

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

CIVIL APPEAL CAUSE NO. 08 OF 2008

BETWEEN

MIKE CHIDZANJA NKHOMA APPELLANT

AND

BASIE VITUMBIKO KACHALE RESPONDENT

CORAM : HON. JUSTICE R.R. MZIKAMANDA

: Unrepresented, Counsel for the Appellant
: Unrepresented, Counsel for the Respondent
: R.S.D. Kahonge, Official Interpreter
: H. Msimuko, Recording Officer

JUDGMENT

This matter is about custody of a child between the appellant and the respondent.

On 21st September 2007, the Court of the Senior Resident Magistrate sitting at Mzuzu dissolved the customary marriage between the appellant and the respondent. There is between them a 3 year old child. Each of the parties applied for custody of the child. The court placed the child under the charge and care of the mother of the respondent while granting the respondent custody. The

grandmother of the child is a nurse by profession. The court allowed the appellant visitation once a month. In the order for custody the court stated that the paramount consideration is the best interest of the child. The appellant was dissatisfied with the order of custody by the lower court and he appealed to this court to grant him custody.

I have seen the order of custody made by the lower court. The court stated that:

“Upon hearing the plaintiff and the defendants, this court has come to the conclusion that it is in the best interests of the child who is 2 years 9 months to be staying with the mother of the defendant who is also a nurse. If the defendant leaves for another place, the court is convinced that care should be taken by the mother of the defendant. The court therefore is granting custody to the defendant, who should be assisted by her mother who is a nurse.

The plaintiff is to assist the child in his own way and that can make proper visit to the child once a month.”

It seems from the above order the court was granting joint custody of the child to the respondent and her mother even though the mother of the defendant did not apply for such custody. One gets a distinct impression that the court had doubts that the respondent on her own would meet the welfare requirements of the child. In fact it is clear in the order for custody that the lower court laid emphasis

on the grandmother of the child to take care of the child, leaving the respondent with little or no responsibility to ensure the welfare of the child.

Now Section 23(3) of the Republic of Malawi Constitution provides that:

“Children have the right to know, and to be raised by, their parents.”

It is as a matter of right that a child is raised by his or her parent and it would be acting in a manner inconsistent with that right to shift the responsibility of raising a child from parents to some other relative or person unless it is shown that the welfare of the child will not be ensured and assured if the child remained under the parent. In Manjaena (deceased): In re The Estate of 15 MLR 243 the High Court in dealing with issue of guardianship of children by a brother of the deceased father of the children observed that the best interests of the child must be considered and in doing so the wishes of the natural parent are paramount. The court also observed that in matters of custody of the child the rights of a mother are the same as those of a father. In Somanje v Somanje and Others (1) 16 (2) MLR 824, Banda CJ as he then was said at page 826 that:

“In questions of custody it is the child’s welfare and happiness which is paramount consideration. The Court will not take into consideration the issue of whether the right of either of the parents is superior to that of the other. I have considered the evidence of the respondent and there can be no doubt, in my view, that it will be in the interests, welfare and happiness of the children of the marriage if

they continued staying with their mother who has a secure employment and a home for them.”

In the case at hand the respondent remains dependent on her parents. The lower court indicated in its order that should the respondent leave her parent’s home the child should remain with her parents. The lower court did not seem to consider the wishes of the appellant, the father of the child as is required by law (See Manjaena (deceased): In re The Estate of (Supra)).

Having examined the matter closely I find that the order of custody by the lower court did not fully take into account the applicable principles. As such I set aside the order. Had the lower court considered the totality of the materials before it including the wishes of the applicant it would have found that the welfare and happiness of the child would best be guaranteed if custody of the child was granted to the applicant with the respondent having reasonable access. I so order.

MADE this day of in the year at Mzuzu.

R.R. Mzikamanda
J U D G E