Privy Council Appeal No. 81 *of* 1947

Fatma Binti Hafidh - - - - - - - - - *Appellant*

v.

The Administrator-General Zanzibar Protectorate - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 1949

Present at the Hearing:

LORD PORTER
LORD MACDERMOTT
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD PORTER]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa dated the 5th October 1946 which reversed the judgment of the High Court of Zanzibar given in favour of the appellant and dismissed her action with costs.

The appellant claimed that she was the daughter of Hafidh bin Muhammad el-Busaidi (hereinafter called Hafidh) and of his slave concubine Panya and as such, under the law of the Ibadhi sect of which her parents were members, to be entitled to her share of her father's estate.

Her mother was originally the slave of Hafidh's mother, Binti Juma, and was said to have been given by her as a slave concubine or "suria" to her son.

It is common ground that in order to establish such a claim it must be proved (1) that the mother was given to the father as a concubine and slave, (2) that by reason of the gift the woman given must have ceased to be the slave of the original owner and have become the slave of the man to whom she was given, (3) that she must have been accepted by him as such, (4) that the claimant was the daughter of this union, and (5) that the alleged father must have recognised her as his daughter.

The evidence was conflicting upon all these points, but certain facts were found by the learned Chief Justice of Zanzibar and were in substance accepted by the Appellate Court. In these circumstances their Lordships would naturally follow these findings both because they are concurrent and because they represent the view of the Court which saw and heard the witnesses.

These facts are (1) that Binti Juma had given Panya as his slave concubine to Hafidh, (2) that he had accepted her in that capacity, and (3) that the appellant was the offspring of that union.

The learned Chief Justice also found that by his conduct Hafidh had acknowledged the appellant as his daughter but this last finding is not a direct finding of fact but is derived partly from an inference drawn from the facts and partly from the law applicable to the circumstances.

As to the law Mr. Gahan contended that the appellant would establish her case if an acknowledgment of paternity could legitimately be drawn either from an actual admission or from the facts proved in evidence; Mr. Dingle Foot for the respondent on the other hand maintained that a mere admission of paternity would not be enough, there must be something from which an acknowlegment of the appellant as one of those entitled to share in his estate could be inferred and in any case the acknowledgment must be clear and could not be derived from inconclusive circumstances. In regard to these contentions, their Lordships are not prepared to accept the view that anything more than an acknowledgment of paternity is required.

It is true that in cases where the question to be determined is whether there has been a marriage between the parents, something more than a mere acknowledgment of paternity is required. This principle is clearly stated in the head note to the judgment of the Board delivered by Lord Macnaghten in *Abdool Razack* v. *Aga Mahomed Jaffer Bindaneem* (1893) L.R. 21 I.A. 56 in the words "The Mohammedan doctrine of legitimacy by acknowledgment does not apply to every case of admission of paternity: an intention to confer the status of legitimacy must be found or presumed." But the reason for this doctrine, as has been pointed out in that case and in the other two cases cited to their Lordships, viz., *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossein Khan* (1866) 11 Moore's Ind. App. Cases 94, and *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (1921) L.R. 48 I.A. 114, is to be found in the possibility under Moslem law of proving the existence of a valid marriage in cases where no ceremony has been performed but evidence is adduced from which it appears that the parties intended to be united in the marriage bond. The mere admission of paternity in no way establishes anything but a casual union and more is required to show the existence of the marriage bond if the existence of that bond is to be derived from association alone without any preceding ceremony. The father may accept his parenthood without intending to make the child legitimate. Once however a marriage is established an acknowledgment of paternity is enough. Similarly in their Lordships' opinion once it is proved that the relationship of master and slave concubine has been proved, a connexion is established which leads to the inference that the child is legitimate if its paternity is acknowledged.

Moreover once a marriage is shown to exist or the nexus of master and slave concubine is proved the child's legitimacy may be established by proof of its treatment as the legitimate offspring of its father: see 11 Moore's Ind. App. Cases p. 94 at p. 113. On the other hand where no marriage is shown to exist or where the concubine is not a slave concubine, the mere admission of paternity is not enough for the purpose of affording proof of legitimacy, the treatment must be such as to convey the fact that the child is acknowledged not merely as the offspring of the father but as his legitimate offspring. In default of such an acknowledgment the father may merely wish to admit that the child is his but not that it is legitimate or that he intends to make it so.

The question of the correct inference to be drawn from the facts is a matter of some difficulty.

The evidence from which the Chief Justice drew the inference that the appellant's paternity had been acknowledged by Hafidh appears from a series of findings set out by him in numbered order and in the following terms:

(1) The plaintiff's mother was given as a concubine to her alleged father.

(2) The plaintiff's mother and alieged father subsequently cohabited in a house in Zanzibar.

(3) The plaintiff was born in the house of the alleged father's mother.

(4) The plaintiff was not brought up by her mother, but was brought up in the house in which she was born and resided there until her marriage.

(5) The alleged father paid Rs.50/- towards the plaintiff's education.

(6) The education was of a kind not usually given to the children of slaves.

(7) The alleged father was present at the plaintiff's marriage.

(8) The plaintiff visited her alleged father shortly before his death in hospital.

All the members of the Appellate Court on the other hand took the view that the facts proved were inadequate to support such an inference.

In Sir Norman Whitley C.J.'s eyes they fell far short of establishing the necessary degree of probability. Sir George Graham Paul C.J. found it impossible to accept the facts proved in evidence sufficient to establish that the plaintiff was the issue of the slave concubinage or that Hafidh in his lifetime acknowledged the appellant as his daughter by Panya. At any rate he found it quite impossible to accept them as proof of the alleged acknowledgment, and Bartley J. took the same view.

Admittedly the facts relied upon are somewhat scanty and the whole position would require careful analysis and consideration if their Lordships thought it necessary to come to a final conclusion on this point.

As it is however they think that the case can be determined upon another ground and therefore whilst refraining from expressing any opinion upon the inferences which ought to be drawn they are content to come to a decision upon the assumption that the facts proved in evidence were sufficient to establish an acknowledgment of paternity upon the part of Hafidh.

If this assumption be made the immediate issue between the parties is whether the gift by Binti Juma of Panya as a slave concubine was or was not prohibited by the law of Zanzibar at the time at which it was made. Some dispute arose in the course of the trial as to when that event took place and as to the law applicable but the learned Chief Justice of Zanzibar has found upon the evidence that the gift was made at a time not later than 1907 and therefore before the Slavery Decree of 1909. Their Lordships see no reason for differing from this conclusion.

Admittedly in these circumstances the law applicable is the Slave Trade (Prohibition) Decree of the 1st August 1890. That Decree is in the following terms :—

"3. We declare that, subject to the conditions stated below, all slaves lawfully possessed on this date by our subjects shall remain with their owners as at present. Their status shall be unchanged."

"4. We absolutely prohibit from this date all exchange, sale or purchase of slaves, domestic or otherwise. There shall be no traffic whatever in slaves of any description. Any houses heretofore kept for traffic in domestic slaves by slavebrokers shall be for ever closed, and any person found acting as a broker for the exchange or sale of slaves shall be liable, under our orders, to severe punishment, and to be deported from our dominions. Any Arab or other of our subjects hereafter found exchanging, purchasing, obtaining, or selling domestic or other slaves shall be liable under our orders to severe punishment, to deportation, and the forfeiture of all his slaves. Any house in which traffic of any kind in any description of slave may take place shall be forfeited."

"5. Slaves may be inherited at the death of their owner only by the lawful children of the deceased. If the owner leaves no such children, his slaves shall, *ipso facto*, become free on the death of their owner."

"9. Every slave shall be entitled, as a right, at any time henceforth to purchase his freedom at a just and reasonable tariff to be fixed by ourselves and our Arab subjects. The purchase-money on our order shall be paid by the slave to his owner before a Kathi, who shall at once furnish the slave with a paper of freedom, and such freed slaves shall receive our special protection against ill-treatment. This protection shall also be specially extended to all slaves who may gain their freedom under any of the provisions of this Decree."

In conformity with the provisions of clause 3 of that Decree all slaves then lawfully possessed remained the property of their owners and their status was unchanged. The question at issue is a different one viz. what (if any) rights of disposition were retained by the owners after the promulgation of the Decree.

For the appellant it was contended that only commercial dealings were affected, that gifts certainly and possibly even the private exchange or transference of slaves from one owner to another were not prohibited. In this contention the overriding consideration was the use of the word "traffic" in the second and last sentences of clause 4. It was the business houses used for slave broking which were to be closed and those who used them for that purpose who were to be subject to the penalties imposed. It would be odd, said the supporters of this view, if the private gift from one subject of Zanzibar to another should suddenly become illegal and the giver and receiver liable to the threatened penalties including the possible forfeiture of all their slaves. If such a result was intended clear words should have been used. No doubt these arguments merit careful considerations, but in their Lordships' opinion they must be rejected. The Decree was promulgated as one of the steps leading ultimately to the total abolition of slavery. No minimum penalty was prescribed and in order to mitigate its immediate harshness, owners were left with the slaves which they then possessed, but any profit to be obtained from dealing with them was in terms prohibited. Their Lordships see no reason for limiting the effect of the clause so as to make it apply to commercial transactions only. They think its wording applies to all transactions and find support for this view in clause 5 which allows slaves to be inherited by lawful children, but if there are no such children sets the slave free.

Their Lordships cannot accept the view that this provision could be defeated by means of a gift of his slaves made by an owner upon the approach of death or when he had reached an advanced age. If it were so the whole provision that slaves are to be freed on the death of their master, unless they pass to his lawful children, might be defeated by a gift to any one before the master's decease.

Upon this point their Lordships agree with the views of the learned trial judge and Sir George Graham Paul, and for the reasons they have given with all respect differ from those of Sir Norman Whitley.

There remains however for consideration the difficulty felt by the Chief Justice of Zanzibar that though the giving of the slave might be illegal, yet the respondent, who stood in the shoes of Hafidh, could not take advantage of an act of illegality in which the latter was fully and deliberately implicated.

In their Lordships' opinion this approach to the question is to regard the matter as if it were merely a contract or dealing between two persons and they alone were implicated. In the view of the Board so to treat the matter is to forget that the decision depends not upon contract but

upon status. It is accepted by both parties that the appellant's legitimacy or legitimation cannot be established unless her mother became the slave of Hafidh as well as his concubine. It is not enough that she was his concubine and the appellant the daughter of that union, unless she also legally ceased to be the slave of Binti Juma and became the slave of Hafidh. If then the Decree of 1890 prohibited her passing from the one to the other she never could become the slave of Hafidh and one of the necessary precedents to the success of the appellant's case is lacking.

In so regarding the matter their Lordships find themselves in agreement with the Chief Justice of Tangânyika and do not find it necessary to express an opinion upon the soundness of the further reason which led him to the same conclusion, viz., that the dispute in question did not concern the administrator as representing the deceased man, but as representing his legitimate children.

Whatever may be the true view as to this and the other matters left undetermined, their Lordships are of opinion that Panya never became the slave of Hafidh and therefore the appellant cannot succeed in this appeal. They will humbly advise His Majesty that it should be dismissed with costs.

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In the Privy Council

FATMA BINTI HAFIDH

v.

THE ADMINISTRATOR-GENERAL
ZANIBAR PROTECTORATE

DELIVERED BY LORD PORTER

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