



120790

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NO.16 OF 1987

BETWEEN:

HAWARD KAMWAZA

APPELLANT

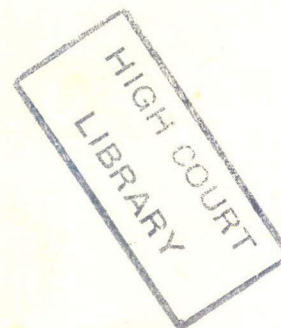
AND

GRACE TABU

RESPONDENT

CORAM: MAKUTA, CHIEF JUSTICE

Appellant, present, unrepresented
Nyimba, Counsel for the Respondent
Kadyakale, Official Interpreter
Maore, Court Reporter



JUDGMENT

This is an appeal against the order of the learned Resident Magistrate sitting at Zomba on 28th August, 1987 in an Affiliation Cause No.31 of 1987. The order was that the appellant pays K24.00 every month towards maintenance of a child, Berlina, a girl born on 20th July, 1986, until she reaches the age of 16 years. He was also ordered to pay the costs of the proceedings.

The appellant filed seven grounds of appeal. But put together there are only two grounds and that is what the appellant dwelt on. I will deal with them as argued by the appellant.

The first ground was that when the case was being heard in the Lower Court, he was absent because his uncle had died. That, in effect, denied him the opportunity of presenting his case. It was observed by this Court that the appellant was served with the summons and since the reasons for absenting himself were unknown, the Court proceeded to determine the case under Order 19 Rule 3(2) of the Subordinate Court Rules. It was incumbent upon him to inform the Court that he would not be able to attend because of the death of his uncle. The Court, in my view, cannot be blamed for hearing the case in his absence. This ground of appeal fails.

The next ground of appeal is denial of paternity. He informed the Court that the evidence adduced in the Lower Court showed that he was not the putative father of the child. He does not deny having sexual intercourse with the respondent. He, however, states that the intercourse took place on 28th December, 1985, and considering the gestation period, the child should have been born in September, 1986. It was therefore his contention that at the time he had intercourse with her, the respondent was already pregnant.

The respondent told the Court below that her last monthly period was in December, 1985 and that is the month she had intercourse with the appellant. She also testified that the child was born on 20th July, 1986. The respondent's mother also testified that the child was born on 20th July, 1986. There is, unfortunately, no evidence whether the child was premature, normal or late. From January to July it is less than the normal nine months gestation period. It would appear therefore, in the circumstances, that the appellant is not the putative father of the child.

There is one further point. There is evidence that the parties had been courting for sometime and had agreed to marry. But the appellant doubted the faithfulness of the respondent when he was informed about the pregnancy. The marriage agreement, as a result, fell off.

Mr. Nyimba, from the Legal Aid Department, represented the respondent during this appeal. In the course of submissions he informed the Court that on the available evidence he would not contest the appeal. It is a cardinal principle that a man cannot be responsible to maintain an illegitimate child unless he is proved to be the father. The evidence in this case falls short of that proof. The appeal succeeds and the order of the Lower Court is set aside.

PRONOUNCED in open Court this 12th day of July, 1990,
at Blantyre.

F.L. Makuta
F.L. MAKUTA
CHIEF JUSTICE

