

CRI/A/14/91

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

KENETE KOTSANE

Appellant

v.

REX

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice W.C.M. Magutu
Acting Judge on the 17th day of March,
1994.

This is an appeal from the judgment of the Magistrate for the district of Leribe. In that case Appellant was convicted of failing to maintain his wife and children under Section 3(1) of the Deserted Wives and Children Proclamation No.60 of 1959 (as amended)

I there has been an unconscionable delay in prosecuting this matter. The problem is that accused

was charged with failing to maintain his family on the 30th June, 1988 but the matter was heard on the 22nd October, 1990. Was this what the legislature intended?

Maintenance claims are basically civil claims but to prevent destitution, the legislature has introduced a criminal sanction. The penalty not exceeding M200.00 or 1 year was still by standards of 1959 very harsh. It was intended to force people to seek employment in order to meet their maintenance obligations.

If this matter had proceeded as a civil claim in 1988 summons would have been served by registered post and a default judgment been obtained. See Sections 7 and 8 of the Deserted Wives and Childrens' Proclamation of 1959. It is my view that the accused should have been charged criminally of failure to maintain his family in 1988 and on conviction be put under an obligation to maintain in future. My reason for saying so is that a maintenance order which formed part of an accused sentence could not date back to a period two years before the date of conviction. See section 3A of the Deserted Wives and Children

Proclamation of 1959, of 1959 as amended in 1977. The other reason for saying so is that two years after 1988, the accused might have been maintaining his family. It, therefore, would not be fair to treat him as if he was still engaged in the criminal activity of neglecting his family when he has mended his ways.

In this case (now on appeal) the distinction between what happened in 1988 and in 1990 was blurred. The Crown did not even realise that it ought to put its case properly before court and that it had an onus of proof. The rebuttable presumption that the accused had the means did not relieve the Crown of setting its case properly and ignoring that the accused had been retrenched. Sections 3(1) and (2) ought to be read along with Section 3A because the Court does not only convict but it is expected to make a maintenance order that has an effect of a civil judgment. It is, therefore, not only part of the burden of the Crown to show that the man is able to maintain but it has to show what his actual means are. In this respect, the prosecution can subpoena the accused employer to enable the court determine the Accused's income.

There is no evidence that in these proceedings

any reference was made to the Deserted Wives and Childrens" Proclamation as amended. This is clear from the fine of M900.00 when the law lays down a maximum fine of M200.00. It will be observed that the court is obliged in terms of Section 3A(2) in determining maintenance to :

"have regard to the record of proceedings at the trial or such further evidence as may be necessary either upon affidavit or verbally

By this I understand that the trial court is obliged to conduct the maintenance proceedings as an enquiry and to seek such other evidence as might be necessary as to the accused's means. It is of course the duty of the prosecution to put such evidence before court. This, does not exempt the Court from duty of seeing to it that such information is available. Cotran C.J. in Thabang Tsooana v. Rex 1978 LLR 218 in a similar case said :

"I am afraid some magistrates are not really applying themselves to this aspect of trial and quantum of maintenance are arbitrarily arrived at."

The view that I take is that the Crown did not really attempt to prove the accused's failure to maintain in 1990. It thought because the accused had

failed to maintain his family two years before that was enough. In the light of the foregoing, I could not consider confirming conviction and sending the case to the court below for the proper determination of the sentence and maintenance.

The appeal is, therefore, upheld. The Appellant is found not guilty and is discharged. His appeal deposit is to be refunded.

I need only add that because maintenance is a continuing obligation, this judgment does not apply for the period beyond October, 1990. If he is in default of maintenance, fresh legal proceedings can be and will be brought against him.



W.C.M. MAQUTU

ACTING JUDGE

17th march, 1994.

For Appellant : Mr. Mohau
For Crown : Mr. Mohapi