

HOLDEN AT LUSAKA

the appellant wrote a letter to the respondent

the following terms:

(Civil Jurisdiction)

the appellant,

ABLAM BINES MCHITALA

Appellant

and Fifth (5th) November 1988 and to the

the respondent, **STAIVEL MWAMBAZI**, on Fifth November, 1988, on Fifth

CORAM: Ngulube, D.C.J., Gardner, J.S. and Bweupe, A.J.S. so that

the respondent was a member of parliament on 7th November, 1988.

22nd March, 1988

H. Silweya, of Silweya and Company, for the appellant

N.S. Simango Legal Aid Counsel, for the respondent

J U D G M E N T

Ngulube, D.C.J. delivered the judgment of the court.

Case Referred to: that he did not allow his wife to accompany the

(1) Nkhata & Four Others -v- The Attorney-General (1966) ZR 124

himself travelled to Lusaka in the company of... This is an appeal against the decision of a High Court judge who reheard a local court case in which the respondent was awarded K800 compensation in respect of the break-up of his marriage, which was attributed to the fact that the appellant was alleged to have taken the respondent's wife without permission. The parties were agreed that, in terms of Mambwe customary law, it is a civil offence for a man to take away another man's wife without the latter's permission and that this was so regardless whether adultery took place or not. There was evidence that the appellant had just won an election to Parliament to represent the Mbala constituency and that arrangements were being made for him to travel to Lusaka for the official opening of the new Parliament. There was also evidence that the respondent's wife wished to travel to Lusaka to witness the proceedings at the ceremonial opening of Parliament. In pursuance respondent's wife by taking her to Lusaka where he probably had an opportunity to commit adultery with her.

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3/.....On

On behalf of the appellant, Mr. [Name] advanced a number of arguments. The most important argument of this arrangement, the appellant wrote a letter to the respondent which was in the following terms:

"Brother Mwarbazi, I am starting off for Lusaka on fifth (5th) November 1983 and we are opening the House of National Assembly on 7th November, 1983, on Friday.

Kindly allow your wife, Mrs Mwarbazi to go with me and my wife so that she attends the celebrations of opening parliament on 7th November, 1983.

Kindly allow her please. Your elder brother,

A.B. Chitala
M.P."

The learned trial judge also held against the respondent who was the plaintiff in the action. He testified to the effect that, on receipt of this letter he was surprised and so was his wife. His position was that he did not allow his wife to accompany the Chitalas to Lusaka. The appellant's evidence, which came from him and a number of witnesses, was to the effect that, having written that letter, the appellant himself travelled to Lusaka in the company of two other Members of Parliament from the district. There was evidence from the appellant's wife and from the respondent's wife that, meanwhile, back in Mbala, the respondent discussed the trip with the women and allowed his wife to accompany Mrs Chitala. The women accordingly travelled to Lusaka where they joined the appellant at the National Assembly Motel. The sleeping arrangements, according to the appellant and the women, were that the appellant went to share a room with one of the M.P.s from Mbala while the women kept his own room. The issue which fell for determination at the rehearing was whether the respondent had not given permission and the appellant had taken the respondent's wife to Lusaka without permission and for a clearly dishonourable purpose. The learned trial judge found that the letter written by the appellant was evidence against him and that it showed that he had both an intention and an inclination to seduce the respondent's wife by taking her to Lusaka where he probably had an opportunity to commit adultery with her.

3/.....On

4/.....and

On behalf of the appellant, Mr. Silweya advanced a number of grounds as well as a number of arguments. The most important argument which was advanced, in our considered opinion, was one which criticises the learned trial judge's finding on the question of credibility as between the respondent's bold assertion and the appellant's version which was supported by an impressive array of witnesses, among whom were two Members of Parliament. Mr. Simango, in reply to the arguments advanced, supported the learned trial judge's reasoning and conclusion. The learned trial judge gave, as one of the reasons for resolving the issue of credibility against the appellant, his impression that their evidence appeared to have been rehearsed since there was a difference, for example, between the testimony of DW5 and the respondent's wife as to whether she was proceeding to Chinsali or to Mbala when they met at the bus stop. The learned trial judge also held against the appellant the fact that they had forgotten the number of the room they had slept in at the motel and what bus fares were paid. The learned trial judge also criticised the fact that the appellant and his wife appeared to have given conflicting evidence in that, while the appellant said after the opening ceremony they travelled to Lundazi to see a sick father, the wife said it was a sick mother. On the basis of such alleged contradictions, the learned trial judge found that the appellant must have travelled to Lusaka with the respondent's wife only without his own wife, and that he must have introduced the respondent's wife in Lusaka as his own wife.

We have considered the arguments and submissions in this case and in particular, we have considered the misdirection which clearly emerged when the learned trial judge found that the evidence of the two Members of Parliament had contradicted the evidence of the appellant and the women on the question of sharing rooms on the ground that the parliamentary witnesses did not allude to such sharing. This was clearly a misdirection and Mr. Simango, on behalf of the respondent, quite properly conceded that this was so. They had not been asked any questions on the matter. We have also considered the other unsatisfactory reasons which the learned trial judge advanced in resolving the issue of credibility. For example, he found as sinister

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... and evidence of an adulterous inclination, the fact that the appellants wrote a letter to the respondent at all. We have looked at this letter and we do not find anything, whether in the terms in which it is couched or in the fact that it was written at all, that suggests anything other than that the appellant was doing the correct thing, both under custom and in keeping with normal standards of behaviour and conduct, when he sought permission from the respondent to allow the latter's wife to accompany him and his wife to Lusaka. As we have indicated, the respondent was the plaintiff in the action but the learned trial judge made it clear in his judgment that the appellant had to prove, not only that he got permission, but also that the trip to Lusaka was an innocent one and that he did not commit adultery. There was certainly no evidence to establish the commission of any adultery in this matter. But the important point is that it is quite clear to us that the learned trial judge had shifted the burden of proving the case to the wrong party. For the reasons which we have indicated, we find that, although the issue in the case was stated to be one which had to be resolved on an issue of credibility, the misdirections which we have pointed out entitle this court to interfere, in accordance with the decision in Nkhata & Four Others -v- The Attorney-General (1). We find that it now falls upon this court to determine this case.

M.S. Ngulube,

The question which arises is whether, on the material in the record, this court can in fact come to a final decision on the matter despite the fact that the issue was one of credibility. We have examined this matter from that point of view and we find as significant the fact that the appellant's conduct throughout this incident appeared to be open and above board. The very fact that he wrote a letter, far from being sinister, was in fact evidence in his favour. What is more, we cannot conceive of any situation where the appellant could have taken another man's wife for sinister motives in the presence of his own wife. We entertain very serious doubts as to whether it was conceivable for the appellant to have behaved in the manner found by the learned trial judge. But what is conclusive in this case is the fact that the claim had to be proved by the respondent. He set out to prove

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that, because the appellant had gone with his wife to Lusaka without his permission, the marriage broke down. The only evidence that he was able to advance was that both he and his wife were surprised to receive the letter which requested the wife to be allowed to travel. Quite clearly, the respondent had failed to prove his case and his action ought to have collapsed of its own inaction.

TRAVEL MANDATE

Respondent

For the reasons which we have outlined, we allow this appeal; reverse the decision below; and enter judgment for the appellant. The appellant will also have costs which will be taxed in default of agreement both in this court and the court below. But if on the other hand, the respondent has been legally aided the order for costs will necessarily be subject to the Legal Aid Act.

JUDGMENT

We understand that the appellant had paid the damages; these must be refunded to him.

M. S. Ngulube v. B. K. Bweupe and Others - v- The Attorney-General (1986) ZR 124

This is an appeal against the decision of a High Court judge who, in a civil court case in which the respondent was awarded damages in respect of his marriage, which was broken to the fact that the appellant was alleged to have taken the respondent's wife without permission. The parties were governed by the laws of Bambe customary law, it is a civil offence for a man to take away another man's wife without the latter's permission and that this was whether adultery took place or not. There was evidence that the appellant had just won an election to be elected to represent the Mbala constituency and that arrangements were being made for him to travel to Lusaka for the official opening of the new Parliament. There was also evidence that the respondent's wife wished to travel to Lusaka to witness the proceedings in the respondent's pursuance.

M.S. Ngulube
DEPUTY CHIEF JUSTICE

B. K. Bweupe
SUPREME COURT JUDGE

B. K. Bweupe
ACTING SUPREME COURT JUDGE