



IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRAR – SITTING AT CHITIPA

CIVIL DIVISION

CIVIL APPEAL CAUSE NO. 20 OF 2015

(Being Civil Case No. 164 of 2014 before FGM Court at Chitipa)

BETWEEN

GABRIEL SIBALE.....

APPELLANT

-and-

AGNESS LWINGA.....

RESPONDENT

CORAM: THE HON. JUSTICE T. LIGOWE

Mr. G Kadzipatike Counsel for the Claimant

Respondent Present/Unrepresented

Mrs. F. Luwe Official Interpreter

Mrs. R. Luhanga Court Reporter

JUDGMENT

1. The marriage between the Appellant and the Respondent was dissolved by the First Grade Magistrate at Chitipa on 12th February 2015. On 9th March 2015 the court distributed the matrimonial property between the parties. It is this that the Appellant was not satisfied with and brought the present appeal. His grounds of appeal are that:-

- (a) The Magistrate erred in law and in fact when he distributed matrimonial property that was non-existent.
- (b) The Magistrate erred in law by placing undue weight on the evidence of the Plaintiff without doing a physical check as to whether the property mentioned was indeed available in the matrimonial home.
- (c) The distribution of the property was erroneous and against the weight of evidence.
2. In arguing the appeal Counsel for the Appellant has placed more emphasis on the fact that the matrimonial property that was distributed was not there, because the parties had sold it while the marriage subsisted and used the proceeds together. Counsel said that if anything what was left were kitchen utensils which the Appellant is ready to give to the Respondent.
3. In her response the Respondent has said that all the property was there before she left the matrimonial home.
4. It is important at this point to state that an appeal to the High Court from any decision of the lower courts is done by way of re-hearing. This means that the High Court goes through the same evidence that was made available to the lower court and reviews the decision of the lower court if it is correct in view of the law applicable and the evidence that was available.
5. In the First Grade Magistrate Court the Respondent brought the list of items which she said she had left at the matrimonial home and the list included:
- 2 houses
 - A maize mill; for milling and shelling
 - 5 cattle
 - 1 motor bike

- 2 bicycles
- 2 radios
- 5 beds and 5 mattresses
- 1 display cabinet
- 2 TVs and 1 TV stand
- 1 fridge
- 1 sofa set
- 12 bags of maize each weighing 90kg
- 1 wardrobe
- 2 satellite dishes
- 2 carpets
- 20 chickens
- Kitchen utensils
- 2 gardens
- 3 blankets
- 2 coffee tables
- 1 decoder
- 1 dinning set.

6. The Appellant did not bring any list but he said he will comment on each of the items.

7. He first admitted that they had a display cabinet, and that they bought a bed and mattress when each of their two sons were born. He also admitted the dinning set, 1 carpet and 3 cattle; one of which had been given when his first born daughter got married. This daughter however was from another woman.

8. He also said he had sold the motor cycle when his wife stole K200,000 from him and that he had sold one of the two houses.
9. He admitted having two maize mills but he had given one of them to his mother and sold the other before he separated with his wife. The wife however said that it was only an engine of one of the maize mills that was sold.
10. He admitted having two gardens but that he gave them to his two sons; Gabriel and Saul.
11. Regarding the kitchen utensils he said that the Respondent had already taken them.
12. Finally he said that all property had by then been given to his children because as a soldier he could die any time.
13. He further commented on the TVs that there is only one TV which belonged to Mr. Lwisha but he kept it as a pledge and later returned it to the owner.
14. He also admitted having a lot of chickens but they died of a disease.
15. In his order distributing the property the Magistrate observed that the Appellant was simply trying hard to prevent the property from being shared. The Magistrate also dismissed the Appellant's claims that he had given the properties to his children.

16. He also observed that the Respondent had sold the one house after the divorce proceedings had commenced in court, and he agreed with the Respondent that the Appellant if anything sold the properties after the Respondent left the matrimonial home.
17. It should be noted however that it is the motor cycle which appears to have been sold while the marriage subsisted, the time the Appellant claimed the Respondent had stolen K200,000 from him, and the one maize mill which he said he sold before separation.
18. It was therefore not in the evidence before the Magistrate that there was no matrimonial property that could be shared between the two.
19. Taking the evidence before him the Magistrate distributed the matrimonial property as follows:

Husband

- Both houses
- 1 motor cycle
- 1 radio
- Both maize mills
- 4 heads of cattle
- 1 Bicycle
- 4 beds and 4 mattresses
- —
- 1 carpet
- —
- 2 Blankets

Wife

- .. To be given K400,000 to build her own house.
-
- 1 radio
-
- one head of cattle
- 1 bicycle
- 1 bed and mattress
- 1 display cabinet
- 1 carpet
- 1 dinning set
- 1 blanket

- 15 chickens	5 chickens
- 1 Sofa	—
- 2 Coffee tables	—
- 1 Decoder	—
- 2 TV screen and 1 TV stand	—
- —	1 wardrobe
- 2 TV dishes	—
- 10 bags of maize	2 bags of maize

20. It would be seen from this distribution list that the Magistrate took into account what the Appellant said and it was much fair to him.
21. The Magistrate had the opportunity to test the demeanor of the witnesses, which this Court does not have and he made that decision.
22. From what the Respondent and the Appellant said in court, he believed none of the items was missing.
23. And having read the evidence, I find that the Appellant gave no impression that any of them was not there except the motor cycle and the one maize mill.
24. Incidentally, the things that the Appellant wanted the court to believe were not there, were given to the Appellant himself. He cannot therefore come to this Court on appeal and say that he has no property to give to the Respondent.
25. I uphold the distribution of the matrimonial property as made by the First Grade Magistrate and dismiss the present appeal.

26. Execution of the order was stayed, it is now vacated. If the Appellant has lost or sold any of the properties he was supposed to give to the Respondent, he will have to give her the equivalent value thereof as at 12th March 2015.
27. Made in Open Court this 28th day of November 2018.


T. Ligawe
JUDGE