



**IN THE HIGH COURT OF MALAWI, AT BLANTYRE**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 40 OF 1983**

**BETWEEN**

**EMILY MBAIJA SOMANJE.....PETITIONER**

**and**

**HARVEY ROBERT SOMANJE.....RESPONDENT**

**Coram:     **BANDA, J.****

Mhone, Counsel for the Petitioner  
Nakanga, Counsel for the Respondent  
Kadyakale, Law Clerk

**JUDGEMENT**

This is an application for custody of the children of the marriage. The application is by the petitioner for custody of the children. There is also an application for custody by the respondent.

The marriage of the parties was dissolved by this Court on the 20th March 1984. The petitioner works as a Bank Clerk with the National Bank at a gross salary of K495.25 per month. The respondent is the Operations Manager for P.T.C. There is some dispute about the respondent's salary. The petitioner has produced a photocopy of a tax return submitted by the respondent's employers to the Department of Taxes. The respondent did not dispute that the return had been submitted by his employers. However, although the tax return shows that the taxable income of the respondent is K24,520.48, his gross salary is shown as K20,511.80. The respondent agreed that his employers could not submit a false return. Although the date when the return was submitted is not legible it is clear that it was submitted for the tax year ending 31st March 1986. I am therefore satisfied and I find that up to March 1986 the respondent was earning a gross salary of K20,511.80 per annum.

The children have, since the dissolution of the marriage, stayed with their mother, the petitioner in this case. In opposing the petitioner's application for custody the respondent has contended that the petitioner's residence which is in the high density area is not congenial to the children's education and that they are insecure as is evidenced by a burglary which was committed at the petitioner's house resulting in the loss of children's belongings, He stated that he lives in a low density area with two servants and that the lady he has married is capable of looking after the children.

He has contended that since the dissolution of the marriage, the children's academic performance has dwindled. However, the respondent has conceded that his house was at one time a subject of an attempted burglary. That only goes to show that houses in low density areas are not immune from burglaries,

Mr. Nakanga has submitted that the respondent is in a better position of looking after the children and has prayed that custody be granted to the respondent. He contended that as the respondent has now married, granting custody to the petitioner would be condemning the respondent to looking after two families.

Mr. Mhone has urged the court to grant custody to the petitioner. He has submitted that the respondent's job takes him away from home for many days and that on the last occasion the respondent was away from home for three weeks. He has therefore submitted that it is the petitioner who can give the necessary supervision to the children. Mr. Mhone has further submitted that the court should consider the interest of the unimpeachable parent.

I direct myself that on applications for custody of any children it is the welfare of the children which is the first and paramount consideration., While I must also consider the interests of the innocent party in the matter, the overriding consideration must be the welfare, interest and happiness of the children.

The respondent has married the co-respondent in these divorce proceedings and she is the lady the respondent said can better look after the children, but on his own evidence his present wife has met the children only once and he could not remember whether the meeting took place late last year or early this year. The ages of the children range from 8 years to 13 years, I am satisfied that children of that age cannot be adequately looked after by an employee or relative. An employee or relative, let alone a step-mother, how anxious or how best she may try to do for the children, cannot take the place of the real mother. Mr. Nakanga has invited the court to consider granting custody to both parties. He stated that the court should consider granting custody one of the two children to the respondent and that custody of the other of the two should be granted to the petitioner. It is possible to grant custody in this manner. But I have to consider the principle that children should not be separated. In my view to grant separate custody would. deprive the children of the advantage of brotherhood and sisterhood. It is clear, in my judgement, that the fact that the respondent is seeking that kind of order shows that the Petitioner has not been a bad mother. I am satisfied that it will be in interest, welfare and happiness of the children if they continued to live with their mother. Consequently, I grant custody of the children to the petitioner with reasonable access to the respondent

I have heard evidence that the respondent has paid school fees for the children for the past two years except this year. The respondent has also informed this court that he delivers groceries for the children at the petitioner's house once or twice a month and he has placed the value of such groceries at K100 to K200. Sometimes, he said, they are less than K100. I am satisfied that the respondent should continue to make a reasonable contribution towards the maintenance and education of his own children. I would therefore award K40 maintenance per month for each child. That is less than the kind of contribution the respondent has been making according to his own evidence,

Made in Chambers on this 23rd day of December, 1986 at Blantyre.

**R.A. BANDA**  
**JUDGE**