

IN THE NATIONAL TRADITIONAL APPEAL COURT SITTING AT MZUZU
CIVIL APPEAL CASE NO. 59 OF 1979

BETWEEN

MARKO KHOZA APPELLANT

-VS-

CHRISSIE MPHAKARESPONDENT

CORAM:

HON, INKOSI MZUKUZUKU (CHAIRMAN) JUDGE

HON. CHIEF KABUNDULI (MEMBER) JUDGE

HON. CHIEF NTHALIRE (MEMBER) JUDGE

HON. B. W. KALUKUSHA (MEMBER) JUDGE

HON. C. C. J. CHIPINGA (MEMBER) JUDGE

JUDGEMENT

Thin is an appeal from the decision of Euthini Traditional Court against a divorce decree.

The respondent was married to the appellant's younger brother who passed away In 1976, survived by the respondent and one child, a son This was a valid marriage in accordance with the Customary Law of marriages prevailing in Mzimba District. After her husband's death, the respondent was taken to Blantyre by her brother-in-law, another younger brother of the appellant in order to comfort her and make her forgot the lose she had suffered. She stayed in Blantyre for 6 months before returning to Mzimba. **According to the Customary Law in Mzimba, the respondent had to choose one of her deceased husband's next-of-kin to inherit her as a wife.** After she had returned from Blantyre the appellant detailed some elderly women to talk to the respondent about choosing a man who could inherit her. It so happened that the only living men in the family who could inherit the respondent, were the appellant and his younger brother who was in Blantyre. The appellant, however was excluded as being too old for the purpose, and this left the respondent with no choice but to accept the man in Blantyre.

It is in evidence that during the 6 months that she stayed with her brother-in-law in Blantyre, he treated her with cruelty to such an extent that she would not go to join him in Blantyre. She did, however, lay a condition for her accepting to be inherited by that man, and the condition was that she was not going to join him in Blantyre but that he was to come to her at home. The appellant wrote to his brother in Blantyre to inform him that the respondent had chosen him to inherit her, and her condition of her acceptance, but his brother never came to the village. and it was concluded that he had refused the inheritance. Since there was no other alternative for her, she demanded of the appellant that she be set free, but the appellant insisted that she should go to Blantyre and, so, they failed to reach a compromise. The respondent petitioned for divorce, on the ground that the appellant was divorcing her because his brother was refusing to inherit her. After hearing the parties, Euthini Traditional Court **granted a divorce to the respondent, giving custody of the child of the marriage, and the dowry to her.** The appellant appealed to the Mzimba District Traditional Appeal Court but that court dismissed his appeal and confirmed the decision and order of the court of first instance, and he appealed further to this court. In his grounds of appeal to this

court the appellant stated that the respondent is the one who is divorcing his brother because she refused to go and join him in Blantyre. He told this court that he had already suffered a loss by the death of his brother and therefore, the trial court erred by ordering that he should lose both the child and the dowry. The respondent, who was said to have married another man and gone to Zambia with him, could not appear at the hearing of this appeal. But after a careful consideration of the evidence obtaining on the record, and upon hearing the appellant, this court is satisfied that the appellant's brother did as a matter of fact, treat the respondent with cruelty, and **cruelty, in law is a sufficient ground for divorce**. The court also found that the appellant's a brother in Blantyre is guilty of **constructive desertion**; another ground for divorce. This court concurs fully with the District Appeal Court when it stated that in Mzimba District: -

1. **when a husband dies, the widow (*chokolo*), is free;**
2. **if the widow (*chokolo*) wants to go, the children of the marriage are left as the deceased husband's home, but she takes the dowry;**
3. **if she wants to be inherited, but the owners of the *chokolo* do not want to inherit her, she takes both the children and the dowry;**
4. the respondent did not want to leave the Khoza village, that is why she had chosen the appellant's brother to inherit her, despite his cruelty;
5. the one chosen to inherit her did, expressly and impliedly refuse to inherit her; and
6. in those circumstances, the respondent was free to leave the Khozas' village and go to her own people.

On the evidence as a whole this court has failed to find any justification for interfering with the decision of the courts below because **marriage is not bondage** and in the circumstances, the appeal is dismissed. **We would like to mention however, that although custody of the child of the marriage was given to the respondent, *the child is free*, and she must be allowed free access to the Khozas' family.** We make no order as to costs. **APPEAL DISMISSED**

PRONOUNCED IN OPEN COURT AT MZUZU THIS 15TH DAY OF AUGUST, 1979

