

IN THE HIGH COURT OF SWAZILAND

In the matter between:

vs.

TIMOTHY MABUZA AND MOSHWAW PETROS MASILELE

RULING

(Delivered on 9th March, 1979)

COHEN. J.:

In this matter the Crown called a witness Sipiwe Maziya to give evidence on its behalf. Mr. Matse for the accused objected to her giving evidence against accused No. 1, arguing that she was not competent or compellable to give evidence in view of the fact that she was the wife of accused No. 1. Of course that objection will not affect any evidence given by this witness against accused No.2, although judging by the summary of evidence there may be a certain amount of overlapping.

I allowed the witness to be questioned by Mr. Matse and Mr. Onuoha as well as by the assessors and myself on the question as to whether or not she was married to accused No. 1 according to Swazi Law and Custom. The Crown is, of course hampered in the light of the view which I take, namely, that the onus is on it to satisfy the Court that a witness produced by it was a competent witness to give evidence before me. I cannot permit cross-examination by the Crown of its own witness nor allow an attack on the credibility of its own witness without rendering her evidence as nugatory. The defence is however not inhibited, in this regard.

Mr. Matse on questioning her ascertained from her that in 1966 she gave birth to a child of whom the accused No. 1 was the father. She was then 16 years of age. She stated that after the birth of the child she was taken to a cattle byre of the bridegroom's parents and there outside the entrance of the byre she was smeared with red ochre and that thereafter there was singing and dancing in the byre itself. It was not clear to me whether or not she performed the usual part of the marriage ceremony, namely, whether she cried. Be that as it may, thereafter she lived with the accused together with the child in his parent's home. In 1973 she and he left that home and in the same area with the consent of the Chief of the area established a homestead of their own. She also gave testimony relating to five herd of cattle

2

which had been paid by accused No, 1 to her parents originally with a view to pacifying them for his having "stolen" their daughter. I take it, reading the evidence as a whole, that this was really a form of damages for her seduction by the accused. As far as I understood the evidence it would appear that the cattle given for this purpose were subsequently regarded as part of the lobola which the accused had undertaken to pay for the witness Sipiwe.

The Chief Justice has in the case of R. vs. Jabulane Fanyana Fakudze. and Johane Makhanya ruled that the smearing with the ochre was an essential part of a Swazi marriage ceremony. This case is reported in the 1970-76 Swaziland Law Reports page 422. His Lordship in making that statement purported to rely upon the views of a special Swazi Law Panel established in May 1964 under the chairmanship of Mr, Rubin. In. the present case there was a smearing of the red ochre. The witness said this was done at the entrance of the cattle byre by an elderly lady. My assessors advise me that it is usually done outside the cattle byre but at the upper end of the byre, that is immediately below the main hut. They - and I am most grateful for their assistance - are of the opinion that even if the smearing was not done at the proper place the person smeared in the circumstances of this case would be considered as a married woman, and this would be so even if no lobola at all has been paid. Basically, I think the assessors are in agreement with most of the points made by Mr. Matse in his very interesting and able address to me on this aspect of the

case.

Even if there was a technical error in the performance of the marriage ceremony I do not think that the error would invalidate the actual marriage according to Swazi Law and Custom. I think one has to take a realistic view point of the matter, namely, that the young couple lived together after the smearing, that there was at least an effort made to comply with other requirements of Swazi tradition, namely, the payment of damages and the conversion of those damages to a payment of lobola. They were recognised by the Chief of that area as being married to each other and he granted them ground on which they could erect their own homestead. Certainly the evidence reveals that the witness and the accused who gave evidence at Mr. Matse's request on the question of the lobola regarded themselves as being married to each other.

It only remains for me to add that I am in respectful agreement with what the Chief Justice said in Fakudze's case at page 424 when he stated, and I quote "The rule excluding one spouse from giving evidence against another is based on public policy, the underlying motivation being the sanctity of

3

marriage and the preservation of marital confidence flowing from the marital state .....". In my view the sanctity of the Swazi marriage is as potent and valid in Swaziland as a marriage according to civil rights, and it is correct that the status thereby acquired lay the parties should be accorded the same privileges and protection as far as the admissibility of evidence by one spouse against the other is concerned,

I therefore rule that Sipiwe Maziya is not a competent witness to give evidence against her husband, accused No. 1. I repeat, however, that she can give evidence against accused No. 2. Again I add that all of us concerned with this case must try and avoid an overlapping so that she does not by her evidence implicate accused No, 1, In so far as by oversight this overlapping is permitted I shall certainly not allow it to influence my judgment in the final result.

(D. COHEN) JUDGE

9th March, 1979

-35-

C The Respondent is ordered to pay the costs both in the High Court and in the Court of Appeal, such costs to include the costs of the application for condonation for late lodging of the record and the postponement of the trial in March, 1988 consequent upon such late filing.

WHR SCHREINER J.A.

WELSH J.A.:

I agree and it is so ordered.

LEON J.A.:

I agree