**THE PEOPLE v CHITAMBALA (1969) ZR 142 (HC)**

HIGH COURT

FORSTER AG J

17th SEPTEMBER 1969

**Flynote and Headnote**

[1]   **Criminal law - Bigamy - Mistake of fact and law - Belief previous**25 **marriage dissolved.**

   Court considers proposition that honest and reasonable belief that previous marriage dissolved is defence to bigamy prosecution.

[2]   **Family law - Divorce - Statutory marriage - Customary law divorce.**

   A marriage under the Marriage Ordinance is not dissolved by a 30 customary law divorce and the parties are not free to remarry.

[3]   **Criminal law - Statutory marriage - Customary law divorce - Parties are not free to remarry.**

   See [2] above.

Case cited: 35

(1)   *R v Gould* [1968] 1 All ER 849.

*Zulu, Director of Public Prosecutions,* for the People.

*Care,* for the defence.

**Judgment**

**Forster AJ:** Accused is charged with Bigamy.

I remind myself that the prosecution must prove its case beyond 40 doubt and of the ingredients of the offence.

**1969 ZR p143**

FORSTER AJ

On 12th April, 1964, a valid marriage was contracted between one Annie Mumbi and the accused in accordance with the requirements of the Marriage Ordinance Cap. 132. The parties have cohabited: The marriage has been consummated. There are three children aged 2, 3 and 4 years respectively. 5

The only way in which this marriage can be lawfully set aside is by petition to the High Court. There is no record of any proceedings for the dissolution of the marriage of accused and Annie Mumbi and it is therefore still subsisting and was so subsisting on the 23rd December, 1968, when accused went through a form of marriage under the Ordinance with 10 Grace Lombe.

Accused gave evidence on oath and during his stay in the witness box admitted his marriage to Annie Mumbi (P.W.5) and that he went through a second form of marriage with Grace Lombe (P.W.8) and that on the 23rd December, 1968 - the date of the second form of marriage - 15 he did not know his marriage to Annie Mumbi (P.W.5) was still subsisting.

Two defence witnesses were called. D.W.1 made a brief appearance and returned perhaps to be called later but never was and Mr Aaron Mwenya (D.W.2) to speak not as an expert but as one who had some knowledge of Bemba Customary law. Counsel considered his evidence 30 vital to the case. I consented to hear him in the absence of serious objection by the Director of Public Prosecution but certainly did not exercise my powers to call him.

D.W.2's evidence was at variance with that of P.W.1, in that he held a Bemba divorce was complete if the parents of the wife accepted 25 her back without starting talks with the husband's side forthwith. P.W.1 went into details of the niceties of the proceeding under customary law required to attain this end.

The defence is based on the fact that ignorance of the law is *not* relevant in this case and that accused was not criminally responsible for 30 his act as he honestly believed, albeit mistakenly, that facts which would enable him to marry again were in existence.

Put perhaps more simply by learned defence counsel, the accused has only to satisfy the court that he believed he was not committing bigamy. If he did that he is entitled to an acquittal. Such is the proposition 35 before me.

I am satisfied that accused contracted a valid marriage to Annie Mumbi (P.W.5) on the 12th April, 1964; that no divorce proceedings have been taken; that this marriage is still subsisting and that accused went through a form of marriage with Grace Lombe on 23rd December, 40 1 968.

The position therefore which I accept to be obtaining at the 23rd December, 1968, was that accused being then married, married another (Grace Lombe - P.W.8) during the life of his wife Annie Mumbi (P.W.5) who gave evidence during his trial before this Court. This, on the face 45 of it, is bigamy.

**1969 ZR p144**

FORSTER AJ

[1] It is now suggested that accused had an honest belief on reasonable grounds that at the time of his second marriage his former marriage had been dissolved. *Re Gould* [1] at 840 is the case in which this proposition evolved and it has now to be decided whether the defence put up by the 5 accused satisfies the Court that he had in fact such honest belief and that it was caused on reasonable grounds.

Accused therefore wishes me to accept that at the time of his second marriage he honestly believed that his first marriage had been dissolved.

[2] [3] Mr Mwenya (D.W.2) in cross - examination, besides giving 10 answers on points put to him on customary law, stated that a person married under the Ordinance cannot take another wife while he is married; that the Marriage Ordinance prevails over customary law and "so a man cannot marry again even if he had a Bemba divorce if he was married under the Ordinance". With these comments I entirely agree. 15

Accused says he had a "traditional marriage' to Annie Mumbi (P.W.5) which was registered at the Boma. According to Mr Mwenya, whom I have no reason to doubt, this would have entitled him to a certificate. In spite of this he says he went through another marriage to her under the Marriage Ordinance "to satisfy my former wife," as he 20 puts it.

Annie Mumbi (D.W.5) was not cross - examined upon this traditional marriage. Had it taken place accused could have given Annie the certificate he says she wanted without a marriage under the ordinance. I accept what Annie Mumbi says in cross - examination, namely that it was accused 25 who first suggested "an Ordinance Marriage" that he explained what it meant. She wanted a "one man - one wife" marriage and that was what the ordinance gave her so she agreed.

Both Mr Mushota (P.W.1) and Mr Mwenya (P.W.2) say "nsalamu" was to be repaid on divorce. Accused says it would not. According to 30 him and to P.W.5 it was not in fact so returned. I accept that there would be a repayment on divorce. As there was no repayment it follows there was no divorce. I also accept accused would have known this.

Accused says he first married Grace Lombe (P.W.8) traditionally. She says nothing about this apart from saying accused first wanted to 35 be married by customary law, but then they went to the Boma. She was not cross - examined on the point. She says both she and accused wanted to be married under the Ordinance. I can only conclude there was no traditional marriage and do not believe accused when he says there was.

I am satisfied that Wilson (P.W.7) explained to accused the consequences 40 of contracting a second marriage when a former was subsisting. This explanation was given at the warning that if he was legally married to anyone he would be committing a very serious offence if he went through with the proposed marriage. It arose out of the fact that accused had told him he had been married and divorced under customary law. I do 45 not believe accused when he says he was not spoken to by Wilson (P.W.7) in these terms.

**1969 ZR p145**

FORSTER AJ

Accused says the only difference between a marriage under the Ordinance and one under Customary Law is that one gets a certificate under the former. Both Mushota (P.W.1) and Mwenya (P.W.2) say certificates are obtainable under customary law. I cannot believe accused knew nothing about this and accept what these two witnesses state. 5

I do not believe accused when he says he does not know that people can only take one wife or one husband at a time under the Ordinance particularly as he says he found out about his obligations and effect of a marriage under the Marriage Ordinance before he got married to Annie Mumbi (P.W.5). 10

I do not believe that accused had questions about this and was not told about having only one wife. He says he did ask what would happen if he married one wife under the Ordinance, but was just given a form. He asked Grace Lombe (P.W.8). He was quite satisfied with her explanation. Later he says he never asked anyone about it and no one said he 15 could not marry more than one wife.

Accused agrees that Paragraph 8 of the affidavit he swore prior to his marriage to Annie Mumbi means that if he was already married he could not marry under the Ordinance.

At the end of his cross - examination accused made some surprising 20 answers: Bemba marriages dissolve Ordinance marriages; does not know about divorce in marriage under Ordinance; on 25th December, 1968, he did not know he was still married under the Ordinance if there has been a previous customary law marriage and finally any breach of contract dissolves any marriage. 25

Accused was required to swear in his affidavit prior to his marriage to Annie Mumbi that he was not married to a third party by native law and custom. There must clearly have been a reason for this and I cannot imagine that even a man "of intelligence," as Grace Lombe (P.W;8) assessed him, would not know or at least inquire why he was required so 30 to swear, and indeed he did show he knew the position when answering a question in cross - examination regarding the Affidavit (Ex p 9).

The answer which accused gave to the question whether he was a member of parliament when the Marriage Ordinance was made applicable to Africans indicated that he knew a lot more about these matters than he 35 would have me believe. He was very quick to answer that he became a member of parliament in 1964 and that the amendment to the Marriage Ordinance was in 1963.

Accused tells me he is now a Minister. In 1964 on his marriage certificate he is described as "Permanent Secretary" and on the 1968 40 certificate as a "Politician". He left school he says at Form II, a useful standard from which to start a career. He has spent approximately two years in Russia studying Political Science. One must assume that this required a reasonably high standard of education, which accused must have possessed. With this background he still expects me to believe and 50

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FORSTER AJ

accept what he has told me on the oath in the witness box, to be the truth. In other words he hopes that he has made himself look the complete ignoramus. It may be that he has by his efforts succeeded to a certain extent in this but I do not believe him when he says that he really thought 5 he was divorced by customary law - that he thought he was free to remarry. It is clear he knows sufficiently about the Marriage Ordinance and I do not believe he thought that a properly obtained divorce by customary law would dissolve his marriage under such Ordinance. I do not believe he really thought he was free to contract another marriage under the 10 Marriage Ordinance when he married Grace Lombe.

I do not accept defence counsel's suggestion that accused "never knew of the existence of Bigamy" - a suggestion for which I can find no foundation - but even if accused had in fact not known the word at one time he was certainly warned in no uncertain terms prior to his form of 15 marriage with Grace Lombe that he would be committing a very serious offence if he went through with the form of marriage to her while another was legally married to him.

I am satisfied that accused was fully aware at the time of the Grace Lombe ceremony not only that he was still legally married to Annie Mumbi 20 but that he would be committing an offence if he persisted with the marriage. Accused clearly entered into this union with Grace Lombe well aware that what he was doing was illegal. He persisted, was caught and now seeks to wriggle out of dilemma in which he finds himself by protesting ignorance and pleading that because of that ignorance he was not 25 criminally responsible for his act as he honestly believed that facts which would enable him to marry again were in existence.

I do not accept that he honestly believed, even mistakenly, that such facts were in existence. I would go further and say that the desperate manner in which he has fabricated a tissue of lies in the witness box 30 convinces me that he knew that these facts were not in existence.

The prosecution has proved all the ingredients of the offence of Bigamy. Accused has failed to cast the slightest doubt on the evidence of the prosecution witnesses. He has also failed to establish the defences open to him. 35

I have not the slightest hesitation in finding him guilty as charged and he is so convicted.

Accused stands convicted of Bigamy, an offence which carries with it a sentence to the maximum of five years imprisonment. The Director of Public Prosecution has offered "nothing known" and defence counsel 40 asks for lenience.

It is agreed that in certain circumstances facts of customary Law might be matters which, though rejected as evidence in the trial, were fit to be considered in mitigation but I am at a loss to know where one can draw mitigating factors in a case which has shown that an accused has 45 openly and knowingly flouted the law not only under the Marriage Ordinance but also the customary law behind which he has sought shelter.

**1969 ZR p147**

FORSTER AJ

I cannot accept that there is anything that I can consider in the suggestion that African culture knows not bigamy nor do I accept that only better informed citizens know of the Marriage Ordinance. In any event one would expect that accused would rate himself among them.

The fact that accused went into the second form of marriage openly 5 and not in secret is abundantly clear and I regard it not as a mitigating factor but as a blatant defiance of the law of the land.

Perhaps I should mention briefly the aspect of a deterrent sentence. I cannot agree that it would be misplaced. Extreme leniency as suggested by counsel might be taken by some to mean anyone can get away with 10 this type of offence but I will deal with accused with the greatest leniency possible in the circumstances.

I sentence him to 12 months' I.H.L.

*Accused convicted*