

DISTRIBUTABLE (24)

Judgment No. S.C. 24/02
Civil Appeal No. 22/01

NTOMBIZODWA SAUTA v ARON MADONDO

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, JANUARY 22 & MAY 23, 2002

The appellant in person

The respondent in person

MALABA JA: This is an appeal from a judgment of the High Court sitting as an appeal court. The High Court dismissed with costs an appeal against a decision of a magistrate granting an order declaring the respondent to be the spouse of the late Loina Sauta.

The essential facts of the matter are as follows. The appellant is one of four children of Loina Sauta (hereinafter called "Loina"). In 1979 Loina fell in love with the respondent. They both worked as domestic workers in Bluff Hill suburb in Harare where they resided. At the time she met the respondent Loina had three children, including the appellant, from a previous marriage. Loina and the respondent lived together as husband and wife and had a child in 1981.

In 1980 Loina lost her employment. She moved to house no. 1636 Old Highfield to live with her parents. On 22 February 1983 she got employment with the Ministry of Finance as a typist supervisor. She died on 17 April 1998.

On 21 July 1998 an edict meeting was held before a magistrate to choose an executor. The respondent claimed to be Loina's husband and therefore entitled to be appointed executor in her estate. His claim was opposed by the appellant. The magistrate who heard the matter was not satisfied with the evidence adduced. He directed that the respondent should produce better evidence.

Meanwhile the appellant and other relatives met before a different magistrate to have the appellant appointed executrix in Loina's estate. She was appointed on 16 September 1998.

The respondent, who was not present at the edict meeting on 16 September 1998, was not happy with the appointment of the appellant as executrix in Loina's estate. Instead of having the order of the magistrate appointing the appellant the executrix set aside the respondent sought to have himself appointed executor by the Master of the High Court.

The Master was advised by a provincial magistrate on 29 September 1999, before he presided over an edict meeting to consider the appointment of the respondent as executor in Loina's estate, that the appellant had already been appointed executrix in the same estate. He was also advised that an application to determine the status of the respondent as Loina's husband was pending before the magistrate's court. The Master of the High Court did not process the application by the respondent to be appointed executor in Loina's estate.

On 28 June 2000 the respondent renewed the application before the magistrate's court for an order declaring him to have been Loina's husband by customary law immediately before her death. The appellant opposed the application. The magistrate accepted the respondent's evidence that he had paid lobola to Loina's father before she died. He found as a fact that the respondent was married to Loina in terms of customary law at the time of her death.

The appellant appealed against the judgment of the magistrate to the High Court but SMITH J, with the concurrence of BARTLETT J, upheld the decision of the magistrate.

On appeal to this Court the appellant argued that the learned judges erred in finding that the magistrate correctly found the respondent a credible witness. She said the respondent gave contradictory evidence. She pointed to the fact that in his evidence the respondent said he gave his go-between a sum of \$400 to pay lobola. The go-between said the respondent gave him \$250 for lobola and \$150 as acknowledgment fee for having lived with Loina without paying lobola. She also pointed to the fact that the respondent said he was not present when lobola was paid to Loina's father and yet the go-between said he was outside the house.

On the finding by the magistrate on the credibility of the witnesses, SMITH J, who wrote the judgment of the court *a quo*, said:

“In an appeal such as this, the court does not have the witnesses appearing before it. It has to rely on the written record. The trial magistrate was in a better position to consider the credibility of the witnesses who appeared before him. In my opinion, the decision of the magistrate has not been shown to be wrong. He exercised his discretion properly.”

I agree with the learned judge. It is trite that an appellate court should not lightly interfere with a finding of a trial court on the credibility of witnesses unless it is clearly wrong. See *Hughes v Graniteside Holdings (Pvt) Ltd* S-13-84.

The evidence supported the magistrate's finding. The appellant did not challenge the evidence that money was paid to Loina's father as lobola. There was no reason why the go-between would say he paid money to Loina's father as lobola when he did not do so. As the appellant did not challenge the evidence that money was paid as lobola, the differences as to the amounts paid and where the respondent was at the time the money was paid did not affect his case.

The respondent's case was strengthened by the fact that on 23 November 1993 Loina made a declaration that the respondent was her husband. When filling in a form for an application for accommodation to the Ministry of Construction, she recorded that he was her husband. There could not be any better evidence before the magistrate to support the respondent's claim than Loina's own written declaration. The parties had lived together as husband and wife from 1979 and had a child in 1981. In 1993 Loina still regarded the respondent as her husband, entitled to live with her in the house she rented from the Ministry of Construction.

In the course of the hearing of the appeal, it became apparent that the respondent laboured under a mistaken belief that once the decision of the magistrate was that he was Loina's husband at the time of her death it automatically meant that he became the executor in Loina's estate. It also became apparent that the appellant

took the decision of the High Court on appeal because she too believed it had the effect of conferring upon the respondent the status of executor in Loina's estate.

The order which the respondent obtained from the magistrate's court was a *declaratur* that he was Loina's spouse at the time of her death. He did not pray in addition for the setting aside of the order by the magistrate appointing the appellant the executrix in Loina's estate. That order still stands and until the respondent has it set aside by a competent order the appellant remains the executrix in Loina's estate.

The appeal is, accordingly, dismissed. Each party is to pay its own costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.