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Mangwende v Machodo: Bride price refund and the violation of women's rights in contemporary Zimbabwe

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Summary: *This article undertakes an analysis of a Zimbabwean High Court case, Mangwende v Machodo, on the refund of the bride price. It is ascertained in the article that the bride price is a legal requirement for customary marriages, hence constituting a significant founding culture for customary marriages. A point of contention motivating the article is, as was held in the case under discussion, that a cheating wife's bride price may be withheld by the husband who would have not paid it in full or, where it was paid up, he can be refunded in full. The gap that exists in this scenario is that, in the case of the husband cheating, the wife does not have a corresponding recourse. The one-sidedness of this custom displays a grave inequality to the prejudice of women. It is also argued that the bride price refund violates the wife's dignity. It is therefore recommended that customary law around the bride price must be developed to meet the constitutional demands of gender equality. In developing this customary law, an important factor to consider is the duration of the marriage. In a situation where a couple stayed together for a reasonable period, each party playing his or her role, it cannot be fair for the husband to be refunded. There could be scenarios where the wife cheats, soon after the bride price was paid and before the couple*

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move in together as husband and wife, when the bride price can be refunded. Furthermore, not all bride price items are refundable and, therefore, those components of bride price that can be refunded must be clearly defined.

Key words: *bride price; refund; women's rights; culture; equality*

1 Introduction

Pursuant to the accepted standing principle of legal pluralism in Zimbabwe, courts are at liberty to apply either general law or customary law while greatly relying on the circumstances of each case. Major factors that come to play when the court is to decide whether to apply customary law or general law are well tabulated in the Customary Law and Local Courts Acts.¹ These factors include, primarily, the justice of the case; the agreement of the parties; the nature of the case; the surrounding circumstances;² and the kind of life that the parties were living.³ The case of *Mangwende v Machodo*⁴ (*Mangwende* case) is an extraordinary case of a bride price claim where the court chose to apply customary law in determining whether the father of an adulterous daughter (the appellant) was or was not entitled to payment of the balance of the bride price. The Court made reference to the fact that under customary law, a husband is entitled to be given a refund of the full bride price if the wife is unfaithful.⁵ This article will analyse this judgment and unpack difficulties associated by its implications and effects on women's rights in Zimbabwe. The analysis is done against the background that Zimbabwe currently is on its firm drive to establish constitutionalism. Women's rights that were lagging behind in the preceding Constitution⁶ have been taken aboard in an elaborative way in section 80 the Constitution of Zimbabwe, which provides:⁷

- (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

1 Customary Law and Local Courts Act ch 7:05 of 2004.

2 Sec 3(1)(a) Customary Law and Local Courts Act (n 1).

3 Sec 3(1)(b) Customary Law and Local Courts Act.

4 *Mangwende v Machodo* 2015 ZWHHC 755.

5 AS Chigwedere *Lobola: The pros and cons* (1982) 2 defines *lobola* as 'all the payments made by the bridegroom and his party to the father-in-law and his party to secure the services of a bride'.

6 Constitution of Zimbabwe 1980.

7 Constitution of Zimbabwe Amendment 20 of 2013 (Constitution).

- (2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
- (3) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.

Furthermore, equality and dignity are taking centre stage both as values underpinning the Constitution and as standalone rights.⁸

2 Facts of the case

In the *Mangwende* case a couple who had been in an unregistered customary union divorced after it was discovered that the wife had been involved in a series of adulterous relationships. During the trial at the magistrate's court it was submitted to the court that the wife had cheated on her husband (the respondent) on multiple occasions with multiple people, who included the respondent's elder and younger brothers, a nephew and a herd boy. The respondent eventually divorced his wife and sent her back to her parents' home. The wife's father (the appellant) decided to demand the outstanding bride price from the respondent. The appellant approached the magistrate's court to claim the outstanding bride price. The respondent opposed the application, objecting to pay the balance of the bride price as the wife had cheated on him with multiple people.

3 Issues

The main issue to be considered by the court *a quo* was whether under customary law the appellant was entitled to be paid the balance of the bride price by the respondent in the circumstances, namely, that the appellant's daughter was divorced because of her adultery. For the above issue to be properly answered, the court *a quo* had to establish whether the wife indeed had been unfaithful to the respondent and with whom. The appellant court was seized with the issue of whether the court *a quo* had properly applied customary law by denying the appellant's claim of the outstanding bride price.

⁸ Sec 3(1) of the Constitution provides: 'Zimbabwe is founded on respect for the following values and principles: ... (f) recognition of the inherent dignity and worth of each human being; (g) gender equality'.

4 Ruling

Upon consideration of all the evidence, the court *a quo* concluded that there was uncontroverted evidence that the appellant's daughter had committed adultery with multiple partners ranging from the respondent's brothers, nephews and the couple's herd boy. The court *a quo* held that the wife had broken the marriage contract by cheating on the respondent. Due to this breach the appellant was not entitled to any outstanding balance of the bride price. The magistrate proceeded to rule that under customary law, a man who would have paid the full bride price was entitled to a full refund if the wife engages in adultery.⁹

The appellant was aggrieved by the judgment of the court *a quo* and lodged an appeal to the High Court. In the appeal he requested that the dismissal of his claim for payment of the outstanding bride price by the magistrate's court be set aside. Mwayera and Uchena JJ dismissed the appeal with costs. In dismissing the appeal, the appellate court stated:¹⁰

In coming up with the disposition of the matter whereby the court *a quo* dismissed the claim for the balance of *lobola*, the trial magistrate properly exercised his discretion and I find no fault in his findings. The court ascertains that, the appeal lacks merit and should fail. It is ordered that the appeal be dismissed with costs.

The appellate court also stated that the very purpose of bride price was flaunted by the appellant's daughter when she engaged in extramarital sexual relations, thereby violating the marriage relationship.¹¹

5 Analysis

5.1 Position of bride price under Zimbabwean law

The highly-celebrated case of *Conradie v Rossouw*¹² established the principle that 'consideration' (bride price) was not part of Roman-Dutch law. Similarly, bride price is not part of general law in Zimbabwe, hence it is not a requirement for a civil marriage.¹³ On the contrary, customary law, as provided for in section 7 of the

⁹ *Mangwende v Machodo* (n 4).

¹⁰ As above.

¹¹ As above.

¹² *Conradie v Rossouw* 1999 AD 273.

¹³ Marriage Act ch 5:17 of 2022 secs 18-27.

Customary Marriages Act, makes it a requirement that the guardian of a woman must consent to the marriage, and the marriage officer must ascertain that there was payment of a consideration in order for a customary marriage to subsist.¹⁴ In particular, the section provides the following as the legal requirements for customary marriages:

Solemnisation of marriage

- (1) If the customary marriage officer is satisfied –
 - (a) save where a magistrate has fixed the marriage consideration in terms of section five, that the guardian of the woman and the intended husband have agreed on the marriage consideration and the form thereof ...

Notably, the Customary Marriages Act does not use the term ‘bride price’, but rather uses the word ‘consideration’. Section 2 of the Customary Marriages Act defines a marriage consideration to be ‘the consideration given or to be given by any person in respect of the marriage of an African woman’. Although it does not expressly define the word ‘consideration’ as a bride price, this definition undoubtedly equates consideration with the customary bride price. Moreover, the Parliamentary House of Senate interpreted ‘consideration’ required in terms of section 7 of the Customary Marriages Act to mean *lobola*.¹⁵ *Lobola*, undeniably, is a customary bride price.¹⁶ Similarly, the Marriage Bill that was passed in Parliament and now awaits presidential assent has unequivocally made bride price (*lobola*) a legal requirement of customary marriages.¹⁷

Unregistered customary unions rely heavily on the payment of bride price as proof of their existence. This position was echoed in the case of *Hosho v Hasisi*¹⁸ where it was held that for a union to qualify as an unregistered customary union, certain cultural practices, which include the payment of *lobola*, are obligatory upon its formation. The Court held that payment of *lobola* remains the most valued proof of an unregistered customary union. The Court reached this decision after the respondent in that matter (Hasisi) had been given an eviction notice from a house she claimed to have been their matrimonial home with her deceased husband. Hasisi’s stepson sold the house without her consent. She argued that she had equal

14 Marriage Act ch 5:17 of 2022 sec 16.

15 Marriage Bill in Parliament, http://www.veritaszim.net/sites/veritas_d/files/Marriages%20Bill%20HB%207A-2019%20-%20Minister%27s%20Proposed%20Amendments%20for%20Senate%20Committee%20Stage.pdf (accessed 20 June 2021).

16 N Ansell ‘“Because it’s our culture!” (Re)negotiating the meaning of *lobola* in Southern African secondary schools’ (2001) 27 *Journal of Southern African Studies* 697.

17 Marriage Bill in Parliament (n 15).

18 *Hosho v Hasisi* 2015 ZWHHC 491.

claims to the house since she was a spouse of the deceased who was the father to her stepson. The Court had to establish whether or not a valid unregistered customary union existed. In establishing the existence of a valid unregistered customary union, the Court considered whether or not bride price was paid. Analogously, in the case of *Gwatidzo v Masukusa*¹⁹ the payment of bride price was also used as an attestation to the existence of an unregistered customary union. Corroborating this position, Chisi points out that *lobola* is verification, in concrete terms, that families have agreed to the marriage of their son and daughter.²⁰

5.2 Correlation between bride price and infidelity

The reading of the judgment establishes a link between bride price and the fidelity of a wife. Before arriving at its decision, the Court was supposed to have ascertained why the bride price was paid under customary law. If it is paid to secure the fidelity of a woman by a husband, then it may certainly be refunded when the wife cheats. However, literature abounds that supports the position that the payment of bride price is not limited to securing the fidelity of a wife. Bride price, traditionally regarded as a token of appreciation to the parents of a bride, usually in the form of cash or livestock, is an entrenched part of marriage customs in Zimbabwe.²¹ One main function of the bride price is that it symbolises the absolute transfer of rights in a wife's procreative and economic capacity from the wife's family to her husband's family.²² A wife, therefore, is expected to fulfil a reproductive and economic role for her husband during the subsistence of the marriage.²³ Chigwedere views the bride price as a form of marriage payment meant to build a relationship between the two families and also to demonstrate the ability of a man to take care of his family.²⁴ Furthermore, under customary marriages, the bride price is said to be paid to show that the husband values his wife.²⁵ In the same vein, Chisi asserts that engaging in sexual relations with a woman for whom a man has not paid the bride price means that the man regards such a woman as one of lesser value and, therefore, 'one of whiling up time, a kind of toy'.²⁶

19 *Gwatidzo v Masukusa* 2000 (2) ZLR 410 (H).

20 JT Chisi 'Lobola in Zimbabwe: A pastoral challenge' Master's dissertation, University of Pretoria, 2018 82.

21 Chigwedere (n 5) 3.

22 Chisi (n 20) 82.

23 Chisi (n 20) 83.

24 Chigwedere (n 5) 2.

25 M Gelfand *The genuine Shona: Survival values of an African culture* (1999) 171.

26 Chisi (n 20) 84.

Chireshe and Chireshe claim that the bride price symbolises gratitude to the wife's family for birthing and raising their daughter who, by virtue of the traditional marriage, is expected to broaden her husband's family by birthing children.²⁷ Since the husband paid the bride price, the children become members of his lineage and ancestry. The bride price also secures a lineage in the bride's family as, according to the Shona custom, the cows paid as bride price will be used by the elder brother to pay the bride price for his own wife, thus securing his lineage.²⁸

Arguably, the Court in the *Mangwende* case gave bride price a different meaning as it tied it to the fidelity of a wife and disregarded all other purposes it carries. The judgment exposes how women lack the power to negotiate for themselves in the bride price transaction and eventually lack agency to determine their sexual rights. In this case, the Court only established that the wife's sexual activities with third parties concerned were not arranged by the family and, hence, it was not a condoned infidelity. This means that her infidelity was going to be condoned if it was a choice that was made by other people.

Another point of contention is the Court's failure to inquire into the reason why the wife of the respondent was unfaithful. In traditional Shona custom, the infidelity of the woman was condoned, even encouraged, where the husband was infertile; hence the Shona idiom *gomba harina mwana* which alludes to the fact that a child born to a married woman belongs to her husband even if she has cheated and fallen pregnant as a result of an extramarital affair.²⁹ This demonstrates how infidelity itself is not a fundamental breach of a customary marriage.

5.3 Should bride price be refunded?

Long ago, when a man failed to present a hoe, or *badza*, as bride price in marriage, he had the option of paying bride price through labour in a practice known as *kutema ugariri*.³⁰ A man seeking marriage would stay with the wife-to-be's family and work for his bride until the father-in-law was satisfied with his work, when he would be given his bride.³¹ Contemporary bride price includes cash,

27 E Chireshe & R Chireshe 'Lobola: The perceptions of Great Zimbabwe University students' (2010) 3 *Journal of Pan African Studies* 211.

28 Gelfand (n 25) 45.

29 'Gomba harina mwana minister says' (2013), <https://insiderzim.com/gomba-harina-mwana-minister-says> (accessed 25 April 2022).

30 Chigwedere (n 5) 3.

31 As above.

groceries, cattle and clothes for the bride's parents.³² This nature of bride price depicts that at divorce, some of the bride price items would have been used up or shared among relatives who would have been present at the *lobola* function. In some cases, cows or cattle would have died or been sold or, in some cases, passed on for inheritance or other customary law trading. Henceforth, the nature of the bride price makes its full refund, at any stage, very problematic.

5.4 Bride price refund and women's right to dignity

The issue then takes a different turn when one evaluates the dignity of a woman *vis-à-vis* the issue of bride price refund. At its best, the concept of human dignity is the belief that all people hold a special value that is tied solely to their humanity. As long as one is a human being they deserve to be treated with dignity. The United Nations (UN) Charter³³ and the Universal Declaration of Human Rights (Universal Declaration)³⁴ set the tone for the recognition of human dignity. Subsequently, the International Covenant on Civil and Political Rights (ICCPR) makes it clear that even those whose liberty has been legally deprived deserve to be treated with dignity.³⁵ At regional level the protocol on women's rights of the African Charter on Human and Peoples' Rights (African Charter) articulates that member states must observe women's dignity.³⁶

Despite its prominence in the international legal discourse, dignity is one of the key founding values in the Constitution as provided for in section 3. It also is a right clearly provided for in section 51 of the Constitution. The section provides that '[e]very person has inherent dignity in their private life, and the right to have that dignity respected and protected'. The endowed dual status of human dignity by the Constitution portrays its importance and calls for that magnified regard.

Human dignity has a broad meaning that covers a number of different values,³⁷ and it is difficult to capture its meaning in precise terms.³⁸ The Zimbabwean courts have not yet ventured a

32 Ansell (n 16) 699.

33 United Nations Charter of the United Nations 24 October 1945.

34 Universal Declaration of Human Rights adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

35 Art 10 International Covenant on Civil and Political Rights 19 December 1966.

36 Art 3 of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 provides for the right to equality for women in Africa.

37 *Le Roux v Dey* 2011 (3) SA 274 (CC) 138.

38 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 29.

comprehensive definition of human dignity. Nonetheless, De Vos and Freedman assert that the right to dignity implies that human beings must be protected from conditions or treatment that offends one's worth in society.³⁹ They go on to say that treatment that may be considered 'abusive, degrading, humiliating or demeaning' is a violation of this right. Haysom regards any treatment that categorises a human being as an object to be a violation of the right to dignity enshrined in section 51 of the Constitution.⁴⁰ With regard to the case of *Mangwende*, the act of refunding the bride price commodifies and objectifies women. Women become objects that can be returned for a refund, thereby demeaning their humanity and dignity.

It is not disputed that the Constitution in section 16 allows the practice of customs and culture of one's choice. However, the practice of culture must not be at the expense of the inherent dignity of a woman.⁴¹ When their sexual rights are tied to bride price, women become sexual slaves and that takes away their sexual agency.⁴² Agency is defined as the ability to make choices and to set goals and achieve these.⁴³ Women's sexual agency is the ability for a woman to realise and act on their wishes, interests and needs in relation to their sexual decision making and sexual behaviour.⁴⁴ Once this sexual agency is taken away from them, it equally affects their sexual rights and it attacks their inherent dignity since they cannot exercise their sexual rights in a way that human beings are expected to do.⁴⁵ It is thus submitted that, because of the customary law that was applied, the appellant's daughter's sexual rights and sexual agency were violated. The payment of *lobola* for a woman under customary marriage takes away the woman's right to decide on who to have intercourse with, and when and how to have it. The appellate court's inquiry into whether the sexual relations that the appellant's daughter had with the respondent's relatives were a family arrangement alludes to the woman's lack of sexual agency. When the Court realised that it had not been arranged, it became illegal and it was then regarded as an infidelity that could

39 P de Vos & W Freedman *South African constitutional law in context* (2014) 423.

40 N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African constitutional law: Bill of Rights* (2002) 131.

41 Sec 16 Constitution (n 7).

42 B Amon *Where are the ancestors?* (1993).

43 B Sahu, P Jeffery & N Nakkeeran 'Contextualising women's agency in marital negotiations: Muslim and Hindu women in Karnataka, India' (2016) 6 *Sage Open Journal* 2.

44 JM Wood, PK Mansfield & PB Koch 'Negotiating sexual agency: Postmenopausal women's meaning and experience of sexual desire' (2007) 17 *Qualitative Health Research* 190.

45 Office of the High Commissioner for Human Rights 'Sexual and reproductive health and rights' (2017), <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>. (accessed 26 April 2022).

not be condoned under customary law, hence the forfeiture of the outstanding *lobola* by the appellant. An upshot of this ruling is the fact that the woman is perpetually voiceless regarding her sexuality which is freely governed, not only by her husband but by his whole family.

5.5 Bride price refund and the right to equality

Equality as a right for women at international level is clearly spelt out in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁴⁶ The core content of the right to equality may be derived from the General Comment on the right to equality under ICCPR which requires that law must extend the same rights enjoyed by men to women on an equal basis and in their totality.⁴⁷ Similarly, section 56 of the Constitution requires that everyone must be treated equally before the law and prohibits any form of unfair discrimination based on the grounds listed therein.⁴⁸ Section 56(3) provides:

Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status or whether they were born in or out of wedlock.

Zimbabwean customary marriage laws give a man the right to claim a bride price refund upon dissolution of an unregistered customary marriage because of the wife's adultery, yet it does not give a woman the right to claim compensation for the value of the services she rendered to the husband or any other corresponding right or remedy in the case of the husband's adultery. The Court in this case clearly stated that 'a man is entitled to a full *lobola* refund'. This means that only men qualify as the beneficiaries of the right to claim a *lobola* refund, and women are excluded. This wording of the Court is grounded on the fact that it is only women for which *lobola* is paid and not men. However, affording men a full *lobola* refund without considering whether during the subsistence of the marriage the woman performed duties that she was expected to perform that are intrinsically linked to the payment of *lobola* leaves the law tilted to the advantage of men and at the disadvantage of women.

46 Convention on the Elimination of All Forms of Discrimination against Women 18 December 1979.

47 General Comment 28 of ICCPR art 3 (The Equality of Rights Between Men and Women) 1 adopted at the 68th session of the Human Rights Committee, 29 March 2000.

48 Sec 56(3) Constitution (n 7).

In order for this law to respect equality between men and women, the Court could have interpreted the custom in a manner that gives women the same right to claim a refund for domestic services offered to men. Conversely, it may be argued that the Court did not have occasion to comment on what a woman would receive, as it was not an issue before it, because the husband was not the one who had cheated. Broadly, this could be an argument against the custom itself as it creates inequality, and in interpreting this custom, the Court could have adopted a purposive approach to develop the custom so that it can be in sync with the Constitution.⁴⁹ When one appreciates trite locus of the Zimbabwean law where women in customary marriages are not endowed with the right to claim adultery damages, it becomes compelling that courts must be alive to customs that confront an equal society envisaged by the Constitution.⁵⁰ Without dwelling much on the equality of *lobola* itself, it may be pointed out that the Court could have moved a step further and applied a broad perspective of the *lobola* payment and the rights of women.⁵¹ Courts are endowed with the duty to deliver justice and to transform laws. The Court in this case neglected or ignored its duty to develop customary law and to align it with the principles of equality that are enshrined in the Constitution.

Payment of the bride price imposes a burden on men as they are mandated to gather resources for the bride price. As such, a bride price refund would seek its justification, where there is infidelity by a woman, in providing solace to a man who, after having paid the bride price, was then betrayed by the person for whom he had paid it. On the contrary, the woman is not compensated for the time lost and services that she would have provided to the husband during the subsistence of the marriage, in the case of infidelity by a man, constituting unfair differentiation of partners in a similar position.

6 Conclusion

The focus of this article was on inequalities that surround the bride price refund that Zimbabwean courts reinforce. In sum, it is to be noted that one of the lessons that emerges from the case under discussion is the problem of a dual legal system. While the notion

49 Sec 176 of the Constitution provides: 'The Constitutional Court, Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop common law or the customary law, taking into account the interest of justice and provisions of this Constitution.'

50 *Gwatidzo v Masukusa* (n 19).

51 P Vengesayi 'Lobola culture and the equality of women in Zimbabwe' (2018) 12 *Pretoria Student Law Review* 114.

of dual legal system in Zimbabwe permits the application of both general law and customary law, in this case the choice to apply customary law rendered nugatory efforts to realise constitutionally-enshrined gender equality. Therefore, the judgment does not advance constitutional equality demands. Furthermore, the judgment set a precedent at law that subjects women to unfair discrimination and an impairment of their dignity. The violation of women's rights in Zimbabwe through customs and the perpetuation of such a violation is lamentable. In light of these shortcomings, women deserve to be relieved of such debauched customs. It thus may be concluded that the judgment in the *Mangwende* case has no place in the constitutional dispensation and sets a bad precedence. The custom of the *lobola* refund was supposed to have been developed to be consistent with the Constitution.

7 Recommendations

In light of the above discussion it is recommended that judicial activism must play a central role in transforming customary laws that have traditionally been repressive to women. In the spirit of cultural relativism judges can improve the treatment of women at the hands of customary marriage laws by interpreting these taking cognisance of gender equality and the dignity of women. In developing the customary law, factors such as the duration of the marriage must be taken into consideration. Once the couple have stayed together with each party playing his or her role, it can no longer be fair for *lobola* to be refunded. There are scenarios where the husband has just paid *lobola* when he discovers that the wife has cheated, before they have stayed together, where it can be refunded. Furthermore, as not all *lobola* items are refundable, the court must clearly define the components of the bride price that can be refunded, and should further ascertain what would be the position if some of *lobola* items have been used up, have died or have been stolen.

The denial of women's sexual rights and sexual agency under customary marriage laws demeans women's dignity, and these laws need to be redefined to allow women to exercise their sexual rights and sexual agency in all circumstances. The legislature must play its part in fairly regulating the bride price refund or otherwise under customary marriage laws. Such regulation should address issues related to the rights of women *viz-à-vis* patriarchal cultural practices. In essence, the dignity and equality of women must be upheld in customary marriage laws. The legislature should bring cultural practices up to date with the ever-changing global equality demands.

Customary marriage negotiations must be premised on the principles of equality. If equality is observed at the inception of customary marriages, all ancillary women's rights violations would be protected.