IN THE UPPER CUSTOMARY COURT OF KADUNA STATE
IN THE KAFANCHAN JUDICIAL DIVISION
HOLDEN AT GWANTU

THIS WEDNESDAY, 10TH JANUARY, 2024

UCCG/CV/24/2023

BEFORE:
HIS WORSHIP EMMANUEL J. SAMAILA, ESQ. – JUDGE
MR. YAKUBU S. GIMBA – MEMBER

BETWEEN
RUTH REUBEN – PETITIONER
AND
REUBEN IBRAHIM – RESPONDENT

JUDGMENT

[1] The petitioner sued the respondent seeking the dissolution of their marriage which was contracted in 2015 in accordance with Gwantu custom. They have one child named Rachel. The respondent's reply to the petition is that it is either the petitioner remains as his wife or refunds his bride price in accordance with Kagoma custom. The parties were given time to explore reconciliation. However, the matter was heard after reconciliation was reported to have failed. The petitioner testified as PW1 and called her father, Joseph Galadima, as PW2. In his defence, the respondent gave evidence alone as RW1. The nub of the petitioner's case is that she and the respondent are married and have one child which she is willing to take custody of in accordance with Gwantu marriage custom if she has to refund her bride price to the respondent. Conversely, the pith of the respondent's evidence is that the petitioner should either remain as his wife or return his bride price in accordance with Kagoma custom.

[2] In order to adequately and justly resolve the dispute between the parties, the following questions will be considered and answered:

1. Has the petitioner established that a valid marriage in accordance with Gwantu custom exists between the parties?
2. Has the respondent successfully proved the existence of a right to the refund of his bride price under Kagoma custom?

Question 1

[3] In her evidence as PW1, the petitioner told the Court that she and the respondent are married. That piece of evidence was materially corroborated by the testimony of PW2. As RW1, the respondent substantiated the testimonies of the petitioner's witnesses about their marriage. He had no objection to the marriage being dissolved but stated that the petitioner has to refund his bride price in accordance with Kagoma custom as she is the one quitting the marriage.

[4] It is the law that a piece of fact admitted by an adversary requires no further proof. In ECO Int'l Bank PLC v NULGE, Jalingo LGC & Anor (2014) LPELR-24171 (CA) p.7, paras. B-C, the Court held that:

> "An admission of a party in law is the best evidence, in the sense that the opposing party need not make any strenuous effort to prove the admitted facts. Thus, a Court of law is entitled to give judgment based on an admission by a party if the admission is relevant to the facts in issue."

[5] Under Gwantu marriage custom, which this Court is conversant with, a suitor is required to perform the marriage rites of a lady he is taking as wife. This is a prerequisite in the process of creating a valid

marriage in their custom. In the instant case, the parties are in consensus that the respondent performed the petitioner's marriage rites in accordance with Gwantu custom.

[6] Considering the evidence of the parties vis-à-vis the Gwantu marriage custom, we answer the first question in the affirmative. We find that a valid marriage in accordance with Gwantu custom exists between the parties. We so hold. Consequently, the marriage between the parties is hereby dissolved in accordance with their mutual wish with effect from today, Wednesday, 10th January, 2024.

[7] In the absence of any claim for custody by the petitioner or evidence that the respondent is incapable of taking care of their 7-year old child, the Court will not inquire into the understanding between the parties about the custody and care of the child. However, for the fact that the child is in the custody of the respondent, the petitioner is hereby granted visitation rights to see Rachel, their child, and spend time with her. No matter the gravity of the rift between parents, no child should be made to suffer a disadvantage such as the denial of access to a parent. The order granting the petitioner visitation rights is subject to review at any time by the Court on its own motion or upon the application of any interested person in accordance with Section 27(2) of the Customary Courts Law 2001 (as amended).

[8] The parties are admonished to relate peaceably with each other in the interest and for the benefit of their child who will invariably bear the consequential pains occasioned by their separation.

Question 2

[9] Pursuant to the order dissolving the parties' marriage, the next issue to be determined is whether the respondent has proved that he has a right to demand and receive his bride price from the petitioner in accordance with Kagoma marriage custom. If the resolution of this issue favours the respondent, the corollary question will be whether the petitioner is bound to refund the token paid by the respondent as her bride price in order to validate the marriage dissolution order and signify the end of the parties' matrimonial relationship.

[10] In his response to the petitioner's statement of her petition for the dissolution of their marriage, the respondent stated that the petitioner should either remain as his wife or refund his bride price. She replied that she will not do so because she has given birth for him. In her evidence as PW1, she restated that the respondent is demanding the refund of his bride price because she has refused to return to his house. Her testimony was corroborated by the evidence of PW2 who added that they are ready to refund the respondent's bride price if he is willing to also comply with their custom by (a) giving them the child she gave birth to, (b) fixing the petitioner's body which he has injured severally with a machete and (c) returning her dowry, the items she took to his house when they got married.

[11] In his defence, the respondent's terse testimony is a restatement of his demand for the refund of his bride price because it is the petitioner that is no longer desirous of being his wife. He stated that his demand is in accordance with the Nigerian Constitution. However, under cross-examination, he stated that his demand is in accordance with Kagoma custom.

[12] In his final address, the respondent restated his demand for the refund of his bride price if the petitioner insists on the divorce. On her own part, the petitioner echoed her father's position and declared emphatically that she will refund the respondent's bride price if he agrees to return their daughter to her. However, the respondent expressed his unwillingness to comply with the petitioner's custom.

[13] There was no disputation by the petitioner about the existence or otherwise of the Kagoma marriage custom requiring a departing wife to refund the token paid as her bride price to her husband. She did not also challenge the applicability of the custom but countered it with a statement of her corresponding right to take custody of their child under Gwantu marriage custom. Similarly, the respondent did not question the existence or applicability of the Gwantu marriage custom requiring a husband, as a pre-condition for the refund of his bride price, to (a) give up the custody of his child, (b) fix the damage done to a woman's body as a result of the husband's acts of cruelty and (c) return her dowry, the items she brought to his house when they got married. Thus, the burden of considering the validity and enforceability of the Kagoma marriage custom in issue rests on this Court being called upon to take cognizance of and apply it. The justice of this case will require this Court to discharge this burden dispassionately, conscious of the need to balance the right of the respondent to a refund of his bride price under Kagoma marriage custom against the petitioner's corresponding right under Gwantu marriage custom to the custody of their child, restoration of her body to its pre-harm state and the return of her dowry, the items she took to the respondent's house.

[14] The fact that a custom has been freely practiced by a people from time immemorial is not an automatic ground for a Court to endorse and enforce it when called upon to do so. Such practices include non-judicial divorce in some customs during which the women who left their husbands are required and compelled to refund their men's bride price as the final act signifying the termination of the marriage and freeing the woman from its bond. When such a custom is sought to be judicially noticed and benefitted from, the Court must ensure that the custom passes the validity test. Such customary right has to be judicially and judiciously considered against any existing and stated corresponding right of an adverse party.

[15] The legal framework for testing the validity of a customary law by this Court is contained in Section 24(a) of the Kaduna State Customary Courts Law, 2001 (as amended). The section is akin to Section 18 of the Evidence Act 2011 (as amended). The power of the Court to screen all customary laws has also been underscored in a plethora of judicial authorities including Okonkwo v. Okagbue (1994) 9 N.W.L.R. (Pt. 368) 301, Ojukwu v. Agapusi & Anor (2014) JELR 36686 (CA) and Ojiogu v. Ojiogu (2010) LPELR-2377 (SC).

[16] Section 24(a) of the Customary Courts Law of Kaduna State provides:

> "Subject to the provisions of this law, a Customary Court shall administer:
>
> (a) The appropriate customary law specified in section 25 of this law in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either

directly or by necessary implication with any written law for the time being in force."

[17] Can it be said that a custom requiring a woman to refund the token paid as her bride price, because she decided to divorce her husband, is not repugnant to natural justice when she is not an inanimate piece of property or an animal bereft of freewill acquired by him?

[18] Is it fair and in accord with the principles of natural justice to require a woman to refund the token paid as her bride price and return alone and empty-handed to her parents' house after investing her life in matrimony she must have desired to last forever? Is it equitable to make and enforce such an order against a woman married under customary law, as in the instant case, when such is not a requirement for either an interim or final decree dissolving a marriage contracted under the Marriage Act?

[19] Will it be conscionable to blindly and slavishly give effect to and make such an order against the petitioner just because it is the custom of the Kagoma people as canvassed by the respondent? Is it conscionable that a woman married under the Marriage Act gets alimony and enjoys the just and equitable right to settlement of property and maintenance but her sister married under customary law gets nothing when she chooses to leave and is even required to refund to her man the token he paid as her bride price? Is it conscionable that a woman who was physically and psychologically battered and bruised in the course of discharging her numerous matrimonial responsibilities for eight (8) years, including taking care of their child and the respondent,

especially when he becomes sick, should be ordered to refund her bride price for seeking to leave a broken union? How will the application of this custom encourage and inspire women married under customary law to be committed to their marriages to the point of returning to their husbands' houses, as the petitioner did severally in the instant case, even after being maltreated, bruised and battered?

[20] Isn't this customary practice manifestly discriminatory against the petitioner and breaches several of her constitutionally guaranteed rights, particularly the right to dignity of person as provided for in Section 34(1)(a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)? Doesn't this practice give more credence to the fact that women married under customary law are considered and treated as mere properties acquired by the man in whose favour exists a reserved and an unqualified right to the refund of the token he paid as bride price if at any time during her lifetime the woman dares to quit the matrimony, even after eight (8) years of complete obeisance to the respondent as in the instant case?

[21] A woman married under customary law is not a mistress, a surrogate mother or an inanimate baby-making machine available for use by a man for the production of children. She is in a lawful marital union with inalienable rights, first as a human being and also as a spouse. She enjoys the protection of the law, particularly our nation's grundnorm, the 1999 Constitution, and is not less human than her counterparts married under the Marriage Act.

[22] Should customary law be allowed to be used as a legal cover for the abuse of the fundamental rights of women who choose to marry

under it? Is this something that our Constitution envisaged when it recognized customary law as one of our sources of law? At some point in our national life, oppressive and discriminatory customary practices have to be brought to an end. One of the paths to achieving this is by the pronouncements of Courts declaring such practices as repugnant.

[23] In a paper presented at the National Judicial Institute titled, *The Legal Rights of the Vulnerable Groups vis-à-vis Customary Practices,* Honourable Justice Joseph Otabor Olubor, President, Customary Court of Appeal, Edo State, made several recommendations. Even though his paper focused on the proprietary rights of women married under customary law, his recommendation for the protection of the rights of such women is sufficiently generic. His Lordship said:

> "The legal rights of our women as contained in our constitution and relevant laws should be protected. The courts especially the customary courts and the Customary Courts of Appeal should not shy away from taking closer look at these rights vis-à-vis the customary practices in order to make the appropriate pronouncements whenever the opportunity presents itself in order to protect the legal rights of our women."

[24] It is interesting to know that as far back as 2015, the custom and practice of demand for refund of bride price after the breakdown of a customary marriage has been declared as unconstitutional by the Supreme Court of Uganda. In *Mifumi (U) Ltd & Ors v. Attorney General (Constitutional Appeal No: 02 of 2014) [2015] UGSC 13 (6 August*

2015), an erudite, insightful and persuasive decision, the Court per Tumwesigye, JSC, said:

> "In my view, it is a contradiction to say that bride price is a gift to the parents of the bride for nurturing her, and then accept as proper demand for a refund of the gift at the dissolution of the marriage. …
>
> In my considered view, the custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2nd respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term 'bride price' is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded.
>
> Apart from this, the custom completely ignores the contribution of the woman to the marriage up to the time of its break down. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. I respectfully do not agree with the suggestion proposed by the 2nd respondent that when the marriage breaks down, a woman's contribution should be subjected to valuation, taking into account the length of the marriage, the number of children the woman has produced in the marriage, e.t.c., on the basis of which the refund should be

determined. If a man is not subjected to valuation for the refund of bridal gifts … when the marriage breaks down, it is not right or just that a woman should be subjected to valuation. She is not property that she should be valued. It is my view that refund of bride price violates Article 31(1) which provides that 'men and women of the age of eighteen and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution'.

It is also my view that refund of bride price is unfair to the parents and relatives of the woman when they are asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund. …

The effect of the woman's parents not having the property to refund may be to keep the woman in an abusive marital relationship for fear that her parents may be put into trouble owing to their inability to refund bride price, or that her parents may not welcome her back home as her coming back may have deleterious economic implications for them.

Furthermore, if marriage is a union between a man and a woman, it is not right that for customary marriage to be legally recognized dissolution should depend on a third party satisfying the condition of refunding bride price failure of which the marriage remains undissolved.

It is my firm view that the custom of refund of bride price, when the marriage between a man and a woman breaks down, falls in the category that is provided under Article 32(2) of the Constitution which states:

'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any marginalized group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'.

I would, therefore, declare that the custom and practice of demand for refund of bride price after the breakdown of a customary marriage is unconstitutional as it violates Articles 31(1) (b) and 31(1). It should accordingly be prohibited under Article 32(2) of the Constitution."

[25] While Articles 31(1)(b) and 32(2) of the Ugandan Constitution do not have similarly worded provisions in Nigeria's 1999 Constitution (as amended), the provisions of the Articles are generally covered by Sections 1(1) & (3), 17(2)(b), 21(a), 34(1)(a) & (b), 40 and 42(1) & (2) of our Constitution. The sections provide:

1(1) "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

1(3) "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

17(2) "In furtherance of the social order-

(b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced;"

21. "The State shall -

(a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter;"

34. "(1) Every individual is entitled to respect for the dignity of his person, and accordingly -

(a) no person shall be subject to torture or to inhuman or degrading treatment;

(b) no person shall he held in slavery or servitude;"

40. "Every person shall be entitled to assemble freely and associate with other persons …"

42(1) & (2)"(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or

advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

[26] As a Court endowed with the jurisdiction to take cognizance of and apply customary law, it is mandatory to ensure that a custom passes the repugnancy test before it is applied, no matter the extent of its popularity, the length of its existence or the degree of its acceptance by a family or community. In *Okonkwo v. Okagbue's* case, it was contended that the Onitsha marriage custom which allows a widow to marry another woman for the purpose of raising children for her late husband is valid if the family and the village consent to it. The trial High Court held that the custom is valid. The Court of Appeal upheld the trial Court's decision. The Supreme Court set aside the concurrent decisions of the courts below and held that the custom was not only repugnant to natural justice, equity and good conscience but also contrary to public policy. The Court declared the marriage as null and void. Hear the apex Court, per Ogundare, JSC:

"A conduct that might be acceptable a hundred years ago may be heresy these days and vice versa. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and

sensitivities of the people of this country and to consensus values in the civilised international community which we share. We must not forget that we are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static."

[27] R.N. Nwabueze echoed similar sentiment in his paper titled, *The Dynamics and Genius of Nigeria's Indigenous Legal Order* published in the *Indigenous Law Journal/Volume 1/Spring 2002*. At page 180, the author said:

"I do not suggest that customary law is beyond reproach and that an Indigenous judge should be faithful to traditionalism in the face of obvious injustice perpetuated by a rule of customary law. This injustice is likely to arise in various areas of customary law concerning the rights of women and female children. I am only suggesting that Indigenous judges are more likely to appreciate customary law and should, as far as practicable, be able to attune it to the dictates of modernity in ways that save the customary law and still make it relevant to contemporary society."

[28] In another paper titled, *Divorce Proceedings Under Customary Law*, presented at the Refresher Course for Judges and Kadis at the National Judicial Institute, Abuja in 2018, His Lordship, Honourable Justice John Bayo Olowosegun, Customary Court of Appeal Lokoja, Kogi State, at page 24, said: "It must be noted that any custom that

encourages servitude or turns a wife into a chattel in contemporary Nigeria will not only look askance but will fail to meet the standard of justice or the repugnancy test."

[29] In *Ezeaku v. Okonkwo (2011) JELR 55606 (CA),* the Court held that a customary marriage is not dissolved unless the bride price is refunded. However, *Ezeaku v. Okonkwo* is distinguishable from the present case on at least two fronts. Firstly, the facts of both cases are not on all fours. In *Ezeaku's* case, there was no statement of an adverse custom which grants a corresponding right and is relied upon as the Gwantu marriage custom concerning the custody of a child after the refund of bride price in the instant case. It is the law that a case is an authority for the issues it decides. In *P.D.P. v. INEC (2023) LPELR-60457 (SC) P. 48 Paras C - D*, the apex Court, per Okoro, J.S.C., held that:

> "[I]t is important to always bear in mind that the decision of a court must always be considered in the light of its own peculiar facts and circumstances. No one case is identical to another though they may be similar. Thus, each case is only an authority for what it decides. It cannot be applied across board."

[30] Secondly, justice in the instant case will require a dispassionate balancing of the conflicting rights of the parties under their respective marriage customs. It is noteworthy that while the respondent gleefully demanded the refund of his bride price in accordance with his custom, he was unwilling to comply with the petitioner's custom which requires him to forfeit the custody of their child if she has to do his bidding.

[31] In a paper captioned, *The Nigerian Legal System, Justice and the Repugnancy Doctrine,* Honourable Justice Ohimai Ovbiagele summarized what the decisions of courts have held to amount to repugnancy as enumerated by Dr A.C. Enikomeyi in *Development and Conflict of Laws.* They are as follows:

> "1. All indigenous laws which justify inhuman or degrading treatment such as customs supporting human sacrifices, infanticide and slavery.
>
> 2. Customary rules which could be relied upon to justify unreasonable or absurd claims or a claim which the enforcement will result in gross inconvenience.
>
> 3. A customary rule of procedure which is incompatible with the principle of audi-altarem partem or nemo judex incausasua.
>
> 4. Any rule or indigenous law which robs a man of his inalienable Right"

It is apparent that the demand for the refund of bride price can neatly fall under points 1, 2 and 4.

[32] We are of the view that, in the instant case, the Kagoma marriage custom requiring the refund of bride price as a condition for validating a divorce, fits into the class of causes described by Uwaifo, JSC in *Mojekwu v. Iwuchukwu (2004) 11 NWLR (Pt. 883) 196* as "obviously outrageous or needlessly discriminatory". This qualifies the custom to be dispassionately considered and subjected to the repugnancy test by this

Court as His Lordship said and as we have painstakingly done in this judgment.

[33] Considering the evidence of the parties vis-à-vis the applicable Kagoma marriage custom, we answer the second question in the affirmative. We find that the respondent is entitled to a refund of his bride price under Kagoma marriage custom. And we so hold. However, the custom is unenforceable because the Kagoma marriage custom requiring a woman to refund the token paid as her bride price, as a validation of the divorce she initiated to terminate a union which has broken down irretrievably, is incompatible with the 1999 Constitution (as amended), particularly Sections 1(3), 17(2)(b), 21(a) and 34(1)(a). It erodes the dignity of a woman married under Kagoma custom by reducing her to the status of a mere property whose value is determinable and recoverable at any time if she dares to opt out of a broken marriage, even after years of lawful cohabitation and all its concomitants including child bearing.

[34] The custom equally breaches the provision of Section 40 of the 1999 Constitution by curtailing the petitioner's freedom not to associate with her husband which the imposition of an unjustifiable and gender-based liability tagged "refund of bride price" obviously aims to achieve. The respondent's reliance on the custom has the propensity of inhibiting the petitioner's decision to seek a release from a marriage which for all intents and purposes has broken down irretrievably as evidenced by her uncontroverted testimony of the respondent's acts of indignity, cruelty, assaults, grievous bodily harms and psychological hurts. The custom, which also violates the petitioner's fundamental right to freedom from discrimination and gender-based disabilities, as guaranteed under

Section 42(1)(a) of our Constitution, is also unfair to the women married under Kagoma custom as no corresponding liability to pay any kind of compensation to a divorced wife is known to exist under Kagoma custom against a husband. We so hold.

[35] In view of the foregoing, we hereby declare the Kagoma marriage custom requiring a woman who initiates a divorce to refund the token paid as her bride price as repugnant to natural justice, equity and good conscience. The order dissolving the parties' marriage earlier made in this judgment remains valid without the need for a corollary order for the refund of the token paid as bride price to the respondent as a validation or final completion of the divorce process.

[36] Before capping this judgment, we wish to state that marriage is not a licence for the perpetration of violence against a spouse. It is not the intention of the law that a marital relationship should be used as a cover for acts which are ordinarily criminal in nature. Spouses must respect and dignify each other. Women married under customary law must not be treated as children or properties. No spouse deserves to be maltreated by the other, as the respondent manhandled the petitioner in the instant case, and still have the temerity of expecting her or rather demanding that she perpetually remains in his house as his wife because of the token he paid as her bride price. No one deserves to be subjected to any act of cruelty, especially not in a marriage, a union between two adults entered into in trust and love with the intention of living together forever, in peace and safety, for as long as it is humanly possible. It is a commendable and more honourable path that the petitioner took by instituting this action seeking the force of law to peacefully exit from a broken union rather than toeing the ignoble path

of vengeance laced with the ultra-likelihood of fatality as demonstrated by some frustrated, depressed and aggrieved spouses in our society.

[37] Any party that is dissatisfied with this judgment may appeal to the Customary Court of Appeal, Kaduna within 30 days from today, Wednesday, 10th January, 2024.

Parties shall each bear their own cost.

Signed.
10.01.2024