IN THE HIGH COURT OF LESOTHO

In the matter between:

SEBOEANE MOTSEKI

V

R E X

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 19th day of February 1996

In the Subordinate Court sitting in the district of Leribe, this Appellant was charged and convicted of failing to provide the person to be maintained with adequate food, clothing and medical Aid in contravention of Section 3 of Proclamation No 60/59 as Amended by ORDER No 29 of 1971 (The Deserted Wives and Children (Amendment) Order 1971.

The Appellant was initially charged with failing to provide adequate maintenance for his wife and child. At the

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end of the trial the learned magistrate absolved the Appellant from liability to maintain his wife. He was accordingly acquitted on a charge of failing to provide adequate maintenance for his wife. He was found guilty of failing to provide adequate maintenance for his son. The appeal is against this conviction.

The grounds for this appeal are as follows:-

1. The learned magistrate misdirected himself in holding that appellant is the father of the child.

2. The learned magistrate misdirected himself in holding that the question of marriage and paternity were res judicata.

3. The learned magistrate erred in making an order of absolution from the instance in respect of the marriage instead of acquitting the appellant in respect of the maintenance of the mother (ALSO the order of absolution is foreign to criminal law).

4. The judgement of the learned magistrate is against the weight of the evidence and is bad law.

The first ground is that the learned Magistrate misdirected himself in holding that Appellant is the father of

the child. Evidence led at the trial shows that the parties (Appellant and Complainant) eloped. The negotiations that followed after that elopement were directed towards the parties' eventual marriage. To the parents of the mother of this minor son the Appellant presented himself as a son-in-law. Although the marriage cattle had not been paid the agreement that the parties are husband and wife had been reached. On more than two occasions this Appellant admitted paternity of this son. Appellant according to the evidence of PW 3, in the company of his mother, he approached PW 3 who is the father of the mother of the minor child who is to be maintained. It is the evidence of PW 3 that the matter of marriage between the Appellant and the minor child's mother was entered into as a result of his admission of his paternity. The two families apparently according to PW 3 agreed that the Appellant and the mother of he minor child should be married. This evidence of PW 3 is supported in material respects by that of PW 4 who as the member of the family of the Appellant's wife, was involved in the resolution of the problem of elopement and consequential pregnancy and birth of this minor child. To the parents and relatives of the mother of this minor child the Appellant never ever denied paternity of this minor child. According to the evidence of PW 4 it was the Appellant who approached the in-laws and notified them that he had taken the wife to the hospital to deliver the said child.

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The overall picture built by the evidence led before the court acquo is to the effect that this Appellant regarded himself as the husband of the mother of this minor. The same feeling of the existence of marriage between the parties is expressed by the mother of the said minor. The question of marriage was not decided by the court acquo on the grounds that it has no jurisdiction. There is no appeal against that decision. Evidence has established that there had been recognition and acceptance by this Appellant that he is the person responsible for the maintenance of the minor child whom he supported until they separated with his mother.

It was argued on behalf of this Appellant by Advocate Teele that the mother of this minor child, when asked when did she marry the Appellant, her answer was that she married the Appellant on 17th March, 1989. It is further suggested that this child was not conceived during the period of marriage of the parties. There was no competent expert evidence to show if this minor was born pre-maturely or whether it was full term pregnancy of a human being which should be nine months. In her evidence in chief the mother of the minor child indicated that the minor child was born on 13th July 1989. It is Advocate Teele's contention that if this child was born on 13th July 1989, four months after the date of marriage of the parents, the Appellant could not possibly be the father more especially because the mother of the minor child claimed that

she was pregnant for nine months. Although Advocate Teele described her as the best person to know, she still is no expert in that matter. There is no evidence that she was equipped with special expertise rather than common notions of mankind. In the absence of expert evidence by special gynaecologist, there is no way the court can accept as impossible that this minor child is the son of this Appellant - MITCHELL v MITCHELL and Another 1963 (2) SA Page 505 at 507.

On the second ground of Appeal the learned Magistrate is said to have misdirected himself in holding the question of marriage and paternity were res judicata. There was evidence produced, in that trial court, that the Appellant and his father-in-law had appeared in the first instance before a local court where the Appellant was sued for six herd of cattle for elopement with the daughter of complainant who in this case is the mother of his minor son. The judgment was entered against the Appellant by the local court sitting at Maputsoe. The Appellant appealed against the judgment to Tsifa-li-Mali Central Court. The appeal was dismissed. Examination of those judgments indicated that the court found that the Appellant had eloped with the daughter of the complainant. Appellant was found liable to pay as claimed six herd of cattle at M500-00 each to the complainant. The question of whether or not that elopement resulted in

consummation of marriage was nevertheless not decided by the local court. The central court at Tsifa-li-Mali when dismissing the appeal did not enter into the matter to make a determination on the merits whether or not there was marriage between the appellant and complainant's daughter. To this extend the question of marriage was not res judicata.

On the question of paternity there was abandoned evidence that the minor child for whose maintenance the Appellant was held liable was conceived during the period when the Appellant and the mother of that minor child were having sexual relations. Whether or not this baby was born after the full term of human pregnancy was not determined by production of expert evidence. Where parties lived together as husband and wife there is a presumption though rebuttable, that children born of such parents are their children. The learned Magistrate cannot be faulted by finding that the minor child was the son of the Appellant who must therefore be held liable to provide adequate maintenance for him. Having found that the Appellant was failing in his duty the learned Magistrate was correct to find him guilty as charged in terms of Section 3 A of Proclamation 60/59 As Amended.

This appeal must fail.

K. J. GUNI
JUDGE