

CHIKUDZA FANUEL MANGWENDE
versus
LIBERTY MACHODO

HIGH COURT OF ZIMBABWE
UCHENA & MWAYERA JJ
HARARE, 28 July 2015 & 23 September 2015

Civil Appeal

Appellant in person
Respondent in person

MWAYERA J: At the conclusion of the trial of this matter, the court *a quo* dismissed the claim for payment of the outstanding lobola.

The court found that there was material breach of the very tenants of lobola. The court concluded that the appellant was not entitled to payment of the balance of lobola because his daughter who was married to the respondent committed adultery with multiple partners ranging from the respondent's brothers, nephews and the herd boy. The court also found that customarily a husband is allowed to divorce an adulterous wife and then if he has paid lobola in full he is entitled to a refund of the lobola from the in laws.

The appellant approached this court seeking to have the dismissal of his claim for payment of lobola set aside. The grounds of appeal as outlined by the appellant are as follows:

- 1 (a) That the appellant's daughter was acting on the respondent's, that is her husband's instructions and was safeguarding her husband's cultural values.
- (b) That it was not the duty of the appellant's daughter to research on the truth of her husband's cultural values but only to do so as per husband's instructions and demands as a respectful wife.
- (c) That the appellant's daughter was forced to confess under duress from the respondent and his relatives.
- (d) That the child of the appellant's daughter did not breast feed after confession but only after they had both visited a prophet.

- (e) That the appellant's daughter was not in wilful wrong doing this is evidenced by her not being in any other affair with outsiders
2. That the learned magistrate erred in dismissing the appellant's claim when it was clear that the parties had engaged into a lobola agreement which was not completely paid off.
3. That the trial court misdirected itself in dismissing this claim when the averments by the appellant that his daughter and respondent's brothers had never been to any court for adultery claims.

The facts of the matter as discerned from the record of proceedings and submissions by the parties can be summarised as follows:

The appellant's daughter was customarily married to the respondent. The respondent and his wife the appellant's daughter had a misunderstanding after the birth of their child. Central to the dispute is the fact that the newly born was not breast feeding. Evidence adduced from the respondent and respondent's wife is to the effect that the child started to breast feed after a confession by the respondent's wife. The confession which was uncontroverted evidence in the court *a quo* was to the effect that the respondent's wife had during the subsistence of the marriage to the respondent been intimate with the respondent's elder, younger brothers, nephew and herd boy.

It was after evidence of intimate relations between the respondent's wife and multiple partners that the respondent took his wife back to her parents. Irked by this move the appellant then approached the court *a quo* claiming for the balance of outstanding lobola.

The magistrate's court, basing on the evidence before it concluded that the confession by the appellant's daughter was voluntarily given. Further the appellant and his daughter did not dispute that the daughter had intimate relations with multiple partners. The appellant sought to argue unsuccessfully that his daughter was wayward in line with respondent's family custom. The herd boy and nephew were not the respondent's brothers. In any event other than the appellant's mere say so there was no evidence to confirm the promiscuous conduct by the respondent was in accordance with custom. No one else in the respondent's family had been subjected to such custom according to the appellant's daughter.

It was with this background that the trial magistrate concluded that the appellant's daughter engaged in adulterous relationship with multiple partners and that she by so doing breached the marriage relationship. This conduct was ruled as not entitling the appellant to payment of the outstanding lobola. The court *a quo* properly spelt out that under customary

law a man who would have paid lobola is entitled to a refund if the wife engages in adultery. Further the court *a quo* stated that parents whose child would have committed adultery are not entitled to payment of the balances of lobola. The very purpose of lobola is what was flouted by the appellant's daughter thereby severing the marriage relationship. The respondent did not choose to condone the adultery but to divorce his wife for the gross misconduct.

In coming up with the disposition of the matter whereby the court *a quo* dismissed the claim for the balance of lobola the trial magistrate properly exercised his discretion and we find no fault in his findings.

Accordingly the appeal lacks merit and must fail.

It is ordered that the appeal be and is hereby dismissed with costs.

UCHENA J: agrees