

**SUPREME COURT OF NIGERIA**  
16TH DECEMBER, 1994, SC 299/1991  
**CORAM: M. L. UWAI, A. B. WALI, M. E. OGUNDARE,**  
**U. MOHAMMED, Y. O. ADIO, JJSC**

NWACHINEMELU IKEMEFUNA OKONKWO ..... APPLLIANT  
AND  
MRS. LUCY UDEGBUNAM OKAGBUE ..... RESPONDENTS  
& 2 OTHERS

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**CUSTOMARY LAW** - *Marriage - For a dead man by his sitters - 30 years after his death - Found to be the custom of the people - Whether repugnant to natural justice equity and good conscience.*

**EVIDENCE** - *Custom - Proof thereof is by judicial notice or evidence - where proved by evidence - Whether concurrent finding of the two lower courts will be interfered with.*

**EVIDENCE** - *Burden of proof - Of alleged facts that were not admitted - On the issue of a type of customary marriage - Rests on the Plaintiff that alleged those facts.*

**PLEADINGS** - *Custom - Whether a particular custom is repugnant - Is a matter of law - That need not be pleaded.*

**PRACTICE & PROCEDURE** - *Parties to an action - Where 3rd defendant's marriage is declared null and void - Hut her children were not parties in the suit - Whether the court will make a pronouncement that will affect the said children.*

**FACTS**

The Plaintiff and his four brothers are the children of late Nnanyelugo Nnebechi Okonkwo who died in 1931. The 1st and 2nd Defendants were the sisters of the late Okonkwo who purported to have married the 3rd Defendant for their late brother, 30 years after his death. The 3rd Defendant gave birth to six children. The Plaintiff/Appellant on behalf of himself and his 4 brothers filed an action before the Onitsha High Court claiming inter alia, that the 1st and 2nd Defendants/Respondents cannot marry the 3rd Defendant/Respondent for their late brother (Plaintiffs father), that the alleged marriage is null and void And that the

3rd Defendant is not the wife of late Okonkwo After taking evidence from the parties' witnesses and a witness called by the court with the parties' consent, on the issue of Onitsha custom, the trial court found that the marriage of 3rd Defendant as aforesaid was valid under Onitsha customary law.

The trial court therefore dismissed the Plaintiffs claim, without considering the plaintiffs submission that any such custom should be declared to be repugnant to natural justice, equity and good conscience. Plaintiffs appeal to the Court of Appeal was dismissed without any pronouncement on the repugnancy test. The plaintiff has further appealed to the Supreme Court to determine amongst other issues, whether the Onitsha marriage custom under consideration is repugnant to natural justice, equity and good conscience and contrary to public.

**HELD** (Unanimously allowing the appeal per lead judgment of **UWAIS JSC**)

***Repugnancy of a Custom - Need not be pleaded***

1. It follows from these legislations that the question whether a particular custom is repugnant is a matter of law and not fact. Therefore, for a party to a case to rely on either section 14(3) of the Evidence Law or section 20(1) of the High Court Law or even both sections, it is not necessary to plead, as contended by the defendants that a custom is repugnant. Indeed, it will offend the rules of pleading for a party to plead law where only facts are allowed by the rules to be pleaded. (P. 15 L 23)

***Proof of custom - Concurrent findings thereof***

2. By section 14 of the Evidence Law, Cap. 49 when a custom is to be proved it may be judicially noticed by the court or evidence of its existence called. In the present case the latter took place. Therefore the findings by the lower courts that the particular native law and custom exists are concurrent findings of fact. It is well established that this Court will not as a general rule interfere with such findings. (P. 16 L 19)

***Marriage for a dead man by his sisters***

3. In the present case when the 1st and 2nd defendants purported to have married the 3rd defendant for the deceased 30 years after his death, the marriage cannot rightly be said to be valid. It is a fiction and a fallacy, for there is no way in which a dead person can naturally get married to the living. It is utterly impossible. Therefore, what, at best, happened in the case at hand is a “marriage” between the 3rd defendant and the 1st and 2nd defendants, which is a “marriage” between a woman and two women. This is what this Court has held in Eugene Meribe’s case (*supra*) that must be regarded repugnant to natural justice equity and good conscience, the marriage by the 1st and 2nd defendants of the 3rd defendant for the deceased is invalid since the custom by which the marriage was contracted is repugnant to natural justice equity and good conscience. (P. 19 L 31)

***Pronouncement that will affect non parties to an action***

4. If there was no marriage between the deceased and the 3rd defendant, it is a fiction to talk of children of such a marriage. In reality, a dead person cannot procreate 30 years after his death. However, there is one snag in this aspect of the case. The children of the 3rd defendant have not been made party to the action. It will not be possible, therefore, to grant any declaration which is capable of affecting their status vis-a-vis the deceased and the plaintiff without giving them the opportunity of being heard. If that is done the principle of *audi alteram partem* (that is no man shall be condemned unheard) would be violated. (P. 20 L 19)

***Burden of proof***

5. By the above provisions of the Evidence Act, Cap. 112, it is clear that the burden of proving the facts alleged since they were not admitted but denied by the defendants, rested with the plaintiff. The rule is: he who asserts must prove. (P. 21 L 21)

**NOTABLE POINTS OF INTEREST**

**UWAIS JSC**

***1. Denial of a right English law guarantees - Will not per se invalidate custom***

5 In keeping the conscience of the communities, by virtue of the provisions of section 14 of the Evidence law and section 20 of the High Court Law as well as similar provisions in other legislations, the courts have come to recognise that the fact that a rule of customary law denies a person a right to which he would under the English law be entitled is not  
10 in itself sufficient to invalidate that rule. (P. 17 L 24)

***2. Supreme court Judgment - Is to be without fear or favour***

It is our sacred and indeed constitutional duty to give decisions in cases that come before us without fear or favour. No matter what manner of  
15 persons are involved. It has not been and will never be the yardstick for this Court to take into consideration extraneous matters, such as the general consequences of its judgment on individuals or a class of persons who are not parties before it, before coming to its decision. The time honoured maxim is: "*Fiat justitia, ruat coelum*" that is, let justice be  
20 done, though the heavens fall. (P 22 L1)

**OGUNDARE JSC**

***3. Need to show how a custom is against public policy***

It is not enough to contend that a transaction or custom is against public  
25 policy, one must go further to show in what respect the transaction or custom is against public policy. (P 38 L 24)

***4. Repugnancy of a custom - What the court should consider***

I agree with the view of McCardie, J that public policy is a variable thing  
30 fluctuating with the circumstances of the time. A conduct that might be acceptable a hundred years ago may be heresy these days and vice versa. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the  
35 court. But this must objectively relate to contemporary modes, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community which we share.

***5. Custom that gives licence to immorality is repugnant***

The institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of the 3rd defendant to him. To claim further that the children the 3rd defendant had by other man or 5 men are the children of Okonkwo deceased is nothing but an encouragement to promiscuity. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant 10 to good conscience. (P. 44 L 7)

***6. A repugnant custom has no force and effect in law***

Of course, where the courts have struck down a custom as being repugnant to natural justice, equity and good conscience or contrary to public 15 policy, the position is that that custom no longer has any force of law and no effect will be given to it where any party relies on it in the enforcement of its rights. The striking down of a custom on the ground of repugnancy and/or inconsistency with public policy has the same legal effect as the striking down of such a custom on the ground of incompat- 20 ibility with an enactment. And no law-abiding society will perpetuate such a custom thereafter. (P. 45 L 19)

**MOHAMMED JSC**

***7. Definition of custom***

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Custom is a particular way of behaviour which, because it has been long established among members of a social group or tribe, can develop and acquire a force of law or right. For a custom to have the force of law it must be approved by consent of those who follow it. Blackstone once said, “Our common law depends upon custom introduced by the volun- 30 tary consent of the people.” (P. 46 L 17)

***8. Marriage to the dead is impossible***

A dead man cannot give his consent, which is an essential element of marriage, nor could he consummate with any woman purported to have 35 been married to him. The 3rd respondent, Rose, cannot therefore by any stretch of imagination be united in matrimony with Mr. Okonkwo who died more than thirty years before the said purported marriage. I therefore agree with my Lord Uwais, JSC, that the custom is repugnant to

natural justice, equity and good conscience. (P. 48 L 2)

**REPRESENTATION**

- 5 Chris O. Abutu with K.V. Durotoye (Miss) for the Appellant.  
J.O. Ernest-Egbuna for the Respondents.

**CASES REFERRED TO**

- Meribe v. Egwu (1976) 3 S.C. 23
- 10 Nwagwu v. Okonkwo (1987) 3 N.W.L.R. (Part 60) 314  
F.C.D.A. v. Naibi (1990) 3 N.W.L.R. (part 138) 270 at p. 281  
Oyewunmi v. Oguncsan (1990) 3 N.W.L.R. (Part 137) 182 at pp 207  
Peenok Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1  
Ashogbon v. Oduntan (1935) 12 N.L.R. 7 at p. 10
- 15 Obiyan v. Military Governor of Mid-West & Anor (1972) All N.L.R. 426  
Ediagbonya v. Dumez (Nig.) Ltd Anor. (1986) 3 N.W.L.R. 753 at p. 764  
Ometa v. Numa 11 N.L.R, 18  
Moses v. Macfarland (1760) 2 Burr. 1065  
Eleko v. Officer Administering the Government of Nigeria & Anor
- 20 (1931) A.C. 662(1931)  
Rufai v. Igbirra Native Authority 1957 N.R.N.L.R. 178  
Lewis v. Bankole 1 W.A.C.A. 81  
Amachree v. Kaillio (1914) 2 N.L.R. 108  
Brandon v. Curling (1803) 4 East 417
- 25 Esposito v. Bowden 7 E & B 779; 119 E.R. 1430  
Richardson v. Mellish (1824) 2 Bing 229, 252; 130 ER 294, 303  
Taiwo v. Lawani (1961) All NLR 733

**STATUTES REFERRED TO**

- 30 Evidence Act ss. 14(3), 135, 136, 137  
High Court Law, Cap. 61 s. 20 (1) Laws of Eastern Nig. 1963  
Supreme Court Act Cap. 424 s. 22

**LEAD JUDGMENT BY UWAIS JSC**

- 35 In a representative action brought by the Appellant, as plaintiff, on behalf of himself and his 4 brothers, against the Respondents as defendants, the Plaintiff claimed, in the High Court of the erstwhile Anambra State holden

at Onitsha, as per paragraph 15 of his Statement of Claim as follows:-  
“15. Wherefore the plaintiff, claims against the defendants jointly and severally as follows:

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1.(a) A declaration that by Onitsha native law and custom, the 1st and 2nd defendants by themselves cannot marry the 3rd defendant for their late brother, Nnanyelugo Nnebechi Okonkwo and that the alleged marriage is null and void,

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(b) That the 3rd defendant is not the wife of the late Nnanyelugo Nnebechi Okonkwo.

2. An order of court that all the children of the defendants namely (1) Izuchukwu (2) Okwudi (3) Uju (4) Victor (5) Okechukwu (6) Obiageli; are not the issues of late Nnanyelugo Okonkwo (sic)

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3. A declaration that the children (aforesaid) cannot inherit both the real or personal property of the late Okonkwo or succeed to any seat temporal or spiritual in Ogbotu village, through Nnebechi Okonkwo (sic) lineage.

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#### AND/OR IN THE ALTERNATIVE

That the children of the aforesaid marriage are the children of Okagbue and Obiozo and belong to Ogbeodogwu and Ogboli Families according to Onitsha native law and custom.”

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Pleadings were filed and exchanged by the parties. The facts of the case as pleaded by the Plaintiff are as follows. The Plaintiff together with four others on behalf of whom he instituted this case, namely (1) Nebolisa Okonkwo (2) Obiesie Okonkwo (3) John Okonkwo and (4) Chinyelugo Ikechukwu Okonkwo were the surviving sons of late Nnanyelugo Nnebechi Okonkwo of Ogboetu Village, Onitsha, who died in 1931. The deceased had two sisters, namely the 1st and 2nd defendants, who survived him. These sisters were married to late Mr. Okagbue of Ogbeodogwu village, Onitsha, and late Mr. Obiozo of Ogboli of Eke village, Onitsha, respectively during the life time of Nnanyelugo Nnebechi Okonkwo. The 1st and 2nd defendants lived in their respective matrimonial homes during the life time

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of their brother - Nnanyelugo Nnebechi Okonkwo. Neither the 1st defendant nor the 2nd defendant had any child by their husbands or anyone else. On or before the Nigerian Civil War, (that is on or before March 1968) the 1st and 2nd defendants married the 3rd defendant for and on behalf of their late brother - Nnanyelugo Nnebechi Okonkwo, without the knowl-  
5 edge or consent of the plaintiff and his aforementioned brothers. As a result of this marriage the 3rd defendant gave birth to six children, namely, (1) Izuchukwu (2) Okwudi (3) Uju (4) Victor (5) Okechukwu and (6) Obiageli. These children bear the surname of late Nnanyelugo Nnebechi Okonkwo and parade themselves as his children. The 1st and 2nd  
10 defendants have held out the children as the lawful children of late Nnanyelugo Nnebechi Okonkwo. By such act, it was intended by the 1st and 2nd defendants that the 3rd defendant would be accorded the status of a lawfully married wife in Ogboetu village by her becoming a member of the women guild called "Ikporo Ogbe", which is contrary to  
15 Onitsha native law and custom. The plaintiff had repeatedly made demands and representation to the 1st and 2nd defendants, but to no avail, to return all the children of the 3rd defendant to the people of late Okagbue and late Obiozo who by the native law and custom of Onitsha should be the fathers of the children.

20      The plaintiff avers further, in paragraphs 6,7, 12 and 13 of his Statement of Claim, the native law and custom of Onitsha applicable to his case. The paragraphs read thus –

25      "6.      *Under Onitsha native law and custom, a woman who has no issue for her husband could marry another woman for and in the name of her husband, only when the husband is alive, (sic) in order to perpetuate the husband's name.*

30      7.      *The Onitsha custom does not admit a woman, be her barren, sister or anything to marry another woman for and in the name of her brother, whether the brother is dead or a life, (sic) more so when the said brother has male surviving issues as in this case."*

*"12.      By Onitsha native law and custom, these children could at best be considered the children of the husbands of 1st and 2nd defendants, that is Okagbue and Obiozo and never Okonkwo's issues.*

35      13.      *By Onitsha native law and custom, these children should not inherit nor succeed to any real or personal property of the late Nnebechi Okonkwo, since they are not his children naturally or by custom or by any accepted rule or imagination. (sic)"*



The defendants, who dispute the facts as pleaded by the plaintiff aver in their joint Statement of Defence, the facts of the case to be as follows: The deceased, Nnanyelugo Nnebechi Okonkwo who hailed from Ogbeotu village, Onitsha died in 1931 and that the 1st and 2nd defendants were his sisters. The 1st defendant who was married to Okagbue of Ogbeodogwu village, Onitsha, got separated from him and returned home to Ogbeotu village, Onitsha, to reside with her family and elder brother, the late Nnanyelugo Nnebechi Okonkwo, three years before his death. The 2nd defendant who was married to Obiozo of Eke village, Onitsha also got separated from him and returned home to Ogbeotu village, Onitsha, to live with her family for more than a year prior to the death of her elder brother, Nnanyelugo Nnebechi Okonkwo. Both the 1st and 2nd defendants had no surviving children for their respective husbands, but they had had children who died in their infancy. They allege that Nwachinemelu, the mother of the plaintiff was married for late Nnanyelugo Nnebechi Okonkwo during his life time, by his younger sister, Monica, against his will. The marriage remained valid under Onitsha native law and custom. Similarly, the 1st and 2nd defendants married the 3rd defendant for their brother, late Nnanyelugo Nnebechi Okonkwo, in accordance with Onitsha native law and custom. They contend that the marriage was entered into by the defendants with the knowledge and consent of the elders of Ogbeotu village, Onitsha, and the Okonkwo family as well as its head. The consent of the plaintiff, as son of late Nnanyelugo Nnebechi Okonkwo, was not necessary under the native law and custom of Onitsha. The agreement of the family of the deceased and the elders of Ogbeotu village to the marriage of the 3rd defendant was reduced in writing as set out in a memorandum made on 25th January, 1981. The defendants contend that the 6 children of the 3rd defendant are legitimate and have been so recognised under the native law and custom of Onitsha as the children of late Nnanyelugo Nnebechi Okonkwo. By virtue of her being accorded recognition as the lawful wife of late Nnanyelugo Nnebechi Okonkwo, the 3rd defendant became and is still a member of "Ikporo Ogbe" which is a guild of women lawfully married to the male citizens of Ogbeotu village. The defendants plead the applicable native law and custom of Onitsha in paragraphs 12 and 22 of the Statement of Defence to be as follows:

*"12. In further answer to paragraph 7 above, the defendants aver that under Onitsha native law and custom, a sister is entitled to marry a wife for and in the name of her brother, be he dead or alive even if the brother has surviving male issue."*

“22. *The defendants aver that under Onitsha native law and custom, no male issue of Nnanyelugo Okonkwo (sic) will succeed to a spiritual seat (ILI UKPO) as their father Nnanyelugo Okonkwo (sic) “APURO IBA.”*

5            At the trial before F.O. Nwokedi, J. the plaintiff testified and both parties called witnesses. The defendants called the eldest son of late Nnanyelugo Nnebechi Okonkwo, namely George Nnebolisa Okonkwo, as witness (D.W.3), He testified that there was a family meeting on 25th January, 1981 at the house of Ogene Egwuatu (D.W.2) where the issue  
10 of the validity of the marriage of the 3rd defendant was raised. He stated that the meeting agreed that the 3rd defendant be accepted, as the wife of the deceased together with her children into the Okonkwo family in order that they might become part of Ogbeotu village. The only qualification imposed being that the children of the 3rd defendant and their descendants  
15 should not at any time ascend to the “Ukpo” of Okonkwo family. With the consent of the parties, learned trial judge called as a witness one Odigwe Egbuji, who was 89 years old and a member of the Onitsha Council known as Obi-in-Council. His evidence was to the effect that under Onitsha native law and custom, sister of a deceased brother can lawfully marry a wife  
20 for the deceased after his death.

In his judgment, dismissing the plaintiffs’ action, the learned trial judge stated as follows;

“On the question of the custom of Onitsha people on this issue, there is not much to choose by way of preference between the evidence of  
25 Chief Ojiba Egbunike P.W. 2, Chief I.N. Egwuatu, the Ogene of Onitsha D.W. 2 and Odigwe Ezenwa called as the independent witness by the court. All the three witnesses are agreed that Onitsha custom permits a sister to marry another woman for her deceased brother even where such a deceased has other male issue surviving him. .... It could be seen  
30 therefore from the evidence of these three witnesses on the Onitsha custom as it affects the matter in hand that there is no dispute whatsoever about the Onitsha custom in this matter and that is that Onitsha custom permits a sister marrying a wife for her deceased brother.”

(emphasis mine)

35 and finally concluded the judgment thus:-

“I am satisfied that Ogbeotu village and some members of the Okonkwo

family endorse the action of the 1st and 2nd defendants in marrying the 3rd defendant as a wife for their late brother Nnayelugo Nnebechi Okonkwo. I have no alternative but to declare that the marriage of the 3rd defendant was valid under Onitsha native law and custom, and that the 5  
six children of the 3rd defendant under the variation of Onitsha native law and custom peculiar to Ogbeotu village of Onitsha, are perfectly legitimate and belong to the Okonkwo family of Ogbeotu village, Onitsha. This is even more so as there is as of now no law in Nigeria on legitimacy or otherwise.

In view of the above, plaintiff's case is hereby dismissed with costs 10  
assessed and fixed at N300.00 to the defendants." (emphasis mine). Dissatisfied with the judgment, the plaintiff appealed to the Court of Appeal. The Court (Onu, J.C.A., as he then was, Ogundere and Macaulay, J.J.C.A.) in dismissing the appeal held, as per the lead judgement of 15  
Macaulay J.C.A., with which the other learned Justices agreed, as follows: "Thus, in view of the evidence led that both before and after the marriage, the necessary consents were obtained, I am satisfied that the learned trial judge was correct in his finding that the marriage was with consent of the family in accordance with Onitsha native law and custom ..... For the 20  
above reasons, I have no hesitation in coming to the conclusion that, as the appellant never proved his case, this appeal is totally devoid of merit and will be, and is hereby dismissed by me."

In his further appeal, to this Court, the plaintiff raised, in his brief of argument, five questions for us to determine, namely - 25  
"1. At the Court of first instance, on whom was the onus of proving Onitsha native law and custom as it relates to the marriage in issue? Where (sic) the High Court and Court of Appeal right in placing the onus on the Plaintiff?

2. Considering the evidence before the Court of first instance, and the finding of the fact made by the trial judge himself, can it be said that 30  
conditions precedent to the contracting of such marriage as the one in issue was fulfilled in this case?

3. Did the Court of Appeal, Holden at Enugu, consider properly the question as to whether or not the custom even if held established is 35  
repugnant to natural justice equity and good conscience? and indeed is the custom, considering the entire circumstances of this case, not clearly repugnant to natural Justice, equity and good conscience and contrary to

public policy.

4. *Are the circumstances of this case entirely the same as that in the case of Nwaniba v. President Orlu District Court, (1964) 8 E.N.L.R. 24 as to make the above case (sic) applicable or distinguishable.*

5. *Was it proper for the learned trial Judge, at the Court of first instance, to use matters which were neither before him as evidence, nor as legal authority in his judgment in this case, only against the Appellant (Plaintiff)?”*

The defendants, on their part filed a joint respondents’ brief in which they formulated the following 5 issues –

10 “1. *When a Plaintiff has pleaded and based his case on particular customary Laws, on whom is the onus of proving the said customary Law - the Plaintiff” or the Defendant?*

2. *Was there enough evidence before the Court that*

15 (a) *Consent of the Umunna (family of the deceased Nnebechi Okonkwo was obtained to the said marriage*

(b) *That the consent required was that of the general family and not that of the nuclear family of the deceased;*

(c) *That the consent required was only and solely consent prior to the contracting of the marriage.*

20 3. *Whether the learned Justices of Appeal failed to consider adequately the issue of whether the particular custom in issue was repugnant to Natural Justice Equity and Good conscience, and to apply same to the case before them:*

25 4. *Whether on the facts before the Court of Appeal, the learned trial Court of Appeal was wrong in not declaring the customary Law that validated the marriage of 3rd Respondent and deceased Nnebechi Okonkwo, repugnant.*

30 5.(a) *Whether the learned trial Judge at any stage of the trial imported or made use of inadmissible evidence in coming to the conclusions in his judgment, which said inadmissibility was condoned in the judgment of the Court of Appeal? or*

(b) *Whether the learned trial Judge “Was entitled to use material not admissible evidence.”*

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There has been concurrent findings of fact by the lower courts on whether there was a valid marriage between the 3rd defendant and the deceased. It therefore, seems to me that a consideration of issue 3 in the Appellant’s brief together with issues 3 and 4 in the Respondents brief is

sufficient to determine this appeal. For once the marriage is found not to be repugnant to natural justice, equity and good conscience, the decision of the lower court is bound to stand in spite of the other issues contained in the briefs. I shall therefore, proceed anon to deal with the fundamental issue.

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Mr. Abutu learned counsel for the plaintiff adopted the Appellant's brief and said nothing by way of expatiation. In the brief it is contended that the Court of Appeal like the trial court, failed to consider the plaintiffs argument that even if the marriage between the 3rd defendant and late Nnanyelugo Nnebechi Okonkwo was valid under Onitsha native law and custom, it is contrary to natural justice equity and good conscience by virtue of section 14 subsection (3) of the Evidence Act. It is inter alia argued, in the Appellant's brief, relying on the decision in Eugene Meribe v. Joshua Egwu, (1976)3 SC. 23, that if one woman marry another woman in the name of a dead or non-existent person that amounts to a marriage between the two women concerned; and such custom had been declared by this Court in the case cited to be repugnant. It is further canvassed that a dead man cannot give consort to the woman married for him and since the essence of the marriage is to produce children, the wife is bound to engage in indiscriminate sexual intercourse in order to fulfill the purpose for which the marriage is contracted. This in itself, it is submitted, is an uncivilised standard encouraging promiscuity. It is, therefore, repugnant to allow the custom to continue. The case of Nwagwu v. Okonkwo, (1987)3 N.W.L.R. (Part 60)314 was cited in support.

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Mr. Ernest-Egbuna learned counsel for the defendants submitted in the Respondents' brief that the Court of Appeal considered the issue of repugnancy raised before it by the plaintiff and argued that it cannot be contended that the Court of Appeal did not consider the point adequately. It is further canvassed that it was not the case of the plaintiff that the custom in question is repugnant since that was not pleaded nor was evidence adduced- to that effect. F.C.D.A. v. Naibi (1990) 3 N.W.L.R. (Part 138)270 at p.281 H. was cited in support. On the provisions of section 14 subsection (3) of the Evidence Act, it is argued that the intention therein is not that native law and custom should arbitrarily be discarded. Reliance was placed on the case of Oyewunmi v. Ogunesan, (1990)3 N.W.L.R. (Part 137)182 at pp. 207 E-F and 196 H-197A.

In his oral, argument, Mr. Ernest-Egbuna urged on us that in reaching a decision on the issue of repugnancy we should take into consideration the effect and consequences of declaring the .native law and custom under consideration repugnant. He submitted that the custom has  
5 existed as a system for a long time and therefore it accords with public morality and policy and as such it should be upheld.

Now, it is true that the issue of repugnancy was raised in the Court of Appeal and it was indeed considered by that Court as per Macaulay, J.C.A. However, the Court of Appeal failed to pronounce on whether the  
10 custom was repugnant to natural justice equity and good conscience or otherwise. The observation made by the learned Justice is as follows –

“Sec. 14 of the Evidence Law to which our attention has been drawn, lays down the mode of ascertaining custom pertaining to a particular set of circumstances, in a particular area of this  
15 Country.....But, to my mind, the matter of repugnancy raised should not be left out, or go unattended. I shall endeavour to do so in this opinion by comparing and contrasting two decisions which may tangentially be relevant to the point raised here, but clearly authority for the points they decided.

20 (a) &let v. Essien (1932) 11 N.L.R. 47

(b) Nwariba v. President, Orlu District Court (1964) 8 E.N.L.R.

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“ .....

On the pleadings and evidence led and accepted before the learned trial  
25 judge, and in the absence of any evidence led by the appellant to prove any particular Native Law and Custom of Onitsha he is relying on, it seems to me that the sisters who had since been separated from their husband, (sic) that is, 1st and 2nd defendant, who had returned to join their family before the death of their brother, have the capacity under Onitsha/Ogbeotu  
30 custom to marry 3rd defendant as they did, after obtaining the necessary consents. Under customary law therefore, when it becomes necessary to grant custody of the children, since, at bottom line, this is what was involved here, the proper party entitled to them, is family of the father into which the mother had been married; as in this appeal.

35 For the above reasons, I have no hesitation in coming to the conclusion that, as the appellant never proved his case, this appeal is totally devoid of merit and’ will be, and is hereby dismissed by me. I assess and fixed costs in this Court as N550 in favour of the respondents.”

It is obvious from this quotation that the judgment' of the Court of Appeal shied away from pronouncing if the custom under consideration was or was not repugnant as enjoined .by legislations.

Now section 14 subsection(3) of the Evidence Law, Cap. 49 of the Laws of Eastern Nigeria 1963 provides -

*"3 Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned ill the particular area regard the alleged custom as binding upon them:*

*Provided that in the case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice equity and good conscience."*

A similar provision to the provision herein is to be found in section 20 subsection (1) of, the High Court Law, Cap. 61 of the Laws of Eastern Nigeria, 1963 which reads -

*"20 (1) The Court shall observe and enforce the observance of every local custom and shall not deprive any person of the benefit thereof except when any such custom is repugnant to natural justice, equity and good conscience or incompatible, either directly or by its implication, with any law for the time being ill force."*

It follows from these legislations that the question whether a particular custom is repugnant is a matter of law and not fact. Therefore, for a party to a case to rely on either section 14(3) of the Evidence Law or section 20(1) of the High Court Law or even both sections. it is not necessary to plead, as contended by the defendants, that a custom is repugnant. Indeed. it will offend the rules of pleading for a party to plead law where only facts are allowed by the rules to be pleaded - Peenok Ltd. v. Hotel Presidential Ltd., (1982) 12 Sc.1. The question whether a custom is repugnant being a point of law can be raised by counsel in his address to court as was done by the plaintiffs counsel in the High Court. The court itself may raise the point suo motu since it is enjoined to take the law into consideration and apply it in determining whether a particular custom is applicable. As was observed by Paul J. in Ashogbon v. Oduntan. (1935) 35 12 N.L.R.7 at p.10:-

*"I regard this Court in its equity jurisdiction as in some measure by virtue of the jurisdiction sections of the Supreme Court Ordinance "the*

*keeper of the conscience” of native communities in regard to the absolute enforcement of alleged native customs.”*

The jurisdiction sections of the Supreme Court Ordinance Cap. 211 of the Laws of Nigeria, 1948 mentioned in the quotation are in pari materia with the provisions of Part III of the High Court Law, Cap. 61 of the Laws of Eastern Nigeria, 1963, which *inter alia* contains section 20 subsection (1) afore-mentioned.

Since the lower courts have failed to -pronounce, as they are bound to do under the legislations in reference, on the applicability of the custom established in this case, it then becomes the function and indeed the duty of this Court as appellate court to do so - see section 22 of the Supreme Court Act, Cap. 424 of the Laws of the Federation of Nigeria, 1990; *Ambrose Iguade Obiyan v. Military Governor of Mid- West & Anor.*, (1972) All N.L.R. 426 at p.433 (Reprint) and *Ediagbonya v. Dumez (Nig.) Ltd, & Anor.*, (1986) 3 N.W.L.R. 753 AT P. 764.

The custom accepted by the lower courts is that a sister or sisters can “marry” a wife for their deceased brother and the children of that “marriage” are legitimate children of the deceased or the deceased’s family. By section 14 of the Evidence Law, Cap. 49 when a custom is to be proved it may be judicially noticed by the court or evidence of its existence called. In the present case the latter took place. Therefore the findings by the lower courts that the particular native law and custom exists are concurrent findings of fact. It is well established that this Court will not as a general rule interfere with such findings. There is a legion of authorities on the point but it suffices to cite *Ometa v. Numa*, 11 N.L.R. 18. However, the question for determination is whether the native law and custom, as found by the lower courts, is repugnant to natural justice, equity and good conscience and/or is against public policy.

The phrase “*repugnant to natural justice, equity and good conscience*” has not been interpreted disjunctively by the courts - see p. 233 of *The Native and Customary Courts of Nigeria* by Keay and Richardson. “*Equity*” in its broad sense, as used in the repugnancy doctrine is equivalent to the meaning of “*natural justice*” and embraces almost all, if not all the concept of “*good conscience*”. The following passage appears Oh p.5 of *Snell’s Principles of Equity*, 27th Edition, by Megarry and Baker.-

*“The term “equity” has a broad popular sense and a narrow*



*technical sense. In its popular sense equity is practically equivalent to natural justice or morality.*" Similarly, the words "natural justice" have been held by Lord Mansfield" C1 in Moses v. Macfarland, (1760)2 Burr. 1065, in an action to enforce.

a quasi-contract, to mean equity and natural law. He put it thus:- 5  
*"The words "natural justice" were here clearly not used in their modern sense, but were synonymous with natural law in the same way as the word "equity" did not refer to technical equity, i.e. the equity of the Chancery Court, but to jus naturale. In other words, natural justice and equity in this passage meant the same thing i.e. - "natural law".* 10  
 In the case of Laoye & Ors. v. Oyetunde, (1944)10 W.A.C.A. 4, the Privy Council, per Lord Wright, stated as follows:-

*"The Courts which have been established by the British Government have the duty of enforcing these native laws and customs so far as they are not barbarous, as part of the law of the land."* 15

The word "barbarous" has been held in the earlier decision of the Privy Council in Eshugbayi Eleko v. Officer Administering the Government of Nigerill & Anor., (1931) A.C. 662; (1931) All E.R. 44 to be synonymous with the repugnancy doctrine. The Privy Council held, per Lord Atkin, at p.673 thereof, thus:- 20

*" .... the Court cannot itself transform a barbarous custom into a milder one. If it still stands ill its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience."*

In keeping the conscience of the communities, by virtue of the provisions of section 14 of the Evidence law and section 20 of the High Court Law 25 as well as similar provisions in other legislations, the courts have come to recognise that the fact that a rule of customary law 'denies a person a right to which he would under the English law be entitled is not in itself sufficient to invalidate that rule - see Rufai v. Igbirra Native Authority, 1957 N.R.N.L.R. 178 and Ashogbon v. Oduntan, (supra) where it was held that 30 there was nothing repugnant in a rule which rendered a family member if he committed any serious form of misbehaviour or misconduct, such as adultery within the household or disrespect to senior members, liable to forfeiture of his share of family land. In the case of Oyewwzmi v. Ogullesall, (1990) 3 ~.W.L.R. (Part 137) 182 at p.196H-197A, Obaseki, 35 J.S.C. cautioned as follows:-

*"A Court of Appeal is not entitled to shy away from giving effect to 'custom' established before it or ill proceedings from the High Court*

*in any appeal before it.”*

Occasions have, however, arisen where the courts had found it necessary to declare certain customs repugnant to natural justice, equity and good conscience or against public policy and morality. In the case of Lewis & Ors. v. Bankole & Ors., I W.A.E.A. 81 Osborne, C.J. made the following observation –

“*I have during thirteen years experience of West Africa been concerned in one capacity or another with several cases in which native customary law has been the subject of judicial investigation; and in nearly every case I have found that there are general underlying principles not difficult to understand, and obviously based on the primitive requirements of the community. In some instances those principles have been modified, and even departed from, as the result of contact with European methods; indeed, one the most striking features of West African native custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency. it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics. The great danger’ in applying it in this Court is that or crystallising it;:: such a way that it cannot be departed from in cases where expediency demands, and where native themselves will depart from it, “*  
(*underlinings mine*).

Let us examine briefly a few cases in which the doctrine of repugnancy was applied by the courts. In Re Effiong Okon Atta, 10 N.L.R. 65 a deceased intestate in Calabar was a former slave of one of the Houses whose traditional head (or chief) applied for letters of administration in respect of his estate. As the Slavery Abolition Ordinance had emancipated the deceased in his lifetime, his surviving sister entered a *caveat* against the head of the house. It was held that it was contrary to equity and good conscience that a head of House should inherit his former slave’s property. See also Re Kwaku Dampety, (1930) 1 W.A.E.A. 12. In Edet v. Essien (supra) a woman who had merely been betrothed but not yet married to one man deserted him for another, by whom she had two children. As the woman had failed to refund the bride price, the jilted man claimed the children as his own by customary law. His claim was held to be repugnant to natural justice, equity and good conscience and was dismissed on the basis that the custom was contrary to public policy.

In Amachree v. Kallio, (1914) 2 N.L.R. 108. It was held that a native law and custom which would enable a community to claim sole fishing rights in open tidal waters, to the detriment of neighbouring communities, is repugnant. Finally, in Nzekwu & Ors. v. Nzekwu & Ors. (1989) 2 N.W.L.R. (Part 104) 373 on p. 395 this Court upheld the decision of Onitsha High Court (F.e. Nwokedi J.) by a majority of 3 to 2 (Nnamani, Karibi-Whyte and Agbaje JJ. S.C. with Nnaemeka-Agu and Craig JJ.S.e. dissenting) that –

*“Any Onitsha custom which postulates that the 1st defendant has the right to alienate, as the Okpala, property of a deceased person in the lifetime if his widow is, in my view, a barbarous and uncivilised custom which, in my view, should be regarded as repugnant to equity and good conscience and therefore unacceptable to me.”*

In the light of the foregoing principles, I will now consider the position in the present case. Marriage as it is commonly known is a union of a man and a woman. For a marriage to be meaningful it is necessary for the husband to physically exist so that the marriage can be consummated. I believe that one of the essentials of marriage under customary law is the element of procreation; which is only achievable when both the husband and wife are together alive. As it has been succinctly put by this Court in the case of Eugene Meribe v. Joshua C. Egusu, (supra) at p. 32 thereof, per. Madarikan J.S.C. –

*“In every system of jurisprudence known to US, one of the essential requirement for a valid marriage is that it must be the union of a man and a woman thereby creating a status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a “woman to woman” marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.”*

In the present case when the 1st and 2nd defendants purported to have married the 3rd defendant for the deceased 30 years after his death, the marriage cannot rightly be said to be valid. It is a fiction and a fallacy, for there is no way in which a dead person can naturally get married to the living. It is utterly impossible. Therefore, what, at best, happened in the case at hand is a “marriage” between the 3rd defendant and the 1st and 2nd defendants, which is a “marriage” between a woman and two women. This is what this Court has held in Eugene Meribe’s case (supra) that must

be regarded repugnant to natural justice equity and good conscience. I, therefore, have no hesitation in holding that the marriage by the 1st and 2nd defendants of the 3rd defendant for the deceased is invalid since the custom by which the marriage was contracted is repugnant to natural  
5 justice equity and good conscience.

Perhaps, I need to point out that the marriage in question here is distinguishable from the “ghost-marriage” of the Nuer People of South Africa, where the ritual processes of marriage are performed in the name of the dead man and the bride-wealth is paid on his behalf. The marriage  
10 is entered into by a living man in the name of his dead kinsman. The living man performs all the obligations of marriage on behalf of the dead man. Thus the living man becomes the physiological father of the children of the marriage, while the dead man is the legal father of the children, who therefore bear the name of the dead man as opposed to that of their  
15 physiological father - See Chapter 10 in volume 11 of Readings in African Law by E. Cotran and N.N. Rubin.

What then is the status in the present case of the children of the 3rd defendant? Are they the children of the deceased? It is obvious from my finding that if there was no marriage between the deceased and the 3rd  
20 defendant, it is a fiction to talk of children of such a marriage. In reality, a dead person cannot procreate 30 years after his death. However, there is one snag in this aspect of the case. The children of the 3rd defendant have not been made party to the action. It will not be possible, therefore, to grant any declaration which is capable of affecting their status vis-a-vis  
25 the deceased and the plaintiff without giving them the opportunity of being heard. If that is done the principle of *audi alteram partem* (that is no man shall be condemned unheard) ‘You Id be violated. See Oloriode v. Oyebi, (1984) 1 SCNLR 390.

The conclusion which I have reached above is sufficient to  
30 determine the plaintiffs claims. It will, therefore, be academic to deal with other issues raised in the briefs of the parties except the first issues in the Appellant’s brief and the defendants’ brief respectively which touch on which of the parties the burden of proving the customary law in question rests. The point is settled by sections 135, 136 and 137 of the Evidence  
35 Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990 which reads:-

“135.(1) *Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts*

*must prove that those fact exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

*136. The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given on either side.*

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*137.(1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgement of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.*

10

*(2) If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom the judgment would be given if no more evidence were adduced,' and so on successively, until all the issues in the pleadings have been dealt with.*

15

*(3) Where there are conflicting presumptions, the case is the same as if there were conflicting evidence."*

From the averments in the Statement of Claim, the plaintiff asserts that the 1st and 2nd defendants could not marry the 3rd defendant for their late brother - Nnanyelugo Nnebechi Okonkwo, in accordance with the native law and custom of Onitsha. Furthermore, that the 3rd 20 defendant is not the wife of the deceased. By the above provisions Of the Evidence Act. Cap. 112, it is clear that the burden of proving the facts alleged since they were not admitted but denied by the defendants, rested with the plaintiff. The rule is: he who asserts must prove. Therefore, the Court of Appeal, per Macaulay, J.C.A., was right when 25 it stated thus –

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*"I am clearly of the view that it is the duty of the Plaintiff who has raised the incidents of Onitsha and/or Ogbeotu customary law to plead and prove any particular customary law that may be relevant."* I see no basis for the plaintiffs complaint in this respect.

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It now remains to consider which of the plaintiffs claims can be granted in the light of my holding that the native law and custom of Onitsha under which the 3rd defendant was purported to have been married to the deceased is repugnant to natural justice, equity and good conscience. It is clear that claims 2, 3 and the claim in the alternative, quoted above, concern the status of the children of the 3rd defendant. As the children have not been joined as party to this case it will be improper, for the reason already stated, to grant

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the claims. Claims 1(a) and (b) clearly concern the 1st, 2nd and 3rd defendants. As they are parties in the case, I have no difficulty, in view of the conclusion which I have already reached, in granting them.

Finally, Mr. Ernest-Egbuna learned counsel for the defendants has expressed the sentiment that we should not declare the custom in question repugnant in view of the consequences of such a declaration to the community concerned. He stated that there are many products of similar marriage in Onitsha, some of whom are prominent in the community as doctors and lawyers and so forth. He gave as example one of the children of the 3rd defendant who is a legal practitioner. With respect, I do not share in the sentiment. It is our sacred and indeed constitutional duty to give decisions in cases that come before us without fear or favour. No matter what manner of persons are involved. It has not been and will never be the yardstick for this Court to take into consideration extraneous matters, such as the general consequences of its judgment on individuals or a class of persons who are not parties before it, before coming to its decision. The time honoured maxim is: "*Fiat justitia, ruat coelum*" that is, let justice be done, though the heavens fall, I suppose this is why the picture of a lady as symbol of justice is blindfolded. I deem it apposite to quote here *in extenso* the policy of our courts on customary law as expressed in a statement made by Balonwu CJ. in 1974 which is contained on p.63 of the book titled *African Indigenous Laws* edited by Elias, Nwabara and Akpamgbo:-

"It is a fair statement to say that, from the time Sir Fredrick Lugard promulgated the Supreme Court Proclamation No.6 of 1900, and relentlessly pursued the British Colonial Policy of Indirect Rule, the British-established Courts have, to this day continued to administer the customary laws of our people in language, which has given their exposition of the subject the utmost clarity and permanence. Sometime, they have administered strict and undiluted customary law; at other times, they have refused to allow themselves to be used as instrument "for observing or enforcing the observance of customary law, which is repugnant or incompatible with any local enactment," or which conflicts with rules of technical equity, or where substantial injustice would result, if the customary law in question were to be applied. But unlike the position where a legislative provision excludes the application of customary laws, which are "incompatible either directly or by necessary implication with any valid local enactment" a declaration by

*the Courts, that a customary law is repugnant to natural justice, equity and good conscience, does not necessarily imply that such customary law is illegal, (query) for sometimes the practice goes on publicly, after the judge decision. In such a case all that the Courts can legitimately do, and have done, is to refuse to enforce' the customary law in question. In Eshugbayi Eleko v.. Government of Nigeria (supra) the Privy Council had ruled that if a custom is barbarous in character, it must be rejected whole and entire as being repugnant to natural justice, equity and good conscience, and that the Court could not itself transform a harsh and barbarous custom into a mild one. (parenthesis and underlining mine)*

Accordingly, the appeal succeeds the decision of the Court of Appeal as well as that of the High Court are hereby set aside. In their place I enter judgement for the plaintiff against the defendants. I make the following declarations in favour of the plaintiff –

1. That the Onitsha native law and custom applicable to the marriage between the 3rd defendant and late Nnanyelugo Nnebechi Okonkwo being repugnant to natural justice, equity and good conscience, the 1st and 2nd defendants by themselves Could not marry the 3rd defendant for their late brother, Nnanyelugo Nnebechi Okonkwo and therefore the purported marriage is hereby declared null and void.
2. That the 3rd defendant is not the wife (widow) of the deceased, Nnanyelugo Nnebechi Okunkwo.

The costs in this appeal which I assess at N1,000.00 are hereby awarded to the plaintiff against the defendants' jointly and severally.

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### **WALI JSC**

I have had a preview of the lead judgement of my learned brother, Uwais, JSC and I entirely agree with the reasoning and conclusions contained therein.

My learned brother having exhaustively dealt with all the issues raised and canvassed in this appeal, I have nothing more to add.

For the same reasons contained in the lead judgement of my learned brother, Uwais JSC, which I hereby adopt as mine, I also allow this appeal. The judgement of both the trial court and the Court of Appeal are accordingly set aside. I abide by the consequential orders contained in the lead judgement.

**OGUNDARE.JSC**

I have had the advantage of a preview of the judgment of my learned brother Uwais, JSC just read. I agree with him that the local custom of Onitsha touted in this appeal be struck down as being contrary to public  
5 policy and repugnant to good conscience and that the appeal be allowed and Plaintiffs claims (a) and (b) be granted. I also agree with his conclusion as mine. I, however, wish to add a few words of my own, particularly on the said local custom.

One Nnanyelugo Nnebechi Okonkwo of Ogbotu village, Onitsha  
10 died in 1931 leaving behind five sons surviving him. The Plaintiff is one of the five sons. Okonkwo also left behind two sisters who are now 1st and 2nd defendants in these proceedings. 1st and 2nd Defendants are childless, even though they were married to their respective husbands. Both -claimed to have separated from their respective husbands and  
15 returned to the family home in Ogbotu village. About 1961 the 1st and 2nd Defendants acting under Onitsha custom 'married' the 3rd Defendant for their deceased brother, Nnanyelugo Okonkwo. Since the said 'marriage' the 3rd Defendant had given birth to six sons who answered Okonkwo's name. The Plaintiff and his other brothers refused to acknowledge 3rd  
20 Defendant's children as children of their late father. As the dispute could not be 'resolved by the family; Plaintiff acting on behalf of himself and other male issues of late Nnanyelugo Nnebechi Okonkwo sued the defendants claiming, as per paragraph 16 of his Statement of Claim –

“(a) A declaration that by Onitsha native law and custom, the  
25 1st and 2nd defendants by themselves cannot marry the 3rd defendant for their late brother, Nnanyelugo Nnebechi Nkonkwo and that the alleged marriage is null and void.

(b) That the 3rd defendant is not the wife of late Nnanyelugo Nnebechi Okonkwo.

30 (c) An order of court that all the children of the defendants namely: (1) Izechukwu (2) Okwudi (3) Uju (4) VICtor (5) Okechukwu (6) Obiageli are not the issues of late Nnanyelugo Okonkwo.

(d) A declaration that the children (aforesaid) cannot inherit  
35 any seat temporal or spiritual in Ogbotu village, through Nnebechi Okonkwo lineage.



AND/OR IN THE ALTERNATIVE.

*That the children of the aforesaid marriage are the children of Ogboli Families according to Onitsha native law and custom."*

At the conclusion of trial and after addresses by learned counsel appearing for the parties, the learned trial judge, in a reserved judgment, found:

1.".....it is not in dispute that the 1st and 2nd defendants in 1961 married the 3rd defendant for their late brother Nnanyelugo Nnebechi Okonkwo. I believe 1st and 2nd defendants that they did so for love and affection for their late brother and also for their own personal appetite for children whom they themselves did not have."

2.".....before embarking on the exercise, they consulted some elders of their village including late lke Abutu who was then the spiritual Head of the Abutu family of which of Okonkwo family was part."

3.".....the 3rd defendant has produced six children in Ogbotu."

4."..... not only that the 3rd defendant was accepted as one of the wives of Ogbotu village, her children have also been recognised as children of Ogbeotu village."

5.". "It could be seen therefore from the evidence of these three witnesses on the Onitsha custom as it affects the matter in hand that there is no dispute whatsoever about the Onitsha custom in this matter and that is that Onitsha custom permits a sister marrying a wife for her deceased brother."

6." I have no alternative but to declare that the marriage' of the 3rd defendant was valid under Onitsha native law and custom, and that the six children of the 3rd defendant under the variation of Onitsha native law and custom peculiar to Ogbeotu village of Onissha, are perfectly legitimate and belong to the Okonkwo family of Ogbeotu village, Onitsha."

In the light of the above findings he dismissed Plaintiffs claims.

Plaintiff appealed to the Court of Appeal and one of his grounds of appeal read:

*"That the trial Judge erred in law in failing to consider the submissions of (learned counsel for the plaintiff that the said custom even if held established is repugnant to natural justice, equity and good conscience."*

PARTICULARS:

(a) That for a woman to marry another woman in the name of a dead

and non-existent man who cannot consummate the marriage is equivalent to a marriage between a woman and a woman.

(b) That such a marriage is nothing but a euphemism for open prostitution and would definitely encourage promiscuous intercourse which is against public policy.”

5 In his lead judgment with which Onu JCA (as he then was) and Ogundere JCA agree, Macaulay JCA observed:

“Finally, it was urged on us by learned counsel for the appellant that the custom, even if held as established, is contrary to natural justice, equity and good conscience under Sec. 14(3) of the Evidence Act.”

10 There followed a discussion on matters not, with respect, relevant to the issue he was discussing. The learned Judge, however came back to the issue when he further observed:

“On the authorities, there are decisions on native law and custom for instance, on succession to property on Death where, in Danmole v. Dawodu (1955) 3 F.S.C. 46 at 49, the Supreme Court decided that ‘Idi-Igi’, in preference to ‘Ori-Ojori’, is not repugnant to natural justice, equity and good conscience,] on the ground that ‘Equality is equity’. This view was confirmed by Udoma I. (as he then was), in Taiwo v. Lawani (1961) ANLR 703 at 708 when he said, inter alia.

20 ‘I have found nothing in this custom which is repugnant to natural justice equity and good conscience, and I hold that is no so repugnant.....’

(unquote)

25 It has also been raised in decisions on Matrimonial Causes and Matters arising from, or connected with, Customary Union. (See Nwafia v. Ububa (1966) NMLR 219). This involved the question whether a man was the eldest son of another (Okpala) a point rather obliquely raised in this appeal. But, to my mind, the matter of repugnancy raised should not be left out, or go unattended. I shall endeavour to do so in this opinion by

30 ,comparing and contrasting two decisions which may tangentially be relevant to the point raised here, but clearly authority for the points they decided.

(a) Edet v. Essien (1932) 11 NLR 47

(b) Nwariba v. President. Ortu District Court (1964) 8 E.N.L.R. 24

35 In (a) above, a woman left her lawful husband by customary marriage, to live with another man by whom she had two children, and who had not

*refunded the husband's bride-price paid on the woman. On a claim by the husband for the children, Carey 1. held, inter alia that –*

*'a native law and custom which permitted such a state of affairs must be overruled ..... as being repugnant to natural justice, equity and good conscience'*

*and this, in spite of the fact that a native court in the same case had ruled to the contrary. In (b), a widow stayed back in the matrimonial home after the death of her husband, and had issue by another man to whom she was not married. It was held that the children belonged to the deceased husband's family, and not to the lover. Though this case finally went to the Owerri High Court on an order of certiorari, perhaps, for our own purposes, it is sufficient to note that, at a co-ordinate level, it was supported in **Amachree v. Goodhead (1923) 4 NLR 101 at 102, where Berkely J. (Acting), in dismissing the application said, quote'***

*'On the other hand, the native law and custom on the subject ~ clearly indicated by the two Native Court decisions and the written admissions and the written admission of the maternal grand-mother' (Unquote)*

It seems to me that the law was clearly stated by Berkely when he said further:

*'The Native Court was dealing with question of the custody of a minor. They had to custody to one party or the other, and the fact that they gave it to the respondent is another indication of what the native law and custom is in the matter.'*

On the pleadings-and evidence led and accepted before the learned trial judge, and in the absence of any evidence led by the appellant to prove any particular Native Law and Custom of Onitsha he is relying on, it seems to me that the sisters who had since been separated from their husband, that is, 1st and 2nd defendant, who had returned to join their family before the death of their brother, have the capacity under Onitshal Ogbeotu custom to marry 3rd defendant as they did, after obtaining the necessary consents. Under customary law therefore, when it becomes necessary to grant custody of the children, since, at bottom line, this is what was involved here, the proper party entitled to them, is the family of the father into which the mother had been married, as in this appeal."

Plaintiffs appeal was dismissed and he has now further appealed to this

Court upon five grounds of appeal two of which read:

“GROUND 3

ERROR IN LAW AND NON DIRECTION

*The learned trial Justices of the Court of Appeal erred in law when they failed to consider adequately or at all, the question as to whether or not the custom in issue is repugnant to natural Justice, Equity and good conscience and contrary to public policy, and therefore unenforceable.*

10 **PARTICULARS**

*1. In trying to deal with the issue of whether or not the custom in issue is repugnant to natural justice, equity and good conscience, and contrary to public policy, the learned trial Justice merely compared and contracted two decided cases namely (1) EDET VS. ESSIEN 1932 11 N.L.R. 47 and (2) NWARIBA VS. PRESIDENT ORLU DISTRICT COURT (1964) 8 E.N.L.R. 24.*

*2. That the learned trial Justices made attempt whatsoever to tie the comparison and contract of the said decided cases to the present case. 3. That the test of repugnancy is a condition and/or a test which every custom must satisfy before its application by any Court.*

GROUND 4

ERROR IN LAW

*The learned trial Justices of the Court of Appeal erred in law in not declaring that the custom, even if held established, is repugnant to natural justice, equity and good conscience and contrary to public policy (and therefore unenforceable).*

PARTICULARS OF ERROR IN LAW

*1. It was clearly in evidence that the deceased, has male children surviving him.*

*2. The family is therefore not faced with the threat of male extinction.*

*3. The purpose for the existence and application of the custom in this particular case can very hardly be appreciated.*

*4. Marriage is a contract which require the consent of both the man and the woman, and where one of them is dead, it becomes impossible to get his consent which is a fundamental requirement in any enforceable marriage.*

*5. The custom is most primitive and will establish uncivilised standards and dangerous precedence if it is allowed to continue in practice.*

*6. For a woman to marry another woman, in the name of a dead and non*

*existent man, amounts invariably to marriage between a woman and a woman, which has been declared by the Supreme Court to be repugnant to by the Supreme Court to be repugnant to natural justice equity and good conscience.*

7. *That the custom if allowed to operate, will be a cost mischievous evasion of the decision of the Supreme Court of the decision of the Supreme Court in the case of Engene Neribe v. Joshua Epu (1976) 3 S.C. 23.*

8. *That to marry a woman for a dead and non-existent man will amount to giving the woman licence to have indiscriminate sexual intercourse especially where children are expected from such absurd union.”* 10

In accordance with the rule of this Court the parties filed and exchanged their respective Briefs of argument. The Plaintiff also filed a Reply Brief. The following five questions are raised in the Appellant’s Brief as calling for determination, to wit:

“*QUESTION 1: At the Court of first instance, on whom was the onus of providing Onitsha native law and custom as it relates to the marriage in issue? Were the High Court and Court of Appeal right in placing the onus on the Plaintiff?* 15

*QUESTION 2: Considering the evidence before the Court of first instance, and the finding of fact made by the trial Judge himself, can it be said that conditions precedent to the contracting of such marriage as the one in issue was fulfilled in this case?* 20

*QUESTION 3: Did the Court of appeal, holding at Enugu, consider properly the question as to whether or not the custom even if held established is repugnant to natural justice equity and good conscience? 25 and indeed is the custom, considering the entire circumstances of this case, not clearly repugnant to natural justice, equity and good conscience and contrary to public policy?*

*QUESTION 4: Are the circumstances of this case entirely the same as that in the case of NWARIBA v. THE PRESIDENT ORLU DISTRICT COURT 30 (1964) 8 E.N.L.R. 24 as to make the above case applicable or distinguishable.’*

*QUESTION 5: Was it proper for the learned trial Judge at the Court of first instance, to use matters which were neither before him as evidence, nor as legal authority in his judgement in this case, only against the Appellant (Plaintiff)? 35*

The Respondents also formulated five issues in their Brief. Questions 3 and

4 and' Issues 3 and 4 are identical. I propose to deal with them first. For if they are resolved in Appellant's favour, that determines the appeal.

**QUESTIONS 3 AND 4:**

The learned trial Judge found that Onitsha custom "permits a sister marrying a wife for her deceased brother." It was contended before him that this custom, if it existed at all, was contrary to public policy and was repugnant to natural justice, equity and good conscience. The learned Judge made no pronouncement on this submission. The contention was again raised in the court below and although, that court adverted its mind to that contention it, however, made no specific finding on it. I think this is wrong. The issue has now been raised again before us.

In the Plaintiff/Appellant's Brief it is argued as follows:

*"The purport of the custom which the respondents are relying upon is that a sister can marry a wife for her dead brother, after his death whether or not the said dead brother has surviving male and female children. It ~ submitted that the custom is absurd, unreasonable, uncivilized, immoral, primitive and purposeless for the following reasons:-*

*1. Marriage is a contract between two parties, who must consent to the said contract or relationship. Since the custom in issue, promotes marriage between a woman, and a dead man, who cannot give consent, the purported marriage cannot be founded in law, equity, and/or commonsense.*

*2. The custom according to the Respondents applies even where the dead brother has surviving male and female children, and where the family is not faced with the threat of male extinction, as in this case. The question is, what purpose is this custom set to achieve. The answer is clearly none for if the custom is not meant to prevent the threat of male and/or female extinction, or any other reasonable purpose, it becomes a purposeless custom, ad I submit that such custom should not be enforced by any Court of law and equity.*

*3. It is further submitted that for a woman, to marry another woman in the name of a dead and non existent man, amounts to marriage between a woman and a woman, which has been declared repugnant by the Supreme Court in the case of EUGENE MER/BE VS. JOSHUA EGWU 19763 S.C.23.*

*4. It is also submitted that to allow a woman to marry another woman in*

*the name of a dead man, who cannot consummate the marriage, amount to euphenism for open prostitution. This is because in such a marriage, children are expected, 'and the woman is given the authority to have indiscriminate sexual intercourse in order to get pregnant: This situation created by this absurd union between the dead and the living, is most unhealthy for the society and no decent society will encourage such unions which invariably promote sexual promiscuity.*

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5. Every custom, is a way of life of a particular group of people. The said way of life must therefore be significant in one way or the other to the life of the people. This custom it is submitted is in no way significant, and serves no reasonable purposes and should therefore be jettisoned. It is also submitted, that such customs should not be encouraged in these modern times when the entire world is fighting the causes and dangers of over population. The custom therefore is at variance with all the Federal Government Policies relating to discipline and social sanity.

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6. In view of the fact that the Respondents (Defendants) at the High Court accepted as pleaded by the Appellant that they could marry for their husbands under Onitsha native law and custom, and in view of the fact that the 1st and 2nd Respondents both had no children for their husbands, it is submitted that it will be more reasonable for them to marry for their husbands and perpetuate their husbands' names, and not for their late brother who already had male and female children, and had no need for more. This would have left the custom with a purpose to serve, that is perpetuating the name and family of a childless man.

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7. It is finally submitted that this custom if allowed to continue, will cause uncivilized standard, promote sexual promiscuity and encourage mischievous women to run out from their husband's homes to cause confusion and disorder in their brother's homes where indeed they ought to have locus whatsoever. See the case of *IHEAGUTA v. J. NWAGWU & ANOR.* vs. *OHAZUR/KE OKONKWO & OTHERS* (1987) 3 NWLR (Part 60) page 314. I urge the Supreme Court to declare this custom repugnant in order to stop a dangerous precedence from being set, and practised in our customary ways of life."

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For the Defendants/Respondents it is submitted -

"On a dispassionate consideration of the repugnancy provision it is clear that there was no intention therein that the native customary law should be arbitrarily discarded. The provision states thus:

S. 14(3) Evidence Act states

‘.....provided that in the case of any custom relied upon in a  
5 judicial proceedings, it shall not be enforced as law if it is contrary to  
public policy and is not in accordance with natural justice, equity and  
good conscience.’

It is clear from the provisions that in considering the above repugnancy  
provision, the court would take into account the nature of customary law.

10 Customary Law is defined thus: in ‘OYEWUNMI V. OGUNESAN (1990)  
3 NWLR (Part 137) at 207 E - F

‘Customary Law is the organic living Law of indigenous people of Nigeria  
regulating their lives and transaction. It is regulatory in that it control the  
lives and transaction of the Community subject to it. It is said that custom  
15 is a mirror of the culture of tile people I would say that customary law goes  
further and imports justice to the lives of those subject to it.

Thus the Court must be very reluctant to set aside or alter the customary  
law of the people on mere whims of an Appellant, for to do so would be  
in effect to alter the culture and mode of life of a people.

20 The Supreme Court has also expressly warned against a too liberal  
application of the repugnancy clause.

‘OYEWUNMI M. OGUNESAN (Supra) at page 196 H to 197 A.

A Court of Appeal is not entitled to shy away from giving effect to ‘custom’  
established before it or in the proceedings from the High Court in the  
25 Appeal before it’ OBASEKI JSC.

Thus the Court would consider:-

- (a) The effect of the non application of the said custom on society  
(good conscience)
- (b) The competing rights of the parties (Equity),
- 30 (c) The needs for survival and existence of society through procrea-  
tion - policy.

The Court of Appeal adequately considered the above and examined same  
by and through consideration of decided legal authorities, i:e. Danmole  
v. Dawodu (1955) 3 FSC 46 at 69 and Taiwo v. Lawani (1961) ANLR 703  
35 and Nwa(ia v. Ububa (1955) NMLR 219,’ Edet v. Essien, (1932) II NLR  
-47,’ Wariba v. President (1964) 4 ENLR 24,’ Amachree v. Good head  
(1923) 4NLR 101 AT 102.



*The Appellant seeks to urge the Supreme Court to declare six children already legitimised by the Onitsha Customary law as fatherless, illegitimate, without any family and without tiny kindred. Such a declaration will be inequitable and against public policy.*” 5

Now section 14(3) of the Evidence Act provides:

*Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them:* 10

*Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.*” 15

Similarly, section 20(1) of the High Court Law, Cap. 61 Laws of Eastern Nigeria (1963) (applicable in this case) also provides:

*“The Court shall observe and enforce the observance of every local custom and shall not deprive any person of the benefit thereof except when any such custom is repugnant to natural justice, equity and good conscience or incompatible, with any law for the time being in force.”* 20

Unless the repugnancy rule laid down in these provisions apply, this Court will have no alternative but to apply the customary law as found by the learned trial Judge in this case.

Let me begin by asking: when is a custom repugnant to natural justice, equity and good conscience? When is it contrary to public policy? In the Shorter Oxford English Dictionary, “repugnant” is defined as “contrary or contradictory (to), inconsistent or incompatible (with), distasteful, or objectionable (to) ..... “ A local custom which is contrary to public policy or inconsistent with natural justice and equity or distasteful to good conscience will be covered by section 14(1) of the Evidence Act and section 20(1) of the High Court Law of Eastern Nigeria. “Good conscience” in this regard, connotes some notions of a moral sense of the right qualities. What is the meaning of “public policy?” The expression is not defined in the Evidence Act nor in the Interpretation Act. Jordan, F.J. 35 attempted a definition of this expression in the Australian case of *Re Jacob Morris (deceased)* (1943) NSWSR 352, 355 when he said:

“The phrase ‘public Policy’ appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest ..... It is well settled that a contract is not enforceable if its enforcement would be opposed to public policy Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is a variable thing. It must fluctuate with the circumstances of the time: Naylor; Benzoni & Co. v. Krainische Industries ‘Gesellschaft (supra). New heads of public policy com~ into being, and old heads undergo modification.”

And in *Egerton v. Brownlow* (Earl) (1853) 4 HL Cas 1, 196; 10ER 359, 437 Lord Truno defined it thus:

“exceptions have been made to the expression of ‘public policy, ‘ and it has been confounded with what may be called political policy; such as whether it’ is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with the foreign States; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.”

These definitions would appear to run counter to the views expressed by Lord Halsbury, L.C, in the House of Lords in *Ianson v. Driefontcin Consolidated Mines, Ltd.*, (1902) A.C. 484 at pp. 491, 492 in these words: “In treating of various branches of the law learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King’s enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge,’ he must find the facts,

*and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe - recognised by the law, which the suggested contract is infringing, or is supposed to infringe."*

But Lord Halsbury's dictum to the effect that "I deny that any Court can invent a new head of public policy was strongly criticized by McCardie, J. in the English case of *Naylor, Benzon and Co. Ltd. vs. Krainische industrie Gerelleschaft* (1918) 1 K.B. 331 at p. 342, 343. The learned Judge observed:

*"The question of public policy may well give rise to a difference of judicial opinion. public policy, it was said by Burrough J. in RicharrJson v. Mellish (1824) 2 Bing, 229, 252., 'is a very unruly horse, and when once you get astride it you never, know where it will carry you.' But the Courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In Janson v. Driefontein Consolidated Mines (1902) A.C. 484,491 Lord Halsbury L.C. said, 'I deny that any Court can invent a new head of public policy.' I very respectfully doubt if this dictum be consistent with the history of our law or with many modern decisions. In Wilson v. Carnley (108) 1 KB. 729 the Court of Appeal held that a promise of marriage made by a man who to the knowledge of the promises was at the time of making the promise married is void as being against public policy. This decision marked a new application or head of public policy. In Neville v. Dominion of Canada News Co. (1915) 3 KB. 556 the Court of Appeal held, affirming Atkin J., that an agreement by a journalist not to comment upon the plaintiff's company or its directors or business was void-as against public policy. In Horwood v. Millar's Timber and Trading Co. (1917) 1 I.K.B. 305 the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance a new head of public policy. The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. Tgus vview us exemplified by the decisions which were discussed by the House of Lords in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. (1894) A.C. 535. The general economic considerations to which the Courts will have regard were indicated by Lord Parker in delivering the judgment of the Privy Council ill Attorney-General of the Commonwealth of Australia v.*

*Adelaide Steamship Co.* (1913) A.C. 781, 809, 810, 'see also the judgment of Lord Haldane in *North- Western Salt Co. v. Electrolytic Alkali Co.* (1914) A.C. 461, 469, 471. The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal C.J. in *Homer v. Graves* (1831) 7 Bing. 735, 743, "Whatever is injurious to the interests of the public is void, on the grounds of public policy". Now on looking at the famous judgment of Lord Stowell in *The Hoop* (1799) I.C. Rob. 196 it will be seen that the prohibition of intercourse with enemies is based in his view on public policy. I think, too, that the decision in *Esposito v. Bowden* 7 E. & B. 763 substantially rests on the same basis. Upon turning to the judgment of Lord Davey in *Janson v. Drie(ontein Consolidated Mines* (1902) A.C. 484, 499 it will be seen that he states expressly that the rule first established in *The Hoop* (*supra*) rests "on distinct grounds of public policy." Hence I see no ground for omitting to consider the question of public policy in respect of a suspension clause contained in an ante-war contract with one who is now an enemy, even though public policy sometimes be an unsafe ground for decisions: see per Lord Davey in *Jallson's case* (1902) A.C. 500 Indeed, in the passage from Lord Halsbury's opinion ill *Janson's* Case Ibid. 491 already referred to, that great lawyer expressly refers to the rule against 'assisting the King's enemies' as a recognized head of public policy."

This Latter case was cited with approval by Jordan CJ in Re Jacob *Morris* (deceased) (*supra*). I agree with McCardie, J. in his criticism of Lord Halsbury's view. Though the correctness of the decision in *JANSON* is undoubted, Lord Halsbury seemed to have been too restrictive in his application of the rule against public policy unless, of course, his observation is confined to the particular head of public policy being canvassed in that case. The facts in *Janson* are simple enough - The respondents, a company registered under the law of the South African Republic, in August, 1899, insured, with the appellant and other underwriters, gold against (inter alia) 'arrests, restraints, and detainments of all kings, princes and people,' during its transit from the Gold Mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the Government of the South African Republic. On October 11 at 5p.m. a state of war began between the British Government and the Government of the

Republic. At the time of seizure war was admitted to be imminent.

The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside the Republic and were not subjects thereof.

The respondent company having brought an action against the appellant upon the policy, it was agreed between the parties that the action should be treated as if brought at the conclusion of the war, and that the Blue Book might be referred to for evidence as to the facts. The action was tried without a jury before Matthew J., who held that the appellant was liable, (1900) 20.B. 339. This decision was affirmed by the Court of Appeal (A.L. Smith M.R. and Romer L.J., Vaughan Williams L.J. dissenting) (1901) 2K.B. 419: On appeal to the House of Lords, Lord Halsbury, L.C. in his speech observed:

*"All the judges, with the exception of Vaughan Williams L.J., have held that the plaintiffs are entitled to recover upon the policy; and if I rightly understand the reasoning of the learned Lord Justice, he thinks the policy was in its inception illegal, and would have been equally illegal even if no war had intervened. He does indeed say that there could have been no claim if war had not occurred; but he is mistaken, since the assumed imminence of the war and the seizure by the Transvaal Government might have occurred even if war had finally been averted.*

*The difficulty I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the State, or what public injury, is supposed by him to be involved,' but at all events, in whatever sense the learned judge Uses this phrase, it is upon this general ground alone that he decides against the plaintiffs.*

*Now, as I have said, I understand the judgement of Vaughan Williams L.J. is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest, injurious to the repugnant to the interests of the State, and no doubt there are equivalent phrases to be found in many judgments where their application is expounded,' but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used; and how and on what principles of law the policy in question was unlawful.*

*I do not think that the phrase 'against public policy' is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a*

principle were admitted, I should very much concur with what Sergeant Marshall said in the first edition of his work on marine insurance a century ago: ‘To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, O’” suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine -spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgements of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart tomorrow from the precedent he has himself established today, or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate.’

But I do not think the law of England does leave the matter so much at large as seems to be assumed.”

Then follows the passage that contains the dictum that came under McCardie, J’s criticism. I think Lord Halsbury was right if his dictum is confined to the particular facts of that case. It is not enough to contend that a transaction or custom is against public policy, one must go further to show in what respect the transaction or custom is against public policy. The rule of public policy involved in JANSON was laid down by Lord Ellenborough in Brandon v. Curling (1803) 4 East 417; and explained by Willes J in Esposido v. Bowden, 7 E & B 779; 119 E.R. 1430, 1430, 1436 in these words:

“It is ‘now fully established that, the presumed object of war being as much to cripple the enemy’s commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy’s country, and that such intercourse, except with the licence of the Crown,’ is illegal.”

It was the attempt to extend the limit of this rule in JANSON that was rejected by the House of Lords. Lord Davey, in his speech observed at page 500 of the Report:

*“Your Lordships will have observed that, in each of the rules on this subject which I have endeavoured to formulate, the actual commencement of hostilities is made the time when and the occasion on which the rule comes into operation. The learned counsel for the appellant has endeavoured to persuade your Lordships to extend their operation to a period when the relations between two Governments are strained and war is imminent, though the peace has not been broken and negotiations are still continued, on the grounds that the same principles of public policy are as applicable to such a state of things as to a time of actual hostility. In the case before us he says that the seizure of the gold by the Government of the South African Republic was in contemplation of and with a view to the eventuality of war. The seizure of the gold, however, was not in itself an act of hostility against this country.*

*My Lords, I am not disposed to agree to such an extension of the law, which appears to me to be unsupported by any authority. Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline. On the one hand; such an extension of the law as your Lordships are invited to lay down would certainly lead to interference with the lawful contracts and commercial pursuits of the King’s subjects. It might conceivably precipitate a state of war which it was the object of statesmen to avert.”*

The speeches of the other noble Lords were to the same effect.

The meaning of the phrase is clearly not free from difficulties. 25

Burrough, J said as much in Richardson v. Mellish (1824), 2 Bing 229, 252, 130 ER 294, 303, a case cited by McCardie, J in Naylor, Benzon & Co. Ltd. (supra). Burrough, J. observed:

*“I, for one, protest, as my Lord has done, against arguing too strongly upon public policy:- it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*

AND in In the Estate of Hall, Hall vs. Knight & Baxter (1914) P. 1, 5 Cozens-Hardy, M.R. opined: 35

*“You do not look for public policy, in the sense in which that expression is used, in an Act of Parliament. It is something which is really part of the common law of the land and does not depend upon statute.”*

Swinfen Eady, J advised caution in its application. He said in Re Beard,

Reversionary & General Securities Co. Ltd. vs. Hall. Re Beard. Beard Hall  
(1908) 1 Ch. 383 at pp. 386- 388:

“When questions arise as to conditions or provisions being void  
as being against the public good or against public policy, great caution  
is necessary in considering them; at different times very different views  
have been entertained as to what is injurious to the public. Thus, in  
Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. (1894)A.C  
535, 564, Lord Macnaghten stated that in the age of Queen Elizabeth all  
restraints of trade, whatever they were, general or partial, were though to  
be contrary to public policy, and therefore void. But since that time the  
rule had been relaxed so far as the exigencies of trade for the time being  
required. If, however, it be clearly established that the condition is against  
public policy, it is certainly void.

In Richardson v. Mellish (1824) 2 Bing, 229, 242, 252 Best C.J.  
held that, in considering whether an agreement was illegal as being  
against public policy, if the question were a doubtful matter of policy the  
plaintiff would not be prevented from recovering, as doubtful questions  
of policy must be settled by the Legislature; but that if it be clearly and  
unquestionably established that an agreement is contrary to public policy,  
a plaintiff cannot recover upon it. Burrough J. took the same view,  
protesting, however, against arguing too strongly upon public policy -  
saying that it is a very unruly horse, and when once you get astride it you  
never know where it will carry you.

In my opinion, however, there can be few, if any, provisions more  
against the public good and the welfare of the State the one tending to  
deter persons from entering the naval or! military services of the country.  
Such a provision strikes at the very security of the State, which must  
depend for its protection against external enemies on the armed forces of  
the Crown,. both naval and military; and the law looks, not to the  
probability of public mischief occurring in the particular instance, but to  
the general tendency of the disposition. If conditions imposed be really  
and in principle against the public good, and clearly and directly opposed  
to the public welfare, they are certainly void. ‘Salus reipublicae s u p r  
e m a l e x

It IS manifest that any condition divesting property on a devisee or legatee  
becoming a member of those forces which Parliament considers necessary  
for the safety of the kingdom has a tendency to deter person from entering



*those forces, and is, therefore, against the welfare of, and injurious to, the community, and absolutely void."*

I agree with the view of McCardie, J that public policy is a variable thing fluctuating with the circumstances of the time. A conduct that might be acceptable a hundred years ago may be heresy these days and vice versa. The notion of public policy ought to reflect the change. 5

That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the Court. But this must objectively relate to contemporary modes, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community which we share. We must not forget that we are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions; experiences and perceptions of the people. After all, custom is not static - see Oyewunmi Ogunsan (1990) 2 NWLR 182 15

I shall proceed to consider the custom under review in this case in the light of the views expressed by the eminent Judges above. There have been cases in which customary law has been challenged as being repugnant to natural justice, equity and good conscience. In Danmole & Ors. v. Dawodu & Ors.! 3 FSC 46; 1958 NSCC4, the Yoruba custom of distribution of the estate of an intestate by the IDI-IGI system whereby the estate is divided into as many parts as there are wives of the intestate having children for him regardless of the number of children by each wife as against the ORI-OJORI system whereby the estate is divided into as many parts as there are children, was held by the Federal Supreme Court not to be repugnant to natural justice, equity and good conscience. The case was followed in Taiwo v. Lawani & Anor. (1961) All NLR 733 (Reprint). 25

In Amachree v. Chief Inko Taria alias Goodhead 4 NLR 101, a case decided in 1922, the question for decision was whether an illegitimate child, born after the death of her mother's husband, becomes a member of the family into which her mother had married; or whether she becomes a member of the family to which her mother belonged by birth. The natural father belonged to third family which advanced no claim. 35

A judgment of the Native Court in 1907 assigned the child to the family into which the mother had married, contingent upon proof that the marriage formalities had been complied with. A subsequent judgment of

the Native Court in 1922 affirmed this decision and decreed /the custody of the minor accordingly.

5 The main issue before the Court was whether these two decisions were in accordance with natural law and humanity in as much as the claim was that of the family by blood as against that of the family by marriage.

Held, that the decision of the Native Court was in accordance with native law and custom, and that it should therefore be upheld. Berkeley, Ag. J in his judgment observed at page 102:

10 *“Finally Counsel submitted that it was repugnant to natural justice to leave Child in the custody of the house into which its mother had married, when the child’s own blood relations were anxious to have its custody. I certainly think it is a pity that some such arrangement could not have been arrived at amicably! but I just as certainly cannot uphold the contention*  
15 *that the existing arrangement is repugnant either to natural law or humanity. On the other hand the native law and custom on the subject is clearly indicated by the two Native Court decisions and the written admission of the maternal grandmother.”*

It is not clear from the Report what the customary law upheld in that case was. But what is clear is that the child’s natural father advanced  
20 no claim on the child. In *Ekpenyong Edet v. Nyong Essien* 11 NLR 47 (decided in 1932), however, where the natural father was a claimant, the Court declined to uphold a custom that would have given the children to their mother’s husband. In that case, X the mother of the  
25 children was married to Y. She left Y without refunding the dowry paid on her and subsequently had children for Z. Y claimed the children as his as the marriage between him and X was still subsisting under customary law. His claim failed. Carey, J. in his judgment at page 48 of the Report put the appellant’s case thus:

30 *“Having conformed to the requirements of native law and custom whereby I became the husband of Inyang Edet I continue to be her husband and am entitled to any children she may bear (to whomsoever) until the money I paid as dowry for her is refunded to me. She cannot contract another legal marriage until the dowry is refunded to me. “*  
35

The learned Judge then ruled:

*“but even assuming that the native law and custom as alleged by the appellant had been definitely established I am inclined to think it should properly have been over-ruled in this case as being repugnant*

*to natural justice, equity and good conscience having regard to the circumstances.*

I think these cases were rightly decided.

Edet v. Essien was distinguished in Godfrey Nwaribe v. President, Registrar, Eastern Oru, 8 ENLR 24, a certiorari case decided in 1964 by Egbuna, J. I like to believe that that case was decided on its own peculiar facts. But if the case is understood to uphold the local custom of Otulu whereby a woman whose husband is dead and cannot be married by any of the relatives of the deceased but the children born after the death of the deceased are the children of the deceased, I would say it was wrongly decided. 10

In In Re Kweku Damphey, Kodieh v. Nana Affram, 1 WACA 12, on the death of one Kweku Damphey, the plaintiff and defendant each claimed to be entitled to administer the estate. The plaintiff based 'his claim on relationship to defendant on the fact that deceased was an Ahinkwa who had been 'dashed' to his stool. The Circuit of Ashanti held that, according to native custom, the defendant was entitled to administer the estate, as deceased has been his Ahinkwa. 15

On appeal it was held that defendant's claim was really based on the fact that the deceased has been 'dashed' to his stool, that this native custom constituted slavery and was therefore repugnant to justice, equity and good conscience. The West African Court of Appeal per Howes, J held at page 14 of the Report: 20

*"The Defendant's claim, being based upon a native custom which I consider amounts to slavery, is in my opinion repugnant to justice, equity and good conscience, and cannot be recognised by this court."* 25

But in Chief Ebiassah v. Tweiku Ababio, 12 WACA 106, the Court held, quite rightly, in my view, that a local custom under which a mortgage in possession could "be ejected as soon as the mortgage debt was paid was not repugnant to natural justice and equity." 30

I have highlighted above examples of local customs that have either been upheld or struck down as being repugnant to natural justice, equity and good conscience. I now turn attention to the custom of Onitsha under consideration in the proceedings on hand. In my respectful view, a custom that allows a woman to be 'married' to a *deceased* man cannot be said to be in good conscience or accords with public policy. As this Court, per Madarika, JSC, put it in Meribe v. Egwu (1976) 3 se. 23, 32-33: 35

*"In every system of jurisprudence known to us, one of the*

*essential requirements for a valid marriage is that it must be the union of a man, and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society of a ‘woman to woman’ marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.”*

The institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of the 3rd defendant to him. To claim further that the children the 3rd defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement to promiscuity. It cannot be contested that Okonkwo (deceased) could not be the natural father of these children. Yet 1st and 2nd Defendants would want to integrate them into his family. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends-against morality is contrary to public policy and repugnant to good conscience. It is in the interest of 3rd Defendant’s children to let them know who their true fathers are (were) and not to allow them to live for the rest of their lives under the myth that they are the children of a man who had died many decades before they were born.

The conclusion I reach, therefore, is that the custom as found by the learned trial Judge is contrary to public policy and it is repugnant to natural justice, equity and good conscience. Effect should not be given to it. This conclusion, in my view, is enough to dispose of this appeal.

My learned brother Uwais, JSC has in his lead judgment quoted from a paper delivered by Balonwu C.J in 1974 at a Workshop on African Indigenous Laws held in Enugu, the report of which is now bound in a book titled “African Indigenous Laws”. In his paper Balonwu CJ had said:

*“It is a fair statement to say that, from the time Sir Fredrick Lugard promulgated the Supreme Court Proclamation No. 6 of 1900, and relentlessly pursued the British Colonial Policy of Indirect Rule, the British-established Courts have, to this day continued to administer the customary laws of our people in language, which has given their exposition of the subject the utmost clarity and permanence. Sometime, they have administered strickt and undiluted customary law; at other*

times, they have refused to allow themselves to be used as instrument 'for observing or enforcing the observance of customary law, which is repugnant or incompatible with any local enactment, or which conflicts with rules of technical equity, or where substantial injustice would result, if the customary law in question were to be applied. But unlike the position where a legislative provision exclude the application of customary laws, which are 'in compatible either directly or by necessary implication with any valid local enactment a declaration by the Courts, that a customary law is repugnant to natural justice, equity and good conscience, does not necessarily imply that such customary law is illegal, for sometimes the practice goes on publicly, after the judges decision. In such a case all that the Courts can legitimately do, and have done, is to refuse to enforce the customary law in question. In Eshugbayi Eleko v. Government of Nigeria (supra) the Privy Council had ruled that if a custom is barbarous in character, it must be rejected whole and entire as being repugnant to natural justice, equity and good conscience, and that the Court could not itself transform a harsh and barbarous custom into a mild one."

(underlining mine)

Of course, where the courts have struck down a custom as being repugnant to natural justice, equity and good conscience or contrary to public policy, the position is that that custom no longer has any force of law and no effect will be given to it where any party relies on it in the enforcement of its rights. It cannot, therefore, in my humble view, be right to say that:

".....a declaration by the courts, that a customary law is repugnant to natural justice equity and good conscience, does not necessarily imply that such customary law is illegal, for sometimes the practice goes on, publicly, after the judges' decision."

The striking down of a custom on the ground of repugnancy and/or inconsistency with public policy has the same legal effect as the striking down of such a custom on the ground of incompatibility with an enactment. And no law-abiding society will perpetuate such a custom thereafter.

Finally, I, too, like my learned brother Uwais, JSC, allow this appeal and set aside the judgments of the two Courts below. I enter judgment for the Plaintiff in terms of his claims (a) and (b) in paragraph 160 of the Statement of Claim and grant the declarations sought therein. For the reason given by my learned brother in his lead judgment that 3rd

defendant's children were not joined in the action, I too refuse claims (c) and (d) and the alternative claim. As the proper defendants were not before the court, these claims are struck out.

I abide by the order for costs made in the lead judgment of my  
5 learned brother.

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### MOHAMMED JSC

10 I too will allow this appeal and declare the Onitsha native law and custom, whereby a sister could marry another woman as a wife for her dead brother, repugnant to natural justice, equity and good conscience. My learned brother, Uwais, JSC., has covered all the salient issues for the determination of this appeal, in the lead judgement, whose draft he kindly  
15 permitted me to read. I only wish to proffer a comment on the procedure 'leading to declaration of a custom repugnant to natural justice.

Custom is a particular way of behaviour which, because it has been long established among members of a social group or tribe, can develop and acquire a force of law or right. For a custom to have the force  
20 of law it must be approved by consent of those who follow it. Blackstone once said, "our common law depends upon custom introduced by the voluntary consent of the people."

Roman jurists recognise the force of custom and held that customs of long standing are not unreasonably observed as law. They  
25 went further and said, "*Ex non scripto jus venit, quod usus comprobavit*" - The unwritten law is that which usage has approved - The commentary went further and said "For ancient customs, when approved by consent of those who follow them are like statutes."

A custom which is not linked with any crime and has not been  
30 declared repugnant through the action of any interested party who has been affected by it, will continue to have legal force being a manifestation of the inner consciousness of those who give their consent to its application. However, once a custom is challenged in a court of law by anyone who is interested or adversely affected by its application and a call  
35 has been made to examine whether it offends natural justice, the courts would pursue such complaint diligently in order to establish whether the custom is inconsistent with the principles of sound reason and good conscience.

The learned counsel for the respondent in his argument against toe call to declare the Onitsha custom repugnant, in this appeal, referred to the case of *Oyewunmi v. Ogunesan* (1990) 3 NWLR. (Part 137) 207 and submitted that the court must be very reluctant to set aside or alter the customary law of the people on mere whims of an appellant, for to do so would be in effect to alter the culture and mode of life of a people. The learned counsel for the appellant, in reply to the above submission, argued that the question of repugnancy is an issue of law and that it is mandatory of any court to subject any custom to the following three tests:

- (i) That it is not repugnant to natural justice, equity and good conscience.
- (ii) That it is not contrary to public policy.
- (iii) That it is not incompatible with any existing law.

The development of the institution of marriage is a matter of historical interest. It originated in the form of irregular unions. There were marital unions through capture, slavery and by purchase. Many of such primitive customs have gradually given way to the acceptable form of marriage by agreement. What is pertinent and most natural is that in marriage there is cohabitation of man and woman, and the marriage ends whenever one' of the spouses passes away.

In the case under consideration the most unnatural concept of marriage was transacted by two sisters of a deceased brother, who died thirty years before the solemnisation of the marriage. The two sisters, 1st and 2nd respondents, followed a primitive Onitsha custom and married the 3rd respondent for their deceased brother. The marriage is therefore between a woman and woman, a custom which has been declared repugnant by this court in the case of *Eugene Meribe v. Joshua EM* (1976) 3 S.C. 23. In that case the facts reveal a custom less distasteful than the present case. In his evidence in Meribe's case, Chief J.O. Ekwuruke (PW. 4) said:

*"It is the custom ill our place that if a woman has no issue she cart many another woman for her husband; any issue from the said married woman would be regarded as all issue from the woman who married her for the purpose of representation in respect of estates and inheritance."*

There is therefore, in the above case, cohabitation between the woman married and the husband of the barren woman. This is the system of marriage which this court declared repugnant. If the facts of the instant

case are analysed, it will disclose a wired and unnatural form of marriage. A dead man cannot give his consent, which is an essential 'element' of marriage, nor could he consummate with any woman purported to have been married to him. The 3rd respondent, Rose, cannot therefore by any stretch of imagination be united in matrimony with Mr. Okonkwo who died more than thirty years before the said purported marriage. I therefore agree with my Lord Uwais, JSC., that the custom is repugnant to natural justice, equity and good conscience.

For the above reasons and the fuller reasons, in the lead judgment, I declare that the Onitsha native law and custom which permitted the 1st and 2nd respondent to marry the 3rd respondent for their late brother, Nnanyelugo Nnebechi Okonkwo, is repugnant to natural justice, equity and good conscience. I also declare that the 3rd respondent is not the wife of late Nnanyelugo Nnebechi Okonkwo, I will refuse to grant claims (c) and (d) because the 3rd respondents's children have not been joined to this suit. I abide by all the consequential orders made in the lead judgment.

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**ADIO JSC**

I have had the privilege of reading, in advance, the judgement just delivered by my learned brother, Uwais, J.S.C. and I agree entirely with it. The appeal succeeds and I too allow it. I abide by the consequential orders, including the order for costs.