CIV/A/2/79

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

TSOEU-EA-THABA DOTI Appellant

v

KORI SEFEANE Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 4th day of March 1982

This is an appeal from the Judgment of the Judicial Commissioner who dismissed the appellant's (and original defendant's) appeal from the Judgment of the Salang Central Court which dismissed the appellant's appeal from the Thabang Local Court which gave Judgment for the respondent(and original plaintiff) for 6 heads of cattle (or Maloti 360) for abduction of respondent's daughter by the son of the appellant.

The Judicial Commissioner gave the appellant leave to appeal on the ground only whether it was necessary for the respondent to have called his daughter Kefuoe Sefeane to testify. It should be noted that the son of the appellant Ntsieng Doti was not called to testify either.

What appears to have happened was that one day probably in early 1976 the appellant's wife (Ma-Davida) found the girl Kefuoe (who was then a pupil at Molumong school) in her home. The appellant himself was at work. Her son Ntsieng must have told her something of his intentions towards the girl Kefuoe. On the second or third day the girl Kefuoe was sent by Ma-Davida packing to her parent's house in company of two women. The respondent himself was not at home but at work; only his wife was present. When the respondent arrived or was called home, it does not matter which, he complained to his chief and then issued a summons against the appellant.

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I shall for convenience refer to the parties as plaintiff and defendant.

The witnesses for the plaintiff were one of the women who accompanied Kefuoe back to her parent's home Mathakane Matjeane with Ma-Davida's message, and her own mother Makefuoe.

The defendant called no witnesses but said that he was just confronted with the summons. He added that his wife Ma-Davida was "wicked" in telling the two women that his son Ntsieng abducted the girl to his home and that if he, the plaintiff, had made attempts to discuss the affair with him, he would have told him that he, the defendant was not responsible for his son's delicts because he was emancipated by mutual agreement. He produced a document, Exhibit A showing that the son aged 26 (it was common cause he was unmarried) will take responsibility for his own affairs. This document is undated and does not bear Ntsieng's signature and the opinion of the trial Court was that abduction had been proved and cast doubts on the genuiness of the document and held, so it seems, that emancipation by a family decision or agreement is invalid by Sotho Law and Custom.

The Central Court dismissed the appeal almost summarily. The Judicial Commissioner thought that abduction was proved and was admitted by the defendant by implication. The only issue was whether defendant had been emancipated. The Judicial Commissioner thought he was not thus supporting the decision of the Local Court.

Abduction(Chobeliso) in Sotho Law and Custom is the removal of a minor child or female from the control of the parents or guardians without their consent. According to Duncan (Sotho Laws and Customs p.107) it need not "always contain a sexual element". According to Poulter(Family Law and Litigation in Basotho Society p. 109) "whether the girl has been seduced or impregnated is irrelevant to the question whether an abduction per se had taken place". According to Palmer (The Roman-Dutch and Sesotho Law of Delict p. 158) "sexual relations are not a necessary element of the delict".

It follows from this that the girl's evidence was not necessary to establish the abduction which I think was established on balance of probabilities.

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Where all parties to the action are Basothos of the rural or the unsophisticated class there is a presumption in Sotho Law and Custom that a parent is liable for his son's delicts if he is unmarried even though the son is over the age of 21. That presumption can be rebutted. The onus is on the one who asserts it had taken place. In the case of confirmed bachelors of 40 years or older making their own living and spending their earnings as they please without effecting regular remittances home to their parents or guardians or support of their minor brothers and sisters may be sufficient to rebut the presumption. The presumption of liability must be disproved by facts given on oath not by informal unauthenticated undated pieces of paper. In Boloko v. Lehlaka 1974-1975 LLR p. 268 it was held that a step mother (there was a heir who could not be found) is not liable in delict for a 40 years old unmarried step son earning (and spending) as he pleased living permanently in Johannesburg, with only spasmodic visits to Lesotho during one of which he seduced a girl. In that case the step mother was held liable in contract since she had voluntarily undertaken to pay the compensation but we have no contract here.

I agree with the Judicial Commissioner that the girl need not testify and abduction may be proved by other evidence but her failure to do so must be taken into consideration in the assessment of compensation. The compensation under Sotho Law and Custom is 6 heads of cattle. (Part II Laws of Lerotholi s. 4(1). The maximum should not be awarded automatically in my view. Each case must depend on its own circumstances. The girl was away from home or school for only two days. In those two days she did not tell us if there was force, assaults or any intercourse or loss of virginity that would reduce her marriage prospects. The object of the law is to compensate the father not to enrich him. Here there is no evidence of anything having been done to the girl.

In my opinion the facts of the case do not warrant the award of more than one beast (or M60). The Court does appreciate that if the defendant choses to pay in cash rather than in specie he would be better off as the value of cattle has increased substantially since the action was first filed in 1976.

If the defendant pays in cash he will have to add to the

M60 12% interest from the date of the Central Court's Judgment (the earlier date is not available) that is, from 28th August 1976. The interest will be calculated on a compounded basis until final payment.

The appeal is allowed to the extent above indicated.

The defendant(appellant) will pay only one-sixth of the plaintiff's(respondent's) costs.

CHIEF JUSTICE
4th March, 1982

For Appellant: Adv.Monapathi
For Respondent: Adv.G.N. Mofolo