CIV/A/11/91

IN THE HIGH COURT OF LESOTHO

In the Application of:

TEBOHO RAMPOKANYO — Applicant

and

'MATIEHO MPASI — 1st Respondent
TIEHO MPASI — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice W.C.M. Maqutu, Acting Judge on the 22nd February, 1994

This is an appeal from the review order of the Magistrate for the district of Mohale's Hoek The Magistrate had set aside the judgment of the Likueneng Central Court in its appellate jurisdiction which reversed the judgment of the Likueneng Local Court after the Central Court had ordered fresh evidence to be given on appeal

The review order of the learned magistrate is

very short and it reads.-

> "Having read and heard both parties in the above matter, it has come to the notice of this court that new evidence was led during the hearing of the appeal when 'Maneo and Abraham were called before Court and asked to give evidence which was not led at the Court of first instance This was a gross irregularity and on that alone I set aside the proceedings of the Central Court and reinstate the judgment of the Local Court "

Before going into the merits of the appeal, I must give a short history of this case. Teboho Rampokanyo who is the Respondent in this matter was plaintitff in the Court of first instance. His claim was that

> "First Defendant's son Tieho had impregnated his daughter 'Maneo Rampokanyo, therefore, he claims 6 head of cattle or M600.00. each "

After the trial Court had heard the evidence on both sides, it found for Plaintiff who is Respondent before this Court. The Central Court in its appellate jurisdiction had ordered evidence to be heard afresh and at the end of proceeding, reversed the judgment in favour of Plaintiff and found for Defendant who is appellant before this Court.

There does not seem to be an application from

either of the parties for the hearing of fresh evidence If such an application was made, it is not recorded In terms of Rule 19 of the Basuto Court Rules of 1961, the Central and Local Court are courts of record This omission is an irregularity

Tieho Mpasi, the Second Defendant in the Court of First instance who was then the Second Appellant, gave a sworn statement that he was not allowed to put questions to Plaintiff's witness 'Maneo in connection with Exhibit "E" The court called P W 1 'Maneo (the girl rendered pregnant and asked her questions and called the Second Respondent (Tieho who is the alleged to have rendered P.W 1 pregnant) and asked him questions. There is no dispute that Abraham or Tieho wrote Exhibit "E".

There is no doubt that the calling of Tieho or Abraham (Second Defendant) and her lover 'Maneo P.W.1 was irregular. The question which the Magistrate ought to have asked herself was whether this irregularity was of such a serious nature that it could vitiate trial. The second question that the Magistrate ought to have asked herself was whether the bringing of both lovers to the appellate court for

cross-examination prejudiced either party Section 8(2) of the High Court Act of 1978 has omitted civil cases in connection with what ought to happen if any irregularity is detected, nevertheless this provision applies to civil cases as well. The reason being that even in civil cases no judgment:-

> "shall be set-aside or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the High Court that a failure of justice has in fact occurred."

Lord de Villiers in Receiver of Revenue v. Sadeen 1912 AD 339 at 342 stating the Common Law Powers of review says.

> "In ordinary legal proceedings, there may occur some irregularity of illegality which would justify the setting aside of legal proceedings "

Jones and Buckle The Civil Practice of the Magistrate Court in South Africa Vol.I at page 324 defines review is a process.

> "by which apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before .. a reviewing superior court, in respect of grave irregularities or illegalities occurring during the course of such proceedings "

This definition of review is a summary of the definition made by Innes C.J. in Johannesburg Consolidated Investment Company v Johannesburg Town Council, 1903 TS III.

By this I understand that not all irregularities should lead to the quashing of proceedings; Only those which are grave and lead to failure of justice should be acted upon. In other words irregularities of one kind or the other should be expected from time to time because no judgment or conduct of court proceedings can be perfect However, before a reviewing court can interfere, it must be satisfied that the nature of the irregularity is sufficiently serious to justify the reviewing court in interfering or quashing those legal proceedings

In this case there is little doubt that the Central Court president by re-opening the trial to further evidence gave himself the power to assess credibility as if he was the trial court The President of the Central Court was able to upset the finding of the trial court because of the improvement to Abraham's evidence that was adduced on appeal This must have led to serious prejudice to Plaintiff

because the appellate Court stepped into the arena to adduced favourable evidence to Second Defendant.

At pages 3 and 4 of the record Abraham's evidence was a bare denial in which Abraham did not specifically deny that he and P W 1 from Pinini's residence, they went to a donga in a tree plantation where they had sexual intercourse. Abraham did not even remember whether he had discussed P W.1's pregnancy with 'Maneo P.W.1 He admitted writing a letter in which he promised to meet P.W 1 at the camp on 30th April, 1988 (the very day P.W.1 claims there was sexual intercourse that led to pregnancy At page 8 of the record Abraham improved his vague evidence by saying.

> "We parted with the girl at the Pinini's at the camp, we did not go anywhere"

It is this very evidence that led to the upholding of the appeal. The Central Court disregarded the evidence given at the court of first instance Mr Mda for Respondent submitted in his view, the Central Court allowed further evidence in order to fill gaps in the case of Defendant

The court of appeal should only allow parties to adduce further evidence only in exceptional circumstances Vide Selloane Putsoane v. Motlatsi Lekatsu C of A. (CIV) No 16 of 1990 In the case of Gemina Mofubelu v Rex 1978 LLR 65 Milne J.A. at page 70 in allowing further evidence to be led said.

> "The circumstances were very special ... it is not to be taken that the Court's decision implies that this Court, in the exercise of its powers ... will order further evidence simply in order to fill gaps in the evidence led at the trial. Such a power will be most sparingly exercised and only in exceptional circumstances . "

This irregularity of calling evidence unnecessarily on appeal although both key witnesses were called (and there seems to have been balance so to speak) could not be ignored because of its result. The Magistrate conclusion was therefore, correct when she set aside the Central Courts judgment and reinstated the Local Courts decision

Mr Matabane for Appellant invited this Court to go into the merits because he believed the leading of further evidence did not influence the judgment of the Central Court. I have already held that it did, but I will briefly ignore the Central Courts activities

and go over the evidence at the trial court

The girl P W 1 says sexual intercourse took place on the 30th April, 1988 At that time there is a letter written by Abraham arranging a meeting between him and P W 1 for the 30th April, 1988 See Annexure "D" P W 1 says she became pregnant. The letter Exhibit "E" written by Abraham reveals a discussion between the two of them Abraham says he first heard from P W 1 that she was pregnant by letter written by P W.1 dated 16th May, 1988. On the 19th July, 1988 when Exhibit "E" was written according to Abraham, P W 1 claimed to be in her third month of pregnancy No court could fail to prefer the specific evidence of P.W.1 to that of Abraham on the point that they had sexual intercourse on 30th April, 1988 in the light of Abraham's bare and vague denial which appears on pages 3 and 4 of the record

The record is badly typed and full of mistakes. Some mistakes have been made by the President of the Local Court himself For example, the President of the Local Court has wrongly put the case number of CC.44/89 in his judgment. He has put it as CC.60/89. See page 4 of the record At page 3 of the record,

the baby is put as having been born on 1/9/88. I checked the original hand written record shows P.W.1's baby was born 1/2/89. See page 6 of the hand-written original record If then the pregnancy began on 30th April, 1988 and ended with the birth of P.W.1's baby on the 1/2/89, the gestation period was 277 days.

Gordon, Turner and Price Medical Jurisprudence 3rd Edition (1953) puts the average duration of gestation period as being between 280 and 283 days if it is computed from the last menstruation date to the day the woman goes into labour Henning J in R. v Sewgoolam 1961(3) S.A 78 at page 81A stated:

> "In my opinion, the normal period of human gestation is a fact so notorious and generally accepted in South Africa that the Court is entitled to take judicial notice thereof. The normal period is usually stated to range from 273 to 280 days "

To the man in the street the period of gestation of a human being is about nine months. P.W.1's baby was born within 273 and 280 days. This fact in itself corroborates the evidence of P W 1 fully

It is significant that in Exhibit "E" Abraham did not specifically deny having had sexual intercourse

with P W 1 on the 30th April, 1988 he only says on that day he asked P.W 1 to tell him about her full history, P W.1 failed to do so He then says in his opinion he is not responsible for the pregnancy, and Abraham, therefore, concludes that P W.1 is trying to cheat him There is a typing error at the beginning of the letter where 15th April, 1987 is typed as 15th April, 1989 Abraham says because on 15th April, 1987 she claimed she was pregnant and this turned to be a false alarm, she cannot be trusted especially because she said she was testing him

Abraham and his parents and the President of the Central Court are not aware of the fact that once sexual intercourse is admitted Van der Riet J. in S v. Sambo 1962(4) S A 93 at 94 EF observes that Voet 4.37 6 is of opinion.

> "that the fixing of the date of intercourse would not avail a man, for he would fix a date in order to free himself of liability "

Van de Riet J. observes that the weight of authorities is that once sexual intercourse is admitted it is the woman who would rather be believed on the question of partenity even where a woman had other sexual

partners The jaundiced view of men in sexual matters which virtually presumes all men are liars in matters of sex is far from fair Even, if it is so, it has a long history in our legal tradition

The Court of Appeal of Lesotho has just accepted that women also should not be presumed to liars in matters of seduction and sexual offence. Therefore, since the case of Limpho Lesoli v. Nthabiseng Mpheulane C of A.(CIV) No. 9 of 1982, it is now possible to find for the woman on the single, evidence of that woman provided the merits of her evidence are beyond question. Corroboration of the woman is no more mandatory It seems to me in these days of free love and contraception an admission of sexual intercourse by a man should not put such a man completely on the defensive vis a vis a woman

The correct statement of the law which is found in R v. Swanepoel 1954(4) S A 31 at page 40 C and which is steeped in history is that if a man

> "admits intercourse at a time or times, when, in the ordinary course of nature such intercourse could have led to the birth of a child, the admission raises a presumption that intercourse resulted in pregnancy, and the accused is the father of the child born

thereafter."

This is the normal burden which in pleadings is brought about by a plea of confession and avoidance. The act that could give birth to a child is admitted but the defendant raises the defence of facts that would show that the expected child would not have been fathered by him The onus is, therefore, on the Defendant to establish on a preponderance of probabilities that he could not possibly be the father despite the possibility that he could be because of the admission of sexual intercourse. In this case, because Abraham was disbelieved by the trial court, the case against him had been proved The appellate Central Court could not interfere unless it could be shown the trial court was wrong.

Simpson in Forensic Medicine 5th Edition at page 157 says a foetus which is over 8 months can service without special medical care This means once pregnancy is over 8 months a normal baby might be born. Similarly as the case of S. v Sewgoolam (supra) shows a child who weighs 9 lbs who is born after a gestation period 310 days cannot necessarily be presumed not to have been born within reasonable time The controversy in cases of that kind

continues. Plaintiff, the father of P.W.1 at page 1 of the record says the child was born in December, 1988 which is about 8 months of pregnancy This could have been acceptable (and enough to prove paternity) although that would mean the child is slightly premature. 'Maneo (P W 1) says the child was born "on the 1st February, 1989 on the tenth month which was after nine months" We have seen the child was in fact born at the expected time of 277 days from the date sexual intercourse.

It seems to me after looking into the evidence these findings of the trial court cannot be assailed P W.1 has shown not only on the balance of probabilities that Abraham is the father of her child, but the surrounding circumstances and other evidence virtually put this fact beyond doubt.

As already stated, the Magistrate had good grounds for setting aside the Central Court because, there were no grounds to hear fresh evidence on appeal. There was not even an application from the parties for this to happen. Indeed fresh evidence was not really called, but the Central Court merely called the two lovers and cross-examined them It then used

what was yielded by the cross-examination and which favoured the Defendants to set aside the trial court judgment and found for Defendants Therefore, magistrate used her review powers correctly in restoring the trial court's judgment

This appeal is dismissed with costs in the light of the aforegoing.

W.C.M. MAQUTU,
ACTING JUDGE.

22nd February, 1994.

For Appellant : Mr Matabane,
For Respondent: Mr Mda.