MUKOSHYA SHIMPETA v. CHAYIWE.

CIVIL APPEAL CAUSE NO. 15 OF 1937.

Custody of infant child—both parties natives—question whether marriage regular—native law and custom—interest and benefit of child to be considered—case of this nature more suitably disposed of by Native Court or Court presided over by District Officer.

In this case the High Court defines the procedure to be adopted and the law to be followed in deciding a claim for the custody of a native child where both contending parties are natives. In addition to ascertaining native law and custom with regard to the custody of infants the Court must consider what would be most beneficial for the child in question.

Cases of this nature affecting natives are most suitably tried by a Native Court or by a Court presided over by a District Officer and Resident Magistrates should not accept jurisdiction.

Francis, J.: This is an appeal against the judgment of the Resident Magistrate, Mufulira, in a case in which the plaintiff Chayiwe, a native mother, has set up a claim for the custody of her infant male child, Mwanza.

The other party to the action was the father Mukoshya Shimpeta. Both parties appeared before the High Court in its appellate jurisdiction sitting at Ndola on the 28th May, 1937. They were unrepresented by counsel, and no argument being adduced, the Court intimated that a written judgment would be delivered for reading at Mufulira at some subsequent date.

From the evidence adduced before the Court below it would appear that the parties are of the Senga tribe, the mother coming from Petauke and the father from Mkushi. There is at the outset conflict as to the nature of the conjugal relationship previously subsisting between the two. The woman states on her part that it was an irregular union, but the man claimed that having paid " bride price " the relationship between them was sufficiently regularised, under native law and custom applicable, to constitute a lawful native marriage. This is a question of fact, and the Magistrate found in favour of the plaintiff. This Court sees no reason to interfere with that finding.

The evidence goes on to show that the child Mwanza was born of this union in 1934, and that subsequently, owing to trouble between the parties, they parted, the mother taking the infant with her.

About a year before the date of the action in the Court below (more specifically placed by a native clerk as December, 1935), it is related by the defendant (referred to hereinafter as the appellant) that he and his

wife went before Mr. Williams, a district officer officiating at Mufulira Boma, and as the result apparently of some inquiry, the nature or details of which are not on record, the District Officer " said that the child should be in the custody of the father as the woman had refused to return to him ".

In consequence presumably of this order, the child was handed over to the appellant, and remained in his custody until the commencement of proceedings before the Court below which were taken at the instance of the mother seeking to reverse that order.

After hearing evidence, the Magistrate in a considered judgment gave the custody of the child to the mother, and from this judgment the appellant has appealed.

The grounds of appeal are as follows:

(1) That the matter has already been decided by a court of competent jurisdiction on the same facts and that therefore the cause of action has lapsed.

(2) That if the cause of action has not lapsed then, that on the facts before the Court the appellant has by native customary law the right to the custody of the child Mwanza (male).

The first ground may be disposed of at once. As there is no evidence that the subject matter of this action ever came before a court of law, it is incontestable that any order made as alleged is null and void and of no effect.

With regard to the second ground, as a result of the finding of fact already referred to the child is adjudged to be the issue of an irregular union, and therefore, in accordance with the evidence of native law and custom accepted by the Magistrate (from which I see no reason to differ) the custody of the child goes to the mother.

The appeal is dismissed. The respondent shall have the costs of her appearance at Ndola, and after deducting these the balance of the deposit made by the appellant may be returned to him.

This judgment is to be read to the parties before the Court of the Resident Magistrate, Mufulira.

The following observations are called for in this case:

(1) Usually an action of this nature is commenced with a writ of *habeas corpus* to bring the child before the Court.

(2) In coming to any determination in such a case, the Court should take into consideration not only native law and custom, but facts indicating what would be most beneficial for the child. Usually it is to the benefit of a native infant that he remain in the custody of the mother; but it should always be shown that such a question has been duly considered by the Court.

(3) On the principle that an action should be taken in the lowest Court of competent jurisdiction, this case might very well have been taken in a court junior to that of a Resident Magistrate. Moreover since the question on which the decision turned involved native law and custom, it would appear that it could have been quite suitably disposed of by a Native Court (any one of which has specific jurisdiction in a case such as this; Native Courts Rules 12 (c) and 15) or failing such a court, by a court presided over by an administrative officer. The Court of a Resident Magistrate has not been set up for use as a court of first instance in such cases and I would prefer that the Resident Magistrate should not accept jurisdiction in the future.