

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CIVIL APPEAL CASE NO. 81 OF 2008

BETWEEN

AGNESS CHALAMANDA APPELLANT

AND

AUSTIN CHALAMANDA DEFENDANT

CORAM : HON. JUSTICE CHOMBO

: Appellant present - Unrepresented
: Resident - Present - Unrepresented
: Mrs. Kabaghe - Court Reporter
: Mr. Kaferaanthu - Court Interpreter

JUDGMENT

The marriage of the appellant and respondent was dissolved in the lower court on grounds of cruelty on the petition of the appellant. After the dissolution of marriage between the parties the court did not make any order on distribution of property. This was because the appellant had taken most of the household property at the time she left the house. The court also felt that the appellant had disadvantaged the respondent by taking almost all the most valuable property

from the house. The appellant also submitted that she was not given an opportunity by the lower court to explain her part of the story by the lower court. It was the evidence of the appellant that the respondent was cruel to her and the marriage was dissolved on the basis of that cruelty. When the respondent was asked about the cruelty he did not deny the matter but admitted that he was cruel to the appellant and the marriage was annulled on that basis. The appellant now claims that she was not given an opportunity to explain her part. However, since the respondent admitted he was cruel to her there was no need to go into details as the end result would have been the same. This is because at custom there is no need for the acts to be proved. However the fact that the respondent admitted to being cruel would have been relevant for purposes of making the relevant orders. Although it was the appellant who petitioned for the dissolution of the marriage, the appellant by his own admission, was the party at fault. The respondent admitted the acts of cruelty before the lower court; without the appellant enumerating them. The lower court did not make any order for compensation. The same ought to have been made.

The appellant claims that the respondent wanted to kill her but the evidence on record does not show a concrete intent on the part of the respondent to kill the appellant. Merely having a panga knife under one's mattress especially in the light of the evidence on record, is not conclusive of an intention to kill. In fact the evidence did point to the fact that the said panga knife was initially placed in the parties' bedroom by the appellant.

The appellant queried why the Magistrate ordered the distribution of the property when she had been given permission by the respondent to take whatever properties she pleased. The respondent admitted he had indeed given that consent. And, the respondent did not make any claim for the return of the said property. But the court acted on its own. In fairness, the court acted without any mandate in respect of the said property as the respondent did not so move the court to act. The lower court should therefore not have concerned it self with the redistributing of the property. The appellant told the court that when she queried this redistribution of the property she was told by the court that it was the respondent working and not her. This court can not vouch that these sentiments were expressed or not by the court. The position however is that even a wife who is not working to earn a salary is entitled to distribution of the matrimonial property. In *Nderuti v Nderuti Civil Appeal No. 203 of 1997* the High Court of Kenya held that even child bearing and home management are enough to entitle a woman to share of the matrimonial property. It would be total disregard of women's non-financial contribution in the home if distribution was based only on financial contributions. Further there are other pertinent matters to take into account when considering issues of distribution such as the expressed or implicit intention of the parties at the time of buying the property. Such issues as to whether the buyer expressed exclusive ownership of the property. However as the property has already been re-distributed there may not be much use now for a re-distribution order.

The appellant submitted and the respondent admitted that the respondent did not build a matrimonial home for the appellant. In Matimati v Chimwala¹ the principal was laid down that

“under customary law a man has an obligation to provide his wife with a house when he marries, and if he divorces his wife before doing so, this will not relieve him of the obligation”. (Underlining supplied for emphasis)

This means that whether the appellant refused to go back to Blantyre or not her entitlement is not affected. This entitlement actually becomes due, one can say, from the same day that the parties have formalized their marriage. The appellant is therefore entitled to her house despite whatever happened in her marriage. Now that the relationship between the parties has soured the respondent may not carry out his obligation under custom. Courts have, of late, merely made an order for some monetary compensation that would be used towards the construction of the said house. What is adequate to build a house in the village may not be easy to determine, especially with the ever escalating prices of various building materials. The order the court will make is only considered to be reasonable for that purpose. I order that the respondent pays K60,000.00 to the appellant for that purpose. However the same should be paid within 6 months from the date of this order.

The appellant further submitted that there has been no maintenance for the child since she left the respondent's home. It was the evidence of the respondent that

¹ [1964-66] ALR Mal 34 at 36

he used to support the child with K2,000.00 every week but that after the child visited him in December the appellant phoned to tell him that the child was not his. The appellant did not dispute this evidence although she cross-examined the respondent on other matters. It is not known why the appellant told the respondent this was not his child if indeed the respondent is the father of the said child. In this respect I would not make any order in terms of maintenance for the child. The appellant will have to maintain the child on her own; or indeed if the respondent is not the father then the father of the child must shoulder the responsibility. I therefore make no order in that respect.

It was the respondent's submission that the appellant left his house to go to another man's house in Lilongwe and that during the life of the marriage she had affairs with other men. Other than taking note of what the respondent said I do not think that the court has been moved to make any ruling on the matter or to make a finding of adultery. In any event even if the purpose of the respondent was to ask the court to make a ruling on the matter, I find the evidence on record inadequate to make a finding of adultery. I will not therefore go further than the observation made.

I find therefore that the respondent must compensate the appellant for being the party at fault which fact resulted in the dissolution of the marriage in the sum of K20,000.00. The respondent is also to pay the K60,000.00 being sums of money paid in lieu of building a house for the appellant. The total sum of money being K80,000.00 to be paid within 6 months from the date of this order.

MADE in Court this 24th day of April, 2009.

E.J. Chombo

J U D G E