

IN THE SUBORDINATE COURT OF THE FIRST CLASS 2017/CRMP/LCA/0036
FOR THE LUSAKA DISTRICT, HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN

MARY CHENDENGANA

AND

NGAMBI MASUZYO



APPELLANT

RESPONDENT

Before: Mrs. N.M Sakala - Chabala

For the Appellant : In Person

For the Respondent : In Person

J U D G M E N T

Statutes Referred to:

1. The Local Courts Act, Chapter 29 of the Laws of Zambia
2. The Subordinate Court Act, Chapter 28 of the Laws of Zambia
3. The Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia

Cases Referred to:

1. Zambia Railways Limited v. Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C)
2. Wachtel v Wachtel (1973) 1 A.E.R., 829

3. Chibwe v Chibwe (2000)SCZ No. 38
4. Violet Kambole Tembo v David Lastone Tembo (2004) Z.R. 79 (S.C.)

On 16th December, 2016, the lower court granted divorce to the parties after 12 years of marriage at the instance of the respondent. On granting divorce, the court ordered that properties acquired during the subsistence of their marriage be shared equally, the respondent compensates the appellant by giving her K5,000.00, respondent maintains the three children of the family by giving the appellant K300.00 per month and also that the respondent gives the appellant K15,000.00 as her share from their house.

The appellant, not being satisfied with the decision of the lower court, appealed on the following grounds:

1. That the respondent erred in law and fact that he divorced her on the ground that she had committed adultery when in fact not
2. That the respondent erred in law and fact because the alleged adultery happened in the year 2009 and he did nothing until 2016
3. That the respondent erred in law when he misled the court yet it was him who was irresponsible and the divorce arose out of his heavy drinking
4. That the lower court erred in law and fact when they awarded her compensation of K5,000.00 only
5. That the lower court erred in law and fact when they ordered that the respondent maintains the three children of the family by only giving appellant K300.00 per month.



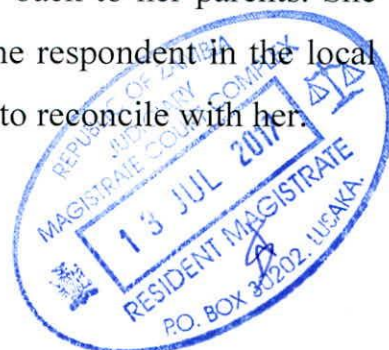
6. That the lower court erred in law and fact when it ordered that the appellant be given K15, 000.00 as her share in the house without taking into account the value of the house.

I must state here that in civil matters, he who alleges must prove on the balance of probabilities. It was stated in the case of Zambia Railways Limited v. Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C) that:

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability “as opposed to beyond all reasonable doubt in a criminal case”. The old adage is true that he who assents a claim in a civil trial must prove on a balance of probability that the other party is liable.”

The appellant was **Mary Chendengana** aged 33years and currently unemployed. She narrated that she got married to the respondent in the year 2004. He was charged bride price of K1, 900.00. He immediately paid K1, 000.00 and paid the balance of K900.00 in April 2016. She went on to state that they have three children together namely Blessings Ngambi aged 12years, Joseph Ngambi aged 8years and Abraham Ngambi aged 4years.

She deposed further that in the year 2012, the respondent would disappear from home without leaving food and that he informed her that he did not want her. In the year 2015, the respondent packed her bags and took her back to her parents. She lived with her parents up to December 2016 and sued the respondent in the local court for reconciliation. The respondent however refused to reconcile with her.



She explained that she built a house together with the respondent in 2010. She went on to state that she contributed K15,000.00 towards the house as she was then engaged in a business of selling clothes and she had a saloon. The lower court ordered that she gets a share of K15, 000.00 from the said house.

She explained further that the court ordered the respondent to maintain their three children by giving her K300.00 every month but that this was not enough. She also stated that the court stated that she be paid maintenance of K5, 000.00. She felt this was too little as she had lived with the respondent for 12years.

When cross examined, she stated that the parties got married traditionally in the year 2004 and that the respondent was asked to pay bride price of K1, 900.00. In continued cross examination, she stated that she did not have a boyfriend.

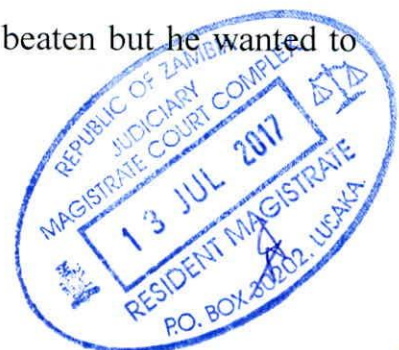
In re examination, she stated that she did not have a boyfriend.

PW2 was **Beatrice Chendengana**, a business lady aged 39years. She narrated that in the year 2015, the respondent took the appellant to her parents' house. She went on to state that the respondent informed them that he had taken the appellant back to her parents because there was a problem at home.

She deposed further that the parties have three children together and maintenance of K300.00 per month was too little. She went on to state that the properties acquired together during the subsistence of the marriage were not shared.

When cross examined, she stated that the respondent did not say why he had taken the appellant back to her parents. In continued cross examination, she stated that the respondent was not beaten.

In re examination, she stated that the respondent was not beaten but he wanted to beat the appellant.

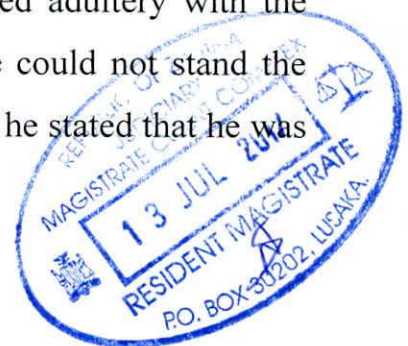


The **Respondent** was **Ngambi Masuzyo**, a general worker aged 34years. He narrated that he married the appellant in the year 2004 and that he was charged bride price of K900.00. He went on to state that in 2006, he engaged a male marriage counsellor as the parties usually fought. He further stated that the appellant had sexual intercourse with the marriage counsellor and she was given K20.00 by the said counsellor. He engaged the counsellor who admitted that he had sexual intercourse with the appellant. He explained that the appellant had boyfriends who would call her even when they were together. He then decided to take the appellant back to her parents. A meeting was later held and he was asked to forgive the appellant.

He went on to state that he knew that maintenance of K300.00 per month was too little. He explained that the appellant would collect rental income of K1, 500.00 per month from their eight roomed house. She had been collecting the said income from December 2015 to January 2017. He however, told the appellant to stop collecting the money after judgment was delivered by the local court.

He deposed that he was ordered by the lower court to pay the appellant K5, 000.00 as compensation. He had not done so but was willing to do so. He further produced four recent payslips indicating that he was getting a negative salary as he had over borrowed. He also stated that the house in question is located in Kanyama and it has eight rooms.

When cross examined, he stated that the appellant committed adultery with the marriage counsellor in the year 2008. He also stated that he could not stand the appellants behavior anymore. In continued cross examination, he stated that he was



willing to support their children and that he had not provided any food for their three children because each time he tried to call the appellant, she never answered the phone. He further stated that the appellant got some properties from the house. There was no re examination.

DW2 was **Friday Ngambi**, aged 61years and currently unemployed. He narrated that a family meeting was held in which the parties and the male marriage counsellor were present. He went on to state that the counsellor admitted that he had sexual intercourse with the appellant and that he gave her K20.00. He stated further that the respondent got a loan to build the house in Kanyama and that the said house was built during the subsistence of their marriage.

When cross examined, he stated that the marriage counsellor had sexual intercourse with the appellant. He further stated that he paid bride price to the appellant's parents but could not remember the year the payment was made.

In re examination, he stated that he cried when the marriage counsellor apologized for having had sexual intercourse with the appellant.

This is all the evidence I heard in this matter. After careful analysis of the evidence, I find that it is a fact that the parties got married in the year 2004 and they were divorced by the local court on 16th December, 2016. They have three children together aged 12years, 8years and 4years respectively. The appellant is currently unemployed and the respondent is employed by the Lusaka Water and Sewerage Company as a general worker.



I will determine this appeal from the grounds of appeal while warning myself that the standard of proof in civil cases is on a balance of probabilities and that the subordinate court is a court of both law and equity as provided in Section 15 of the Subordinate Court Act, Chapter 28 of the laws of Zambia.

The first three grounds of appeal allege that the respondent erred in law and fact when he stated that he divorced the appellant because she committed adultery in 2009 and also that the parties divorced because the respondent was irresponsible and would drink heavily.

In her testimony, the appellant did not adduce any evidence to show that the respondent engaged in heavy consumption of alcohol. She also did not adduce any evidence to show that the respondent was irresponsible.

When the respondent testified, he stated that he was tired of the appellant's behavior. He also stated that the appellant had sexual intercourse with their male marriage counsellor and that the appellant was given K20.00 by the said counsellor. He further stated that the appellant would receive phone calls from her boyfriend whilst they were together. This evidence was unchallenged by the appellant. I therefore find that the Appellant has not proved the first three grounds of appeal to the required standard and I accordingly hold that these grounds of appeal fail.

The fourth ground of appeal was that the lower court erred in law and fact when they awarded her compensation of K5, 000.00 only. The appellant testified stating that she had been married to the respondent for 12 years and compensation of K5, 000.00 was not enough. In his testimony, the respondent stated that he was ready to compensate the appellant by giving her K5, 000.00



Section 35 of the Local Courts Act, as amended by Act Number 8 of 1991, provides as follows:

(1) Subject to the provisions of this Act or of any other written law, and to the limitations imposed by its court warrant, a local court, in cases of a civil nature, may-

(d) make an order for the payment of such monthly sum for the maintenance of a divorced spouse as the court may consider just and reasonable having regard to the means and circumstances of the parties for a period not exceeding three years from the date of divorce or until re-marriage whichever is the earlier;

This means that at the grant of divorce regard must be made as to whether either of the divorced spouse's needs maintenance and this takes consideration of the extent of their ability to support themselves and the financial needs and capacities of the party on whom the claim is being made.

I must state here that the above provision of the law is not worded in mandatory terms. It is therefore clear that the awarding of compensation is in the courts discretion. It is evident that the appellant is currently unemployed and the respondent works for the Lusaka Water and Sewerage Company as a general worker and is currently getting a negative salary as he has over borrowed. As already stated, the awarding of compensation is in the courts discretion. I therefore find that the Appellant has not proved this ground of appeal to the required standard and I accordingly hold that this ground of appeal fails.

The fifth ground of appeal was that the lower court erred in law and fact when they ordered that the respondent maintains the three children of the family by giving the



appellant K300.00 per month. The respondent produced four pay slips for the past four months showing that he currently receives a negative salary as he has over borrowed. The respondent also testified that he had not provided food for the children because each time he tried to call the appellant, she would not answer the phone. The respondent also adduced evidence that the appellant had been receiving rentals of K1, 500.00 from their eight roomed house from December 2015 to January 2017.

In making maintenance orders, the court is guided by the provisions of Section 11(2) of the Affiliation and Maintenance of Children's Act which provides that:

“Without limiting the generality of subsection (1), the court shall have regard to the following matters:

(b) the income, earning capacity, property and other financial resources which each interested person has, or is likely to have, in the foreseeable future, including, in the case of earning capacity, any increase in that capacity which it would, in the opinion of the court, be reasonable to expect a person to take steps to acquire;”

I must state here that both parties are currently not earning any income. I have therefore taken this fact into account.

The sixth and final ground of appeal is that the lower court erred in law and fact when it ordered that the appellant be given K15, 000.00 as her share in the house without taking into account the value of the house. The evidence adduced and on record shows that the house in question was built during the subsistence of the marriage. The appellant and her witness testified that properties acquired during the subsistence of the marriage were not shared equally between the parties. When



the respondent was cross examined, he stated that the appellant got some properties from their house and he also remained with some properties.

According to the case of Wachtel v Wachtel (1973) 1 A.E.R., 829 and Chibwe v Chibwe (2000) SCZ No. 38, upon dissolution of marriage, the divorced wife is entitled to reasonable maintenance and share of property acquired during the subsistence of marriage. I must state that property sharing is applied by the courts within the laid down guiding principles of reasonableness and having regard to all circumstances of the case and practicability.

Further, in the case of Violet Kambole Tembo v David Lastone Tembo (2004) Z.R. 79 (S.C.), the Supreme Court held that:

“When the issue of settlement of property arises, the Court is obliged, among other things, to have regard to all the circumstances of the case and so exercise its powers as to place the parties, so far as it is practicable and having regard to their conduct in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.”

In the present case, it has already been established that the house in question was acquired during the subsistence of the marriage. A party to divorce proceedings, provided he/she has contributed either directly or in kind (that is looking after the house) has a right to financial provision. The percentage is left in the court's discretion. In the exercise of that power the court is statutory duty bound to take into account all circumstances of that case. I therefore find that the Appellant has proved this ground of appeal to the required standard and I accordingly hold that this ground of appeal succeeds.



I have addressed my mind to the fact that the parties were married for 12 years and have three children together. I have also considered the fact that the appellant contributed either directly or in kind and has a right to financial provision. I have also considered the evidence adduced by the respondent which was unchallenged by the appellant that the appellant had been receiving rentals of K1, 500.00 per month from the parties eight roomed house from December 2015 to January 2017. Based on the analyses and findings above, I therefore find that the appeal succeeds in part as above.

For avoidance of doubt, I hereby make the following orders:

1. That the properties acquired during the subsistence of the marriage be shared equally.
2. That a valuation of the eight roomed house in question be done within 3 months and subsequently sold. The proceeds from the sale to be shared equally between the appellant and respondent.
3. That the Appellant shall recover a lump-sum spousal maintenance amount of K2, 500.00 from the Respondent payable on or before 30th October 2017.
4. That the respondent shall maintain their three children by giving the appellant K600.00 per month starting July 2017.
5. That both parties should contribute towards the educational requirements of their children.

These orders shall be subject to renewal on application by either party.

Each party will bear their own costs.

Parties are informed of their right to appeal within 30 days.



DELIVERED IN OPEN COURT THIS ^{13th} DAY OF JULY, 2017


HON. N.M SAKALA - CHABALA
RESIDENT MAGISTRATE

