Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – *Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor*

Obonye Jonas[*] *and Patrick Gunda*[**]

Abstract

For centuries, children born out of wedlock have been subjected to many forms of discrimination under customary law in Botswana. One such example is succession, whereby a child born out of wedlock is prohibited from inheriting from or through its father. This discrimination had adverse implications on such children's rights to equality, non-discrimination and dignity. The aim of this comment is to discuss and appraise the judgment of the Court of Appeal of Botswana in *Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor* which abrogated the customary law rule that a child born out of wedlock cannot succeed its father *ab intestato*. The gist of this comment is that the court's decision in this case is ground-breaking in that it recognises and affirms (for the first time in Botswana) that children born out of wedlock are equal to, and worthy of the same respect and consideration as those born in wedlock.

INTRODUCTION

Before the decision of the Court of Appeal in the case of *Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor* (the *Kealeboga* case),[1] delivered on 31 July 2014, children born out of wedlock were denied the right to inherit from, and through, their fathers in terms of customary law in Botswana. This was blatantly discriminatory as their counterparts enjoyed

[*] LLB (UB); LLM (Pretoria). Senior Lecturer: Law Department, University of Botswana & Practising Attorney with Jonas Attorneys.

[**] LLB (UB); LLM (Stellenbosch). Lecturer: Law Department, University of Botswana

[1] Case No CACGB-045-13.

succession rights in relation to their fathers. The differential treatment between children born out of wedlock and their counterparts projected the former children as targets of scorn and stigma. The greater part of the stigma that attached to children born out of wedlock was social and religious in origin, rather than legal. This stigma had grave negative implications for the children's dignity. This reprehensible legal policy has been carried forward from one generation to the next with active endorsement and support from the judiciary, until it was recently struck down by the Court of Appeal in the *Kealeboga* case. The society rationalised this objectionable treatment of children born out of wedlock on the ground that it prevented men and women from bearing children outside marriage and in this way safeguarded traditional family life.[2]

The central thesis of this note is that the abolition of the customary law principle that denied children born out of the wedlock the right to inherit from and through, their fathers was long overdue, as it violated a constellation of these children's rights including the right to dignity and the right to equality. To this end, it is submitted that this principle is outdated and is not in accordance with modern social democratic realities. It can therefore not be promoted or accommodated in a democratic society such as Botswana which is undergirded by the cardinal constitutional principles of equality and dignity. It is against this backdrop that the authors contend that in abolishing the rule in question, the *Kealeboga* decision represents an important milestone in the discourse of rights of children born out of wedlock, in general, and their inheritance rights in relation to their fathers, in particular.

THE POSITION OF CHILDREN BORN OUT OF WEDLOCK UNDER CUSTOMARY LAW BEFORE THE *KEALEBOGA* JUDGMENT

As already stated, before the judgment of the Court of Appeal in the *Kealeboga* case, the general rule was that children born out of wedlock could not inherit from or through their fathers. There were, however, two exceptions in this regard: where the parents of a child born out of wedlock subsequently entered into a marriage which legitimises the child, or where such a child was adopted.[3] Professor Schapera, a renowned social anthropologist who has made tremendous contributions in ethnographic and

---

2 Jonas 'Extra marital children and their right to inherit from their fathers in Botswana: a critical appraisal' 2015 *European Journal of Law Reform* (forthcoming).

3 *Ibid.*

typological studies of the indigenous peoples of Botswana, explains the pre-existing customary law position as follows:

> [a] man may be the natural father of a child, but he cannot claim that child nor has it any claims upon him, unless certain legal conditions have been fulfilled. Of these the most essential is marriage, and, above all, the payment of *bogadi* (*lobola*). It is only if he has given bogadi for its mother that a man is fully entitled to any child he begets with her.[4]

Schapera adds that:

> [n]ormally the children a man begets by his wife are regarded as his. He deserves every benefit from them and they in turn have the right to be maintained by him, to inherit his property, succeed to his social position and all other benefits and privileges accorded by society ... owing to the rights established by the payment of *bogadi*; it further follows that where a child is born of adulterous intercourse, it does not belong to its natural father.[5]

Restating the position as indicated above, Nganunu CJ stated in *Hendrick v Tsawe*[6] that an 'illegitimate' child could not inherit from his father. In the words of the Chief Justice, '[o]nly the children born in marriage, legitimised by subsequent marriage or by adoption can inherit the property of their father'.[7] He proceeded to opine as follows:

> [d]espite certain modern developments in some countries in the world, I think it is still correct that marriage is the critical legal step that ought to take place in order to bind a man and a woman together and make them husband and wife; thus forming a legally recognised unit known as a family. By and large the children born out of that union are regarded as entitled to the protection and support of their parents until they can fend for themselves. And on the death of one of their parents, those children are entitled to a share of the estate of the couple; or such part of it as is then distributable as an inheritance. Children born outside the marriage are not treated like and do not have the same rights in inheritance as children born within the marriage, save for a few exceptions.[8]

---

4 Schapera *A handbook of Tswana law and custom* (1938) 169.
5 *Ibid*.
6 [2008] 3 BLR 447 (HC).
7 *Id* at 450.
8 *Ibid.* See also *Marman v Marman* 2003 (1) BLR 97.

Although numerous cases of respectable lineage propounded the view that children born out of wedlock could not inherit from their fathers under customary law in Botswana, in *Mosienyane v Lesetedi and Others* (*Mosienyane* case),[9] Justice Masuku expressed some indignation and disapproval of the rule under discussion in the following words, albeit *obiter*:

> There is one issue that I must address as an *obiter dictum* which has caused me spasms of disquiet, [namely] that the applicant is not entitled to inherit from his father's estate because he was born out of wedlock. In some countries in the region, the distinction of children on the basis of whether or not they were born out of wedlock has been removed in relation to their right to inherit from their fathers. This is an issue worth considering in this country…[10]

What the judge considered extremely repugnant to all notions of good conscience and justice was the fact that on the evidence before him, the deceased had died leaving behind the applicant who he had sired outside of wedlock and for whom he was paying academic fees at a university. This meant that as the deceased had no child born in wedlock, his estate fell to be distributed to his nephews, nieces, cousins and other relatives to the exclusion of 'his own flesh and blood' – his only surviving son.[11] In the judge's view, the customary law rule in this regard was out of touch with modern realities in terms of which children born in wedlock and out of wedlock are treated equally – simply because they are all children. The *Kealeboga* case underscores this approach.

THE LITIGATION IN THE *KEALEBOGA* CASE

The facts

The appellants were born out of wedlock to the late Charles Kehumile and Keamogetse Kealeboga. Charles and Keamogetse never entered into a marriage. However, they had a relationship which was well known and accepted by both of their families. In fact when Charles died on 14 April 2009, marriage negotiations for his and Keamogetse's marriage were on-going between the two families. In 2008 Charles had offered to pay *lobola* for his children and their mother. However, for reasons that are not clear from the judgment, he died before he could do so. Prior to his death Charles

---

9 Misca F257/2005 (unreported).
10 *Id* at par 74.
11 *Ibid*.

maintained the appellants and paid school fees and other associated education costs for them. Although the appellants lived with their mother, they visited their father's home as and when they pleased, and were accepted by their father's family as members of their family. The first appellant sometimes stayed with his father, and on occasion accompanied him to the cattle post and helped him in activities relating to the maintenance of the cattle post. During his lifetime, Charles never entered into a marriages with any woman and had no children apart from the appellants.

The appellants' contention before the court was that they had the right to inherit from their father's estate despite the fact that they had been born out of wedlock. On the other hand, the respondents, who are the deceased's siblings, countered that the appellants could not inherit from their father as they were born out of wedlock and unknown to his family. The Customary Court and the Customary Court of Appeal ruled in favour of the appellants. However, on appeal, the High Court, per Walia J, ruled against the appellants on the basis that 'the second respondent and the deceased were not lawfully married under customary law and that the first respondent and his siblings [the appellants before the Court of Appeal] are not entitled to inherit from the deceased'.[12] The judge in the court *a quo* supported his conclusion as follows:

> [a]s the decision that the children were entitled to inherit from the deceased was based entirely on the finding that their parents were lawfully married, there should be no need to take the matter further as a finding of the illegitimacy must lead to the conclusion that they were not entitled to inherit.[13]

Aggrieved by the judgment of the High Court, the appellants appealed to the Court of Appeal which ruled in their favour.

The judgment of the Court of Appeal

In delivering the judgment of the Court of Appeal, Legwaila JA (Lesetedi and Howie JJA, concurring) stated that '… there is a trend towards recognising the right of children to inherit irrespective of the circumstances of their birth.'[14] The court further remarked that it was unfair and unjust for

---

12 *Tidimalo Mercy Kehumile & Anor V Baone Kealeboga & Anor CAHLB-000024-12* (unreported) at 10.

13 *Ibid.*

14 *Kealeboga* case n 1 above at 27.

children born out of wedlock to be arbitrarily excluded from inheriting from their fathers on the basis of 'out dated and demeaning description – illegitimate'.[15] The Court pointed that the exclusion of the appellants from inheriting from their father's estate on the basis that they were born out of wedlock becomes more unjust when regard is had to the fact that prior to his death, their father took excellent care of them, had no other children and never contracted a marriage. On this score the court observed that it was startling that the law would allow relatives of the deceased to have a better right over his estate than his biological children. The Court also relevantly stated that denying children the right to inherit from their father on the basis that they were born out of wedlock offended the spirit, object and purport of section 2 of the Customary Law Act[16] of Botswana, which enjoins courts of law to ensure that the application of customary law is not inconsistent with the principles of 'morality, humanity or natural justice'.[17] The Court reasoned that it is not humane, moral or an act of natural justice to deny a child the right to inherit from his or her biological father on the basis that the child concerned is 'illegitimate'.[18] The Court further pointed out that the Customary Law Act requires judges to deploy equitable principles of law in adjudicating disputes brought before them.[19] The court also made reference to the case of *Molefi Silabo Ramantele v Edith Modisagape Mmusi and Others* (*Mmusi* case)[20] in the Court of Appeal, per Kirby JP, where the following passage appears:

> … it is noteworthy that the Customary Law Act is to be applied by all the courts in Botswana. These include the customary courts themselves at all levels, as well as common law courts. This means that evolving and flexible rules of cautionary law must be fairly applied according to the facts of each case, and this is what, historically the customary courts have usually done. Where the application of a flexible rule will not in the circumstances be in accordance with the principle of natural justice, equity and good conscience, it will not be applied and an order appropriate to the circumstances will be made. Where an old or any rule of customary law is contrary to morality, humanity or natural justice, it will not be applied at all. So, essentially, the Customary Courts Act has confirmed by statute what had in any event

15 *Ibid*.
16 Cap 16:01 Laws of Botswana.
17 *Kealeboga* case n 1 above at 27.
18 *Ibid.*
19 *Ibid.*
20 CACGB – 104–12 (unreported).

> become the norm in practice – namely, that the customary courts operate by and large as courts of equity.[21]

Justice Legwaila proceeded to remark that under Tswana culture, there is no equivalent of the word 'illegitimate' applied to children born out of wedlock and that the word 'illegitimate' connotes human beings of a lesser worth when used within the context of children.[22] Whereas it is correct that the word 'illegitimate' has negative connotations when applied to children, it is not correct that the concept of 'illegitimate child' is unknown to customary law. Under customary law, an extra-marital child is commonly labelled as *ngwana wa dikgora* (a child whose father surreptitiously crept into the girl's compound through the fence, without a legal right to do so).[23] The judge also correctly pointed to the egalitarian nature of the Children's Act,[24] which requires all parents to ensure that their biological children inherit from their estate (27(6)). The court also stated that customary law is not static but evolutionary as the people who live by its normative imperatives change. In this regard, the court again referred to the case of *Mmusi* above, where Lesetedi JA remarked that

> [i]t is axiomatic to state that customary law is not static. It develops and modernises with the times, harsh and inhumane aspects of custom being disregarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times.[25]

GENERAL REMARKS

That customary law is not static but evolutionary, dynamic, flexible, living and adaptable cannot be doubted.[26] It is this organic character of customary law that allows it to keep pace with societal developments as, unlike statutory law, customary law is not subject to legislative amendments to maintain its relevance to societal needs. In *Alexkor Ltd and Another v Richtersveld Community and Others,*[27] the Constitutional Court of South

---

21 *Id* at 28.
22 *Ibid.*
23 Schapera n 4 above at 171.
24 Act 8 of 2009.
25 *Mmusi* case n 20 above at 25.
26 See Morapedi 'Customary law and chieftainship in the 21st century Botswana' (2011) 250. See also *Attorney General v Dow* (1993) BLR 137, where Amissah P remarked that 'custom and tradition have never been static'.
27 2003 5 SA (CC).

Africa observed that '[t]hroughout its history [customary law] has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.'[28] It is from its organic character that customary law draws its durability and endurance to equitably serve present and future generations. As Gubbay CJ stated in *Zimnat Insurance Co Ltd v Chawanda*,[29] 'if [law] fails to respond to [societal conditions] and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose.'[30] Courts of law serve an important role of ensuring that principles of customary law do not offend notions of human rights in this evolutionary process and are in line with international best practice. In outlawing discrimination on the ground of illegitimacy, the court was aligning Tswana customary law of inheritance in relation to children born out of wedlock, with regional and international trends and contemporary norms, expectations, experiences, aspirations, and sensitivities of modern societies that are governed by principles of human rights.

It is no longer permissible to discriminate between children on the basis their parents' marital status. In Namibia, the High Court abolished the common-law rule that excluded extra-marital children from inheriting from their fathers in the case of *Lotta Frans v Inge Paschke* (*Lotta Frans* case)[31] on the ground that it is inconsistent with the general non-discrimination clause in the Namibian Constitution.[32] In South Africa, the Constitutional Court also ruled that discrimination on the basis of illegitimacy offended the human rights notions of dignity, equality and non-discrimination in the case *Bhe v Magistrate, Khaliyelitsha & others.*[33] The US Supreme Court outlawed discrimination on the basis of illegitimacy in cases such as *Weber v Aetna Casualty and Surety Co,*[34] *Levy v Louisiana,*[35] *Glona v American Guarantee and Liability Insurance Co*[36] and *Trimble v Gordon,*[37] among others. At a regional level, the European Court on Human and Peoples Rights has

---

28 *Id* at 53.
29 (1991) 2 SA 825.
30 *Id* at 831.
31 Unreported, case no P (I) 1548/2005.
32 Adopted in February 1990.
33 2005 1 SA 580 (CC).
34 406 US 164 (1972) 175.
35 391 US 68 (1968).
36 391 US 73 (1968) 76.
37 430 US 762 (1977).

abolished this discriminatory rule in cases such as *Mazurek v France*,[38] *Marckx v Belgium,*[39] and *Inze v Austria*,[40] among others.

CONCLUSION

The rule that excludes born-out-of-wedlock children from inheriting from their fathers is offensive to modern thinking. It is a fossil from a bygone legal dispensation and has lost all social currency. Its abolition was therefore overdue. Thus, in abolishing this rule, the *Kealeboga* decision represents an epic development in the discourse of rights of children, in general and their rights to inheritance, in particular. It communicates a powerful message that all children are worthy of concern, whether born in wedlock or out of wedlock. Although the case deals with the right of born-out-of wedlock children to inherit, it is important to note that in both its symbolic and practical terms, the case does not only concern itself with material equality between marital and extra-marital children in inheritance. Rather it deals with equality of rights derived from descent.

---

38 Application no 34406/97 of 1 February 2000.
39 Application no 6833/74. 13 June 1979.
40 [1987] ECHR 28 par 41.