

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CIVIL APPEAL CASE NO. 19 OF 2007

BETWEEN

JULIUS MALEWEZI APPELLANT

AND

ANNE MALEWEZI DEFENDANT

CORAM : **HON. JUSTICE MZIKAMANDA**
: Mwale, Counsel for the Applicant
: Nankhuni, Counsel for the Respondent
: Mrs. Kabaghe – Court Reporter
: Mr. Kaferaanthu – Court Interpreter

JUDGMENT

This is an appeal against the order of distribution of matrimonial property made by the First Grade Magistrate sitting at Lilongwe. The appeal is opposed.

The back ground to this appeal is that the appellant had filed a divorce petition in the magistrates' court for the dissolution of his customary marriage with the respondent on the ground that the customary marriage had irretrievably broken down. The appellant had married the Respondent for nine years when the

petition was filed. The Appellant told the lower court that he was no longer interested in Respondent on account of her unfaithful behavior and her rudeness to him. He stated that the Respondent does not take advice from him and from the marriage advocates who had on numerous occasions intervened in their marriage problems. On unnumbered occasions the Respondent went out with her boss at Auction Holdings Limited in the name of Mr. Madula. The two had an affair which continued even after the Respondent had left her employment with Auction Holdings. Once the Appellant confronted Mr. Madula on the telephone regarding the affair but Mr. Madula had nothing to say. Then the Respondent had another affair with a man called Uncle Bob whom she used to bring home each time the Appellant was away from home. She was confronted on this and advised against it but she could not listen. She also had an affair with her sister's boy friend who lived in Mzuzu and she helped him build a house in Area 25 Lilongwe. She could not listen to advice stopping her from continuing with that affair either. As if that was not enough, when she began business she would go to Dar-es-Salaam and stay there for two weeks with the husband of the Appellants' sister. She never listened to any advice stopping her from her unfaithful behavior. Instead she began challenging that she had money and she could do anything she wanted. She even threatened the Applicant that he would leave the matrimonial home a dead person. Following those threats he discovered some strange medicines in the house. None of the above allegations by the Appellant were challenged by the Respondent to the satisfaction of the lower court. The lower court stated at page 8 of the typed record that:

“All this evidence above was not disputed by the defendant in cross-examination and even the issue that she was assisting this boyfriend of her sister when she also was in love with him. She did not deny she even admitted assisting him to build a house but denied being in love with him. However, this court noted with keen interest that when the complainant was testifying he was not moved and this court also weighed the demeanor of the defendant, and court has some doubts whether to believe her that she was just assisting this man and that he was not her lover simply because she failed to rebut what complainant had started in his evidence.”

The lower court found the Respondent guilty of bad and uncontrollable behavior in the marriage. It found that the marriage had irretrievably broken down on account of the Respondents bad behavior in the marriage. The court then dissolved the marriage. The Respondent was granted custody of the 8 year old girl child of the marriage. The court proceeded to distribute the matrimonial property. It is against the distribution of property that the Appellant appeals to this court. The grounds of appeal are:

- (i) That the court record does not reflect a true account of what was presented by the Appellant’s side as regards distribution of property.
- (ii) That the learned magistrate erred in distributing property without hearing the parties as to their intentions as regards ownership of the property at the time of the purchase.

- (iii) That the magistrate erred in holding that the real property be sold and shared equally as the principle of matrimonial property is clear in the manner of distribution where contribution can be defined and or ascertained.
- (iv) That the learned magistrate erred in distributing the property without regard to the legal principle that joint ownership cannot be inferred from the mere fact of marriage.
- (v) Consequently the learned magistrate erred in distributing the property on the basis of equality is equity without regard to the intention of the parties.
- (vi) The reliefs sought are an order for a retrial of the matter in as far as it concerns distribution of property, redistribution of the property and such other order as the court deems just and expedient.

As earlier stated the appeal is opposed. Both Counsel for the Appellant and the Respondent filed skeletal arguments in support of their positions. I do not consider it necessary to reproduce those arguments here although I must say I will take them into account. My attention had been drawn to pages 13 to 16 of the typed court record where the learned magistrate dealt with the issue of distribution of matrimonial property. She stated in the material part that:

“Any person is entitled to own property. If such is been solely acquired by an individual it can not be shared. In this instant case a list of items has been given in this court, things that the couple had jointly owned. They had two plots on which one is in Area 25 and the other is in Area 49. They both agree to have contributed in building the houses though the husband claims that he is the one who had contributed more than his wife. The wife also argues that she had contributed the sum of K100,000.00 towards the acquisition of the car which they bought after selling the old car and the complainant has not refunded this. So as these were things jointly owned by both, it will not be in the interest of justice that I just share the houses as they are not the same. In order that we avoid one party have advantage of the other, this court rules that both the houses be valued together with the vehicle and they be sold and proceeds be shared amongst them. I have arrived at this decision taking into account that even the wife was doing business and the husband was the one working but all were pulling their resources together in acquisition of the said properties for their joint use and benefit.”

The learned magistrate then proceeded to distribute remaining items between the parties.

It is the contention of the Appellant that there was no proper evidence for the distribution of the property citing the case of Gwanda Chakuamba v Electoral Commission Civil Cause No. 74 of 1998. I am unable to appreciate that argument

given what the learned magistrate stated in the paragraph quoted above. She surely must have obtained that information from the parties. The Appellant is not challenging the truth of the matters stated by the learned magistrate. I am satisfied that the magistrate had appropriate information which she used in order to arrive at her decision. Again on the argument that joint ownership is not to be implied from the mere fact of marriage as in Malinki v Malinki 9 MLR 441 it is clear that the learned magistrate was very much alive to that principle as evidenced by her opening statements in the paragraph quoted above. I have the distinct impression that the parties had the opportunity to present their evidence in relation to the distribution of the property and it was the information the parties gave that assisted the court in making the order it did. It was argued that the record does not reflect a true account or what was presented by the appellants side as regards distribution of property. It is not explained how the record could be said not to reflect a true account. No specific areas have been highlighted which are not true.

Having said this I must observe that I do not agree with the learned magistrate that the interest of justice can best be served or can only be served by ordering the sale of the real property and the car and to share the proceeds between the parties equally. I do not agree that the lower court rightly applied the principle that equity is equality in respect of the real property and the car. I see no problem with the distribution of the other items. I however have serious difficulty with the order of sale of the real property and the car and the sharing of the proceeds between the parties. I set aside that part of the distribution order and direct that the parties address me on that part only before I make an order.

Grounds (i), (ii) and (iii) of the appeal fail and are dismissed. I did not see the real difference between grounds (iii) and (iv) of the appeal which succeed. Ground (vi) partially succeed, with respect to the real property and the car.

This appeal therefore succeeds to the limited extent described above.

PRONOUNCED this 15th day of April, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E