IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NUMBER 151 OF 2006

BETWEEN:

BERTHA DEMBA ………………………...………………..APPELLANT

- AND -

MILWARD DEMBA …………………………………….RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Appellant, present, unrepresented

Respondent, present, unrepresented

Mr Mchacha, Official Interpreter

JUDGEMENT

Manyungwa, J.

This is an appeal by the appellant one Bertha Demba against the decision of the Second Grade Magistrate Court sitting at Dalton Court, Limbe, which after full trial dissolved her marriage to the respondent, Milward Demba. The marriage was dissolved by the lower court on the grounds that the appellant was ill-tempered, coming home late in the night and that she was not discharging her domestic chores as is required like washing clothes for the respondent etc. The lower court found the appellant guilty of marital offences and accordingly dissolved the marriage. The appellant appealed against the lower court's judgement, and filed four (4) grounds of appeal, viz.

1. That the appellant was dissatisfied with the dissolution of her marriage to the respondent
2. That the distribution of property especially on the houses was not fair
3. That the respondent is not maintaining the children
4. That the respondent did not build the appellant a house at her home.

I shall deal with the grounds of appeal as they appear in the notice of appeal. On the first ground, it was the lower court's finding that blame lay with the appellant, hence the dissolution of the marriage. On page 16 of the lower court's judgement, the court stated:

> "I have carefully observed both parties and their witnesses when they were bringing forward evidence. In this civil action the plaintiff did not impress me as being truthful. She was very evasive when answering questions. It is only too clear that the defendant did not have peace with the plaintiff. To say the least plaintiff may well be described as shrewd (ill-tempered woman), very difficult to tame. Small wonder that the defendant was spending the better part of his time at his sister's place (house). Really, the plaintiff is deserving of blame. It does appear the defendant endured a great deal".

The evidence in the lower court was that the plaintiff was not discharging her domestic chores as is required of a wife at custom, since the marriage was a customary marriage, the parties having married each other in 1979. Under customary law a wife is required to do certain domestic chores which notwithstanding, that a man can do them like cooking for the husband, washing clothes and general cleanliness of the house. A wife at custom is regarded as a keeper of the house, and the appellant's behaviour, which as shown by evidence that she used to come to the matrimonial house late at night, sometimes after midnight, does not accord very well with the domestic obligations of a wife under customary law. Moreover, the court notes that the appellant was found to be an ill-tempered wife and that the respondent underwent a gruesome ordeal living with the appellant. Further it is in evidence that the appellant was swearing at the respondent's

relatives including her mother in-law. This is enough at custom to lead to dissolution of marriage. On this footing therefore, it is my finding that the decision of the lower court in dissolving the marriage of the appellant to the respondent can not be faulted, as such I find that the marriage properly dissolved.

On the issue of the matrimonial house, the position at customary law is that a husband who marries under a chikamwini or matrilineal system of marriage is under an obligation to provide or construct a house for his wife at his wife's home. The evidence in this court is that the respondent who comes from Ntcheu married the appellant from Thyolo in 1979 and the two at the time of the dissolution of the marriage were residing at Mbayani Township in the city of Blantyre where the couple built a house six doors.

The appellant stated in the lower court that she has no house at her home village. However, the evidence of DW1, the respondent himself is that he built a house for the appellant at her house at Nansadi and that the said house was built by the defendant's young brother DW3 as is evident on page 20 of the lower court record. DW3 told the lower court that the house was built in 2004. This evidence was repeated by DW4, a sister to the respondent who told the court that the respondent did build a house for the appellant at the appellant's home in Thyolo. This was also stated by DW1 Edson Demba. The lower court at page 19 of its judgement regarding the matrimonial house made the following finding:-

> "According to customary law of marriage applicable to this matter the defendant had a duty to construct a house for the plaintiff at her home.
> From the evidence on record, I am satisfied on a balance of probabilities that the defendant discharged his duty of building a house for his wife at her home. The plaintiff did testify that the defendant did build a house. The one who actually constructed the house and was paid for that, Mabvuto Demba, testified to the same effect that she indeed slept in the house in question on one occasion".

On the basis of the foregoing, it is difficult to believe the appellant as the evidence on record shows and this I do find that a house was actually built for her by the respondent at Nansadi in Thyolo. I would therefore dismiss this ground of appeal.

Turning to the third ground, that the lower court did not fairly distribute the houses, especially the one that is at Mbayani, which has 6 doors, five of which at being let out, the lower court's record shows that the lower court gave the appellant one house (two bed roomed) at Mbayani. She was also given blankets, all household utensils and a pushing tray, while the husband remained with one house, chairs and tables and also a bicycle and a bed. From the foregoing it appears to me that the lower court fairly dealt with the issue here. Accordingly to the evidence on record, there are only two houses at Mbayani, that were built during the subsistence of the marriage between the appellant to the respondent. The court gave a house to each, one to the appellant and the other to the respondent. There can not be a further other. Accordingly, I dismiss the 3rd ground of appeal.

On the 4th ground, that the respondent was not assisting or maintaining children. The lower court did find that it was the wife, now the appellant, who was at fault. That I agree with and I have found that that the dissolution was proper. However, this notwithstanding, regarding maintenance of children the position at law is that a child's welfare is a primary consideration under customary law, and that it is irrelevant which party is at fault, or indeed who procures divorce. In the case of ***<u>Kafele V Komwa</u>*** [1968 – 70] ALR Mal p 149, the High Court regarding this point said at p 150

> "The assessors have all advised me that it makes no difference whether it was the wife or the husband who procured the divorce and whether medicine was planted or whether there was a false accusation that medicine was planted. They say the prime consideration is the welfare of children who will maintain the name of the respondent. I agree with the assessors. It is clearly in the interest of children that the husband pays maintenance for

> them. I can see no justification for the Cholo (Thyolo) Appeals Court's having set aside the pronouncing the divorce and ordering the respondent Mr Komwa to pay to his wife Miss Margaret Kafele the monthly sum of £1.10s 0d for maintenance of the three children of the marriage".

The evidence in the lower court's record is that the couple had had nine children, four (4) of whom passed away, and there are five (5) children still living. The appellant told the court that the eldest of the children remaining is Esther, aged 26, followed by Kelita aged 21, Gabriel aged 19, Eliza aged 15 and Regina aged 10. The appellant further told the court that Regina is disabled, she can not speak properly so she needs assistance.

In these circumstances I do order the respondent to pay the petitioner a monthly sum of MK3000.00 until the last born daughter, Regina attains the age 0f 18. Further, I order the respondent to ensure that the school going children if any, are financially assisted in terms of school fees, uniforms etc until they finish school. To that extent the appeal succeeds.

Pronounced in Open Court at principal Registry, Blantyre, this 19th day of March, 2007.

Joselph S Manyungwa

JUDGE