

IN THE HIGH COURT OF LESOTHO

In the Appeal of

ZAKARIA MATOOANE Appellant

v

TEBOHO PHILLIP Respondent

J U D G M E N T

Delivered by the Hon. the Chief Justice Mr. Justice
T.S. Cotran on the 11th day of April 1984

This is an appeal from the judgment of the Judicial Commissioner (G. Sennane, Esq.) who allowed the appeal of the respondent Teboho Phillip against the judgment of the President of Ramokoatsi Central Court (L.J. Lekoatsoa, Esq) who had dismissed the appeal of the respondent from a judgment of the President of Ramokoatsi Local Court (J.T. Rafiri, Esq.) who had awarded damages in favour of the appellant, the original plaintiff, against the respondent, the original defendant

For simplicity and convenience I shall refer to the parties in this appeal as plaintiff and defendant.

The plaintiff claimed that he and the defendant had a dispute about an enclosure which the plaintiff (and apparently one other person at least) used to kraal his cattle. The defendant maintained that the yard where the enclosure is situate belonged to his family and that the plaintiff should remove his animals. He (defendant) maintained that his own animals were kraaled in a place full of dung (moraha) and he wanted the plaintiff to remove his animals. The plaintiff refused.

The plaintiff's evidence was to the effect that one August

/evening in 1979,

evening in 1979, in early dusk, when in the company of one Tsiu (P.W.1), the defendant threatened the plaintiff that he would kill his animals if they were not removed. The defendant followed this threat by another one directed at one Nloko Nthako (P.W.2) who also used to kraal his animals in the same enclosure as the plaintiff.

The plaintiff reported the threat to his Chief Poleliso Mahao (P.W.3) on the following morning. The Chief unfortunately was busy elsewhere on that day but he promised the plaintiff to take action on the day following by arranging a confrontation between him and the defendant.

On the morning of the day that the matter was to be attended to by the Chief the plaintiff's five heads of cattle were found speared to death.

The defendant denied that he was the one who stabbed the cattle to death. There was no evidence that anyone saw him with his own eyes doing the spearing. The defendant's case was that if no one saw him, he could not be responsible. The defendant's wife gave evidence that he "never disappeared" from her side because they lived together.

The President at the trial Court, in a careful judgment, reviewed the evidence of all the witnesses who appeared before him. He concluded

"The Court had to settle down to weigh the evidence adduced before delivering judgment and it finds that plaintiff's evidence outweighs very much that of respondent more so when it considered the two idioms

1. A man may be trapped by his tongue.
2. An ox is trapped by the horns

The Court is satisfied by all the evidence adduced by plaintiff that in their talks with respondent and P.W.2 Ntoko, respondent's intention was that

/they should

they should remove their cattle from the yard which he alleged belonged to his family. In August, 1979 and overnight he had speared all the cattle in the kraal and they all died and plaintiff sued him for five (5) of his. For these reasons plaintiff's complaint is accepted. Respondent is ordered by judgment to compensate plaintiff with five (5) head of cattle to replace those he has killed in conformity with evidence adduced and happenings before this Court."

In an appeal to the Central Court the President again reviewed the evidence. He concluded

"The law of evidence agrees that one may be sentenced on circumstantial evidence, even in a criminal case, if the evidence is satisfactory. In this case I do not see how I could say that the evidence of plaintiff's side is not satisfactory in the lower Court. I find that appellant has been very lucky that the terms of Laws of Lerotholi Part II Section 16 were not invoked where it says where a person kills another's animal he should pay it and pay another one in addition because in this case respondent's cattle are disputed as five as they were killed being five."

The learned Judicial Commissioner disagreed, and allowing the appeal, reasoned thus

"In my opinion, the fact that the defendant was heard to say, "I shall eat those cattle and then defeat the owners in a Court case" cannot per se be interpreted to mean the defendant alleged he would kill the cattle belonging to the plaintiff. On the other hand, someone with a grudge against the plaintiff might have heard defendant utter the alleged threatening statement and during the night in question he went and killed the plaintiff's cattle so that it could be inferred that it was the defendant who did so.

The conclusion I now come to is that the plaintiff failed to prove on a balance of probability that the defendant killed plaintiff's five head of cattle etc. . ."

The possibility that the learned magistrate posed to himself viz, that someone else, with a grudge against the plaintiff, having

/overhead the

overheard the threat, could have done the deed, is too remote and far fetched, even if the Judicial Commissioner was faced with a criminal conviction rather than a civil case. Mr. Sennane had some fifteen or twenty years' experience mostly in crime and, no doubt subconsciously, placed too high a burden on a litigant in a civil case. He did not see or hear the witnesses and could not therefore gauge their demeanour or the atmosphere of the trial.

I would allow the appeal and restore the judgment of the trial Court. The respondent will pay the costs here and in the Judicial Commissioner's Court and all the Courts below.

CHIEF JUSTICE
11th April 1984

For Appellant Mr. Maqutu
For Respondent Mr. Mda, Sr.