



CUSTOMARY FAMILY LAW

Customary law simply refers to rules, principles, practices and customs of indigenous and local communities which are intrinsic and central party of the way of life of these communities.

Rwebangila defines customary law in her book titled *The Law of Inheritance in Tanzania (A Status Report) of 1995* at pg 5, as the law which is written, declared or unwritten but is recognized by community as having force of law. It is applicable to African members irrespective of their religious affiliation.

Types of Customary Law

There are two types of customary law

a) Codified Customary Law

These are those rules as contained in the Customary Law Declaration Order of 1963 and Judicial Decision (case law)

The Local Customary Law Declaration Order of 1963 is divided into two parts;

- i. First part GN 279/63 which contains rules relating to dowry, marriage, divorce and status of children.
- ii. Second part GN 436 which contains rules relating to guardianship, will and inheritance.

However it should be noted that the Customary Law Declaration Order of 1963 applies to patrilineal communities only.

b) Un Codified Customary Law

These are traditional norms and taboos of the people regulating and governing a social behavior of matrilineal tribes eg Makua



NOTE;

The Local Customary Law Declaration Order GN 279 provides detail rules governing customary marriages, however, most of them they are no longer applicable following the enactment of Law of Marriage Act, [Cap 29 RE 2002].

The LMA incorporated customary and religious marriage into a uniform marriage code, giving both customary and Islamic marriages state sanction, but also subjecting them to state regulation. The effect of LMA is that it deprives the application of customary law to all matters of marriage, divorce and dowry as it is provided under 2nd schedule of LMA.

In *Mahenga Zengo Vs Holo Kadaso*¹ it was held that the court has the duty to assist the growth and promotion of equitable customary law/rules which reflect common sense.

In *Mwanibope Mwaitenda Vs Lazaro Mwakanjuki*² the Customary Law Declaration Order is subject to any relevant Act of parliament.

Read also *Mbaruku Vs Chemonyoro*³

Current Basis for the Application of Customary Law

The applicability of customary law is based on the followings;

a) Constitution

There is no express provision in our constitution which declare applicability of customary law. However Article 64(5) of United Republic of Tanzania of 1977 is given purpose meaning to include customary law.

¹ (1982) TLR 94

² (1976) LRT 60

³ (1971) HCD 406



b) Statutes

There are several statutes which govern and regulate application of customary law today.

1) Magistrate Court Act⁴

Section 18 provides that the law applicable to primary court is customary law and Islamic law.

2) Judicature of Application of Law Act⁵

Section 11(1)a-c and 11(2) as amended by 2nd schedule of Law of Marriage Act of 1971 which provide modality/circumstances of application of customary laws.

3) Law of Marriage Act⁶

Section 10(2) and 25(1)d recognize customary marriage to be contracted according to customs of a given community.

4) Probate and Administration of Estates Act⁷.

Section 19 provide for application of customary law in administration of deceased estate if a deceased is a member of customary law community.

5) Local Customary Law Declaration Order GN. 279 and 436 of 1963

These are the main source of customary law. A lot of rules of customary law are provided under these GN.

Conditions for Application of Customary Law

⁴ [Cap 11 R.E 2002]

⁵[Cap 358 RE 2002]

⁶ [Cap 29 RE 2002]

⁷ Cap. 352 [R.E. 2002]

Customary law is applicable to primary court as provided under section 18 of Magistrate Court Act of 1984. In order for customary law to apply the following conditions must be established.

- ❖ As per Article 64(5) of the Constitution, customary law will be applicable if it is not contrary to constitution or other written law.
- ❖ Customary law is applicable to matters of civil nature only as per section 11(1) of JALA; Matters of civil nature may be marriage, inheritance, custody of children, guardianship and divorce. e.t.c
- ❖ Customary law is applicable if parties involved to dispute are native. Section 11(1)a. of JALA (R.E 2002);

It applies between members of community/native in which rules of customary law relevant to the matters or between members of one community if the rules of both communities make similar provision.

Customary law will also apply if it is proved by adducing evidence that the said customary law exist and is practiced in the particular area.

SPECIFIC ASPECT OF CODIFIED CUSTOMARY LAW

1) Bride price

Bride price is the term used to refer to the *process through which the family of man makes payments in the form of cash, cattle or other goods to the family of the woman whom he intends to marry*. Rule 1 of GN 279/1963

However a bride price is no longer essential element for customary marriage to be valid, this is provided under rule 5 of GN 279/63 and section 41(a) of Law of Marriage Act of 1971.

Also in the case of *Mwapombe vs Lazaro Mkwaya*⁸. It was held that nonpayment of bride price is not defect that would go to the root of marriage

⁸ (1976) TLR 60

contract. That is to say nonpayment of bride price has no legal effect to the validity of marriage.

Also read the case of *Ramadhan Ramadhan Vs Sungi Andalu*⁹

Who is supposed to Pay Bride Price?

According to rule 6 of GN 279, it is provided that, it is a duty bound to the groom to pay bride price though his relative may help him in fulfilling his obligation/dischARGE his duty.

In the case of *Masero Mwita Vs Rioba Masero*¹⁰ Among others the court held that the customary law imposing on the father an obligation to give cattle to his son for bride price was repugnant as it is dangerously encroached to the security of property.

WHO IS SUPPOSED TO RECEIVE BRIDE PRICE?

Rule 7 clearly provide that a father of bride or his legal successor/heir be a woman or a man save for the successor if is the one bride is paid for.

WHAT SHOULD BE PAID

According to rule 10B it depends to the social economic position of the groom. Rule 10A invalidate all rule/ laws which put amount of bride price.

RETURN/REFUND OF BRIDE PRICE

Who is responsible to repay back bride price?

⁹ (1984) TLR 158

¹⁰ (1968)HCD 199

According to rule 37A a father of a bride or his legal heir is liable or responsible to refund the bride price whenever the marriage is broken down.

It should be noted that death of wife is not good cause for return of bride price as per rule 80. Only where there is divorce the issue of refund of bride price may come in.

Rule 37B is to the effect that the person liable to be sued for refund of bride price is either the person who received it or his heir.

In the case of *Maagwi Kimito Vs Gibeno Werema*¹¹

It was held that it is not only correct in law but proper in principle that the respondent, who is the sole heir of the deceased husband, be liable to refund the bride price which her husband received in respect of the marriage of his sister to the appellant.

Rule 37B of GN 279/63 is to the effect that the person liable to be sued for refund of bride price is either the person who received it or his heir. This rule is not suspended by any provision of the LMA or any other statute.

Rule 39, return of bride price must be done before elders or clan council, and must be witnessed by two witnesses, one from bride side and the other from bride groom side. Also must be witnessed by father in law and husband or their representatives.

Rule 40 and 44 must be read together, if the bride price was in form of cattle or chattel, if they are still in possession of father in law the husband can claim them back.

Rules 52, 53, 54, and 55 contain principles which provide for guidelines for deciding on the quantum of refund of bride price. These rules among other things consider who is wrong doer (53), if couple have children or not (52), cruelty by husband (57), if wife misbehave (59).

¹¹ (1985)TLR 132

Read the case of *Makupila Chalo Vs Mninda Mdama*¹² and *Andrea Chilena Vs Masaka*¹³

MARRIAGE

What is customary marriage?

Customary marriage is a union of a man who may not be married and a woman who must be unmarried at the time of entering into marriage. The essence of the union is that it permits a man to have more than one wife.

TYPES OF CUSTOMARY MARRIAGE

- a) Sororate Marriage
- b) Levirate Marriage (wife inheritance)
- c) Ghost Marriage

TYPES OF MARRIAGE UNDER THE LMA

The LMA recognizes two types of marriages;

- a) Monogamous marriage, eg Christian marriage
- b) Polygamous marriages; eg, Muslim Marriages, Civil Marriages and Customary Marriages.

We have seen earlier that customary marriages understood to be potentially polygamous, meaning that man may contract any number of subsequent marriages.

Customary marriage which is contracted according to customary rules and confirms conditions provided under S. 25(1)d of LMA.

AGE

Under Rule 3, 4 and 86(C)b, marriageable age for female is 21 years old.

¹² (1995) TLR 120

¹³ (1992)TLR 346



CONSENT

Rule 86A of GN 279 provides for two types of consent required to contract a valid customary marriage. Rule 86A must be read together with Rule 3 of GN 279 which provides that a female who is below 21 years cannot contract a marriage without her father consent.

The consent of both spouses to marry each other is essential to the validity of the customary marriages. The consent of girl's parents except in cases of widowers and divorcees is essential to the validity of marriage. This is the fact that marriage is regarded as a linking of two families.

A man contracting a polygamous marriage does not need to consult or obtain the consent of any existing wife. However, it is common for such a wife to divorce her husband if he contracts a polygamous marriage, normally on the basis of alleged cruelty or neglect.

HOW CUSTOMARY MARRIAGE IS CONTRACTED

S.25(1)d of LMA provides that where the parties belong to a community or communities which follow customary law, marriage can be contracted in civil form according to the rites of the customary law the parties belong.

In the case of *Galipenzula Vs Magoye*¹⁴, it was held that customary marriage must be witnessed by customary ceremony.

In the case of *Daniel Masalu Vs Mussa Shadrack*¹⁵ Mwalusanya J. Held that marriage under sukuma law rites, involves handing over of a woman as a wife according to the rites stipulated under section 25(1)d of LMA, that is to say should be celebrated according to custom of particular group. I.e. pombe/local beer and Local dance.

¹⁴ (1983) TLR 289

¹⁵ (1987) TLR 35

The custom should be recognized as customary law, the custom must have acquired the force of law i.e. it binds the people of the entire community in a particular place. The ceremony must be conducted at the place or in an area where people practice those customs.

FREE WILL/VOLUNTARILINESS

In *Ahmedi Ismail Vs Juma Rajabu*¹⁶ Sisya, J held that making an unmarried girl pregnant and marriage under customary law rites are two different and separate issues which must be viewed and treated as such. The mere fact that the plaintiff made the defendant's daughter pregnant does not mean that he was married to her.

In *Tangasi Makau Vs Richard Msagara*¹⁷ Rule 190 of GN 279/63 provides for a man who make an unmarried girl pregnant pays compensation to the girl's father. Read also *Jacob Mwangoka Vs Gurd Amon*¹⁸,

DIVORCE

Divorce means dissolution of marriage/termination of marriage contract. In discussing divorce under customary law it is better to discuss it in two phases i.e. before the LMA of 1971 and after the LMA of 1971.

Under customary law divorce was a simple and common matter, initiated by both men and women. Before 1971 marriage was considered as a private institution. As a result all matters relating to marriage/family vested to the people themselves and regulated by their customs. Under customary law divorce can be pronounced by husband or elder council save as in complicated matter or issues, divorce may be pronounced by court of law. Eg. if either spouse is unwilling to return bride price.

GROUND FOR DIVORCE UNDER CUSTOMARY LAW

¹⁶ (1985) TLR 204

¹⁷ (1982) TLR 262

¹⁸ (1987) TLR 165

There were various grounds used to dissolve customary marriage as follows;

a) Adultery

Adultery means sexual intercourse between two people of whom one or both are married but who are not married to each other. Committed by wife rule 106, only serious adultery committed by husband can be a ground of divorce rule 170A.

b) Desertion

Unjustifiable withdraws from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently. Rule 133 and 160 is to the effect that desertion of one year is good cause for a husband to divorce.

c) Cruelty

Cruelty is a ground for divorce for both husband and wife; however for wife to raise as ground for divorce it must cause permanent disorder or grievous harm. Rule 150 cruelty of wife, 163-4 cruelty of husband.

d) Willful Neglect

Failure of either spouse to discharge his/her marital obligation Rule 171 failure of husband to maintain his family, Rule 168 if the wife denied marital intercourse and Rule 153 a husband denied marital intercourse.

e) Impotence

Rule 169 the impotence of husband is ground for divorce whether proved before or after marriage.

CUSTODY OF CHILDREN



Custody of child is defined to be a bundle of power over the child until the child reaches the age of majority. These include the power to physical control, education, the choice of religion and administration of his property.

DETERMINATION OF CUSTODY UNDER CUSTOMARY LAW

Under customary rules all legitimate children belong to father side and attached with all rights against their father such as a right to custody, maintenance and inheritance as provided under rule 175 of GN 279/63 and rule 104, 105

In other side rule 175 and rule 178 of GN 279/63 are to the effect that all children born out of wedlock belong to maternal family without any legal rights against their putative father, the putative father can acquire right of custody, maintenance only after legitimating them in the prescribed methods.

According to rule 181 there are methods which illegitimate children can be legitimized one by payment and by marriage.

Read the case of *Ramadhan Said Vs Gati Magoti*¹⁹ in which the court held that domicile and custody of illegitimate child follows the mother side.

However, custody pattern varies depending on the local lineage pattern. Among the matrilineal societies, the child born within wedlock belongs to his or her mother and her lineage, and remain with the mother in case of divorce. If the mother dies, the child still remains with the members of the matrilineal and is usually maintained by a maternal uncle.

DIVISION OF MATRIMONIAL PROPERTY

In the case of *Mwaitenda Mwanibope Vs Lazaro Mwakanjuki*²⁰ it was held that Customary Law Declaration Order is subject to any relevant Act of

¹⁹ (1968) HCD 343

²⁰ (1976) LRT 60

parliament. Section 108b of LMA recognizes the distribution of matrimonial property when a marriage breaks down.

But this section must be read with section 114(2)a makes it quite clear that whenever the court shall inquire into the division of matrimonial assets it shall have regard to the customs of the community to which the parties belong.

In *Hoka Mbofu Vs Pastory Mwijage*²¹ It was held that rule 93 authorize the property acquired during concubine association to be divided between the parties if they decided to part company and rule 94 sets out the manner in which the property shall be divided.

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²¹(1983) TLR 286