

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

CIVIL APPEAL CAUSE NO. 67 OF 2007

BETWEEN

MARKO MAPSYELE APPELLANT

AND

JOYCE MAPSYELE (MRS) DEFENDANT

CORAM : HON. JUSTICE MZIKAMANDA

 : Unrepresented, Counsel for the Applicant
 : Unrepresented, Counsel for the Respondent
 : Mr. Kafotokoza, Court Interpreter

JUDGMENT

This is an appeal from the decision of the First Grade Magistrate sitting at Lilongwe on a divorce matter relating to a customary marriage. The appeal is opposed.

In the lower court the appellant took out a petition for divorce against the respondent on the ground of cruelty.

The appellant and the respondent married in 1986 but the two divorced in 1996 on grounds of the respondent's cruelty. They reconciled in 2000 and got back together. They then built a house in Area 36 in the City of Lilongwe on which they also built six detached rooms let out to people. They also dug a well from which they sold water. They set up a battery charging business. The respondent received and kept all the proceeds in respect of the rental premises, water hole sales and battery charging business and never informed the appellant about it.

One day the respondent was found in possession of twelve zitenje clothes but could not say where he got the money for them from. Church elders were invited in to intervene in the problems of the marriage and the respondent asked for forgiveness. Later the respondent wrote a letter to the appellant's sister saying she would deal with the appellant any time. The three discussed the matter. Then the respondent would instigate their daughter not to respect or listen to the appellant. She also sent away a niece of the appellant from the matrimonial home. The appellant was transferred to Kasiya and the respondent refused to go with him. Later she opened a shop. He gave her K20,000 and later K12,000. He also gave her 15 bags of maize for food. She however shouted at him saying he was not assisting her. He became annoyed and assaulted her. Later she moved from the bedroom and refused to have sex with him. She reported to Malawi Human Rights Commission and openly stated that she was no longer interested in the appellant.

The defense story was that she married the appellant and had been with him for 20 years. They had seven children between them. They at first divorced but later

reconciled and formalized their marriage. They built a home but the appellant sent his relatives who kept saying the respondent was not owner of the home but just a servant. She had agreed to go with the appellant on transfer to Kabudula but the appellant later changed his mind and decided not to bring her along. She later opened a grocery and the appellant wanted her to be giving him the money. She refused. The appellant threatened to set the house on fire and he brought a gallon of paraffin. He assaulted her and told her to sleep outside. She phone 997 who came and told him that the respondent should sleep inside the house. The appellant lodged a complaint that she wanted to kill him and he insisted that she should go away from the matrimonial home. She complained to the Malawi Human Rights Commission. She never intended to divorce him.

In its judgment the lower court granted the divorce not because of the respondent's cruelty but the cruelty of the appellant towards the respondent. The court then ordered that the appellant compensate the respondent with K50,000 and that the respondent should have custody of the children with the appellant having reasonable access to them. The court also ordered the sale of the matrimonial home and the rented houses and the proceeds shared between the two. The court also ordered the appellant to build the respondent a house at her home in Zomba or pay her K120,000 in lieu thereof.

In this appeal the appellant raised fifteen paragraphs. The grounds can be summarized as follows:

1. That he was assaulted by the complainant and three children who used stones and metal bars. He got injured and lost a lot of blood. He complained at police and had three sutures. The magistrate failed to take this into account.
2. The learned magistrate did not consider that the respondent did not give him water to bath, did not wash his clothes, did not prepare food for him and refused to have set with him.
3. That the magistrate did not give him a chance to invite any witnesses.
4. That the magistrate was very emotional towards him and that she shouted at him, making insults on him and personalized the proceedings.
5. That the magistrate misconstrued the evidence and interpreted it against the appellant.
6. That the magistrate erred in coming to the conclusion that the appellant never supported the respondent when he in fact did.
7. That the order of compensation was far too high an amount and the Order for Sale was without consideration of other better options.
8. That the magistrate erred in ordering the appellant build the respondent a house at her home while she stays in town and without giving him an option to give her money to build a house of her choice.

9. That the magistrate erred in ordering custody of the four children of the marriage to the respondent who is not employed and is solely dependant on the appellant.

In arguing the appeal before this court the appellant referred to pages of the court's judgment where he said the magistrate made conclusions which were not supported by the evidence and which were emotional, made out of the magistrate becoming personally, rather than professionally, motivated. He also sought to highlight incidents which show that the respondent treated him with cruelty, which points the lower court ignored.

I have had occasion to read the full judgment of the lower court, along with the record of the proceedings. Cruelty is a ground for the dissolution of a customary marriage because it goes to irretrievable break down of marriage. Going through the record this court is able to detect some serious cruelty on the part of both the appellant and the respondent. The record shows that the marriage between the appellant and the respondent had irretrievably broken down. There were attacks and assaults on the appellant exacted on him by the respondent and some of the appellant's own children. Yet there was an assault on the respondent exacted by the appellant. Denying the appellant food, bathing water as was as refusing to wash the appellant's clothes in a customary setting amounts to cruelty too. Denying the appellant conjugal rights too amounted to cruelty. It seems to me that each one of the parties to the marriage had a fair share in causing the marriage to irretrievably break down.

The record shows that there were no witnesses called. There is no indication that the parties intended to call witnesses. Neither is there an indication that the court informed the parties that they had the right to call witnesses. A court must always indicate to parties that they have the right to call witnesses. The omission here however can not be said to have caused a miscarriage of justice. I am aware that the insistence by the appellant to call witnesses at this stage was to have the witnesses from the Malawi Human Rights Commission come to this court and state that the respondent said in the presence of the intended witnesses that she no longer wanted the appellant as her husband. That point has been fully covered by the evidence herein and supports the finding that the marriage between the two had irretrievably broken down.

As regards the conduct of the trial the appellant has indicated as a ground of appeal that the magistrate was very emotional towards him and that she shouted at the appellant including making insults and personalizing the proceedings. Where a magistrate behaves in the manner alleged by the appellant, that magistrate would be said to have conducted the trial in an extremely unprofessional manner. What is worse is that the magistrate would have created a situation of unfair trial and would thus be going against the right to fair conduct of trial or court proceedings. Where a magistrate takes personal interest in the matter before him or her, as opposed to professional interest, he or she would not properly act as a referee or an umpire who is neutral. That conduct would be prejudicial to one party and perhaps favour the other party. It is critical that a magistrate should never descend into the ring as the dust that is thrown up will

cloud his or her vision and would never be able to see where the justice of the case lies.

Of course the record herein does not contain any insults from the magistrate. Perhaps those could not have been recorded. However some of the conclusions the magistrate made are not supported by the evidence and are surprising. The conclusion for example that because the appellant married a second wife meant that the appellant had many extra marital affairs is not supported by the evidence. Again there is nowhere in the evidence to show that the appellant used to say that the respondent was just a servant to him. The respondent never stated that the appellant said it. She said some relatives of the appellant said it but did not bring evidence to support that claim. Reading through the judgment it is clear that the magistrate ignored aspects of the appellant's evidence, which were not contradicted, that showed cruelty of the respondent to the appellant. The finding that the respondent was not cruel to the appellant can not be supported by the evidence. The record clearly shows that cruelty emanated from both the appellant and the respondent causing the marriage between the two to become irretrievably broken down. This marriage must be dissolved on that ground. This finding must necessarily mean that the level of compensation ordered by the lower court be reduced. It is reduced to K30,000.

On the issue of custody of the children it is true that the welfare of the children is paramount consideration. In the present case the lower court ordered that custody of the children be with the mother with the appellant having reasonable access. I have no problems with that order. Welfare is not about money alone. In

the case at hand the appellant himself said that the respondent joined together by some of his children assaulted him to the extent that he had to seek medical attention. What this means is that between the appellant and some of his children the relationship is not that good. Of course it can improve. The evidence does not show which children these are. The sour relationship between the appellant and some of the children can not be conducive to welfare of the children. If anything there is need for healing of that relationship and that might take some time. Meanwhile custody of the children is best placed with the mother, with the appellant having reasonable access to the children. I would therefore not disturb the custody order made by the magistrate, save only to say further that the appellant must continue to provide reasonable support on a monthly basis for the children. If it becomes necessary in the course of time to review this order the parties shall bring the matter back to court.

This was a customary marriage which placed a duty on the part of the appellant to provide a house for the respondent. The requirement is for him to have built a house for the respondent at her home. In modern times it is legitimate for the appellant to build a house for the respondent at a place of her choice. Presently there is no such house. An order that the respondent should leave the matrimonial home would place the respondent and her children in a situation where she would be rendered homeless. An order of compensation of K120,000 in lieu of a house does not appear satisfactory because that shifts the role of building a house from the appellant to the respondent. That in my view is not appropriate. I set aside the order of compensation of K120,000. Instead I order that the appellant provides the respondent with a decent home at a place of the

respondent's choice for her and her children. Reasonable house, I am not suggesting an expensive house. Meanwhile she will continue to stay on the matrimonial house until such house is provided for her. I also set aside the order by the lower court made that the premises be sold and the parties share 50%. The respondent shall remain on the premises leading a normal life and deriving support from the rented facilities until a descent house is provided for her within reasonable time. Once that is done the court will then make a fresh order on how the premises should be dealt with. Reasonable time for the provision of the descent house should be understood to mean within a year.

MADE in court at Lilongwe this 25th day of March, 2009.

R.R. Mzikamanda

J U D G E