IN THE NATIONAL TRADITIONAL APPEAL COURT SITTING AT MZUZU.
CIVIL APPEAL CASE NO. 54 OF 1980.

BETWEEN

RICHARD NGWIRA …….APPELLANT
-VS

MARY KUMWENDA ……..……...RESPONDENT

CORAM:

THE HON. JUDGE INKOSI MZUKUZUKU (DEPUTY CHAIRMAN)
THE HON. JUDGE KALONGA KABUNDULI (MEMBER) .....
THE HON, JUDGE THEMBA NTHALIRE (MEMBER)
THE HON. JUDGE MR. D. W. KALUKUSHA (MEMBER)
THE HON. JUDGE. MR. D.F. MWAUNGULU (MEMBER)

JUDGEMENT

This case arose from very odious circumstances. The appellant was the defendant in a claim by the respondent for cutlery brought to the appellant on their wedding day. The matter originated in the Lura Traditional Court in Rumphi District because the respondent comes from Rumphi. The appellant comes from Chilumba in Karonga District. Albeit the appellant contends that the property was not brought to him. The Court of first instance after hearing all witnesses found as a fact that the cutlery was brought to the appellant. It according ordered that the appellant pay K101.93 to the re respondent the value of the cutlery.

The appellant was disgruntled with the order of the lower court and he appealed to the Rumphi District Appeal Court against the order. This Count wittingly discovered that it had no jurisdiction on the matter in as much as the matter arose from Karonga District. It therefore sent the record to the Chief Traditional Courts Commissioner for his direction. The Chief Traditional Courts Commissioner ordered, and properly, in our view, that the matter be heard by the Rumphi District Appeal Court notwithstanding the want of jurisdiction. He has such power provided in Section 32(1)(a) of the Traditional Courts Act.

In the case of **Mwangobola v. Mwangobola (Civil case nun number 4 of 1980 Southern)** this Honourable Court declined to dissolve the marriage on appeal to this court because the lower Court had no jurisdiction to dissolve the marriage in as much as the marriage was contracted in Nkhata-Bay District. In the case of **Margaret Majawa v. Richard Lister (Civil Appeal case number 12 of 1981 -Southern)** we stated *obiter* that an order of court cannot be vitiated for want of jurisdiction because immediately a defendant appears in court he subscribes to the jurisdiction of that Court and subsequent proceedings cannot be nullified for want of jurisdiction. The view of this Court is that in matrimonial causes and in causes touching real property (Sections 8 -of- the Traditional Courts Act) the jurisdiction of the court is *sine qua nona* (reason without which) a Court may interfere with a judgement of a lower court for want of jurisdiction. The reasons for

this rule are obvious. These categories may involve *nicene* points of customary law notion which may not be appreciated by a court that is not conversant with them. In other matters between individuals this strictness may not be very necessary and in a case like the present which is a claim for chattels and indeed in a case like **LISTERS** where no marriage in fact existed, the court will take the view that a person *albeit* not amenable to the jurisdiction of that court subscribes to its jurisdiction when he appears before it and an appellate Court should be wary to interfere unless there is an affront to justice.

The appellant has filed a lengthy petition of appeal. In all he is contending two things. Firstly, he denies that these things were brought to him. He says if they were there should have been according to the custom in Chilumba a relation of his to witness the ceremonial handing over of the same. Secondly he says that even if these things were brought to him the respondent would not be entitled to have them back since when he paid the *Lobola*; all the things brought at the marriage belonged to the husband. He has contended forcefully that this is the custom in Chilumba and was not followed by both courts in Rumphi. Indeed, if this is the custom in Chilumba then the cause of the error by the two courts is obvious: it is because the two courts had no jurisdiction. It follows almost *afortiori* that they could not have known the custom unless the Traditional Courts Commissioner ordered that evidence of the custom in Chilumba be brought in terms Section 32(2)(a) of the Traditional Courts Act.

The odious facts from which the claim arose are as follows. The appellant and respondent wedded in a C.C.A.P. Church in Chilumba. **Our custom is that on this occasion, apart from the gifts of the well-wishers, the bride brings cutlery from her home**. **Traditionally this included Milundu (earthenware pots), Bakhoma (woven plates), etc. These days these things are seldom used and other things have taken their place, such things as tea sets, plate etc. are the things of the day**. On the wedding of the two the bride brought all the things enumerated in the record. According to custom on this ceremonious handing of these things there is supposed to be a relation or two from both sides. The bride's party should produce one representative and the groom's party one such representative. Unfortunately, on this occasion no such representative was called or rather produced from the groom's side. However, it is quite clear that because a lot of things were brought from the bride on this occasion because the appellant had to hire a motor vehicle to collect them.

For the two however marriage was not a "they lived happily thereafter." It was rife with problems just after the wedding. After living together as husband and wife for or barely two weeks the respondent was chased from the house and that was the end of it. Attempts were made to reconcile them both at home and at Church but to no avail. Their marriage was finally dissolved by the Uliwa Traditional Court. **The appellant forfeited some heads of cattle to the respondent in the process.**

The respondent then, sued the appellant for recovery of the things that she brought into the marriage. The two lower Courts granted her relief and the appellant appeals to this Court against orders of both Courts. At the hearing of this appeal the respondent, even though served, is absent. She has not applied for her attendance to be dispensed with in terms of rule 11 A of the Traditional (Appeal) Court Rules. The Court therefore proceeded with the matter *ex parte* by virtue of rule 11 B, *ibedem.*

In his first ground of appeal the appellant denies that these utensils were ever brought to him. He says if they were then his relation according to his custom should have been present. The complainant in order to prove her claim called two of her relatives who handed the cutlery to both her and her groom. These witnesses agreed that in fact at the handing over no appellant's relation were present. They said that the cutlery had been kept in *Nyankhazi's* house at the appellant's home - this was the appellant's relation and she knew of the things they brought. They told the court that it was the duty of the appellant's relations to make themselves available for this auspicious occasion. There was no duty on them to request the presence of their compatriots in marriage. They never thought that the marriage would end as tragically as it did that is why they were not compelled to meet the demands of this ceremonial custom. Their Lordships are persuaded to think that whether those utensils were handed to the appellant or not is an evidential point. It depends on what the witnesses say and whether they should be believed or not. The lower Court found the complainant's witnesses to be witnesses of truth and it found as a fact that the cutlery were given to the appellant. Of course the witnesses acted unwisely in not requesting their counterparts to attend the handover but who can blame them for being so foolish in view of all the joy, exhilaration and excitement that accompanies this occasion? To require the presence of a relation at a handover of gifts is one thing, and it is quite another thing to say that there was no handover of property simply because some customary notion was overlooked. Even though the appellant could not remember all the things that were brought, he conceded that cutlery was among the things that were carried in the motor vehicle that he hired. This ground of appeal therefore falls through.

In his second ground of appeal the appellant says that even accepting that the cutlery was brought, the cutlery should belong to him because he had paid *Lobola* and thereby "bought" all the things that were brought for the wedding. He has contended vehemently that this is the custom in Chilumba. This is an utter confusion of a custom so virgin. There is no relationship whatsoever between *lobola* and the gifts that are brought on the wedding end in no way can payment of *lobola* be payment for the gifts that are brought on the day of the wedding. *Lobola* is paid for quite different reasons. It's paid for the fact that the bride's parent has fended the child up to maturity - this is why the mother claims in Chilumba - *Mkhuzi*. It's paid because the bride is out as it were from her ancestors - *ng'ombe ya Chibanda* or *Fuko*. It's paid because the man is taking the bride to have children with her suitor. All the gifts that they bring even *Milundu* or *Vikhung'usha* are just part of the joy and excitement for the family ties that are cemented by this noble fact called marriage. This ground therefore equally falls thorough.

The question that this court has to answer is whether according to the customary law in Chilumba the appellant should surrender those items of cutlery to the respondent. Before we consider the custom we just want to say that we feel the respondent is entitled to claim those things from the appellant on the face of it. This marriage lasted only two weeks. It would really be unreasonable and unfair that the appellant should have these things when he chased the respondent in shame and in disgrace. We think with all fairness to the parties the surrendering of the cutlery is the most reasonable thing to do. But what does our custom say on this point? No doubt, **however brief their union was, the parties were married at customary law**. It's true that all this property was matrimonial property. The union actually meant that all the things found in the home were for both of them. Their Lordship were agreed that custom is the same throughout the Northern Region that

when marriage ends the issue of matrimonial property does not oven raise problems. The wife is entitled to carry all the things that she brought into the marriage. And some clever women always ensure that before the marriage is over quite a fair amount of property has been taken from the matrimonial home. The husband cannot go to a Court and claim those things from the wife.

Moreover, at customary law when the marriage ends, there is sharing of property between the spouses. This affects even the produce of the fields. In fact, the respondent was very lenient in that she demanded only those things that she brought. In fact, she did not take any of the appellant's things. Their Lordships feel that she should have all the things that she brought to the house. The appeal is therefore dismissed with cost of K1:00 to the respondent. The appellant should pay the amount ordered by the lower Court not later than 31st October, 1981.

DATED THIS 26TH DAY OF AUGUST, 1981. SITTING AT MZUZU