

INNOCENT BHERA
versus
LEONARD MACHINGAUTA

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 24 January 2017 and 16 February 2017

Civil Appeal

S. Banda, for the appellant
Respondent in person

CHITAKUNYE J. On 24 January 2017 upon hearing submissions by the parties we dismissed the appeal with costs. The following are the reasons for the dismissal:

On 1 December 2015, the respondent sued the appellant in Chief Nyamandi's court on allegations of the appellant having bought the plaintiff's wife some under garment. The Chief found in favour of the respondent and ordered the appellant to pay one bovine beast or the equivalent value of USD400.00. Dissatisfied with the Chief's judgment, the appellant appealed to the Magistrates Court at Gutu. As is the procedure, in terms of s 24 of the Customary Law and Local Courts Act, [*Chapter 7:05*], the matter was heard afresh with the calling of witnesses.

The respondent, as plaintiff, gave evidence and called his wife as witness. Thereafter the appellant, as defendant, gave evidence and called his wife as witness.

The respondent's evidence was to the effect that the appellant is their church pastor/bishop. During the month of May 2015 the respondent was away at his in-laws homestead on some assignment. When he returned to his home at the end of May 2015, his wife made a report to him to the effect that the Pastor had given her a gift wrapped in a newspaper. The Pastor had advised her to only unwrap it after he had gone. True to that when the Pastor had gone she unwrapped the gift and to her shock, it was a woman's undergarment (pants). Upon receiving this report the plaintiff said that he felt disturbed and wondered what

the Pastor could have been up to. When this issue could not be resolved at church he reported to the Chief hence the Chief's hearing.

The respondent's wife confirmed the events as narrated by the respondent. She confirmed that the appellant came with the gift and told her to only open it after he would have gone. When she did this to her dismay she noted that it was an undergarment. She held her breath till her husband returned without reporting to anyone. When the respondent returned she reported the incident to him.

The appellant on the other hand contended that he did not wrong the respondent at all. Other than a bare denial he had no explanation to offer on the matter. The appellant's wife testified but her testimony did not take the appellant's case any further.

After hearing the evidence from the parties the trial magistrate believed the respondent's version and found against the appellant. In concluding his judgment the learned magistrate stated thus: "on a balance of probabilities, the defendant brought the gift of a pair of pants to the Plaintiff's wife in his absence. Such conduct in terms of the African custom is prohibited. In the foregoing I don't have any reason to set aside the decision of the Chief's court which I believe, based on the evidence led in this court is just and proper. The judgments of Chief Nyamandi of 05/12/15 is therefore to stand."

The appellant being dissatisfied with the magistrate's decision has now appealed to this court.

The grounds of appeal were couched as follows:-

That the court *a quo* erred and misdirected itself in:

1. Failing to appreciate that the respondent's failure to cross-examine the appellant amounted to an admission of the entirety of the Appellants evidence. An admission is conclusive of the facts in issue.
2. Not granting absolution from the instance despite having admitted that the evidence led lacked coherent corroboration.
3. Failing to appreciate that the police report was made prior to the respondent's report to the chief, therefore validating the Appellant's claim that the report was vengeful and malicious. This failure to appreciate a fact is so gross as to amount to a question of law.
4. Finding in Respondent's favour when clearly such finding was inconsistent with the evidence led.

It is trite that an appeal to this court must essentially be on a point of law. If it is related to the facts, then there must be an allegation that “there has been a misdirection on the facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such a decision. And a misdirection of fact is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented.” *Reserve Bank of Zimbabwe v Granger & Another* SC34/01.

In the absence of such an assertion, the substance of the grounds of appeal must show that that is what is in fact being alleged. The substance must point to such a degree of misdirection on the part of the trial magistrate.

This is the test the appellant had to pass if the appeal was to succeed.

In his heads of arguments the appellant’s counsel dealt with grounds 2 to 4 only. He apparently abandoned the first ground. On the date of hearing he confirmed the abandonment after we had pointed out that the appellant had in fact been cross examined by the respondent as was recorded on pp 24 to 25 of the record of appeal. It was thus not correct to say that the respondent had not cross examined the appellant and so whatever the appellant said must be taken as unchallenged. This therefore disposed of ground number 1.

Ground 2

This ground is premised on the trial magistrate’s statement that:

“All what is alleged by either party lacks coherent corroboration.”

Based on this statement counsel for the appellant argued that the trial magistrate should have granted absolution from the instance as this showed that the respondent had not proved his case on a balance of probabilities.

Counsel’s argument would have carried some weight had the trial magistrate ended at that. What the trial magistrate proceeded to say after that statement confirmed that the trial magistrate did not mean to say that the evidence adduced was neither credible nor worth believing. After that quoted statement the magistrate proceeded to say that:

“There is nothing to corroborate the giving of the gift other than the plaintiff’s wife’s testimony. On the other hand there is nothing to support the assertion that the allegations are a fabrication after a police report was made against the plaintiff. The plaintiff’s wife gave her testimony clearly and she appeared to be unshaken by the cross examination of the defendant. She explained how the ‘gift’ was brought to her and what happened thereafter. She denied, just like the plaintiff, that there was any church property for safe keeping by the Defendant. That denial in my view is supported by the evidence of the defendant’s wife.”

After analysing the evidence as given the trial magistrate later stated that:

“The plaintiff’s wife in my view had no reason whatsoever to fabricate and lie to her husband that the defendant had brought her a gift when such was never brought putting her marriage at risk.”

It is my view that the earlier assertion by the magistrate upon which the appellant based this ground of appeal was not meant to discredit the plaintiff’s case, but to merely show that in as far as the incident of the giving of the ‘gift’, no other witness witnessed it as it was an incident between the plaintiff’s wife and the defendant. It was in this vein that the trial magistrate proceeded to consider the evidence of those two and believed that of the plaintiff’s wife as to whether that incident occurred or not.

In any case this is not a case where corroboration was needed for a witness’ evidence to be believed. All that was required was credible evidence. This the magistrate found in the plaintiff’s wife’s evidence.

A reading of the evidence given by the plaintiff’s wife confirms the trial magistrate’s finding that she gave her evidence well. Her evidence rang a ring of truth in it. She steadfastly maintained her stance under cross examination. There was no suggestion that she had fabricated the story and the reason behind such fabrication. It is an incident she could have kept to herself but she chose to inform her husband.

Ground 3

A perusal of the record of proceedings clearly shows that it is the appellant who reported to the police before the respondent took the matter to the chief. The respondent and his wife had been pursuing the issue through their own way as congregants having an issue with their Pastor. The respondent clearly explained the manner in which the issue progressed with what he termed misunderstandings taking place between him and the appellant as they continued to congregate together. At some point appellant demanded back some garment material he had given to respondent to sew garments for his family members and respondent realised things were getting worse. Purportedly in pursuance of the garment material, the appellant then reported to the police. When the police could not resolve the issue respondent was referred to the appellant’s headman. It was that headman who referred him to the Chief; hence the matter was heard by the Chief.

It was clear from the respondent’s evidence that he had hoped to resolve the issue amongst themselves by possibly appellant apologising for his conduct but appellant did not see it that way. It was after considering all this that the magistrate concluded that:

“I am bound to believe that the reporting of the case to the police was a bid by the defendant to thwart Plaintiff’s pursuance of the case.”

The respondent had not been pursuing the issue by going to the chief but by trying to resolve the matter within the confines of their church.

It was thus far fetched to argue that the respondent reported to the chief as vengeance for the appellant’s reporting to the police.

Ground 4

There was virtually no merit in this ground. The evidence led clearly favoured the respondent’s case. The magistrate’s finding on credibility cannot be said to be so unreasonable as to warrant this court’s interference. After perusing the record of proceedings I found nothing to faulty the findings of fact by the trial magistrate

In the circumstances, the appeal be and is hereby dismissed with costs.

NDEWERE J agrees

J. Mambara & Partners, appellant’s legal practitioners