

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NUMBER 18 OF 2002

MARGRARET KAMUDZIKA.....APPELLANT

V

MOSES FIDES KAMUDZIKARESPONDENT

**From the Second Grade Magistrate Court sitting at Lilongwe.
Being Civil Cause No. 23 of 2002.**

CORAM : CHINANGWA, J.
: Mr. Songea, Counsel for the Appellant
Mr. Makono, Counsel for the Respondent
Mrs. B.C.F. Jere, Court Reporter
Mr. Chulu, Court Interpreter

J U D G M E N T

The Appellant Mrs. Margaret Kamudziaka appeals against the judgment of the Second Grade Magistrate Court sitting at Lilongwe on 28th March, 2002. The Appellant had petitioned the trial court for divorce against her husband Moses Fides Kamudziaka. The ground for divorce was adultery. The Respondent was alleged to have persistently committed

adultery with Appellant's younger sister Thokozani Chikaonda. It was alleged that she eventually became pregnant and gave birth to a child. The one alleged responsible for was Moses Fides Kamudziaka. At the time of trial the child was already dead. At the time of hearing this appeal Thokozani was also dead.

The appeal is not against the dissolution of the marriage, but against the ground for the dissolution. The Appellant petitioned for divorce because Respondent had persistently committed adultery with Thokozani Chikaonda. Whereas the trial court did not find Respondent guilty of this matrimonial offence of adultery, but that the marriage was irretrievably broken down.

It was her further appeal that the trial court did not award her compensation or order the Respondent to build a house for her.

My starting point is to remind myself that I did not have the advantage of assessing the demeanour of witnesses which the trial court had.

I would like to state at the outset that the marriage appears to have been contracted under customary law. However, it has not been stated in evidence or submission under which custom the marriage was contracted. This has a bearing on the course of this appeal.

From evidence the Appellant was the second wife. The first wife resided in Area 18. In the course of marriage Appellant brought into the matrimonial home her younger sister Thokozani Chikaonda. Appellant alleged in her evidence that Respondent had an affair with her. She found Respondent with Thokozani at Kaliyeka location. She also found them at a rest house at Likuni. When Thokozani went to live in Nkhota-kota Respondent is alleged to have followed her. Appellant found Respondent's clothes in her house in Nkhota-kota

The issue of the illicit affair and pregnancy was discussed at family level. The Respondent is said to have apologised. The matter was buried under the carpet. However the illicit relationship continued. The first child died but the party had another child. Appellant sued for divorce on the ground of

adultery. The trial court did not find the ground of adultery proved, nevertheless dissolved the marriage.

I have carefully examined the evidence of Mrs. Maliro (PW2), Assani Maliro (PW3), William Maliro (PW4) and Mai Patuma Maliro (PW5). Their evidence was a mere repetition of what the Appellant told them. It was hearsay. It was proper for the trial court to have disregarded it.

The only credible evidence was that of PW6 – Mrs. Rozina Simfukwe who was a tenant for Appellant at that time. She lived in one of her houses. It was her testimony that one day she escorted Appellant to Kaliyeka where they found Respondent and her younger sister in a house. She did not state any further than this.

In defence Respondent denied the issue of adultery. Respondent alleged in evidence that it was Appellant who had seduced him into love and eventual marriage. At that time Appellant was in marriage with one Mr. Konola. When they married Appellant displayed loose behaviour. That at one time she went to stay for a couple of days at Kachingwe rest house in Blantyre with manfriend. When Respondent

confronted Appellant it was alleged that she apologized. It was his testimony that Appellant married four times before marrying Respondent.

The question to ask is whether there was a marriage. The Appellant testified that they married under matrilineal custom. Respondent testified that they were married but did not confirm under what custom the marriage was contracted. Apart from the Appellant and Respondent, no other person testified to prove the existence of a marriage. Observably, no marriage advocate(s) testified as to the existence of the marriage under matrilineal custom. Was it therefore a marriage? Perhaps, it was a marriage by repute. Counsel for Appellant did not allude to this aspect of law before the trial court.

Was Appellant entitled to sue Respondent when there was no proof of marriage? I very much doubt. Much as Respondent's behaviour was appalling. Appellant could not sue because there was no marriage.

The second ground of appeal is that the trial court did not order Respondent to pay compensation to Appellant and

also order Respondent to build her a house. Respondent testified that he already built her a house at her home. This was not challenged by Appellant.

The question is whether this Court has jurisdiction to order Respondent to build her house. When there was no proof of marriage. It is my view that this Court has no such jurisdiction. This ground fails.

Appellant claimed that she contributed K40,000 towards the purchase of a motor vehicle. She did not state the type of motor vehicle or registration number. When it was bought, where, for how much e.t.c. This ground fails.

On the final analysis, there is no justification for me to interfere with the trial court's decision.

Appeal fails.

Each party to bear own costs.

PRONOUNCED in open court at Lilongwe District Registry this
29 day of May, 2008.

Hon. R.R. Chinangwa
J U D G E