

2016CRMP/LCA/354

IN THE SUBORDINATE COURT OF THE FIRST CLASS

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN

PATRICK KAYEKA

AND

RABECCA BANDA



PLAINTIFF

DEFENDANT

BEFORE:

HIS WORSHIP F. KAOMA

FOR THE PLAINTIFF:

IN PERSON

FOR THE DEFENDANT:

IN-PERSON

JUDGMENT

CASES CITED

- a) Rosemary Chibwe v Austin Chibwe (SCZ Judgment No. 38 of 2000)
- b) Sanikonda Phiri v Elestina Zulu 2012 ZR441
- c) Jenala Nambeye v Chileshe Chirwa (1979) Z.R. 117 (H.C.).



This matter came before this court as an appeal against the judgment of the Matero Local Court Grade A by the Appellant who was the Defendant in that court after being dissatisfied with the judgment of the lower court. In the lower court, the respondent sued appellant due to matrimonial disputes which resulted in the court granting divorce to the couple. In addition the lower court ordered appellant to compensate the Respondent with K7000 payable in installments of K700 being the first Installment thereafter K400 every month. He was further ordered to maintain the children with K300 per month. However, no order was granted in respect of share of property. The Defendant was dissatisfied with the local court judgment and appealed to this court on the following grounds;

1. That the amount of K7000 as compensation to his ex-wife is too much
2. That the first installment of K1000 to be paid and K700 every month is on the high side.
3. That he is not in formal employment to manage K7, 000 as he is just a marketer.
4. That his ex-wife is the one who instigated the divorce.
5. That the financial problems they had were not properly explained to the court as the main cause of the divorce.
6. That custody of the children should be granted to him as his ex-wife abandoned the children for 2 months with him, and she has no fixed abode where he would meet the children for financial support.
7. That this is the second time she has sued him for divorce in the same court.
8. That the psychological torture he suffered and perceived in marriage was not divulged
9. That the money she owes him for service charges in business was not divulged
10. That the assaults he suffered in marriage was not divulged

After perusing through the record of the lower court, in the interest of justice I decided to hear the matter *denovo*. The parties will therefore be called Plaintiff and Defendant just the way they were called in the lower court.

The burden therefore lies squarely on the Plaintiff to prove her case on a balance of probabilities.

The evidence of the Plaintiff was anchored on one witness who is the Plaintiff herself. Similarly, the only evidence for the defense is only that of the Defendant. It is therefore the word of the Plaintiff against that of the Defendant. The evidence of both parties is as follows;

PLAINTIFF'S EVIDENCE



The first and only witness for the Plaintiff was the Plaintiff herself, unemployed of unknown house number, Zingalume. Her evidence was that they got married in 2008 under tradition. Defendant came to her Parents and he was charged K2, 500 and he paid the whole amount. She has two children with him. She however not living well in the marriage because any small thing he would chase her. One evening he was drinking tea. The following morning she washed the cup and threw the tea bag. He later asked for the same tea bag of which she told him that she threw it because it was used. In response he told her that she was provocative and added that he would take her to her home. That is how he started parking her things. She told him to stop parking her things. She moved him away from the plates he was parking. He told her that she couldn't be touching him on his body. That is how he left and came back later with a torn shirt. She asked him who tore the shirt but in response he just said she should not talk to him and threw a call out on her. He further told her that she should go with him so that she hears what the BOMA would say. That is how they went to the police. At the police they asked her what she did to her husband. She refused doing anything to him but they still detained her around 18:00hrs. At around 23:00hrs Defendant came and had her released. The officer asked her why she did that to her husband that is the time she explained to them what happened. The officers started reprimanding Defendant. The following day she parked and left. After one month Defendant came and apologized and she went back but problems never ended. The last time she left they differed. Defendant wanted to go out but she locked the door so that they resolve the matter inside because that was his tendency. He went in the bedroom and got a laser blade and started cutting himself. He then started saying it was her who did that. He went outside and started shouting. She then decided to go home that was in May and in August she decided to go to court. At court they were divorced. She prayed that she wanted the marriage to end just like that. She further told this court that they have two children who are both girls aged 8 and 6. Both are still with her. I summing up she deposed that her husband sells hardware at Lilanda Market.

When cross examined by the Defendant it was her evidence that the tea bag in question was for green tea. He took her to the police because he said she touched him. She however denied assaulting him. She could not know what he told the police. She denied tearing his shirt.

DEFENSE EVIDENCE

The first and only witness for the defense is the Defendant himself a marketer of George Compound. His evidence is that in marriage he has suffered a lot. They got married in 2008. After 6 months of marriage his wife told him to take her to the hospital because she was pregnant. He refused because she was his wife



and there was no problem with her getting pregnant. She kept on troubling him until he called her sister. Two months later he started coughing blood. He went to the clinic twice until it stopped. As days went by she came and told him that he embarrassed her because he accused her that she aborted. He refused but the story grew big. According to Defendant the main problem started in 2009. His wife was saying he was sting because he likes counting things. He suggested to her that they should work together so that what he has she should also have. He then made a makeshift stand for her but after some time she became broke. From there he pumped in K800 but nothing came out of it. In 2010, she said she is just supposed to be fed because that was the responsibility of a man. The things were not ok in the house as they were arguing over small things. He has gases so his medicine is green tea and he uses a tea bag twice but on this particular day she threw it. When he told her they differed. She got hold of him and tore the shirt which he described to be not the first time of being assaulted as he had 2 x-rays before for being assaulted so he decided to report to the police. In 2009, he gave her K900 to put in the business but nothing happened. In 2015, he decided that they should work at the same stand. The money she started with was K300 and it grew to K2, 500. He told her that that was the same with his capital. In September, she said she wanted to go and work at PEPSI alleged because casual workers get over K4000. He advised her against that but she couldn't hear him. She sold all the things and parked her items from the house and she left. Afterwards she went and sued him. After a week she told him that she withdrew the matter and wanted to discuss. They accordingly discussed and reconciled. In August, 2016, she sued him for divorce and they were divorced. In October, 2016 she got married to a marriage counselor in their area. That is where she came from to come to court. He added that on the child maintenance, he has done more than what the court ordered. He gave her maintenance for the children but she doesn't buy food for the children.

When cross examined by the Plaintiff he testified that when she started business it was her who produced K40. However, when the capital went under he gave her capital. It was his further evidence that children came to him to say they were starved. He maintained that she got married in October. He further maintained that she assaulted him and he has 2 X-Lays and a police report.

This was evidence in totality from both parties which I have closely considered from which it seems to me that most of the facts are not in dispute. For example it is not in dispute to me that the couple got married in 2008. The marriage has been unhappy one to both sides. Notwithstanding the couple is blessed with two girls aged 8 and 6 who are currently living with the Plaintiff. The marriage was finally resolved by the Matero Local Court due to matrimonial disputes. I therefore find these to be facts in this case.



Validity of marriage

There seem to be no dispute on the validity of the marriage between the parties although no evidence was adduced regarding the custom used to contract the customary marriage other than the fact that Defendant was charged K2, 500 and he paid the bride price in full which practice is common in most of the customs. Besides there is no argument from the parties of the fact that two were legally married under customary and as such I am satisfied that there was a valid customary marriage between the Plaintiff and the Defendant.

Divorce

It must be noted that two courts have been conferred with original and competent jurisdiction to dissolve customary marriages namely the subordinate courts of the first, second and third class of the first hand and the Local court on the second hand. To augment foregoing I am fortified by the holding of the High Court in the case of JENALA NAMBEYE v CHILESHE CHIRWA (1979) Z.R. 117 (H.C.). In that case following passage is instructive;

Subordinate courts of the first, second and third classes do not have original jurisdiction in matters affecting the validity or dissolution of marriages under the Marriage Act - See para. (iv) of the proviso to s. 20 (1), s. 21 end para. (iv) of the proviso to s. 22 of the Subordinate Courts Act, Cap. 28. Subordinate courts have original jurisdiction in matters relating to marriages under African customary law. It should be said that original jurisdiction in respect of marriages under African customary law is also exercised by the local courts under s. 5 and s. 12 of the Local Courts Act, Cap. 29. However, in terms of s. 56 of the Local Courts Act, subordinate courts of the first and second class are also entitled to hear and determine appeals from judgments or decisions of local courts and these would include appeals in respect of matrimonial disputes decided by local courts under African customary law.

It is clear from this passage that both the subordinate courts and the local courts have original and competent jurisdiction to dissolve customary marriages except the subordinate has also appellate jurisdiction. The ~~matter under~~ marriage under consideration was dissolved by the local court due to matrimonial disputes suffices to mention that unlike statutory marriages, the grounds for divorce in customary marriages are not well defined. The learned Author of the book titled Family Law in Zambia-Cases and Material observed at page 120 as follows;



"The grounds for divorce under customary law are many and vary from one ethnic group to another. Most of them are weak and frivolous while the more serious ones are in many ways similar to the factors that are relied upon to dissolve a civil marriage. The grounds include adultery, cruelty, childlessness, not providing for the family, excessive drinking, desertion, to name only some."

It can be discerned from this passage that unlike in statutory marriage, proving grounds for divorce in customary marriage is not difficult provided the parties have shown discontentment in their marriage. In the matter before me there are many allegations and counter allegation. For example Plaintiff accuses Defendant of being min and keeps on chasing her even on small things like a tea bag. On the other hand Defendant accused Plaintiff of being abusive physically and emotionally. He claims to have been assaulted not more than once. It is therefore clear to me that this marriage is unhappy one and bound to fail. The local court therefore cannot be defaulted to have granted the divorce as there are reasonable grounds on which to grant the divorce and I accordingly uphold the divorce.

Compensation or simply put maintenance after divorce

In respect to maintenance after divorce or property settlement in customary marriages, guidance has been providence by the Supreme Court in the most celebrated case of ROSEMARY CHIBWE v AUSTIN CHIBWE (SCZ Judgment No. 38 of 2000) in which it was held *inter alia* that;

"In making property adjustments or awarding maintenance after divorce the court is guided by the need to do justice taking into account the circumstances of the case."

The foregoing was further elaborated by Judge Matibin SC in the case of Sanikonda Phiri v Elestina Zulu 2012 ZR441. In that case it was held *inter alia* that;

"The court is also required to take into account the financial obligation or responsibilities which the parties have or are likely to have in the foreseeable future"

It follows that in order to do proper justice the court must put all the circumstances of the case into consideration before making any property adjustment or maintenance. These obviously include, the duration of the marriage, factors leading to the divorce, the financial status of the parties and ability to earn money either present or future.



Turning to this case before me it is not in dispute that the marriage has subsisted for from 2008 to date meaning that the couple has only lived as husband and wife for almost 9 years. It is also not in dispute that the bread winner in this case was Respondent who is a Marketeer trading in hardware. Further it is not in dispute that the factor that led to the dissolution of the marriage is certainly unreasonable behavior on the part of the Defendant although he accuses Plaintiff of physical abuse. Before pronouncing myself on the issue of maintenance it is imperative to resolve the issue of the marriage of Plaintiff to another man as it has a bearing on the quantum of maintenance the court may award. This is so because it is it will be absurd to allow maintenance after divorce to be paid to a woman who is already married. However, it has been said he who alleges must prove. It is therefore not sufficient for Defendant to simply say the Plaintiff is married without adducing any evidence to support his assertion. The allegation of marriage is therefore dismissed.

Coming back to maintenance after divorce which is succinctly referred to in the local court as compensation, I must state that the essence of maintenance after divorce is not necessarily to compensate the innocent party or to punish the guilty party but to allow the divorced wife maintain the way of life she had in the house of the husband for a considerable period before she could finally settle on her own. In other words it is meant to avoid drastic change in the life of the divorced spouse. In this matter before me after considering all the circumstances I have decided to award Plaintiff a sum of K10, 000 as maintenance after divorce payable in instalments of K400 per month with effect from this month end. In addition he shall maintain his two children who are living with the Plaintiff with K300 per month until they reach the age of 18 years or until they complete their education which ever will be the latter but subject to review in accordance with the needs of the children. In the circumstances and by the reasons stated above the whole appeal therefore has failed out and accordingly dismissed. Each will have to bear its own costs.

DELIVERED IN OPEN COURT

DATED THE.....DAY OF



F. KAOMA



J8

RESIDENT MAGISTRATE

