General Musengule V. The Attorney-General (2009) ZR 359**

Other works referred to:

Max Gluckman's book titled, "the ideas in Barotse Jurisprudence" 1965 Edition

This is an appeal from the decision of the High Court dated 17th January, 2014, wherein the High Court refused to declare the union between the parties as a mere cohabitation.

The brief facts of the matter are that the Appellant and the Respondent were in a relationship and lived together from about 2000.

On 23rd December 2002, the Respondent's relatives called for a meeting and at that meeting, it was agreed that the Appellant pays ZMW1,100.00 for elopement and ZMW400 for dowry. The total amount came to ZMW1,500.00.

The following year 2003, the Respondent's relatives called for another family meeting and at that meeting, the Appellant's relatives paid ZMW1,000.00 towards the bill. It was also agreed at this meeting that there would be a charge of two heads of cattle at ZMW600 each. A document was signed to this effect and it appears in the Record of Appeal. The relationship between the couple culminated into the Respondent getting pregnant and on 13th May 2003, the couple had a child. The couple continued living together and in 2009, they had another child.

On the 13th of January 2011, the Appellant commenced proceedings for divorce before the Kitwe Local Court. Divorce was

not granted by the Local Court. The Appellant was dissatisfied with the Judgment of the Local Court, and on 17th May 2011, he appealed to the Subordinate Court.

According to the Appellant, he decided to withdraw his appeal before the Subordinate Court after learning about the decision of **Fenias Mafemba V. Esther Sitali** [1]. He stated that the decision made him realize that there was no marriage subsisting between him and the Respondent because no dowry was paid. It was the Appellant's evidence that as a result of the discovery and the withdrawal of the appeal, he commenced an action by Writ of Summons in the High Court for a declaration that the union between him and the Respondent was a mere cohabitation and not a marriage.

The evidence on record reveals that throughout their stay together, the parties referred to each other as husband and wife. The parties obtained a marriage certificate from the local court whose authenticity the Appellant disputed on grounds that his signature was forged.

After hearing the matter, the learned High Court Judge stated that it was the duty of the Appellant to show that the ZMW1, 000.00 payment was for elopement only. The trial Judge added that what the ZMW1,000.00 was for, was also not stated on the document that was signed. The Judge was of the view that the Appellant paid ZMW1,000.00 and neglected to finish paying. That in her view, this and the Respondent's family's failure to push for completion of payments as agreed should not affect the Respondent's status. She added that she could not find fault with the validity of the marriage merely because the payment was not done in full as agreed.

The Judge went on to state that:-

"even if I were to agree with the Plaintiff that K1, 000.00 was for elopement, the evidence is clear that after the meeting and subsequent payment of K1, 000.00, the parties continued living as husband and wife. The Plaintiff did not surrender the Defendant back to her family after being charged for elopement or paying as he contends, which he was free to do, as testified by PW2 that a man can end at elopement if he did not want to marry the girl."

Regarding the marriage certificate, the Judge added that it was incumbent upon the Appellant, who was alleging fraud, to prove it. The Judge concluded that the evidence indicating the existence of a customary marriage between the parties was conclusive and unequivocal. The trial Judge went on to say that the parties eloped with intention to marry, which they did after their families met and agreed. Accordingly, the Judge refused to declare the union between the parties as a mere cohabitation.

The Appellant appealed to this Court on the following five grounds.

Ground one

The Court below erred in fact and in law when she held that the Plaintiff and his family elders elected to abandon completing the marriage payments as agreed after they paid K1,000 when no marriage payment had been paid but only damages for elopement.

Ground two

The Court below erred in fact and in law when she held that the Appellant's failure to make marriage payments as agreed by the families should not affect the Respondent's status when it is clear from the law that it is payment which constitutes marriage.

Ground three

The Court below erred in fact and in law when she held that the validity of the marriage cannot be faulted merely because payment was not done in full as agreed when no payment for the marriage was ever made.

Ground four

The Court below erred in law and in fact when she held that what was important was that the parties met and discussed elopement and dowry and amounts were indicated and that the parties continued living together when it is not meeting of the parties and discussion of elopement and dowry and living together which is important but payment of dowry that is important. Meeting and discussion and living together do not constitute marriage.

Ground five

The court below erred in law and in fact when she held that evidence indicating the existence of a customary marriage between the parties was conclusive and unequivocal and that the parties eloped with intention to marry.

Counsel for the Appellant filed heads of argument on behalf of the Appellant and he appeared on the date of hearing. However, no heads of argument were filed on behalf of the Respondent and no one appeared on the date of hearing the appeal.

Ground one and three were argued together. Mr. Bota submitted that the finding that the Appellant and his elders abandoned to complete the marriage payments was without foundation. That the evidence from the expert witness who testified in the court below was that *"traditional marriage"* is constituted or sanctioned on payment of marriage payment. He stated that what is on record is that the Appellant did not pay anything towards the marriage payment or lobola. That this was evident from the fact that the evidence from the local court was that the Appellant never paid dowry;

1. **the purported marriage certificate placed on the Court's record by the Respondent does not indicate the amount of dowry paid;**
2. **the evidence of the uncle to the Appellant was that the K1,000 was for elopement; and**
3. **the evidence of the Respondent's uncle was also that the K1,000 was for elopement.**

It was submitted that from the above it is clear that the above evidence does not support the finding of the trial Court that the family elders elected to abandon completing the marriage payments as agreed after they paid K1,000.00. Mr. Bota urged us to reverse

the above finding in line with **Attorney-General V. Marcus Achiume** [2].

In ground two and four, the Appellant is challenging the Court's findings to the effect that:-

> **"the Plaintiff paid K1,000.00 and neglected to finish paying. In my view, this and the Defendant's family's failure to push for completion of payments as agreed should not affect her status. The couple lived together for over seven years and had two children....**
>
> **what is important is that the parties met and discussed elopement and dowry amounts were indicated. The parties continued living together afterwards..."**

Mr. Bota argued that the above opinions by the trial Judge were clearly contrary to the law on what constitutes customary marriage. That customary marriage is constituted neither on agreement nor living together but payment of the marriage charge, also known as dowry or lobola. It was his submission that this law has been succinctly propounded in the following cases:

1. Esther Ngula Sitali V. Fenias Mafemba [3]; and
2. Fenias Mafemba V. Esther Sitali [1]

It was argued that the learned trial Judge should have looked at the case objectively and not subjectively.

Mr. Bota went on to cite a passage from **Max Gluckman's book titled, "the ideas in Barotse Jurisprudence" 1965 Edition**, which says:-

> **"that the marriage agreement and the ritual cannot achieve this is made clear by the rule that if a man agrees with a woman's kin to marry her, and all the marriage ritual is performed, but he does not transfer the marriage cattle, there is no marriage. He cannot proceed against adulterers, and the Court describes the man as a wife of the Country. Some transfer of property is essential to create any rights and obligations."(sic)**

That the above authorities and many others show that payment of marriage or dowry is essential to the constitution of marriage under customary law. Counsel repeated the six reasons given to the Court below in seeking to persuade the trial Judge not to accept the evidence that payment of ZMW1,000.00 by the Appellant was for both elopement and dowry. These were:-

1. **that when a man elopes with a woman, elopement should be paid first before any marriage payment or dowry is paid;**
2. **that in so far as the local court record was produced in Court by the Respondent's testimony that the Appellant told the Local Court that he**

had not paid any dowry which testimony was unchallenged by either the Respondent or her relatives;

3. that with objectivity, payment of ZMW1,000 cannot possibly cover payment for ZMW1,100 and ZMW400. That it is arithmetically inaccurate to say that ZMW1,000 covered both the elopement and dowry;
4. that the document that was signed took precedence as it clearly stated that- "the elopement charge should be paid as soon as possible considering the long period you have stayed together";
5. that after the payment of the elopement charge, the Appellant and his relatives were waiting to be notified of the time when they were expected to address the issue or payment of dowry; and
6. that the expert opinion was that the ZMW1,000 was for elopement and not marriage payment.

In ground five, Mr. Bota submitted that the learned trial Judge erred when she held that evidence indicating the existence of a customary marriage between the parties was conclusive and unequivocal and that the parties eloped with intention to marry. He argued that the above holding by the Court suggests that the following are what constitute a valid marriage:-

(i) intention of the parties to marry; and

(ii) meeting and agreement of the families.

Counsel argued that the above holding is contrary to the established custom as recorded by distinguished authorities like Max Gluckman who was cited with approval in the case of **Sitali v. Mafemba.**

He submitted that there is no basis on record to conclude that evidence of the existence of a customary law marriage in the instant case was conclusive and unequivocal when the Appellant, who was supposed to be the husband, and his relatives or family never, at any time, set out to pay marriage payment. Further, that the uncle to the Respondent, standing for the supposed wife's family, purported to have only converted money paid for elopement into marriage payment unilaterally after supposedly realizing that the Appellant failed to pay the balance.

Counsel added that what customary law requires is not unilateral conversion of penalty money or payment for damage for elopement ex-post into marriage payment.

The Respondent did not file any submissions.

Further, the record of appeal has a document which was signed by the parties' relatives. The document reads, in part, as follows:-

"On 23rd December 2002, I Charles Mbuta the guardian to Mitress Nyondo received Mr. Lewis Malama the uncle to Mr. Lameck Malama and Mr. Sefelino (word not clear) the witness regarding the subject of elopement and dowry."

It was agreed upon that Mr. Lameck Malama would pay:

K1, 100, 000 - ELOPEMENT

K400, 000 - DOWRY

Total: K1, 500, 000.00

The elopement charge should be paid as soon as possible considering the long period you have stayed together.

Signatures: Mitress Guardian (SIGNED)

Lameck's Uncle (SIGNED)

The witness (SIGNED)

23/12/2002

FRIDAY THE 5TH 2003

PAYMENT FOR LAMECK MALAMA TO THE NYONDO

PAID K1, 000, 000

BALANCE K500, 000 -TO BE PAID IN THE NEAR FUTURE

WITNESS - LEWIS MALEMA (SIGNED)

EWAN MALEMA (SIGNED)

CHARLES MBUTA (SIGNED)

CHARGE FOR CATTLE K600, 000=00 FOR TWO

TOTAL BALANCE K1, 100, 000=00."

The above document shows that at the time the parties and their families met in 2002, the intention was to formalise their association by bringing together both families at that meeting. It should be noted that at the time the above document was signed, the parties' had been cohabiting for some time. Therefore, if the intention was not to marry, the parties would have parted company and they would not have discussed the issue of dowry.

In addition, the Appellant argued that the ZMW1, 000 which was paid was for elopement only. However, the above document shows that the charge for elopement was K1, 100.00. We are of the view that the Appellant's contention that the ZMW1,000.00 was for elopement only cannot be true. We say so because:-

1. **at the first meeting, the parties agreed that the total to be paid included dowry;**
2. **it was agreed at the second meeting after the ZMW1, 000.00 was paid, that ZMW600 be included as a charge for cattle. This shows that the charge for cattle was discussed otherwise it would not have been included and signed for by the Appellant's representatives. Cattle is**

paid towards marriage because the amount for elopement had already been discussed. The fact that they discussed the charge for cattle shows that even at the time when the ZMW1, 000 was paid, the intention and the payment was towards the marriage; and

3. **when the ZMW 1,000.00 was paid, the parties stated that the balance remaining was ZMW500. After ZMW600, charge for cattle was included, the balance increased to ZMW1, 100.00.**

Even assuming that the ZMW1,000.00 was only for elopement, we do not understand why the Appellant's family would pay ZMW1,000.00 from the ZMW1,100.00 elopement charge. We would have expected them to pay the ZMW1,100.00 and not have a balance of ZMW100.00. It does not make sense for them to leave a balance of ZMW100.00. It seems to us that the Appellant's family paid ZMW1, 000.00 towards the total bill for elopement and dowry and not just for elopement. The parties from both sides met and the intention was that there should be a marriage. If it was an elopement, one would expect the Appellant to have walked away from the Respondent after paying the money.

As regards the Appellant's contention that this case should be looked at like that of **Fenias Mafemba v. Esther Stali** [1], our views

are these. In that case, this Court held that despite the parties living together for 14 years, there was no marriage. This Court made such a decision because the marriage in **Fenias Mafemba** case should have been solemnized in accordance with Lozi customary law and under Lozi customary law, there is no marriage if "**lobola**" has not been paid.

In the case at hand, however, there is no specific customary law that was brought in question. The Appellant was the one seeking a declaratory order that there was no marriage. Therefore, the burden to prove that there was no marriage was on him. He ought to have shown the Court that since the marriage was supposedly a customary one, it should have been solemnized in accordance with a particular custom. He ought to have brought evidence of the particular custom and shown the Court that in accordance with such a custom, the requirements for a marriage are as follows. He failed to do so. The Respondent did not bear the burden to prove anything.

Further, in the **Mafemba case**, there was no meeting held by the families to discuss anything and neither was there any

exchange of money. In the case at hand, there was a meeting of the two families, money exchanged hands and there was an agreement by the couple's relatives that elopement and dowry was to be paid.

Therefore, we are of the view that the **Mafemba** case is distinguishable from the case at hand.

The circumstances of this case show that the parties intended it to be a marriage. They cohabited for some time and they took steps to formalise the marriage by, having a meeting, agreeing to pay dowry and actually make a payment towards the bill.

In addition, throughout the marriage, the couple referred to each other as **"husband"** and "**wife".** The evidence on record and the circumstances show that even the Appellant took it as a marriage until it deteriorated. The parties even went further to obtain a marriage certificate from the Local Court. Even though the Appellant argued that the signature on the marriage certificate was not his; that it was forged. In the case of **Lieutenant General Musengule V. The Attorney-General** [4] this Court held that-

"At law, he who alleges fraud carries the burden to prove it, and the standard of proof is greater than the simple balance of probabilities."

The Appellant failed to prove any fraud as held in the above case. He failed to discharge this burden.

Therefore, we agree with the holding by the learned trial Judge that the Appellant had failed to prove that there was no marriage existing between him and the Appellant.

Accordingly, we dismiss all the grounds of appeal for lack of merit. The appeal fails.

We award costs to the Respondent, to be taxed in default of agreement.

M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

N.K MUTUNA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE