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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NUMBER 26 OF 2018

(Being civil cause number 230 of 2016 before the Second Grade Magistrate Court sitting at Mangunda)

BETWEEN:

BRIAN KAJAWA

APPELLANT

AND

ESNART KAJAWA

RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

Appellant, present and unrepresented
Respondent, present and unrepresented
Mankhambera, Official Court Interpreter

JUDGMENT

This is this court's judgment following a hearing of the appeal in this matter.

The appellant appeals against the decision of the Second Grade Magistrate court sitting at Mangunda by which the lower court dissolved the marriage of the parties

herein having found that the marriage between the parties herein had irretrievably broken down due to the conduct and lack of love of the appellant, who is the husband of the marriage.

The respondent had commenced proceedings before the lower court seeking dissolution of her marriage to the appellant on the ground that the appellant had been cruel to her.

The lower court heard the evidence of both parties and dissolved the marriage on the ground that the marriage between the parties herein had irretrievably broken down due to the conduct and lack of love of the appellant who is the husband of the marriage. Particularly, that the appellant was not supporting the respondent and did not love her. The lower court specifically did not find evidence of cruelty as alleged.

The respondent had also sought compensation on dissolution of the marriage, maintenance and construction of a house as per the custom under which the marriage was contracted.

The lower court ordered maintenance at K250 000. It also ordered maintenance monthly child maintenance at K15 000 and construction of the house.

Being dissatisfied with the lower court's decision, the appellant filed numerous grounds of appeal in this matter.

Before this Court could deal with the rest of the grounds of appeal this Court wishes to single out the first two grounds of appeal that suggest lack of impartiality on the part of the lower court in how the matter herein was handled.

The said two grounds of appeal allege as follows

1. The Magistrate was not supposed to continue presiding over my case after he had expressed anger on 15th December 2016 against me over my reports to the ACB and Registrar of High Court about unlawful fines I had been charged by the court in an on-going divorce case that commenced on 2nd November 2016.
2. I was intimidated on 13th December 2016 through a phone call, number 0 885 975 145 by a man who only identified himself as a relation to Mr

Clement Killion one of the court messengers at Mangunda in the course of the on-going case because of my reports to the ACB and Registrar.

This Court wishes to state that, on hearing of civil appeals, this Court has the following powers as provided in section 22 of the Courts Act

In a civil appeal the High Court shall have power—

- (a) to dismiss the appeal;
- (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;
- (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;
- (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;
- (e) to make any amendment or any consequential or incidental order that may be just and proper;
- (f) to confirm, reverse or vary the judgment against which the appeal is made;
- (g) to order that a judgment shall be set aside and a new trial be had;
- (h) to make such order as to costs in the High Court and in the subordinate court as may be just.

The appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny. Of course, this Court is always mindful that when sitting as an appellate Court it should never lose sight of the fact that the lower court had the advantage of determining the credibility of the witnesses first hand.

By way of background, it must be stated that, during arguments on the appeal it transpired that there was indeed a point in time when the parties appeared before the presiding magistrate in chambers to discuss complaints made by the appellant to the Anti-Corruption Bureau and to the Registrar of the High Court concerning the

manner in which the lower court treated the appellant as the divorce matter was on-going before the lower court.

The appellant alleges that at that appearance before the lower court in chambers the presiding magistrate was angry with the appellant's complaints and threatened that he could do something that could result in the appellant losing his job as a civil servant.

The respondent's recollection of the event is however different from that of the appellant. Whilst confirming the appearance before the presiding magistrate in chambers, she stated that the magistrate only stated that, as public servants, the appellant should show love to the presiding magistrate by not reporting issues to the magistrate's superiors.

It is against this background of a tense atmosphere between the appellant and the lower court and its personnel that the appellant alleges that he asked the Registrar that the presiding magistrate recuse himself and for the matter to be transferred to another court.

The appellant contends that the presiding magistrate should have recused himself from the matter because he got angry with the appellant and threatened that he could get the appellant's employment as a civil servant terminated.

The appellant felt aggrieved that he had been ordered to pay K10 000 for the absence of his witness at a hearing before the lower court. And also that he had to pay K15 000 for child maintenance. He stated that this happened on 29th November 2016.

The appellant showed this Court a record in his cellphone indicating that he had paid the said total sum of K15 000 to Mr Killion the lower court messenger on 29th November 2016. The payment was made by mobile money transfer hence the record in the appellant's cellphone.

The appellant claims that in fact he was put in a cell at the Court which compelled him to make the payment by airtel money.

The added that he was not issued with an official receipt for the payment as is required. These are the matter that he reported to the Anti-Corruption Bureau and the Registrar.

This Court notes that the record of the lower court proceedings does not bear the facts alleged.

However, this Court is convinced at least of the fact that the appellant made the payment of K25 000 given that the record in the appellant's cellphone shows that he paid K25 000 to the lower court clerk, Mr Killion, by airtel money.

This Court notes that failure of a witness to attend trial is not a matter that should attract a penalty of a fine on the part of the party that called the intended witness.

It was therefore irregular for the lower court to impose the fine of K10 000 whether the magistrate knew of that fact or not.

The fact that there is no record of proceedings to that show that the appellant was ordered to pay the K25 000 means that there was no justification for the same.

When the appellant reported the issue to the Anti-Corruption Bureau and the Registrar and the presiding magistrate heard of the issue, the presiding magistrate should have inquired into the matter of payment of the k25 000 to his messenger, if the magistrate was not aware of the same.

It appears the presiding magistrate was not interested in finding out about the truth of the matter concerning the alleged incarceration of the appellant following the irregular requirement to pay the K25 000. This points to the fact that it may be true that Mr Killion the messenger indeed incarcerated the appellant and managed to get the K25 000 from the appellant.

It is worth noting that the order of K15 000 for alleged child maintenance was prematurely made given that by 29th November 2016 the lower court had not yet made such an order in so far as the record is concerned. The order for child maintenance was not made until June 2017.

Given the foregoing set of facts, it is clear that the allegation of lack of impartiality on the part of the lower court is well founded.

This is notwithstanding that the second allegation of intimidation did not directly come or concern the presiding magistrate.

The appellant ought under normal circumstances to have asked the presiding magistrate to recuse himself. However, given the manner he was treated before and after his well-founded complaints to the Anti-Corruption Bureau and the Registrar, it would be asking too much to expect the appellant being a layperson to ask the same presiding magistrate to recuse himself from presiding over this matter.

In the circumstances, this Court agrees that the presiding magistrate ought to have recused himself from presiding in this matter given the sequence of events.

There is a high likelihood of lack of impartiality in the matter on the part of the lower court given the events that happened as the matter was on-going.

As the adage goes, justice must not only be done but must be seen to be done. See *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

Although the presiding magistrate has not been heard on the allegations in this matter, to any reasonable and objective observer it would appear that the lower court would most likely be impartial given how it treated the appellant as the matter was on-going.

The appellant was unfairly treated by both the presiding magistrate and his messenger. Payment of K25 000 was clearly made to the messenger since there is proof. The matter was reported to relevant authorities. Instead of probing the matter, the presiding magistrate chose to fault the appellant for raising the matter with the relevant authorities. That is regrettable, grossly unfair and unjust.

The appellant could not expect justice from a magistrate who behaved in such a manner. The presiding magistrate should indeed have recused himself after the matters were reported to him through the query from the Registrar's office.

The decision of the lower court is accordingly set aside and this appeal succeeds for the reason that the lower court should have recused itself in this matter as it would not be expected or perceived to deliver justice in the matter.

This court will consequently not consider the other grounds of appeal.

This Court is of the view that in the foregoing circumstances it should exercise its powers under section 22 (g) of the Courts Act to order a re-trial of the matter and

that the matter be re-tried before a Resident magistrate to be assigned by the Chief Resident Magistrate.

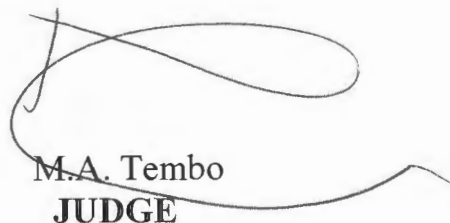
It is therefore ordered that the re-trial shall be done at Thyolo by a Resident Magistrate to be assigned by the Chief Resident Magistrate.

In the circumstances, each party shall bear its own costs on this appeal.

It is also ordered that the Chief Resident Magistrate shall investigate the allegations of payment of the K25 000 accordingly as there is no record of the same except for the phone record indicating that Mr Killion the messenger received the K25 000 from the appellant on 29th November 2016 so that the appellant's complaint that he refunded the said sum is sorted out. It is not possible for this appeal to address that aspect as it requires an inquiry where Mr Killion must be heard.

Any party dissatisfied by this decision has a right to appeal to the Supreme Court of Appeal.

Made in open court at Blantyre this 30th July 2018.



M.A. Tembo
JUDGE