IN THE NATIONAL TRADITIONAL COURT OF APPEAL
SITTING AT MZUZU ON 20TH AND 21ST APPRI, 1977 AT 9:10 A.M.

CIVIL APPEAL CASE NO. 25 OF 1977

LOVENESS NYALONGWE ……APPELLANT
VERSUS
HON. M LUNGU……. RESPONDENT

CLAIM: DIVORCE

CORAM:

CHIEF CHIMUTU (DEPUTY CHAIRMAN / JUDGE)
IKKOSI MZUKUZUKU (MEMBER/JUDGE)
MTEMI KILIPULA (MEMBER/JUDGE)
MR. D. S. TAMBALA (MEMBER/JUDGE)
MR. N.J. MHONE (MEMBER/JUDGE)

JUDGMENT

The Appellant in this case is Loveness NyaLongwe while the Respondent is the Honourable Mr. Mordecai Malani Lungu, M.P. and Regional Minister for the Northern Region. In the Mzimba District Traditional Court (hereinafter called the lower Court) the Respondent sued the Appellant seeking the dissolution of their marriage which was contracted in 1954. In that Court, the Respondent gave the following three reasons as grounds for his claim: -

(a) That during the year 1976 the Appellant went privately to Katawa Location to seek some African medicine.

(b) That later the appellant was found with a cut on her neck and when asked what caused the injury the appellant gave three inconsistent statements; and

(c) That one day the Appellant removed blankets and bed covers of the Respondent's mother, put them outside, looked the house and left the house without informing the Respondent's mother.

The Appellant asked the Lower Court not to dissolve the marriage because the marriage had subsisted for a very long time; she also told the Lower Court that there are five children of the marriage and that dissolution of the marriage would result in the parties contending over the children; the appellant then asked the respondent to forgive her if he felt that she had wronged him.

Despite what the appellant stated in the Lower Court and notwithstanding the fact that the Lower Court felt that the Respondent ought to have forgiven the Appellant that Court proceeded to pass judgment in favour of the Respondent. The Lower Court granted divorce and while awarding, dowry to the Appellant custody of' children was surprisingly given to the Respondent.

The Appellant then appealed to this Court against the judgment and order of the Lower Court. In her grounds of appeal, the appellant complained *inter alia* that since it was the Respondent who was divorcing her, then the Court was wrong in giving, custody of the children to the Respondent, she said that the Lower Court was-biased favour of the Respondent because the Respondent was a "Minister" while she was "an ordinary housewife".

The Appellant also complained that she would need her children to help her and take the place of her husband who is divorcing her; she said that this is particularly because she has stopped bearing children.

The Appellant further stated, in her grounds of Appeal that for the past nine years she was left alone at the home of the Respondent and that during that period she had been developing the "home farm" hoping that she would enjoy the wealth resulting from her labours jointly with her husband; she also complained that the Respondent seized from her a Savings Bank Book operated in her name.

Finally, the Appellant in her grounds of appeal complained among other things that it was very clear that the Lower Court was biased in favour of the Respondent and that the judgement was obtained at dictation of the Respondent.

The brief facts of the case are as follows: - The Respondent married the appellant properly according to the traditions obtaining in the Mzimba District. The marriage took place in 1954, during the same year, the marriage was officiated in Church. It was therefore a "Christian Marriage". Five children were born during the course of the marriage. The Appellant gave birth to the last child in 1967; since that time, she has had no child.

It would appear that later the Respondent married a second wife called Nya Gama. The Appellant was therefore regarded as a senior wife. For the past nine years the Appellant was living alone at the home of the Respondent; she was staying with the Respondent's mother in a house built by the Respondent. It would appear that during these nine years the Respondent never allowed the Appellant to come to stay with him in Mzuzu where the Respondent had another house. It appears that it was the second wife, Nya Gama who had the exclusive privilege of staying in Mzuzu Town with the Respondent.

We now examine the judgment of the Lower Court. It was the view of this Court that the Lower Court erred on a number of points. The first point is that when a party seeks divorce in a Traditional Court, **the general practice is that divorce is not granted during the very first time the case comes into Court. This in particularly so where the marriage has subsisted for a long time and there several children of' the marriage, the normal practice is that they are given a chance to go back home and reconcile. It is common practice that parties, to a. suit of divorce are sent back home to reconcile several times before a Traditional Court can finally dissolve the marriage. This practice is so established that, only in exceptional cases can a Traditional Court depart from it**.

This Practice allows parties sufficient time to consider the advice which the Court normally gives to them, it also gives them sufficient time for them to cool down and examine the situation objectively. Very often parties return to Court to inform tile Court that they have reconciled after being advised by the Court to go brick home and try a reconciliation.

In this case the Lower Court had a stronger reason to order the parties to go home and reconcile. This is because the respondent's advocate Mr. Gibson Kamanga clearly told the Lower Court that he saw no reason for dissolution of the marriage. It is our view that the Lower Court was clearly wrong when it failed to order the parties to go home and try to reconcile.

Then the Lower Court stated in its judgement that it felt that the respondent ought to forgive the appellant. This Court understood this to mean that the matter would have ended with the respondent merely forgiving the appellant for whatever wrong the respondent felt she had done. If this is what the lower Court felt, then it should not have rushed to dissolve the marriage between the parties; the Lower Court should have felt compelled to ask the parties to go home and try to reconcile.

Then the Lower Court awarded dowry to the appellant but gave custody of the five children to the respondent. We hasten to point out that on this point the lower Court erred grossly. **The custom in Mzimba is clearly that the party who is found to be at fault in a case of divorce loses both dowry and children. The general practice is that the dowry and children go together, they are inseparable in a case for divorce**. In this case, there is no special reason why there was a departure from general practice. It the Lower Court felt that the Appellant was responsible for the dissolution of the marriage, then it had a duty to grant the dowry and custody of the children to the Respondent. If on the other hand the Lower Court felt that it was, the Respondent who was responsible for the breakdown of the marriage then the Lower Court had a duty to order without fear that the Respondent lost both dowry and children. It is our view that when the lower Court awarded dowry to one party while granting custody of children to the other party, it confused itself and it was clearly wrong.

We shall now examine the Respondent's grounds for divorcing the Appellant; such grounds were stated in the Lower Court and have been reiterated with much force before this Court.

The first ground is that the Appellant privately went to Katawa where she sought some medicine from a certain woman. The Court inquired from respondent whether the appellant actually obtained the medicine. The Respondent failed to satisfy the Court that the medicine was obtained. This Court was therefore satisfied that the Respondent totally failed to support this ground and the Court, rejected it.

The Second ground is that the appellant was one day found with a cut on her or neck. This Court inquired from the Respondent if he could tell the Court actually caused the cut. Again the Respondent failed totally to tell the Court the cause of the injury. We, therefore found no justification for the suspicious of the Respondent. We found no truth in this ground and we also rejected it.

The third ground on which the respondent tried to rest his case before this Court is that, the Appellant one day locked her mother-in-law out of the house after removing the blankets and bed covers of her mother-in-law from the house. The Appellant told this Court that she simply forgot to collect the and bedcovers back into the house after she took them out to dry them in the sun according to the usual practice. The Appellant also the Court she apologized for what she did and the matter ended. The Appellant appears to be supported by the Respondent's advocate Mr. Gibson Kamanga who told the Lower Court that the Appellant admitted having done a wrong thing; Mr. Kamanga also told the Lower Court that he saw no reason for the dissolution of the marriage. This Court has been satisfied with the explanation of the Appellant and we hold that the appellant simply forgot the things outside the house and she did not intend to chase her mother in law from the house. Again the advocate of the Appellant was not informed of this, he heard about this matter in Court. If this were a serious matter, then it would have been reported to the appellant's advocate before it went to Court.

We have therefore found the third ground not to be sufficient cause for the dissolution of the marriage between the parties. We have also rejected it. Having rejected the above three grounds, we were satisfied that there was no ground upon which the marriage between the parties could be dissolved.

The Court after carefully considering the peculiar facts of this case and all the circumstances surrounding it reminded the Respondent of his special position and status in the community. The Court also reminded the Respondent as a result, his marriage is of special importance to the whole Nation in general and to the people of the Northern Region in particular. The Court pointed out to the Respondent that if he divorces his wife on such trifling grounds his children whose custody he strongly claims will never be happy and should such children have the impression that the only ground upon which the respondent is divorcing the appellant is her lack of education then the children will never forgive the respondent in future.

The Court also took the opportunity of reminding the Respondent of his active duty to the people he leads. The Court made it clear to the Respondent that it was his duty to ensure that marriages are stable not only in Mzimba District but also in the Northern Region as a whole.

It therefore warned the respondent in very unequivocal terms that it would be very difficult for the Respondent in future to discharge his duty if he himself takes the load in divorcing his wife on frivolous grounds.

After advising and warning the Respondent along the above lines the Court following a well-established customary practice obtaining in every part of this country gave the Respondent about one and a half hours to reflect on what the Court stated and thereafter to return to the Court and tell the Court whether he took heed of the Court's advice and warning.

When the Court resumed sitting after the one and a half hours of adjournment the Respondent, to the dismay of the Court, informed the Court that he had not changed his mind but insisted that he wished to divorce the Appellant. The Respondent repeated the same frivolous grounds as a basis for dissolution of his marriage, with the Appellant.

Since the Respondent after the Court's advice and warnings still maintained his wish to divorce the Appellant on such frivolous grounds this Court then tended to agree with the Appellant that the real reason for the Respondent's wish to dissolve his marriage with the Appellant is the Appellant' a lack of education. This is supported by the fact that when summing up his case before the Lower Court, the Respondent said that he had taught the appellant many things but she has failed “She has never changed". When asked by the Court what he meant by that, the respondent failed to explain satisfactorily. Then it would appear that the Respondent never allowed the Appellant to stay with in his house in the Town of Mzuzu for any substantial period of times for the past nine years. It was the junior wife Nya Gama who had the complete and. to stay with the Respondent in Town. This indicates that the Respondent considered the Appellant too uneducated and unfit to stay with him

It is therefore surprising that the Respondent complains that the Appellant was failing to receive and entertain his guests properly. The manner in which the Respondent treated the Appellant could drive any woman to develop an inferiority complex. Women suffering from inferiority complex usually fail to entertain important and distinguished guests; but we maintain that the inferiority complex, if any, must have been the direct result of the respondent’s conduct towards her.

According to the facts of this case we are satisfied that the Appellant for the past nine years lived almost alone at the home of the Respondent; she stayed there peacefully; there is no evidence that she used to quarrel or fight with the Respondent's mother or anyone at the village; the Appellant gave us the impression that she is a quiet, gentle lady only concerned with preserving her marriage with the Respondent. On the other hand, the Respondent confined the Appellant to his home in the village and never allowed her to come and stay with him in Town. It would appear that during the time when the Appellant was staying alone at the home of the Respondent, he was neglecting her and showed very little or no love at all towards her. This must have caused much mental on the part of the appellant. Now, as if such suffering is not enough the Respondent wishes to inflict more suffering on the part of the appellant by divorcing her without any reasonable ground; he also wishes to have custody of the children.

The Appellant does not want the marriage to be dissolved; she does not also wish to be deprived of her own children who are now her only hope for future happiness and security.

It is also very clear to this Court that the advocates of both the Respondent and the Appellant do not want the marriage between the parties to be dissolved. It is only the Respondent who seeks the dissolution of the marriage.

To grant divorce in this case would be allowing the Respondent to take advantage of his own wrong doing towards the appellants. This Court will not deliberately allow itself to be associated with such conduct. It will therefore not take such course of action.

It must be made abundantly clear that this is a Court of law. It is the active duty of this Court to administer justice without fear, favour or affection. This Court would be failing in its duty

if it allowed its judgment and order to be dictated upon it by either party to the dispute. The duty of this Court is simply this; ***it will examine and consider the facts of the case and apply the law to those facts.***

For the above reasons we have quashed the judgment of the Lower Court and we have set aside the order of that Court. The marriage between the Respondent and the Appellant is not dissolved. We direct that the appellant should return to the matrimonial home and stay there happily and peacefully.

The appeal is allowed.

DATED AT MZUZU THIS 21ST DAY OF APRIL, 1977