

IN THE NATIONAL TRADITIONAL APPEAL COURT SITTING AT LIMBE,
BLANTYRE
CIVIL APPEAR CASE NO. 97 OF 1979

BETWEEN

OSBELL NKHONJERA..... APPELLANT
-VS-
WATSON NKHONJERARESPONDENT

CORAM:

HON. JUDGE CHIEF CHIMUTU (ACTING CHAIRMAN)
HON. JUDGE CHIEF MLONYENI (MEMBER)
HON. JUDGE CHIEF CHIGARU (MEMBER)
HON. JUDGE, MR. S.Z.P. GONDWE (MEMBER)
HON. JUDGE MR. B.W. KALUKUSHA (MEMBER)

JUDGMENT

This is an appeal against the judgement of the Blantyre Traditional Court which found the appellant liable on a claim headed "**Kunditengera Katundu wanga ndi ndalama zokwana K40.00**" and ordered her to re-join the respondent and return to him all the properties in question. Dissatisfied with both liability and order the appellant has appealed to this court arguing:

- (a) that she had never been married to the respondent so that the court erred in ordering her to re-join the respondent; and
- (b) that since she had not been married to the respondent the properties in question had not been jointly owned and she was, therefore; entitled to take all her own items. She denies having taken the respondent's own items.

The appellant had been a student nurse at St. John's Hospital, Mzuzu, when the respondent got to know her. They had sexual relations which resulted in the appellant's pregnancy and expulsion from school. She joined the respondent but it is common ground that arrangements to transform the union into a valid marriage failed to materialise. However, the parties moved to Lilongwe together and, after some time, to Blantyre where they lived in a friend's place and it is from the latter place that the appellant is alleged to have taken the items shown on Exhibit 1.

As both parties had not, in law, been married the court erred to order a rejoinder and, in any case, that wasn't the issue before it. Thus we set that order aside. As for the properties in question it is clear that in ordering their return to the respondent the court had been clouded with the notion that the parties had been married and, on that basis, dismissed the respondent's claim for K40.00 saying the **appellant could not have stolen the money from the respondent or herself since in legal fiction, she and the respondent were one.** The court further found that there was no evidence that the appellant had taken the money and noted that she admitted having taken the properties; but in prosecuting her appeal it has become apparent that her admission related to her

own properties and the court, therefore, left unresolved the issue whether she had taken the respondent's properties enumerated in Exhibit 1.

In our view the respondent's evidence failed to establish his case on a balance of probabilities. There is only his story and he omitted to call witnesses who allegedly saw the applicant take the items although he had been given sufficient opportunity to call them. In our view had the court below not confounded the issues before it with those of marriage it should have dismissed the claim. We set aside the order concerning the return of the properties since it was not sufficiently proved that she had, taken them. Thus, the appeal is allowed *in toto* and the respondent is condemned in costs.

PRONOUNCED 111 OPEN COURT AT LIMBE, THIS 18TH DAY OF AUGUST, 1980.