

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL APPEAL CAUSE NO. 23 OF 2002**

BETWEEN:

ROSE MAGOMBO.....APPELLANT

- VS -

LUKA MAGOMBO.....RESPONDENT

CORAM: TWEA, J.

Appellant present in person

Respondent present in person

Jere, Official Interpreter

JUDGMENT

This is an appeal against the judgment by the Second Grade Magistrate court sitting in Chiradzulu. The petition has three (3) grounds of appeal which are mixed up. However, the issues she raises are: that the respondent did not build a house for her at her home, that the trial Magistrate did not take into account that she contributed to the development of the plot that they acquired and built the house in which they lived, that the compensation order, is not sufficient in view of the fact that she has six children with the respondent which children live with her.

The facts of the case which are not disputed are that the parties were married at custom according to the laws obtaining in Chiradzulu District in 1983. They resided at Bangwe in the City of Blantyre, where the respondent was teaching. They have six children from the marriage. It is on record that they had marital disputes and that the respondent did not support the appellant financially. He would also physically abuse her even in the presence of the children. The appellant referred the matters to the advocates, the church and the traditional authorities but to no avail. The respondent and his advocates would not attend such forums and the respondent would physically chase away those that came to try and reconcile them at home. The appellant finally left to live in village. Thereupon the respondent dispatched all the children to her as her responsibility.

The lower court found that the marriage had broken down and that the respondent was the cause for the break down. It granted the divorce and ordered that the respondent compensates the appellant in the sum of K6,000.00 and further that he pays her K4,000.00 for her to build a house in the village. The court further ordered that the matrimonial property be divided equally among them and that the respondent should be responsible for the upkeep and school fees for the children. The appellant now appeals this decision.

I must mention at the outset that during the trial, no mention was made of the plot of land and the house they lived in. This came out in the court record after the court asked the parties to declare the property that they had acquired during their marriage. It is not clear which of the parties gave the court this information. It is clear however, that none of them disputed what was declared. It was also not disputed that the house would be worth K500.00 - K600.00 per month in rentals on the open market.

I have considered the order made by the trial Magistrate and agree that the legal custody of the children under Lomwe Customary Law would be with the mother. The children however, are free to live with any of their parent, father or mother. This was a proper marriage under custom and as such a father cannot be ordered to maintain the children. It is the duty of the parents to raise their children. In this case, the respondent is under a duty to do so.

Be this as it may, I take into account that the parties had lived in a town house for 20 years of their marriage. This house was in fact their matrimonial home. This plot was developed as they lived together and the appellant contributed labour. She therefore, has an equitable right to the house which is lost by the divorce. The court ought to have taken this into account. I have considered that the house be sold, but in view of the fact the children and more so the elder one may chose to live with their father, it would be proper that the house remains in the family. I however, order that the appellant is entitled to of the house at K600.00 per month. She should be compensated for this for 10 years which is K20,000.00 in total. The respondent is to pay the appellant K400.00 a month on top of the K500.00 and K600.00 a month for compensation and for the house, until January, 2003. Thereafter he has to pay her K1,500.00 a month until the K20,000.00 is fully paid.

The respondent to bear costs of this appeal.

Pronounced in open court this 24th day of September, 2002 at Blantyre.

E.B. Twa

JUDGE