IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.53 OF 1993

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N :

HERBERT MUNUNKHA APPELLANT

and

MITSON NYIRONGO RESPONDENT

Coram : Bweupe, D.C.J. Chirwa and Muzyamba, J.J.S.

23rd November and 17th December, 1993

For the Appellant : B.K. Chishimba, Chishimba and Co.,

For the Respondent : In Person

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

This is an appeal against a decision of the High Court ordering the appellant to surrender three herds of cattle to the respondent which the appellant received and kept as lobola for the respondent's niece's marriage.

Briefly the facts of the case, as they appear on the evidence on record, were that the respondent's sister got married to the appellant sometime in 1969. He did not pay any lobola. Before then she had four children from a previous marriage, one of whom was a girl called Alupi. The appellant brought up those children and eventually Alupi got married in 1984 and Alupi's husband paid the appellant four herds of cattle as lobola. The appellant kept the cattle and refused to surrender them to the respondent. The respondent bought summons in the local court against the appellant for refusing to surrender the animals. The local court upheld the claim. The appellant appealed to the Subordinate Court. The appeal was dismissed. Appellant again appealed to the High Court. The appeal succeeded in part in that the appellant was allowed to keep one animal and ordered to surrender three to the respondent.

The appeal to this court was argued on one ground namely that the learned judge fell into error by ordering that the appellant surrenders three anima to the respondent who was not entitled to them at all. At pages J3-4 this is what the learned Judge had to say:-

> "Now turning to the upbringing of the step children, it would be unconcionable to deny the step father, who has brought up these children, rights over such children. What matters most, in the modern days, is not the making a woman pregnant or "fathering" the child, but the upbringing of children. It is this man called step father who finds food and clothing for these children and gives them education if any. He has, by implication, adopted those children. How does the Uncle, Aunt or grandmother, come in who has done absolutely nothing to the upbringing and socialisation of these children? The answer is that it is most unfair. If step children can benefit from their step father while he is alive and under the law after death in hi estate as children or dependants (see S.3 of Intestate Succession as to the meaning of a 'child' and s.9 of the same Act No.5 of 1989 and s.3 and 20 (1) of Wills and Administration of Testate Estates Act No.6, 1989) why should a step father not benefit from the children he has brought up? Certainly such a custom is repugnant to the principles of natural justice and equity. Afortiori such custom must be abolished or modified, because it allows the people to reap where they did not sow. In this case there is no evidence that at anytime in her youth Alupi was ever looked after by any of the Uncles. So I saw some doubt in my min as to the validity of their total claim to what was paid for marriage of their niece."

Mr. Chishimba argued that the learned judge having found that the appellant was solely responsible for the upbringing of Alupi and other step childr and that the custom requiring the appellant to surrender all the cattle to the respondent was, in the circumstances of this case, repugnant to the principles of

natural justice he should not have made the order he did. That by ordering the appellant to surrender three animals the learned judge contradicted himself. That in view of his earlier observations, a proper order would have been for the judge to allow the appellant to keep all the animals. The respondent's argument was that the appellant was not entitled, as a matter of customary law and in the circumstanc of this case, to keep the animals or to a share of the animals because he refused t pay lobola when he married his sister. That it was, as a tradition, in his discret to give a portion of the lobola to the appellant as a sign of appreciation for bringing up his niece.

We have considered the arguments on both sides and we are satisfie that the sentiments expressed by the the learned judge in the above quotation were obiter and that the reference by him to the Intestate Succession Act, No.5 of 1989 and the Wills and Administration of Testate Estate Act, No.6 of 1989 was a misdirec ion because it is quite obvious that in upsetting the decision of the lower court he was influenced by the provisions of these Acts which had no bearing on the case before him. In so doing he was wrong and we have no doubt that had he not misdirec himself he would have come to a different conclusion. For this reason we would dismiss the appeal and confirm the local court's decision that the appellant do surrender the four herds of cattle to the respondent.

We award the costs in this court and in the court below to the respondent to be taxed in default of agreement.

In passing off we would comment that one cannot abolish or modify a custom which has evolved over a period of time by a stroke of a pen. Much more is needed and the change must generally be accepted by those who practice a particular custom.

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B.K. BWEUPE
DEPUTY CHIEF JUSTICE

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D.K. CHIRWA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE