**SITHOLE v SITHOLE (1969) ZR 92 (HC)**

HIGH COURT

SKINNER CJ 15

16th MAY 1969

**Flynote and Headnote**

[1]   **Family law - Marriage - Potentially polygamous - Conversion to monogamous marriage**

   Marriage under the Marriage Ordinance of persons previously married to each other by customary law converts the potentially 20 polygamous marriage to a monogamous marriage.

[2]   **Courts - High Court - Jurisdiction - Divorce - Marriage potentially polygamous - Conversion to monogamous marriage.**

   Where marriage was potentially polygamous at its inception but was monogamous at time of proceedings, the court has jurisdiction 25 to adjudicate upon such marriage.

[3]   **Family law - Marriage - Effects of subsequent monogamous marriage - Distinguished from English law.**

   Because Zambian Marriage Ordinance expressly provides for conversion of a customary marriage into a monogamous marriage, 30 doubts as to the validity of the second marriage do not arise as is possible under English law.

[4]   **Family law - Divorce - Form of petition - Necessity of including both cutsomary and statutory marriages - One marriage recited in decree of divorce.**

   The 35   petition for divorce should provide particulars, as required by Rule 9 (2) of the Matrimonial Causes Rules, 1968, of both the customary marriage and the marriage under the Marriage Ordinance to enable court to decide which marriage to recite in decree.

[5]   **Family law - Divorce - Customary and statutory marriages - Recitation**40 **in decree.**

   Where persons contract a customary law marriage and subsequently a second statutory ceremony between the same persons takes

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   place, both marriage ceremonies have legal effect but only the statutory marriage should be recited in the decree.

[6]   **Courts - High Court -  Jurisdiction -  Divorce - Polygamous or potentially - polygamous marriages - Conversion to monogamous marriage.**

   The High Court exercises jurisdiction in divorce in substantial 5 conformity with the law and practice for the time being in force in England which does not assume jurisdiction to dissolve polygamous marriages. But where a subsequent statutory marriage has taken place, the High Court has jurisdiction.

[7]   **Family law - Divorce decree  - Effect on status of parties.** 10

   A decree dissolving a marriage operates not on the ceremony but the status of the parties and where parties have married under customary law and then under Marriage Ordinance the decree dissolves the status of marriage and the parties are restored to single status. 15

Cases cited:

   (1)   *Cheni v Cheni* [1965] p.85, [1962] 3 All ER 873, [1963] 2 WLR 17.

   (2)   *Ohochuku v Ohochuku* [1960] l. All ER 253; [1960] 1 WLR 183.

   (3)   *Ali v Ali* [1966] 1 All ER 664 [1966] 2 WLR 620.

   (4)   *Reder v Reder* [1948] W.N. 238; [1948] 92 Sol. Jo. 469. 20

   (5)   *Thynne v Thynne* [1955] p. 272; [1955] 3 WLR 465.

Statutes and rules construed:

   (1)   Marriage Ordinance (Cap.132), s.32.

   (2)   High Court Ordinance (1960 Cap.3), s.11.

   (3)   Matrimonial Causes Rules, 1968 r. 9 (2). 25

**Judgment**

**Skinner CJ:** The petitioner was lawfully married in accordance with Ngoni tribal custom to the respondent on the 1st of January, 1959. I am satisfied from the evidence of the petitioner herself that she was married in accordance with Ngoni tribal custom, and I have evidence from Mr Chinjavata that the ceremonies and formalities described by the 30 petitioner constitute a valid marriage under Ngoni customary law. A second ceremony of marriage took place under the provisions of the Marriage Ordinance, Cap. 132 of the Laws of Zambia, at the office of the Registrar of Marriages in Lusaka on the 10th July, 1965, and this marriage has been proved by the evidence of the petitioner and by the production of 35 a certificate issued under the provisions of section 29 of the Marriage Ordinance.

[1] Evidence has been given that a marriage under Ngoni law was potentially polygamous. There is provision in the Marriage Ordinance which allows a person married under customary law to marry his customary 40 spouse and the second marriage ceremony was a valid one. A marriage under the Marriage Ordinance is monogamous. Consequently a potentially polygamous marriage can be converted into a monogamous marriage, and the parties in the instant case converted their marriage into a mono -

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gamous union and did so by virtue of express statutory provisions. I have had evidence from the petitioner that the respondent had only one existing wife, namely herself, at the time of the second ceremony. Both ceremonies of marriage were valid, but the second ceremony converted 5 the potentially polygamous union into a monogamous one. [2] If a marriage is monogamous at the time of the proceedings, the court has jurisdiction to adjudicate upon it. In *Cheni v Cheni,* [1] it was held that the courts had jurisdiction to adjudicate on a marriage which, although potentially polygamous at it's inception had become monogamous 10 on the date of the commencement of the proceedings. In the course of his judgment Sir Jocelyn Simon P. reviewed the law and said (at 92):

   "Therefore, on weight of authority, on principle and on ground of convenience I am of opinion that if the marriage is monogamous at the time of the proceedings, albeit potentially polygamous on its 15 inception, the court has jurisdiction to adjudicate upon it."

In the case of *Ohochuku v Ohochuku* [2] the facts were that the parties to a potentially polygamous marriage in Nigeria were later married in an English Registry Office. The court recognised the marriage as a valid case of conversion of a polygamous marriage into a monogamous marriage and 20 pronounced a decree dissolving the marriage. It is true that in the case of *Ali v Ali,* [3] Cummings Bruce, J, when considering the decision in *Ohochuku v Ohochuku* [2] expressed doubt as to the validity of the second marriage as by English law the parties were already validly married at the time of the second ceremony. [3] However, this doubt does not arise in the 25 instant case because there is express statutory provision in Zambia for the conversion of a marriage under customary law into a monogamous marriage under the Marriage Ordinance. I hold that the marriage in the instant case was monogamous at the time of the commencement of the proceedings and that I have jurisdiction to adjudicate upon it. 30

The petitioner petitions for dissolution of the marriage on the grounds of cruelty. Having heard the evidence I am satisfied that cruelty as alleged in the petition has been proved. The respondent has been guilty of cruelty which caused injury to the petitioner's health and which she could not be expected to endure. 35

I am satisfied that the petition is not presented or prosecuted in collusion with the respondent, and I am further satisfied that the petitioner has not condoned the cruelty.

Rule 9 (2) of the Matrimonial Causes Rules 1968 provides that a petition shall contain the information required by Form 2 appended to 40 the Rules, and paragraph 1 of that form requires particulars of the marriage ceremony, namely the date and place of marriage. In the instant case paragraph 1 of the petition states that petitioner was married to the respondent in accordance with Ngoni tribal custom and that a second ceremony took place under the Marriage Ordinance at Lusaka on the 45 10th of July, 1965. [4] This form of pleading is correct because if there have been two ceremonies, the court must decide which of the two ceremonies created the marriage and that only must be recited in the decree, *Reder v Reder* [4]. I have now to decide which of the ceremonies should be

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recited in the decree. The English cases are of little help because they were concerned with an earlier ceremony which constitutes the true marriage and a later ceremony which was no marriage at all. In Zambia, customary law is as much part of the law as imported law and a marriage under customary law is a valid marriage. We have provision in our statute law 5 for the conversion of a customary law marriage into a statutory marriage: The provisions of the Marriage Ordinance permit of a second ceremony between the spouses and this is again a valid marriage. [5] Both ceremonies have legal effect, but it appears to me that as the second ceremony now governs the relationship between the parties in the sense that it makes a 10 previously polygamous relationship monogamous, it is the statutory ceremony which should be recited in the decree. Moreover, the High Court in Zambia exercises its jurisdiction in divorce by virtue of the provisions of section 11 of the High Court Ordinance which provides that the jurisdiction of the court in divorce shall be exercised in 15substantial conformity with the law and practice for the time being in force in England. It is established by weight of authority that a court in England will not assume jurisdiction to dissolve a polygamous marriage. I have jurisdiction in the present case because the polygamous marriage was converted into a monogamous union as a result of the marriage under the 20 Ordinance. [6] The ceremony which converted the original marriage status into a monogamous union was that under the Marriage Ordinance, and it is as a result of that ceremony that I have jurisdiction to give a decree. I will decree the dissolution of the marriage had and solemnised between the parties at the office of the Registrar of Marriages on the 10th 25 of July, 1965.

As I have said earlier, the rule is that the court must decide which of the ceremonies created the relationship and that ceremony should be recited in the decree. A perusal of the case law shows that the rule grew up as a result of cases where the first ceremony was a valid one and the 30 second ceremony was of no legal effect. It does not appear to me to be applicable to a case where there are two valid ceremonies, the second of which converts the relationship between the parties into a monogamous union, and by which a husband gives up his rights under customary law to have additional wives. 35

It is necessary to be clear as to the effect of a decree dissolving a marriage, such a decree operates, not on the ceremony, but on the status of the parties. It puts an end to the status of husband and wife which has existed between the parties prior to the decree. [7] It was held in the case of *Thynne v Thynne* [5] that a decree of divorce dissolves the marriage 40 status and not the marriage ceremony; the position was put clearly by Hodson, LJ, at page 305 of the report when he said: "The term 'dissolution' is inappropriate to the concept of a ceremony. What is dissolved is the status not the ceremony". Singleton, L. J, said: "The grant of a decree of dissolution puts an end to the status of married people therefore 45 existing between the wife and the husband". Where there has been a customary marriage followed by a marriage between the parties under the provisions of the Marriage Ordinance, the granting of a decree of divorce dissolves the status of marriage and thereafter the marriage

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relationship is at an end, and the parties are restored to the status of single persons.

I am satisfied that the parties are domiciled in Zambia.

I pronounce a decree nisi or the dissolution of the marriage celebrated 5 between the petitioner and the respondent at the office of the Registrar of Marriages, Lusaka, on the 10th of July, 1965. I order that the petitioner pay the costs of this suit. I adjourn the question of maintenance to the Deputy Registrar in Chambers.

*Judgment for the petitioner* 10

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