



Magaya v. Magaya

Customary Law

And

Human Rights


Magaya v. Magaya

■ Facts:

- Appellant, Venia Magaya, was daughter and eldest child of deceased by his first marriage. Respondent was the second son by the second marriage. Deceased person's first son also by second marriage declined heirship on grounds of inability to support family.

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- Thus, appellant applied to be designated heir on grounds that only male issues are entitled under customary law to be nominated heirs. Community Court appointed Appellant but Respondent appealed on ground that not all family members had opportunity to attend trial of case. Magistrate's Court reversed and appointed Respondent as heir.

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- Source of Customary Law:
 - Muchechetera JA in his judgment quotes with approval a text from Bennett's book: Human Rights and Customary law, and a text from "African Law and Custom in Rhodesia" by Goldin and Gelfand, to the effect, broadly, that in both Shona and Ndebele customary law the deceased's estate devolves on the male heir, often the eldest son.

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The heir inherits the “status” and responsibilities of the deceased, to support the surviving family dependents, under Shona Law, but inherits the property in his personal capacity under Ndebele customary law.

- Justice also cites numerous court decisions in support of the rule.



Human Rights in Constitution

- The equal protection clause in the Constitution, Section 23, is subject to an African Customary Law exception stating:

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- *23(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters – (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case.”*

Characterization

- Customary Law or Common Law?
- In *Katekwe v. Muchabaiwa, Dumbutshena CJ* quoted with approval the decision in *Bull v. Tylor*, decided on basis of Common Law, that the action of Seduction is an action for recovery of damages by the seduced female for loss, inter alia, of chances of a successful marriage.

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- In *Magaya v. Magaya*, Muchechetero JA ruled that the action among Africans is at Customary Law and is an by the guardian or parent of the seduced female (with her consent) for damages for loss of *Lobola/roora*

Evolution or Revolution?

- In *Katekwe*, Dumbutshena CJ held that the Majority Act had the effect on Customary Law of abolishing the requirements for *Lobola/Rooro*, unless the intended bride allows the father to ask for it.
- *Muchechetera JA in Magaya v. Magaya* disagreed.