



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL APPEAL NUMBER 69 OF 2007**

**BETWEEN:**

**MIRRIAM NAMKUMBA .....APPELLANT**

**- AND -**

**MR RABSON NAMKUMBA.....RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE E. B. TWEA**

Absent, of the Counsel for the appellant

Absent, of the Counsel for the respondent

Mrs Nkhoma – Official Interpreter

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**J U D G M E N T**

**Twea, J**

This is an appeal from the First Grade Magistrate Court sitting at Lunzu. The appellant filed five grounds of appeal.

When the case was called I noted that the grounds of appeal on record were not signed. Upon inquiry the appellant informed this Court that someone, she could not recall, drafted the grounds of appeal for her. The respondent was not served. Upon inquiry the respondent told this Court that he had no objection to the grounds of appeal being read over to him and the case

proceeding. The court duly read the grounds of appeal and proceeded to hear the parties.

It was the evidence in the Court below, and in this Court, that the appellant and respondent were man and wife. They had been married for five years before the appellant fell ill.

It was the appellants evidence that when she fell ill the respondent did not take care of her and their child. Eventually he came and collected all his property from the house. She complained to the village headman. The Village Headman summoned them for a discussion. It was the evidence of the respondent that there was much talk about him infecting the appellant with a disease. Eventually they went for an HIV/AIDS test. The appellant was confirmed to be positive. The respondent then left her because his mother – in – law accused him of passing on the disease to her.

The action was brought by the appellant for neglect and lack of care for her and the child. After the hearing the lower court found that the parties are no longer compatible. It found as follows:-

“The court having taken into account all these facts has found the respondent unwilling to go back to the complainant and as such is cheating this court that he still needs the plaintiff as a wife. The court has decided to dissolve the marriage between you two having found you Rabson Namkumba liable for the dissolution of this marriage.”

The finding of the court is clear that the respondent was the one found liable for the break down of the marriage. When making the order however, the court said as follows:-

“As the plaintiff has denied the respondent and that they stayed together for 5 years the court feels the plaintiff should compensate the respondent for divorcing him. I therefore order you Mirriam Nankumba to pay sum of K6,000 to the respondent which will be paid in two instalments of K3,000 effective this April, 2007.

Anything belonging to the respondent which is at the plaintiff's house be given back to the owner.”

The order of the court is not supported by the finding. There is no explanation for this order. The court found the respondent liable for the dissolution of the marriage. It is strange that it made an order of compensation in favour of the guilty party.

The appellant naturally failed to appreciate the basis of the order against her. It was her submission that when she queried the order all court staff were hostile to her and accused her of having a husband. There was only one member of staff who was sympathetic and drafted the grounds of appeal for her.

I was taken aback by the order of the magistrate, which is not only wrong and unjust, but also a travesty of justice. The guilty party should have compensated the innocent party and not the other way round. Clearly the order is wrong at law. Accordingly I set it aside.

There are two grounds that pertain to maintenance and school fees for the child. It is the duty of the father to maintain his child. The court should have taken this into account.

The parties argued about whether the respondent build a house for the appellant or not. What transpired is that the respondent started building a house for the appellant, when a dispute arose. The appellant took over the project, but admitted that she received some assistance from the respondent. The issue now boils down to the fact that the appellant contributed more to the project than the respondent did.

At custom the requirement is that the husband should build a house for the wife, which is the matrimonial house. This does not exclude the wife's assistance; material, financial or otherwise. However, it is expected that the major contribution would be from the husband. The court, should therefore take this into account.

Lastly, the appellant complained that the respondent took away all the property from the house.

It is significant to note that when the appellant was found to be HIV positive the respondent lost interest in her. He refused to maintain her and referred to her as already dead person. He took away his property and his articles of clothing. He not only acted unilaterally, but also inhumanely. If he did not want the company of his wife because she was ill, he was wrong to withdraw financial support and condemn her as dead. He was also wrong to remove property which formed part of amenities in the house thereby causing her further distress. The court should have taken this into account.

It is my judgment therefore that this appeal must succeed. I therefore order as follows:-

- that the respondent compensates his wife, the appellant in the sum of K10,000 for the divorce and causing her distress.
- that he compensates her in the sum of K12,000 for the contribution to the matrimonial house.
- That he compensates her in the sum of K10, 000 for the property he took away from the house unilaterally.
- That he maintains the child and pay school fees for her until she attains the age of 16 years.
- The respondent to pay costs for the appeal.

The award of compensation must be paid in instalments of K3, 000 a month with effect from this month: November, 2007 until all moneys are paid.

Any party not satisfied with the judgment may appeal to the Supreme Court of Appeal.

***Pronounced in Open Court*** this 24<sup>th</sup> day of January 2008 at Blantyre

E. B. Twea  
**JUDGE**

