IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL APPEAL NUMBER 15 OF 2006

BETWEEN:

BARNET PHIRI APPELLANT

And

FANNY PHIRI DEFENDANT

(Being Civil Cause Number 18 of 2006 before First Grade Magistrates Court at Mzuzu)

CORAM: THE HONORABLE MR. JUSTICE L P CHIKOPA

Lameck of Counsel for the Appellant

Chipembere of Counsel for the Respondent

I Zimba Bondo (Mr.) Official Interpreter

J V Nyaleza (Mrs.) Court Reporter

Chikopa, J

JUDGMENT

INTRODUCTION

The appellant petitioned the court below asking that it dissolves the marriage subsisting between him and the respondent. After a full trial the said court said from page 8 of its typed record that:

'*this court grants the divorce basing on cruelty and adultery committed by the plaintiff. ……. Dowries are accordingly forfeited.*

The defendant is at school at Polytechnic. The plaintiff allowed her to go there. He even partly paid K100000.00 as fees. …….. this court wants the defendant to proceed with her education. As such this court orders the plaintiff to pay K500000.00 as the defendant's fees.

The plaintiff took the defendant to court while she was at school. That was one way of physically disturbing the defendant as regards her education. Such amounted to torture by the plaintiff psychologically.

Physically the defendant was also tortured by the plaintiff. This type of behavior cannot be allowed at all.

The plaintiff is therefore ordered to compensate the defendant with the sum of K120000.00 to be paid by 31st March 2006.' [**Sic**]

Regarding matrimonial property the trial court ordered *inter alia* that an uncompleted house in Salima be the respondent's.

The appellant was not satisfied with the trial court's determination as above of the matters. He has appealed to this court.

THE APPEAL

The appellant filed seven [7] grounds of appeal. They were in reality six. We paraphrase them as follows:

1. the lower court was biased against the appellant in the manner it admitted and treated evidence from the parties herein.
2. the lower court erred in law and in fact in ordering the appellant to pay K500000.00 as

school fees for the respondent when the same was not the subject of any assessment;

3. the lower court erred in law in awarding K120000.00 as damages to the respondent when this was neither prayed for nor awardable in a divorce proceedings;
4. the award of K120000.00 was excessive;
5. the award of K120000.00 was *ultra vires* the lower court; and
6. the lower court erred in law in awarding the respondent the premises in Salima in the absence of evidence to the effect that the respondent had contributed towards putting up the said premises.

Going through the arguments it is clear that neither party contests the divorce. Only the orders the trial court made consequent upon the dissolution of the marriage. We are of the firm view therefore that the appellant's concern with the manner in which the said court treated the evidence before it is not with respect to the grant of the divorce but rather with respect to the evidence the trial court relied on to make the two monetary orders and the order relating to the property in Salima. We think therefore that the appeal will not in any way be adversely affected if the above grounds of appeal were reduced to three namely:

1. that the trial court erred in awarding K500000.00 as school fees for the respondent;
2. that the trial court erred in awarding K120000.00 as damages for psychological and physical torture; and
3. that the trial court erred in awarding the respondent the real property in Salima.

These grounds we are sure encapsulate all that we heard herein from both parties. For convenience's sake we deal with each issue separately. This of course after dealing with the preliminary issue of whether the parties hereto were in fact husband and wife.

Was The Appellant And The Respondent Husband And Wife?

The trial court did not make a specific finding on this. It should have done so for a court cannot embark on dissolving a marriage that does not as a matter of proven fact exist at law. But since appeals in this court are by way of rehearing we decided to make a specific finding as to whether or not the parties were husband and wife. We even went to the extent of asking, with the consent of both Counsels, the appellant to take oath and testify on this. Fortunately our doubts were laid

to rest. The marriage was valid. There were ‘thengas’ and ‘lobola’ was paid.

The K500000.00 Award

The appellant attacked the award from three angles. Firstly from the evidential one. In his view the award of K500000. 00 can only be justified if the respondent proved on a balance of probabilities that the appellant had not only allowed her to pursue the course in issue but also that he had unequivocally undertaken to shoulder the burden of school fees. It is the appellant’s view that such has not been proven herein with the result that the award ought not to have been made. Secondly the appellant attacks from the point of view of pleadings. In his view the respondent in her prayers to the court below does not ask for school fees specifically or at all. In the absence of such a prayer the trial court had no business making the award in the first place. Thirdly he argued that even if the school fees were payable they were beyond his means. That the lower court should before awarding the sum have examined him as to his means. To the extent therefore that no such examination was made the sum is not payable it being beyond his means. The case of **Sunje v Sunje and Nkhoma** 11 ALR Mal 485 which we are told is authority for the proposition that it is not practical to make an award that the one to pay would not be in a position to meet was cited.

The respondent also responded from three angles if we understood her correctly. Firstly she is of the view that the appellant having encouraged her to go for the course and having paid the first installment is obliged even after the dissolution of the marriage to pay the said fees. Secondly we understood her to argue that if it is the styling of the award that we find offensive the said sum can be properly regarded as maintenance. We were referred to a definition of maintenance from **Blacks Law Dictionary** which we reproduce below:

> ‘*sustenance, support; assistance; aid. The furnishing by one person to another for his or her support, of the means of living, or food, clothing, shelter, etc, particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife. The supply of the necessaries of life. While term primary means food, clothing and shelter it has also been held to include such items as reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities and*

household expenses.' [**Sic**]

And also of section 24(1) (b) (ii) of our Constitution which says women are entitled on the dissolution of marriage to *inter alia*::

'*fair maintenance, taking into consideration all the circumstances and, in particular the means of the former husband and the needs of any children.'*

It was the view of the respondent that the K500000.00 awarded by the trial court can properly be regarded as maintenance as defined above. Thirdly the respondent thought that the award was reasonable and fair in the circumstances taking into consideration the means of the appellant whom she described as a man of able means.

On our part we think it necessary to remember that a court record, unless the contrary is proven, is the best evidence of what transpired in the court whose record is in issue. In this our case the best evidence of what transpired in the trial court is the record before us. Going through such record we think it incorrect with respect to say that the court below awarded K500000.00 as maintenance. We have above quoted the relevant part of the court below's judgment. Nowhere does it use the word maintenance. This can only be because the trial court was not and did not make an award in respect of maintenance. The award was for school [college?] fees. We are of the view therefore that it is unfair to the said court to regard it as having awarded maintenance when it clearly did not. All considerations of the K500000.00 award should therefore proceed, in our view, on the basis that the same was for maintenance and not fees.

Secondly and having gone through the definition of maintenance in Black's Law Dictionary we are reluctant to regard fees in the instant case as maintenance. It is clear in our mind that maintenance has a lot to do with the provision of means to sustain the maintained person. That is why the emphasis is on food, clothing, shelter, medical expenses and now transportation expenses. We fail to see how we can regard fees as part of maintenance to a person like the respondent who already has a college education, had a job and is now going for a course which though clearly desirable can not be said, if truth be told, to be a necessity.

Thirdly and even if one were to regard the award as maintenance we wonder whether the same can be justified in terms of section 24 abovementioned. It must be remembered that whereas the

Constitution gives our womenfolk the right to maintenance the right is qualified in that such maintenance must be fair in the circumstances regard being had to *inter alia* the means of the former husband. In the instant case assuming that the K500000.00 was for maintenance the question to be asked is whether or not the said sum is 'fair in the circumstances regard being had to the appellant's means'. In our view the former husband had to be heard not only as to his means but also to what in the circumstances would be fair maintenance for the former wife. The record of the trial court does not disclose such an examination. It does not even give the basis on which the award was made except maybe the fact that it clearly is half the fees payable at the Polytechnic for the respondent's tuition. We do not think the measure for what amounts in any given case to fair compensation should be the maintenanee's wants or indeed needs. The measure should be the circumstances of the particular case with emphasis on the means of the giver of maintenance. In so far as the court below was influenced by the measure of the fees payable we are of the view that it took into consideration irrelevant considerations. The award is clearly untenable.

Fourthly we also think that it is important to understand the payment of K100000.00 fees part payment and any promises towards payment of fees in their proper perspective. The parties were husband and wife. Whatever problems they might have been having it would be the natural thing for the appellant as husband to pay for his wife's tuition at the Polytechnic. The question being whether any promises and/or undertakings made towards such payments were made irrespective of whether or not the parties continued being husband and wife. We have gone through the record but have not come across any allegation by the respondent to such effect. Neither have we come across an admission to that effect from the appellant. The trial court did not even address its mind to that fact. In our thinking it would be amiss if any court were to conclude from the mere fact that the appellant paid the first installment the fact that he would make further contributions towards the fees or pay the whole sum irrespective of whether or not the parties continued being husband and wife. For such a conclusion to be made the party seeking to benefit, in this case the respondent, should show on a balance of probabilities that there was in fact an agreement between the parties not only that the appellant would pay the fees but that he would continue paying them irrespective of their marital status. With respect we do not think that such can be the conclusion from the evidence before us or indeed before the trial court.

Fifthly, and this with reference specifically to the argument that the fees should have been

specifically pleaded if they were to be awarded, let us say that we agree with the argument that customary law marriages should be treated differently from those under statute. Whereas in the latter it might be necessary that reliefs be pleaded the same might not be strictly necessary in customary law marriages. See **Arnold Juma v Ireen Juma** Civil Appeal Case Number 42 of 2002. We would be surprised therefore if a court were to refuse to order maintenance just because the same was not pleaded specifically in court papers. Similarly if a court refused to distribute matrimonial property just because there was no specific mention of it in the summons. The present case is a tad different though. As we have said above the award was not in respect of maintenance. It was of a special nature to cater for the respondent's special requirements. To that extent, and to that extent only, we are of the view that she should have specifically asked the court for it rather than await the good court's benevolence. To proceed otherwise would in our view effectively permit/facilitate the ambush of the appellant in court.

The K120000.00 Award

The appellant raised four objections against this award. Firstly that an award for physical and psychological torture is an award from the realm of torts. No tortiuous liability having been alleged herein it was wrong for the trial court to make the above award. Secondly he raised the issue of pleadings. He said because the respondent did not specifically ask for relief in the form of compensation for torture it was again wrong for the court below to make the said award. Thirdly, he says even if tortiuous liability were proved the amount awarded is excessive in the circumstances of this case. Fourthly the appellant says the award of K120000.00 is *ultra vires* the jurisdiction of the trial court in terms of the Courts Act.

The respondent basing on the case of **Willard v Mlenga** 1968 – 70 ALR Mal 313 argued that it is normal in customary marriages that a party who is instrumental in the break up of the marriage is ordered to pay compensation to the other party. That the K120000.00 must be taken to be compensation payable by the appellant for causing the breakup of the marriage. Regarding the trial court's jurisdiction the respondent said that it is impossible to put a monetary value to the reliefs that are sought and granted in matrimonial cases. As we understood her she said that a subordinate court should not be constrained from awarding appropriate compensation on the dissolution of a customary marriage just because the amount[s] exceeds its monetary jurisdiction.

That in the view of the respondent would produce an absurdity in that it would work to the disadvantage of women. Courts would be compelled to award lower sums just to comply with jurisdictional issues. We would have sympathy with such thinking in an appropriate case.

On our part, and referring to the instant case, we must reiterate that it is important that we do not, so to speak, introduce into the record of the court below words/terms that are not part thereof expressly or by necessary implication. The trial court never spoke of compensation being awarded against the appellant for causing the break up of the marriage which we are sure it could have done had if it so wanted. It spoke about compensation for physical and psychological torture. It in our view cannot be denied that ordinarily damages or compensation for physical or psychological torture are awarded in respect of tortiuous liability and that a party has to allege and prove damage before the courts can award compensation. In the realm of matrimonial law an award for torture is rather strange. We are ourselves firm in our belief that if a party wants to go beyond using physical or psychological harm as a ground for divorce i.e. he/she wants to use them as a basis for getting compensation or an award in damages such party must plead and prove such injury. The courts whatever their benevolence can not just wake up and make awards not asked for by the parties or not necessarily implied in the dissolution of a marriage. More than that we think it a cardinal principle of our justice system that each party should be made aware of the case against them and the possible consequences thereof. One goes into a divorce litigation expecting *inter alia* orders on the dissolution of the marriage, the distribution of property, the custody of children. One does not in our view expect awards to be made on tortiuous liability. If that should be the case it is our view that the party seeking such relief should through the pleadings warn the other party. If there is no such warning it would not be right in our thinking for the courts to take it upon themselves to award damages for torts in respect of whom no prayer for damages has been made. The most that can happen is for the court to alert the concerned party to the possibility of a civil action in respect of the suspected tort. To allow the courts to make such orders also denies the other party a hearing. As happened in the instant case it is clear that the appellant was not heard on the question of liability and damages.

We are aware of the fact that the party at fault is invariably asked to make compensation to the other party on the dissolution of a customary marriage. See the Willard v Mlenga case. It is however vital to bear in mind that this is interpreted differently from area to area depending upon

customs prevailing in an area. Among the tumbukas and ngonis of northern Malawi therefore upon dissolution of a customary marriage the party at fault loses lobola and custody of children. That is compensation for them of the nature Chatsika J had in mind in Willard v Mlenga. In many parts where the matrilineal system of marriage is practiced the compensation that Chatsika J had in mind is paid as part of 'kusudzula'. The party at fault is thus asked to formally and symbolically divorce the other party by paying some token sum or item as compensation for having broken up the marriage. In the instant case it was open to the trial court to order that the appellant having been found at fault had forfeited any lobola paid. It was not in our view open to it in the name of 'compensation' to start ordering damages for torture of whatever nature.

The Uncompleted House at Salima

This was granted to the respondent by the court below as it went about distributing matrimonial property. The appellant thinks it was not the correct thing to do. He says he financed the construction of the structure up to the level it is now. That the trial court erred in not making an inquiry as to ownership but instead inferring joint ownership of the property from the fact that the two parties were husband and wife.

The respondent thinks the said court correct. In her view the trial court first decided what was matrimonial property as between the parties and went on to distribute it. She also thinks that the appellant should not be allowed to bring in issues of how the house was built. It is a new issue not raised during trial in the court below. She cited the case of **Ng'ong'ola v Kabambe** 1964 – 66 ALR Mal 139.

The starting point has to be section 24(1) (b) (i) of the Constitution. It provides that women are entitled on dissolution of a marriage to **'a fair disposition of property that is held jointly with a husband**'. [**Our emphasis**] It seems to us that the process of getting a divorcing or divorced woman to benefit from this provision must involve a determination firstly, of what as between the parties is property that is jointly held i.e. is matrimonial property. Secondly and only after having answered such question we think can a court properly go on to determine what amounts to a 'fair disposition of property'. Both issues should only be tackled by actually hearing the parties. It will be remembered that the distribution of matrimonial property after a divorce under

the Marriage Act is done by a separate summons. There is therefore a separate hearing through which the court is able to determine what is matrimonial property and how the same must be shared between the divorcing parties. We see no reason why the situation should be any different just because we are here dealing with a customary marriage. In any case the Constitution itself does not discriminate. In the instant case it is clear that the trial court was content to ask the parties to provide lists of the property they had. One might say implicit in that request was the fact that such property should only be such as was owned jointly by the parties. Maybe it is but it would be better if such markers were clearly spelled out to the parties. Once the list was at hand the trial court went on to distribute the property. There is according to the record no such a thing as a hearing to determine who owned what and in what shares. That cannot be right in our view. And it is precisely because the trial court did not hear the parties as to who owned what that we are now faced with query from the appellant that the property in Salima belongs to him. Had the trial court heard the parties on the ownership and distribution of matrimonial property we would have been able to appreciate why it awarded the Salima property as it did. As it is our hands are tied. We do not know why it arrived at the conclusion it did. We are unable to say whether it was correct so to do. We can say however that proceeding in the manner it did had the effect of denying the parties a hearing on the specific issue of distribution of property. It is difficult if not impossible in those circumstances to stand by the trial court distribution of property in so far as it related to the Salima property.

For the avoidance of doubt let us say that the matter of this property cannot be a new matter. Distribution of property only comes at the end of divorce proceedings. That is when it first arose in the instant case as well. That the appellant did not raise the issue of ownership in the court below is not because he did not want to or neglected to. It was simply because the trial court never gave anybody an opportunity so raise the matter as we have demonstrated above. We saw no reason therefore why we should not rehear the matter as the law clearly says we can do.

CONCLUSION

It is our considered view that the orders of the court below in respect of the K500000.00 award, the K120000.00 award and the property in Salima cannot stand. They are hereby set aside. But like we have said above appeals in this court are by way rehearing. This court has the power to make such order[s] in respect of the appeal as it thinks just in the circumstances bearing in mind

of course the law applicable. In the instant case we have no doubt that the trial court was entitled to make certain orders regarding matrimonial property and maintenance as between the parties. Sadly it came up with the wrong ones. Dismissing this matter entirely will work an injustice to one of the parties especially the respondent. It is our order therefore that this matter be remitted to the Chief Magistrate North. He will bring this matter before a different court which shall then sit in the manner we have herein recommended or in such other lawful fashion it may deem fit to decide on maintenance and the Salima property. Such hearing to be held and this matter disposed of within 90 days from the date of this order.

If the appellant made any payments pursuant to the orders herein set aside, such payments will of course be taken into consideration at the new hearing.

COSTS

They are in the discretion of the court. In the due exercise of such discretion we order that each party shall pay its own costs both in this court and in the one below.

Pronounced in open court this February 19th 2007 at Mzuzu.

L P Chikopa

JUDGE