IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY
MATRIMONIAL APPEAL NO. 18 OF 2015

BETWEEN:

CHIMWEMWE YASINI ..... PETITIONER

-V-

AMASI YASINI .....RESPONDENT

Coram: Hon. Justice M L Kamwambe
Mickeus of counsel for the Petitioner
Phiri.....Official Interpreter

JUDGMENT

Kamwambe J

This is an appeal against the judgmen t of the Third Grade Magistrate Court sitting at Blantyre. The Respondent was absent and was not represented. Mr Mickeus, counsel for the Petitioner' intimated that the Respondent was duly served but that he opted not to avail himself to this court for trial. He filed an affidavit of service as the Respondent refused to accept service. Mr Mickeus further said that he was in the company of the deponent, Mr Kamkwasi, on the day of service and saw that the behaviour of the

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Respondent was uncivilised. He prayed that we proceed with the appeal in Respondent's absence and I ordered that we proceed.

The parties married in 2006 and were officially divorced by the said Third Grade Magistrate Court on 25th January, 20 15. They have two children a boy and a girl aged 8 and 3 then. It was a marriage by cohabitation. There were no marriage advocates (ankhoswe) to bind the marriage. The Respondent is a Muslim while the Petitioner was a Christian by faith. He wanted her to convert to islam and she commenced taking classes but stopped on the way to the chagrin of the Respondent.

The grounds of appeal are as follows:

1 . The learned Magistrate erred in law and in fact in holding that both parties herein were responsible for the breakdown of the marriage when the evidence was so clear that the Respondent had deserted the Appellant and found another woman.

2. The learned Magistrate erred in law by failing to give a share to the Appellant of the two houses located at Kameza Township since the same were constructed during the subsistence of the marriage and there is no evidence to the contrary.

3. The learned magistrate erred in law in holding that the "Appellant should be given i/3 of the value of the minibus (MK 1 10, 000 .00) when there was no evidence that the Respondent had contributed more than the Appellant to the purchase of the said minibus.

4. The learned Magistrate erred in law in varying the order as to maintenance of the two children from MK20,000.00 to MK 10,000.00 without evidence that indeed the Respondent

could not manage to pay the maintenance of MK20,000.00 per month on top of school fees

5. The maintenance of MK 10, 000.00 per month for the two school going children is inadequate.

6. The learned Magistrate erred in law by failing to make an order in respect of housing rentals for the Appellant and the children while they are waiting for the Respondent to build a house for them.

7. The direction that the Respondent should build a house for the Appellant valued at MK200, 000.00 is erroneous and the value is just too low.

The Constitution of Malawi provides for a marriage by cohabitation or by permanent repute. This is also replicated by the Marriage, Divorce and Family Relations Act 2015 which recognises marriages by repute or cohabitation. This marriage was contracted before the 2015 Marriage Act came into force, therefore, common law principles would apply to this marriage.

I have tried to make an analysis of the lower court's record and I find that indeed there is hardly evidence to support some orders made. For Instance, the lower court did not have the list of all matrimonial property and its value thereof to determine whether it has jurisdiction or not to handle the issue of distribution of property. Yet the court went ahead to distribute the property known to it such as a minibus out of which Petitioner 's share was 1/3 of the total value of MK 110, 000.00. One wonders how the value of MK 1 10,000.00 was arrived at. The two houses at Kameza were apparently given to the Respondent without any reason being given. Further, the Respondent was not asked about his means of livelihood or income to ascertain how much maintenance he would pay for the two school going children. There was no basis for reducing maintenance from MK20, 000.00 to MK 10, 000.00 per month which

of course is inadequate for the children, despite that he pays MK90,000.00 school fees for both. It is not even clear whether the MK90,000.00 is payable monthly or yearly. Also, the court failed to consider the issue of residence for the children and the Appellant before the construction of the house for the Appellant.

Pending the re-trial hearing and decision thereof the Appellant should immediately acquire a house for up to MK40,
000.00 rent to be paid for by the Respondent.

The amount of MK200, 000.00 for construction of a house for the Appellant is plainly a mockery considering today's money value. One wonders the basis of arriving at the said figure. No explanation was given at all.

The parties seem not to have been heard on the issues. When the Respondent pleaded with the court that he pays MK90, 000.00 school fees on top of MK20, 000.00 child maintenance, the court reduced maintenance to MK 10, 000.00. The Appellant was not given opportunity to be heard on the issue. The reduction was made arbitrarily. I wish to agree with the Appellant that the orders given in respect of property distribution and child maintenance were so unfair and speculative.

For the reasons outlined above, I order a re-trial in the High Court for further and more particular evidence to be collated to support any orders to be made.

The first ground of appeal in respect of who was responsible for the breakdown of the marriage still remains. The Appellant instituted the divorce proceedings in the lower court on the ground of desertion. On page 6 of the typed record the court said as follows:

> *"Both parties seemed to be tired with their marriage. The court can't force the parties to continue with the marriage if one* or *both of them doesn't want.*
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> *The marriage has irretrievably broken down. And as such under Section 39(2)* of *the Courts Act grants this court power to handle this issue. I declare that Chimwemwe Yasini and Amasi Yasini as dissolved as to who has caused the marriage to break down, this court has found*, *that both parties were at fault. No one seem to be serious with the marriage because the Petitioner told this court that the Respondent deserted her whilst the respondent told this court that he* moved *out because the petitioner stopped going to* moslem."

I do not see anywhere that the lower court fully canvassed the issue of desertion which is the cause of action in this matter. It is very scantly addressed. Instead the court focused broadly on the nature of relationship and treatment that existed. The court should have analysed if the ground of desertion was sufficient to dissolve the marriage as petitioned. How could there be fault on the part of the Appellant as if there was any counter-claim? The issue whether the marriage was irretrievably broken down is not what was being claimed.

Further, the fact that the Appellant stopped attending Muslim lessons on itself may not be legally sufficient to attribute fault and responsibility for the breakdown of marriage. There was no cross examination on why she stopped attending the classes and whether she would resume later. From the facts that are there the Respondent admitted deserting the Appellant but says due to Appellant stopping islamic classes. Is this excuse valid to apportion blame on the Appellant? In short, the scanty facts to this case were not adequately analysed, as such, an unfair decision was reached.

For this reason I allow the appeal and order a re-trial in the High Court. Costs to be in the cause.

Pronounced *in Open Court this 18th day of November, 2016 at Chichiri, Blantyre.*

M L Kamwambe
JUDGE