

## Chapter 12

### Discrimination

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#### Case 12.1 Ndewawiosia v Emanuel

(Ndewawiosia D/O Ndeamtizo v Emanuel S/O Malasi)<sup>1</sup>

High Court of Tanzania

**Aspects relevant to VAWG:** Discrimination through customary law norms, discrimination on account of sex, right of daughters to inherit father's land, equal protection of the law

#### Summary of facts

The deceased, who died intestate, was survived by his five daughters, four of whom had married, and the appellant, who was the youngest and the only unmarried daughter of the deceased. He was also survived by a son of the appellant, born out of wedlock and whom the deceased had recognised.

The defendant was a nephew of the deceased, and both the plaintiff and the defendant belonged to the Chagga tribe in Tanzania. Both of them claimed the right to inherit the land of the deceased. When the matter of inheritance of the disputed land went before the court, the respondent's evidence was that he was the nephew of the deceased who died leaving no sons and therefore the rightful person to inherit the land. He based his claim to the land on custom and stated that, under Chagga customary law, women were not entitled to inherit clan land. He asserted that shortly before death, the deceased had asked him to take charge of the land.

The plaintiff told the trial court that the deceased was her father and since she was not married and had a son, whom the deceased had recognised before his death, she, together with her son, were entitled to inherit her deceased father's land. The trial court held that since the parties to the case belonged to the Chagga tribe in Tanzania, they were governed by the custom that prevented women from inheriting clan land. The court awarded the land to the defendant (the nephew of the deceased). Dissatisfied with the decision, the plaintiff filed an appeal against the judgement.

#### Issues and resolution

The court took note of the said custom and was required to determine if it had any value and if it applied to the parties in this case. It considered the

provisions of the Restatement of Customary Law [G.N.436 of 1963, Cap. 333 of the Law] and held that:

- Traditionally, among the Wachagga and various other tribes of Tanzania, women were disabled from inheriting the property of their fathers in order that such property would stay within the clan.
- The provisions of the Restatement of Customary Law<sup>2</sup> paragraph 29 declares a daughter to be a principal heir if the deceased has left no sons, while paragraph 20 provided that: '*Women can inherit except for clan land which they may receive in usufruct but may not sell*'. The court found these two provisions contradictory and not resolving the issue.
- Citing *Bi-Mwana Amina Mukabali v Severini Shumbusho*,<sup>3</sup> and *Saidina d/o Angovi v Saiboko Mlemba*<sup>4</sup> the court stated that:

*It is clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice and equality, daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality.*

Finally, the court held that the claim of the plaintiff's son was superior to that of the defendant, because a child born of the appellant out of wedlock was a member of his maternal family, in this case, the family of the deceased. The appeal was allowed with a direction that the plaintiff and her son be put in possession of the land in question.

### **Ratio Decidendi**

- (a) Daughters like sons have the right to inherit clan land owned by their deceased parents.

Lessons learnt/Points to Note:

- The decision had the effect of modifying a customary practice or law limiting the right of girls/daughters to only usufructuary rights of land inherited from deceased parents to full inheritance.
- Court recognised and protected matrilineal relations by allowing the son of a daughter to inherit property from his maternal grandfather.

## Case 12.2 Rono v Rono & Another

(Civil Appeal No. 66 of 2002)<sup>5</sup>

### Kenya Court of Appeal

**Aspects relevant to VAWG:** Discrimination on account of sex, gender stereotypes, denying daughters the right to inherit fathers' property on basis of equality with brothers

### Summary of the facts

The subject of this appeal was a piece of land comprising part of the estate of the deceased, who died intestate leaving two wives, three sons and two daughters from the first house and four daughters and no sons from the second house. In the trial court, the parties agreed on the distribution of all the assets of the deceased except for his 192-acre freehold land.

Concerning division of the piece of land, the first house proposed that each widow and daughter get 14 acres while each son get 22 acres, while the second house proposed that each house gets 96 acres. The trial judge considered the customary law of the deceased, wherein succession was patrilineal with equal allocation to each house but daughters receiving no share of inheritance. She also considered statutory (the Law of Succession Act), which provides for distribution to dependants irrespective of their sex, and also provides that in the case of polygamous families, division should be made to the houses according to the number of units, adding the widow as an additional unit. As there was no agreement between the two houses of the deceased, the trial judge, did her own independent distribution in which she gave each daughter an equal share of five acres, each son an equal share of 30 acres, with the two widows getting 20 and 50 acres respectively.

She had, prior to the distribution, ruled that although the daughters of the deceased were entitled to inherit the land of their deceased father, they could not inherit an equal share with their brothers because they were expected to leave the clan and get married, an implication that they would also inherit from their husbands.

### Issues and resolution

The second house filed an appeal to the Court of Appeal, arguing that there was no statutory basis for discriminating against the daughters of the deceased by awarding differential shares to daughters and sons. In response, the first house argued that the subject land was agricultural land and therefore was exempt from the statutory directions on distribution, and

that division of the land was therefore subject to the customary law of the deceased.

The court was required to determine whether customary law applied to the land in dispute and whether the mode of distribution adopted by the trial court had subjected the daughters of the deceased to discrimination.

The Court of Appeal held that:

- Discrimination on grounds of sex is prohibited in the constitution, but with a proviso excluding laws relating to adoption, marriage, divorce, burial and succession. However, international customary law may be relevant in determining what constitutes discrimination, including the fact that Kenya has ratified – though not adopted – numerous international instruments prescribing elimination of discrimination against women (*Longwe v International Hotels* [1993] 4 LRC 221 adopted).
- Customary law was applicable in Kenya only insofar as it is not repugnant to justice and morality and not inconsistent with any written law.
- Customary law was excluded from application in statutory succession, except where there is an express provision allowing its application. The act did not allow customary law to be applied in respect of agricultural land and crops thereon, but only in such areas as the Minister by notice in the Gazette may specify. The Minister did publish a list of various districts, but the domicile of the deceased was not included. Hence the law applicable to the distribution of the agricultural land was statutory law.
- Under statutory law, the Superior Court has discretion to take into account fairness in determining the distribution to dependants. This discretion must be exercised on sound, factual and legal basis.
- The possibility of girls marrying is only one factor that may be considered. Equal treatment of the children by the deceased was another factor. However, in intestate succession, there was no principle of law that the houses of the deceased, or the children/beneficiaries, must inherit equally.
- The court allowed the appeal, set aside the distribution, upheld the principle of non-discrimination on account of sex, and found that the learned judge had no factual basis for drawing a distinction between the sons of the deceased on one hand and the daughters on the other and ruled that both the sons and daughters of the deceased were each entitled to an equal share (14.4 acres) of the land.

It is noted that this case was decided under the old constitution, which provided that in matters of devolution of property, the personal (customary) law of the deceased would apply. Customary law is patrilineal and does not recognise inheritance of clan land by daughters of a deceased person.

### **Ratio Decidendi**

1. The application of African Customary Laws is legal only if it is not repugnant to justice and morality or inconsistent with any written law.
2. The Constitution outlaws any law that is discriminatory in itself or in effect on grounds of sex.
3. However, discrimination through statutory law is allowed by the Constitution in respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.
4. In adjudicating matters regarding discrimination, Kenyan Courts must make reference to, and are guided, not just by domestic legislation alone but also the relevant international laws which Kenya has ratified. (Note: this case was handled before the promulgation of the new Constitution in August 2010. The 2010 Constitution gives international law a more prominent role in the domestic legal system through the inclusion of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law.)
5. Where dependants of an intestate deceased seek a fair distribution of the deceased's net estate, the possibility that girls in any particular family may be married is a factor, albeit only one factor among others, which the court may consider in arriving at how much each child will receive. It is not a determining factor
6. Where a polygamous man dies intestate, the net intestate estate is to be distributed according to houses, each house being treated as a unit. Nevertheless, the Judge doing the distribution has a discretion to take into account or consider the number of children in each house. It is not the law that there must be equality between houses.
7. It is not the law that each child of a deceased intestate must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice.

**Point to Note**

Although the decision of the Court resulted in gender justice for the women in this particular case, the essence of the decision cannot be said to have destroyed the stereotype expectation that a girl child would get married and thus acquire property from her marital family. It cannot therefore be celebrated as having contributed to gender justice in its entirety. What the Court held was that in the particular circumstances of this case, there was no reasonable factual basis for drawing a distinction between the sons on the one hand and the daughters on the other hand in distributing the property and thus inheritance from their intestate father. And the question remains: had the women in this case been younger (with the expectation that marriage remained possible), would the court have arrived at the same decision? Had the women been married, would their marital status have been used against their 'right' to equal treatment with their brothers for purposes of acquiring the property of their father, a father who in his life time did not offer differential treatment to his children on the basis of sex?

**Case 12.3 Re-Estate of Lerionka Ole Ntutu**

(In the matter of the Estate Of Lerionka Ole Ntutu)<sup>6</sup>

High Court of Kenya at Nairobi

**Aspects relevant to VAWG:** Discrimination, customary laws that perpetuate inequality and discrimination in property rights, right of daughters to inherit fathers' land, role of the judiciary to create awareness

**Summary of the case**

This case was decided before Kenya enacted the current Constitution of Kenya, 2010. The brief facts of the case were that the deceased, a member of the Maasai, a pastoral community in Kenya, died intestate leaving land (LR Narok/Cismara/Ochora Oirwua/24) among other properties for inheritance. Maasai customs and traditions do not recognise the right of daughters to inherit their father's land or any part of the estate, because daughters are expected to get married and inherit from their husband's clan.

The sons of the deceased, relying on this custom, urged the court to find that distribution of the deceased's estate was governed by Maasai customary law, which does not recognise the right of daughters to inherit the estate of their fathers. The daughters contended that they were entitled to inherit their father's land and any custom which provided otherwise was discriminatory and not applicable.

The court, in deciding the matter, relied on *Rono v Rono* in which the Court of Appeal (Waki JA) in the lead judgement cited provisions of CEDAW and other international conventions in applying the principle of non-discrimination in the distribution of the deceased's land among his children.

The High Court held that a customary law which denies daughters the right to inherit their father's land was repugnant to justice and morality and had no place in present day Kenya. It could not therefore be applicable to the estate of the deceased. The court further held that the personal law of the deceased could not be used to discriminate against women in property inheritance and made reference to CEDAW, among other human rights instruments which Kenya has ratified and which establish gender equality and non-discrimination standards for all human beings. Finally, the High Court ruled that the daughters of the deceased, together with their brothers, had an equal right to inherit their father's land.

#### **Ratio Decidendi**

- (a) A customary law which denies daughters/women the right to inherit their father's estate is repugnant to justice and morality.
- (b) A customary law which differentiates between male and female children in regard to the right to inherit their father's estate is no longer good law.
- (c) A customary law which differentiates between married and unmarried daughters in regard to the right to inherit their father's estate is no longer good law.

#### **Contribution to jurisprudence/Point to note:**

- The court not only made reference to the obligations of the country arising from international instruments it had ratified but also cited principle 7 of the Bangalore Principles on the Domestic application of International Human Rights norms to get support to apply the International Covenants and treaties.
- The court strived to interpret the provisions of the Succession Act and the country's Constitution in tandem with the country's obligations flowing from international human rights instruments.

Comment: We note that this case was brought to court before Kenya enacted its Constitution (progressive) which expressly prohibited discriminatory laws on the basis of sex. However, the judge in arriving at the decision applied the Succession Act alongside international human rights laws. The judge stated that after Kenya was exposed to International laws, the country had knowingly and rightly taken a bold step to eliminate the discrimination of all manners and types against women.

### Case 12.4 Stephen Gitonga M'Murithi v Francis Murithi

(Civil Appeal No. 3 of 2015)

**The Court of Appeal at Nyeri**

This was a case in which the issue related to distribution of the deceased's estate among his widow, sons and daughters. The Court of Appeal held:

*That all children of the deceased were entitled to equal distribution of the deceased's estate and further held as per widow having been given an outright tangible shareholding in the net estate of the deceased as opposed to life interest the court found nothing in Section 40 of the Law of Succession Act that prevents a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interest of justice to all affected parties.*

### Case 12.5 JAO v Home Park Caterers

(JAO v Home Park Caterers Ltd & 2 Others)

(Nairobi HT Civil Case No. 38 of 2003)<sup>7</sup>

**High Court of Kenya at Nairobi**

Aspects relevant to VAWG: Discrimination on account of HIV status

#### **Summary of facts**

The plaintiff, JAO, filed suit against her former employer, arguing that the company unlawfully terminated her employment based on her HIV status, in violation of her constitutional right to be free from discrimination. She also sued her doctor and hospital, claiming that they violated her constitutional rights to privacy and confidentiality by testing her for HIV without her consent and disclosing her status to her employer.

In addition, the plaintiff claimed that the defendant doctor breached his professional and statutory duty to disclose her HIV status to her and to counsel.

The facts giving rise to this case were that the plaintiff was an employee of the first defendant. The first defendant (employer) sent her to the company doctor for tests and, without informing her, the doctor did some tests including one for HIV/AIDS. He found her positive for HIV and secretly passed this information to her employer. He did not inform the plaintiff that he had tested her for HIV, neither did he inform her of the outcome. Upon

receiving the doctor's report on her HIV status, the employer terminated her employment on account of her HIV status, whereupon the plaintiff filed this case against the employer, the doctor and another.

The defendants filed a Chamber Summons asking the court to dismiss the suit on the ground that it failed to disclose a reasonable cause of action.

The court held that the complaint disclosed a cause of action that was reasonable in light of the nature of the case, the universality of the HIV pandemic and the development of human rights jurisprudence, together with attempts that were then ongoing to harmonise international human rights conventions with the national law of Kenya. The defendants' application was dismissed with costs to the plaintiff.

**Contribution to jurisprudence/Point to note:**

- Although the case was reverted to the lower court for the fact that the presiding officer of the matter was found to be biased, the court emphasised that termination of employment on basis of one's HIV status amounted to discrimination.

## **Case 12.6 Uganda Association of Women Lawyers & Others v the Attorney General**

(Constitutional Petition No. 2 of 2003)

**Facts**

The petitioners challenged several provisions of the Divorce Act (Cap. 249 Laws of Uganda) as being inconsistent with the provisions of the 1995 constitution. In particular, they contended that the provisions of Sections 4(1), 4(2), 5, 21, 22, 23 and 26 of the Act were inconsistent and in contravention of Articles 21(1) and 21, 31(1) and 33(1) and (6) of the constitution.

**Issues:**

1. Whether the impugned sections of the Divorce Act were in contravention of the constitution as alleged.
2. Whether the petitioners were entitled to the reliefs prayed.

The petitioners in brief argued and adduced evidence to the effect that:

1. The Divorce Act discriminated against women in violation of express provisions of the constitution.
2. The Act perpetuated inequality between sexes.
3. The Act was against the dignity, welfare and interest of women and undermined their status.

The petitioners argued that the impugned sections were discriminatory, because they made prescriptions for divorce on the basis of sex. For instance, the sections allowed a man to divorce his wife solely on proof that she had committed adultery, whereas a wife could not divorce her husband on commission of adultery alone; in addition to adultery, the man had to have committed an additional marital wrong e.g. cruelty or desertion. Furthermore, on dissolution of a marriage, wives were entitled to alimony, but husbands were not. The sections also required that where a husband petitioned for divorce on the basis of his wife's adultery, he names a co-respondent (i.e. the man with whom the wife had committed the adultery). On the other hand, where a wife petitioned for divorce and one of the grounds was the husband's adultery, it was not required to name a co-respondent (i.e. the woman with whom the husband had committed the adultery).

In essence, the provisions contravened Articles 21, 31 and 33 of the constitution, which provide as follows:

*Article 21: (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*

*(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.*

*(3) For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.*

*Article 31: (1) Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.*

*Article 33: (1) Women shall be accorded full and equal dignity of the person with men.*

### **Held**

All the five justices held that the cited provisions of the Divorce Act were inconsistent with the constitution. However, Twinomujuni JA who wrote the lead judgement went beyond merely declaring the provision unconstitutional, and further stated that:

*All the grounds of divorce mentioned in Section 4(1) and (2) are available to both parties to the marriage and the provisions of the Act relating to*

*naming of the co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage.*

Similarly, Justice Okello held that:

*(the impugned sections) of the Divorce Act discriminate on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with the Constitution ... they are null and void.*

*This means that the grounds for divorce stated in section 4(1) & (2) are now available to both sexes. Similarly, the damages or compensation for adultery (S.21), costs against a co-respondent (S. 22), alimony (S. 23 and 24) and settlement under section 26 are now applicable to both sexes. Application of this order is likely to meet some difficulties. It is, therefore, necessary that the relevant authorities should take appropriate remedial steps as soon as possible.*

**Contribution to jurisprudence/point to note:**

- The court was emphatic in striking down a law which was discriminatory in some instances against women and in others against men. The decision enabled the protection of the right to equality before and in the law to both women and men at the dissolution of the marriage.
- The judgement is also an example of judicial innovation/activism in that the judges did not only declare the law unconstitutional (which often creates a vacuum), but also modified the existing law to ensure that it applied equally to men and women.

**Notes**

- 1 1968 HCD No. 127, Tanzania (PC) Civ-App. 80-D-66, 10/2/68.
- 2 GN 436 of 1963, Cap. 333 of the Laws of Tanzania.
- 3 *Digest Of Appeals from Local Courts*, 1955–1956, No. 88.
- 4 *Digest of Appeals from Local Courts*, 1961, Vol. VIII, (No. 205).
- 5 In the Court of Appeal, Kenya, Civil Appeal No. 66 of 2002, available at: [www.kenyalaw.org](http://www.kenyalaw.org).
- 6 High Court of Kenya sitting at Nairobi, High Court Succession Case No. 1263 of 2000, available at: [www.kenyalaw.org](http://www.kenyalaw.org).
- 7 High Court of Kenya at Nairobi, Civil Case No. 38 of 2003.