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THE DECISION IN KATEKWE V MUCHABAIWA A CRITIQUE*

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INTRODUCTION

Few statutes in the history of this country have attracted as much debate and controversy as the Legal Age of Majority Act, No 15 of 1982 which formally became law on 10 December, 1982. In a comment in *The Sunday Mail* (9.9.84) and in the Talking Point Column of the same paper (16.9.84) the Legal Age of Majority Act was condemned for having destroyed our society's culture and social norms. The Act has even raised eye brows and discomfort in Zimbabwe's Parliament, the body which enacted it. During the Prime Minister's question time on 2nd September, 1984 Mr Mukarati, the UANC MP for Mashonaland East asked the Prime Minister to comment on the Supreme Court Judgement in Katekwe's case in so far as it has "obliterated *lobola"* and if he was aware of the sharp adverse reaction by the public. The Prime Minister replied that"if there has been a flaw in the drafting of the regulation that flaw will be amended". He added, apparently in a moment of jest, that if his sister were to get married, he would demand *lobola* and if the intended husband pointed to the Katekwe judgement, he would say to him "O.K. That is the judgement. Do you want to marry my sister or not?" *(Hansard,* 12th September, 1984).

On November 7, 1984, the Minister of Justice, Legal and Parliainentary Affairs, Cde. E. Zvobgo was quizzed on the same subject in Parliament. He was asked by Mr Mukarati if the government would consider amending the Legal Age of Majority Act in order to accommodate *lobola.* The Minister replied that his Ministry had "no intention of repealing the Act for reasons given by the questioner". On being pressed by Mr Mukarati and Cde Sydney Malunga, ZAPU MP for Matabeleland North, the Minister disclosed that the government was "looking" into whether the Legal Age of Majority Act could be amended to allow an African father to claim seduction damages *(Hansard,* 7th November, 1984). Opening Chiunye Primary School in Mt. Darwin on the 23rd November, 1984, the Minister Community Development and Women's Affairs, Cde. Teurai Ropa Nhongo on pursued the same theme and declared that the Legal 'Age of Majority Act will be amended to give parents control over their children. "We want to retain our cultural values and we shall invite parents, elders, and traditional leaders to advice us on the necessary amendments needed to retain those social values we cherish", said Cde.

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mine and should not be interpreted to be those of either Doris or Denis,

Nhongo amid loud applauses from elderly people ***(****The Herald* ***7th*** November, 1984). Hardly the words of a Minister who a few weeks earlier in her opening address to delegates at the Colloquium on "The Rights of Women in Zimbabwe", organised under the auspices of the Legal Research Department of the Ministry of Justice, Legal and Parliamentary Affairs, had said:

> It should be borne in mind also, that in the context of the national ideology and the principles on which the liberation struggle was fought, a perpetuation of inferior status of women is a real embarrassment for it negates the very principles of socialism ... Cultures and traditions are not static but change as circumstances and situations change. Customs are made by people and it is people who can change them. They are fashioned to suit the prevailing socio-economic order and it is on this basis that women feel certain aspects of customary law are simply obsolete and out of step with the situation in Zimbabwe today (The Rights of Women in Zimbabwe p. 23)

> Speaking on the ZTV programme, "The Nation", television on Sunday 25th November, 1984, the Minister of Justice, Legal and Parliamentary Affairs, Cde. E. Zvobgo, was of the opinion that there was nothing wrong with the Legal Age of Majority Act as interpreted by the Supreme Court. However, he added that,"we hear an outcry against the judgment and the Act, to which the Government must respond". The Government's response took the form of a proposed Legal Age of Majority Act Amendment, 1984, which at the time of writing is still being discussed by officials of the Minister's Ministry. The proposed amendment would provide that notwithstanding the provisions of Act 15 of 1982 a person who would in terms of customary law be regarded as a guardian of a woman should be entitled to claim *lobola* in respect of the marriage. Further the amendment seeks to give the person who would have been the guardian of the woman at customary law the right to claim damages for seduction in terms of customary law. The Minister of Justice confirmed this in a news item carried by ZTV in their main news bulletin on 5 December, 1984.

The proposed amendments, it is respectfully submitted, would effectively return African women virtually to the position which they occupied in terms of customary law before Act 15 of 1982. The novel situation would be created where African women would be majors for contractual purposes but "quasi - minors" in relation to some aspects of personal law, for example, in seduction suits. Consequently a ridiculous position would arise whereby the law would say that a woman who had attained the age of eighteen years and was a major may marry without the consent of her father and yet, at the same time she requires the consent of her father to have sexual relations before her marriage. The latter would be so because the father's customary law right to claim damages for the Seduction on his daughter/ward is based on the fact

that a man has had sexual intercourse with the daughter/ward without his (the father's) consent but surely a major daughter should not require such consent. With respect, the proposed amendment would lead to ridiculous results, not to mention its complete negation of the principles of socialism.

It cannot be seriously argued that the government and Parliament were unaware that Act 15 of 1982 would remove *lobola* as a legal requirement to validate a marriage. In introducing the Bill to Parliament, the then Minister of Justice Cde. Simbi Mubako made it clear that one of the consequences of the Bill was to remove *lobola* as a legal requirement to validate a marriage. *(Hansard* 16th June, 1982). Therefore, the government's attempt to backtrack on the Legal Age of Majority Act, must not be seen as an effort at correcting a consequence that was unforeseen in introducing the Bill, but as an example of the sacrifice of a fundamental principle for political expediency.

The Decision

Katekwe's case came before the Supreme Court as an appeal from the decision of the District Court for Midlands Province, that the respondent, the father of the seduced daughter, was entitled and had *locus standi* to sue for damages for the seduction of his daughter, notwithstanding the fact that at the time of the seduction, his daughter had been a major. In the District Court, the Magistrate, while agreeing that Act No. 15 of 1982 conferred majority status on any person who had attained the age of eighteen years, dismissed the appeal by holding that" the court is fully of the strongest opinion that at no time did the Legislature intend to do away with the award of damages despite indicating that the Legal Age of Majority Act applies also in relation to customary law."

In appealing to the Supreme Court, the appellant repeated his contention that 'in the wake of the Act, a black Zimbabwean female who is a major may contract a valid marriage without a parent's or guardian's consent, it follows that, in so far as her guardian must loose his legal right to claim *lobola* for her upon her attaining majority, the whole purpose underlying the action for seduction falls away. Consequently there can be no impairment of a non-existent right". In a judgment handed down on September 7, 1984 Dumbutshena C J held that:

1. As a result of Act 15 of 1982, an African father had last the right under customary law to sue for damages for the seduction of a daughter who has attained the age of 18 years at the time of seduction. The father could not sue even if the major daughter consents.
2. The right to sue for damages for seduction - a delict- now falls on the major daughter under the genera law of Zimbabwe which requires that the woman must prove that there was sexual intercourse and thereafter she is presumed to have been seduced and to have been a virgin at the time the seduction.

3. The proviso to section 3(3) of the Customary Law and Primary Courts Act, No. 6 of 1981, has been repealed by No. 15 of 1982 and hence the capacity to enforce or defend any rights in a court of law or to enter into contractual obligations is determined and governed by the general law of Zimbabwe.
4. If however, the daughter is a minor the right of action remains with the father under customary law, if his daughter is seduced.

The Chief Justice also made detailed pronouncement on the issue of *lobola*. In his *obiter dictum* on lobola Chief Justice Dumbutshena was of the opinion that as a result of the Legal Age of Majority Act the father no longer has an independent legal entitlement to *lobola*. However, a woman with majority status can, if she so desires, allow her father to ask for *lobola* from the man who wants to marry her. "She and she alone can make that choice", said the Chief Justice (at page 16).

These points will now be analysed in turn.

1. *That a father has no right to sue for seduction damages if the daughter was a major at the time of seduction.*

Under traditional customary law, the delict of seduction is defined as sexual intercourse with a woman, with her consent, but without her guardian's consent. The delict is committed not against the woman, but against her guardian, who, as the wronged party is entitled to claim damages. The woman is merely an object through whom the delict is commited. Customary law does not recognise a woman's right to claim damages for her seduction. A guardian cannot succeed if he has consented or encouraged the seduction, as such action amounts to collusion. Damages are awarded to him for the dimunition in the *lobola* value of the girl.

Under customary law, women were perpetual minors. At all times they were under the guardianship of their fathers, husbands, or some other male relative. Section 3(1) of Act No 15 of 1982 provides that "on and after the fixed date a person shall attain the legal age of majority on attaining eighteen years of age". Unlike the Legal Age of Majority Act, (Chapter 46) which it repealed, and which did not apply to Africans, Act No 15 of 1982 proceeded to provide in section 3(3) that "the provisions of subsection (1) and (2) shall apply for the purpose of any law including customary law." The Act thus conferred full legal capacity on African women over the age of eighteen who had hitherto remained perpetual minors under customary law, and had had no *locus standi* at law.

Before the coming into force of the Legal Age of Majority Act No 15 of 1982 an African woman could not, regardless of her age validly contract a marriage without her guardian's consent. With the passing of the Act on attaining eighteen years of age, all women acquire full legal capacity and full contractual powers. Consequently they can now enter into any contract, including a contract of marriage, without the consent of their father of former guardian. If, therefore a woman can validly contract a marriage without her father's consent, it follows that the father can longer insist on the payment of *lobola* before the marriage. Previously, as his consent was necessary, a guardian could always withhold it, unless and until *lobola* was paid or satisfactory agreement in respect thereto had been made.

Under customary law, the father was entitled to damages if his daughter was seduced on the theory that the seduction had the effect of reducing the amount of potential *lobola* he would receive on the marriage of his daughter. But as a result of Act No. 15 of1982, the father lost his Entitlement to lobla *and*, therefore, it followed that the whole purpose underlying an action for seduction damages fell away.

Further, cession apart, (which can only be under general law) the seduced daughter cannot confer a right to claim for seduction damages on the father, since it is an established principle of law that a delict committed against one person of full legal capacity cannot found a cause of action by a third party. Thus, the Supreme Court correctly stated that a 'woman with majority status cannot surrender her majority in order to enable her father to sue for damages for seduction".

In view of the foregoing the Chief Justice was, it is submitted, correct in law when he held that a father has no *locus standi* to sue for damages for the seduction of a daughter who has attained the age of eighteen years at the time of seduction.

2. *The Right to sue for damages for seduction now falls on the major daughter under the general law*

At page 9 of his judgment the Chief Justice said;

> It is my view those in terms of section 3 of Act 6 1981 (namely, the Customary Law and Primary Courts Act) an African woman who has been seduced can make an election as to which law she wants to be applied: If she elects the general law Zimbabwe, then she herself can bring an action for damages for seduction.

Further at page 20, he added:

> The right to sue for damages for seduction- a delict-now falls on the daughter. The daughter can sue for damages for seduction under general law of Zimbabwe. She has the capacity to do so.

With the greatest respect to the Chief Justice, no party to a dispute can unilaterally elect that his/her case is to be determined in accordance with the general law or with customary raw. It is the duty of the court to determine which system of law applies, and it must do so in accordance With the guidelines set out in section 3 of the Customary Law and Primary Courts Act.

Section 3 (1) (a) of Act 6 of 1981 sets forth the guidelines for determining whether customary law or general law applies to a particular dispute. It provides that
Customary law shall be applicable in any civil case where:-

i. the parties have expressly agreed that it should apply; or
ii. having regard to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
iii. having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply.

Further, section 3 (1) (b) provides that "the general law of Zimbabwe shall be applicable in all other cases". Section 3 (2) then defines what is meant by"surrounding circumstances", and provides as follows:-

> For the purpose of paragraph (a) of subsection (1) 'surrounding circumstances', in relation to a case shall without limiting the expression include;
>
> (a) the mode of life of the parties;
> (b) the subject matter of the case;
> (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which applies to the case;
> (d) the relative closeness of the case and the parties to customary law or the general law of Zimbabwe, as the case may be.

It is clear from section 3 that the court must decide which system of law applies. It must consider all the factors contained in section 3 (2) in making its determination. In its determination the court should only concerned with which system it is proper to apply to the case. Such matters as whether or not a cause of action exists under one system or the other and which party would win under either system are totally irrelevant should not be considered by the court at all. In deciding that the woman can now sue under the general law of Zimbabwe the Chief Justice at to have given too much weight to the consideration that, since customary law no longer provides remedy for a major daughter's seduction, then *all* major daughters can claim under the general law. However, the correct position, it is submitted, is that the non-existence of

a remedy under customary law does not necessarily entitle everyone to claim under general law.

Further, under section 3 the parties may, subject to a controlling statute, agree which system they want applied to their case. If they are agreed, then the court must decide the dispute in accordance with the system of their choice. However, no one can unilaterally decide which system should apply. It follows, therefore that in so far as the Chief Justice held that a woman can unilaterally elect that her case be decided in accordance with the general law, this cannot be supported by the language of section 3 of the Customary Law and Primary Courts Act.

If the guidelines set forth in section 3 subjects the parties' dispute to customary law, then such a woman cannot claim under the general law. To illustrate this point, an illiterate, rural major girl who has lived all her life in Binga and has been seduced by a Batonga fisherman who is also illiterate and has lived all his life in rural Binga, cannot succeed in claiming to be governed by general law and therefore cannot have a claim for seduction damages under the general law. The traditional life style, mode of living, closeness of the parties to customary law, and their understanding of customary law, excludes the application of general law. It is thus those women who can point to a non-customary life style who would successfully claim to be governed by general law.

What the Legal Age of Majority Act did was to take away the right to sue for seduction damages from all fathers, but it did not African women a right to sue for seduction damages in their own right if they are governed by customary 1aw.

3. *The Proviso to section 3(3) of the Customary Law and Primary courts Act has been repealed by Act No. 15 of 1982*

The Honorable Chief Justice decided that the Legal Age of Majority Act has repealed by implication the proviso to section 3 (3) of Act 6 of 1981.

> What has been directly affected and repealed by implication by Act 15 of 1982 is the proviso to section 3 (3) of Act 6 of 1981. Now the capacity to enforce or defend any rights in a court of law or to enter into contractual obligations is determined and governed by the general law of Zimbabwe. African women have full legal capacity"

said the Chief Justice at page 16 of his judgment.

At this stage it must be noted that in a subsequent case, *Ettie Nyemba v Joshua Jena* HC-H-434-84 Sandura JP agreed with this conclusion.

Section 3 (3) of Act 6 of 1981 reads:

> The capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law shall subject to any enactment affecting such capacity be determined in accordance with the general law of Zimbabwe.

If there had been no proviso to section 3(3), that section would have given African women the same legal capacity as that enjoyed by white women under the general law. That would have meant that African women would have acquired full legal capacity on attaining the age of twenty-one years (the old legal age of majority) and would have had their capacity governed by general law. However, the proviso to section 3(3) went further to provide that:

> Provided that if the existence or extent of any right held by an African or of any obligations vesting in any African depends upon or is governed by customary law, the capacity of the African concerned in relation to any matter affecting that or obligation shall be governed by customary law.

This proviso effectively deprived African women of the right to elect to be governed by general law in matters relating to their capacity, as long such election would have had the effect of depriving an African father/guardian of any right vesting in him under customary law.

It is clear that the proviso is inconsistent with Act 15 of 1982 in so far as it purports to deny major African women the right to have their capacity governed by the general law and in its attempt to have the capacity of all African women governed by customary law. It is not inconsistent with Act 15 of 1982 in so far allows a father to claim rights in relation to a minor daughter. It is not inconsistent with a father's claim seduction damages for a minor daughter.

With respect it is not correct that the proviso has been repealed in *toto.* It has only been repealed to the extent that it is inconsistent with Act 15 of 1982. For all other purposes the proviso remains intact.

To argue that the proviso to section 3(3) has not been repealed *in toto* is not to concede that the proviso is desirable. On the contrary, it needs to be repealed by the Legislature for the avoidance of doubt, since it is largely responsible for most women being deprived of certain rights under customary law. It is this proviso that maintains the dominance of men over women in many aspects of personal law. The repeal of the proviso is an absolute necessity as it has not been rendered meaningless by a subsequently inconsistent statutory provision, namely Act 15 of 1982.

4. *If the daughter is a minor the right of action remains with the father under customary law*

After holding that proviso to section 3 (3) of Act 6 of 1981 has been repealed, and that a father has no *locus standi* to claim damages for seduction of his daughter, even if the daughter consents to such claim Dumbutshena CJ proceeded to point out that the father's right to claim

seduction damages remains intact under customary law, if the seduced daughter was below the age of eighteen years at the time of seduction. No reasons are given in the judgment for that conclusion. In the absence of an explanation, it is to be presumed that the father retains his customary law right because he is still the guardian of the girl: and as such, apparently retains all his customary -law rights which remain unaffected by Act No.15 of 1982.

The Supreme Court decided that the proviso to section 3(3) had been repealed *in toto* and, therefore, section 3(3) of Act 6 of 1981 now stands alone, without a proviso. Consequently according to the Supreme Court "the capacity of any person to enter into any transaction or to enforce or defend any right in a court of law shall, subject to any enactment affecting such capacity, be determined in accordance with the general law of Zimbabwe". The crucial question here is the meaning of the word "capacity". Generally, capacity refers to a person's *power* to perform, or benefit from, juristic acts. Therefore, in order to determine whether or not a given person is a minor one must look at the general law which provides, by necessary implication through the Legal Age of Majority Act, that any person under the age of eighteen is a minor. The consequences of that minority fall to be determined by the system of law that is applicable to each particular case. In other words, while the capacity of all Zimbabweans falls to be governed by the general law, the rights sought to be enforced may be governed by either the general or by customary law. The fact that capacity is governed by the general law does not *per se* result in the substantive rights, which may be sought to be governed by the general law.

Therefore, the fact that the capacity (i.e. the power to perform certain acts), of a minor is governed by the general law does not mean that that minor's substantive rights or obligations fall to be determined under general law. The general law only governs her capacity and it provides that as a minor she must have a guardian with obligations towards her.

Under customary law a father's claim to seduction damages is predicated on his entitlement to *lobola.* Since the general law provides that he is still the guardian of the girl who is below the age of eighteen years, he must still be entitled to receive lobola for that minor daughter, on her marriage, unaffected by Act No. 15 of 1982. Consequently he is still entitled to claim damages for the seduction of his daughter since such seduction has the effect of diminishing her *lobola* value. This is how the Chief justice *must* have reasoned in coming to his conclusion.

But such reasoning assumes, it is submitted incorrectly, that the father's entitlement to *lobola* is based simply on his being guardian of the woman. Is it not inherent in the *lobola* institution that the woman must be a perpetual minor? Was it not part of the institution that the woman must be a perpetual minor? Was it not part of the institution that the father transfers his rights of guardianship to the husband? Was it not implicit in the institution that the husband paid *lobola* for the acquisition of the father's rights of "ownership" over the woman? Further, was it not the father's undertaking to surrender to the husband in perpetuity, or at least until divorce, his rights of ownership? In the light of Act 15 of 1982 the woman can no longer be regarded as a perpetual minor, the father can no longer fulfill his obligation of transferring his rights of ownership in perpetuity, or at least until divorce, nor can the husband claim to acquire such

rights as a *quid pro quo* for his *lobola.*

It is submitted, with respect, that the purpose of *lobola* cannot be realized in circumstances where the woman does not remain a perpetual minor. If a minor girl's capacity is governed by the general law she becomes a major on her civil marriage and the husband to such a marriage *canno*t, therefore, acquire any right of guardianship over her. Why then should he be obliged to pay for a woman who will be emancipated from minority by the very fact of marriage?

With the greatest respect to the Chief Justice, it is far too simplistic to reason that the father is entitled to *lobola* by the fact of his being guardian of the woman simpliciter. He is not just entitled to *lobola* qua guardian himself he must be able to surrender that guardianship to the husband. But if the capacity of any person is determined in accordance with general law, he cannot do so, since the woman will become a major by the simple fact of her being married in terms of civil rights, or alternatively when she reached the age of eighteen, if she marries in accordance with customary law.

The Chief Justice's conclusion leads to the somewhat ridiculous result that an African minor's rights duties would, at all times be governed by customary law concepts of minority while on attaining the age of majority by the general law concepts of majority. That would mean that one system of law applies (subject to section 3 of Act 6 of 1981) as long as a person remains a minor, and another system (the general law) takes over on the attainment of majority. African minor girls on attaining the age of eighteen years would "graduate" to a large extent from the operation of customary law.

The Obiter on Lobola

We now turn to Chief Justice Dumbutshena's ***obiter dictum*** on the issue of ***lobola.*** The Chief Justice summed up what he thought was now the position as follows:-

> As I see it, what the Legal Age of Majority Act has done with regard to ***roora*** is this: The major daughter will say to her father,"Father I want to get married. You have no right to stop me. I do not require your consent because I *have majority* status. But if you want *lobola* you are free to negotiate with my prospective husband. If he agrees to pay roora *that is* a contract, an agreement between you and my prospective husband If he refuses to pay *roora,* I shall go ahead with my marriage". (Page 19)

Earlier, **at page** 16 of his judgment, the Chief Justice remarked that *lobola was* dependent on the discretion of the woman. In his own words:

"It seems to me that an African woman with majority status can, if she so desires, allow her father to ask for *roora/lobola from* the man who wants to marry her. She and she alone can make

that choice".

The Chief Justice's *obiter dictum* was based on the fact that since an African woman can now marry without the consent of her father, it followed that the father has no legal entitlement to demand or receive lobola. The woman having been released from his guardianship or legal control, he no longer can have any right to claim *lobola.*

As the Chief Justice correctly pointed out, under traditional customary law the father the daughter, and because of his rights of ownership, he is entitled to receive *lobola* from whoever marries his daughter. He receives *lobola* in exchange for surrendering and passing over his right of ownership to the husband. The husband then acquires that right of ownership. Now in the wake of Act No. 15 of 1982, the father loses his right to ownership of his daughter when his daughter attains the age of majority. The father, therefore, has no right to claim *lobola* in respect of his major daughter.

The Chief Justice was therefore correct in law when he held that an African father no longer has an independent entitlement *to lobola* upon his daughter's attaining her majority. Legally speaking, whether or not he will receive any *lobola* will now be dependent upon the discretion of his major daughter.

The daughter has a right to impose any condition precedent to the contract of marriage. She can say to her prospective husband, "I want my parents to receive *lobola* and, therefore, if you want to marry me, you will have to negotiate with them and agree on a reasonable amount of *lobola.* If you do not want to pay *lobola*, then I shall not marry you." She is entitled to do that, and if the man does not want to pay *lobola then* the woman is at liberty to refuse to marry him.

Further, she need not make the agreement on lobola a condition precedent of the marriage. She can, in fact merely allow her father to negotiate and make it clear, as the Chief Justice pointed out, if no agreement is reached between her father and the prospective husband; she will nonetheless marry the man.

However, one wonders whether or not the daughter's right to impose a condition to the marriage is totally unfettered. Can she confer the right to negotiate for *lobola* on anybody she chooses, including a former boyfriend? If that is so, will the resultant contract of *lobola* be enforceable as a customary law contract or as a general law contract?

Whatever the answers to those questions may be, it is clear that a woman with majority status can, if she so desires, allow her father to negotiate for lobola with the man who wishes to marry her.

In conclusion, it must be pointed out that the institution of *lobola* is inconsistent with the

creation of equal status between men and women. If, in enacting Act No. 15 of 1982, the intention of the legislature was to create equality of status between men and women regardless of race, the institution of *lobola,* which the author regards as nothing more that cultural stagnation, stands as a bulwark against such a noble intention. To the extent that Act No. 15 of 1982 permits a daughter to enable her father to claim *lobola,* it falls far short of creating the ground work for equality of spouses in the family.

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