

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOTLELENG MATSINYANE Appellant

v

MOSALA MATSINYANE Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice F.X. Rooney
on the 1st day of November, 1982.

Mr. Moorosi, Legal Aid Counsel for the Appellant
Respondent in Person.

The appellant has two sisters, 'Mantai and 'Mafusi. In November 1978, these two ladies assaulted the respondent's wife and injured her. On the 1st February, 1979 in the Matsieng Local Court, the respondent claimed M300 compensation.

The appellant did not deny that the assault had taken place. Instead, he relied upon an allegation that his sisters were married women whose husbands were responsible for their delicts. The local court decided that the appellant should pay compensation of M130 on account of the unlawful actions of 'Mafusi. In regard to 'Mantai the court held that she was married.

The appellant appealed to the Matsieng Central Court and there was no cross-appeal. The appellant was successful as the central court was satisfied that 'Mafusi was also married.

The respondent took the matter to the Court of the Judicial Commissioner. The learned Commissioner decided that 'Mafusi is not yet the legal wife of her purported husband. He made an order setting aside the judgment of the central court and reinstating that of the

2/ Matsieng Local Court.....

with costs in all courts. The appellant applied for leave to appeal against the judgment of the Judicial Commissioner and this was granted on the 25th May, 1981.

It is likely that the parties to this dispute are members of the same family, but, I do not know their exact relationship. In her evidence, the respondent's wife 'Makarabo told the Court that she never knew that 'Mafusi had a husband. She went on

"I have never heard that her husband was present ever since she started staying at this place".

That is the only evidence given by the present respondent in support of his contention that 'Mafusi was still under her brother's tutelage.

The present appellant told the local court that he had no responsibility for the actions of 'Mafusi as she was married in the village of Motanyane to Letsema Lets'aba the son of Lefu Lets'aba. He said that by arrangement with her husband, 'Mafusi is still living at her maiden home. She was brought there because she was very ill. He said that he expected her husband to come and take her away at any time.

He produced a bewys which he said proved that bohali had been paid. This document which is dated the 22nd September, 1971 certified that Lefu Lets'aba was in lawful possession of two donkeys which he was authorised to sell. It is stated that the donkeys were "bohali to Lefata Matsinyane of Neo Pita". The appellant told the Court that 'Mafusi's husband was away at work. He called his witness, 'Mafusi herself and she said that she was married to Letsema. She confirmed that she was staying with her brother's family by agreement with her husband. She said that her husband said that he would take her away as soon as he had been allocated a site upon which he could build.

Cross-examined, 'Mafusi said that her husband was at the mines and that she was using her maiden surname because she was staying at her own home. She agreed that

3/ she is bound

she is bound to inform her husband about her misdeeds and that he should be the person to answer for them. She has stayed with her brother for two years.

A witness Mojalefa Matsinyane said that he knew about 'Mafusi's marriage, but, he believed that she was under the responsibility of her husband.

I take the view that the proper resolution of this case depends to a large extent upon the onus of proof. In answer to the allegation, the appellant set up a special defence that he was not responsible for the acts of his sister by reason of her marriage. For his defence to be upheld the appellant was required to satisfy the court that he was entitled to succeed on it (See Pillay v. Krishna 1946 A.D. 946) and in particular the words of Davis A.J.A. at 951 and 952.

Although the parties may be related, 'Mafusi's marital status is a fact more likely to be within the knowledge of her brother as the person otherwise responsible for her. It was easier for the appellant to establish the existence of the marriage than for the respondent to establish the negative proposition that 'Mafusi was still unmarried. I am satisfied that the appellant was under a duty to prove on the balance of probabilities that his sister was married to the person he alleged was her husband.

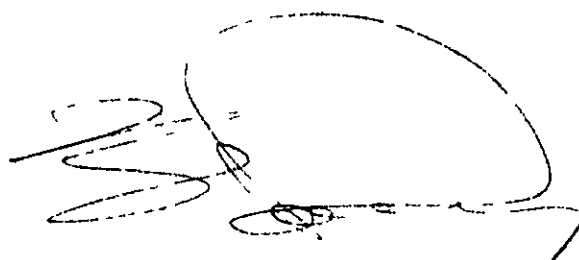
The best evidence to support the marriage would have been the testimony of the alleged husband. His absence was not satisfactorily explained. Although it is said that he was working in the mines in South Africa, no application for a postponement in order that he could come forward to give evidence and accept his responsibility in the matter was made in the local court. 'Mafusi had an interest in protecting her brother upon whom she apparently now relies for her support. The reference on the bewys to the bohali is not in itself persuasive evidence, as the chief who signed it was not called to explain it. The reference could have been a mistaken one. On the other hand 'Mafusi is living at her brother's house and is using

4/ her maiden name.

her maiden name. That has been in that situation for two years.

I take the view that the appellant did not succeed in discharging the onus upon him to establish that he was not responsible for his sister 'Mafusi. The decision of the Matsieng Local Court and the Judicial Commissioner are correct.

I direct that this appeal be dismissed with costs.

A handwritten signature in black ink, appearing to read 'F.X. ROONEY', written over a large, faint circular stamp or watermark.

F.X. ROONEY.
JUDGE

1st November, 1982.