

EDWARD MUCHUCHUTI  
versus  
TENDAI MUCHUCHUTI

HIGH COURT OF ZIMBABWE  
HLATSHWAYO AND CHITAKUNYE JJ  
HARARE, 14 May 2013 and 13 April 2017

### **Civil Appeal**

Appellant in person  
Respondent in person

CHITAKUNYE J: This is an appeal against the entire judgment of the magistrate sitting at Murambinda Magistrate Court handed down on 19 November 2012. Upon hearing arguments we dismissed the appeal on 14 May 2013. These are our reasons for the dismissal.

The background facts are that: - The appellant and respondent are husband and wife. They have been married for a period in excess of 17 years. In March 1996 about 3 months after their wedding, the towel/cloth they used to wipe themselves with after sexual intercourse, herein after referred to as sex cloth went missing at their rural home. At the rural home they had their own bedroom in which the sex cloth was kept. As they resided in Harare they would leave the rural bedroom locked when coming to their urban place of abode. Upon discovery that the sex cloth was missing respondent informed appellant. Appellant's response was such that she formed the view that he was unwilling to assist her search for the cloth. Respondent described the cloth as of significant cultural value and its disappearance could have adverse consequences on her.

It is common cause that the issue of the sex cloth remained unresolved till the respondent approached the village head. The village head held a hearing in which he advised the parties to approach traditional healers or prophets in a bid to unravel as to who could have taken the sex cloth.

The village head later referred the parties to Chief Nyashanu when he could not resolve the problem.

Chief Nyashanu, sitting as the community court, conducted a hearing at which parties testified. The chief found appellant liable for not assisting his wife in searching for the sex

cloth. His findings were based on the basic role of a husband as the head of the family. In that position appellant was culturally expected to assist his wife as the missing sex cloth could have adverse effects on respondent. This was augmented by the results of consultations the parties had done with traditional healers and prophets. The chief ruled that appellant should pay a beast or in its place pay \$300.00.

Dissatisfied with the chief's ruling the appellant appealed to the magistrate court.

Section 24(1) of the Customary Law and Local Courts Act; [Chapter 7:05] provides that:-

"Any person who is dissatisfied with any decision of a Community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the Community Court is situated."

Subsection 2 thereof provides that:-

"Upon an appeal being made in terms of subsection (1), the magistrate shall rehear the case and shall give such decision, order or direction as it thinks fit."

The magistrate conducted a trial after which she upheld the chief's decision.

The appellant was not satisfied with the magistrate's decision and so launched this appeal. There are five grounds of appeal. The grounds of appeal were basically that:-

1. The trial magistrate misdirected himself by failing to appreciate that this case is not about the sex cloth which went missing about 17 years ago but rather an attempt by the respondent to frustrate appellant because he has filed a divorce action at the High Court.
2. That the trial magistrate misdirected himself by failing to pick up the irregularity which occurred that the respondent failed to observe the order of the traditional healer whom she and her relatives had resorted to in pursuance of identifying the so called 'thief of the missing sex cloth.
3. The trial magistrate erred and misdirected himself by concluding that appellant was responsible for the sex cloth despite the fact that he was staying in Harare mostly and would not be able to account for it.
4. The trial magistrate erred when he failed to appreciate that, though as head of the family appellant was expected to assist the respondent. *In casu*, the court failed to appreciate that in this case it was practically impossible for him to assist the respondent in her endeavour to locate the sex cloth, as we differed in terms of approach and perspective.

5. While it is not denied that the Chief is the custodian of cultural issues and has jurisdiction to preside over the same, however it is not constitutional on the chief's part to force a person to engage in activities that conflict with their faith and conscience.

Upon perusal of the record of proceedings and hearing the parties on appeal we concluded that the appeal had no merit and so should be dismissed with costs.

The grounds advanced by appellant were not sustainable bearing in mind proceedings from the court *a quo*.

On the first ground the alleged misdirection is not correct. It is clear from the evidence that the issue of the sex cloth was at the core of the dispute brought before the magistrate. The issue of the sex cloth arose in 1996 and was discussed and pursued at different *fora* with a view to recovering the cloth. The parties had visited traditional healers/ n'angas and prophets in trying to solve the issue. They had been directed to do certain acts, such as appellant approaching members of his family over the issue but he had refused to do so. According to respondent appellant had in no uncertain terms threatened that if she asked or confronted his mother about the sex cloth that would be the end of their marriage. Having been so threatened respondent could only seek advice from members of her family. She was thus suppressed for long for fear that if she confronted her mother in law as the custodian of the keys to their bedroom during the period the sex cloth disappeared that would be the end of the marriage. When appellant sued respondent for divorce she realised that her effort at preserving the marriage by not reporting her in laws was in vain as the appellant was now seeking divorce. She thus approached the appropriate court and sought relief.

The nature of the issue was such that it was in the domain of the headman and the chief. The chief being the custodian of cultural values and the responsibility to maintain cultural harmony duly presided over the matter. The chief was better positioned to understand the implication of the disappearance of the sex cloth and remedies thereto.

It is thus not true that the suit by respondent was meant to merely frustrate appellant in his divorce suit.

On the second ground we were of the view that the evidence showed on a balance of probabilities that appellant failed to assist his wife as found by both the chief and the magistrate. In his evidence appellant confirmed this. For instance when being led in evidence in chief he said words to the effect that: -

“I gave her the responsibility to search for the missing cloth. I told her that I am a Christian. I was not compelled to search for the missing cloth. It was up to her since she believed in tradition. Constitutionally I was entitled to my rights not to conduct a search for a missing cloth. I believe in prayer.” (see page 29 of appeal record).

The appellant clearly declined to assist his wife on the pretext that he was a Christian. The proceedings of the court below shows that his strong Christian belief of not consulting traditional n’anga was only rekindled after preliminary consultations had already been done with his participation. They had even gone to Chipinge in pursuance of these consultations. It was only after the directive that he inquires from his family relatives who were at the rural home at the time the sex cloth disappeared, and who included his mother, that his defence of being a Christian came up.

In fact on p 29 of record, the appellant indicated that respondent and her family failed to turn up at a traditional cleansing ceremony his family was to conduct. Though he said he was compelled to visit the n’anga that directed that such a ceremony be held, he was not heard to say he was forced or compelled to comply with the directive.

Under cross examination appellant’s reliance on prayer as a Christian was deflated when he conceded that he had never invited his wife for a prayer for the recovery of the sex cloth.

Clearly appellant was trying to use Christianity to conceal his inability to assist his wife by inquiring from those members of his family who were at the rural homestead during the period the sex cloth went missing, more so his mother in her capacity as the only one who had keys to their rural home bedroom in their absence.

The third ground of appeal was ill-conceived. It was not the magistrate’s finding that appellant was responsible for the missing cloth.

The fourth and fifth grounds are concessions that as head of the family he needed to assist his wife when she encountered problems. However his assertion that in this case it was practically impossible for him to assist her because of differences in approach and perspective is without merit. I have already shown that appellant dealt in traditional beliefs in traditional healers and n’angas as well.

The chief’s jurisdiction over cultural related issues is without doubt. In *casu*, from inception the parties were agreed that the safety and preservation of the sex cloth has some cultural connotations such that its disappearance has some cultural ramifications. It is clearly the domain of the chief to address such issues within his community to ensure cultural harmony is preserved.

The appellant's contention that due to lapse of time it was no longer proper for the chief to hear the matter was misplaced. Section 3(2) of the Prescription Act, chapter 8:11, clearly confirms that customary law knows no prescription when it provides that:-

“In so far as any right or obligation of any person in relation to any other person is governed by customary law this Act shall not apply.”

See also *Muwalo v Mugunga* 2006(1) ZLR 485 wherein court reaffirmed that position.

After a careful consideration of the grounds of appeal as advanced by the appellant we concluded that the appeal cannot succeed. The appeal was thus dismissed with costs.

HLATSHWAYO J agrees .....