

**IN THE SUBORDINATE COURT OF THE FIRST CLASS 2016/CRMP/LCA/289
FOR THE LUSAKA DISTRICT, HOLDEN AT LUSAKA**

(CIVIL JURISDICTION)

BETWEEN

PROGRESS MUMBA

AND

MOSES KALEBAILA



APPELLANT

RESPONDENT

Before: Mrs. N.M Sakala - Chabala

**For the Appellant : Likezo Mungambata,
Legal Resources Chambers**

**For the Respondent : Nganga Yalenga
Messrs Nganga Yalenga & Associates**

J U D G M E N T

Statutes Referred to:

1. The Subordinate Court Act, Chapter 28 of the Laws of Zambia
2. 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. Elizabeth Nadine Wesson v Brian Sydney Stroud SCZ No. 35 of 1998
3. Wachtel v Wachtel (1973) 1 A.E.R., 829
4. Chibwe v Chibwe (2000)SCZ No. 38
5. Violet Kambole Tembo v David Lastone Tembo (2004) Z.R. 79 (S.C.)

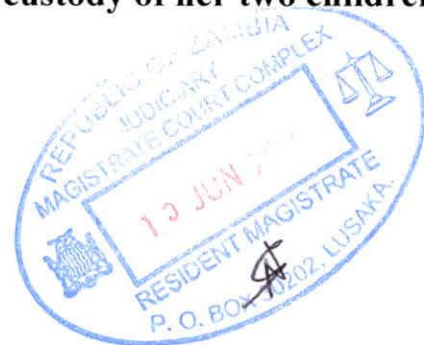
Other Works Referred to:

1. Raydens Practice and Law on Divorce, 9th Edition London Butterworths

On 18th March, 2016, the lower court granted divorce to the parties after 8 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, custody of their two children to the respondent and that appellant should have access to the children.

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

1. **That the lower court erred in law and fact when it made an order granting custody of the two children to the respondent when it failed to take into account the ages and sex of the said children who are both girls and aged 6 and 7 years respectively.**
2. **That the lower court erred in law and fact when it made an order granting custody of the two female children to the Respondent when it failed to take into account compelling circumstances which would render the appellant incapable of having custody of her two children.**



3. That the trial court erred and misdirected itself both in law and fact when it failed to take into account the fact that the appellant who is the biological mother of the two children is now in full and payable employment and therefore capable of taking care of the said children
4. That the trial court erred and misdirected itself both in law and fact when it made a finding that property acquired by the appellant and respondent should be shared equally without taking into account the inventory of the said property.

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.”

In proving her case, the appellant called two witnesses.

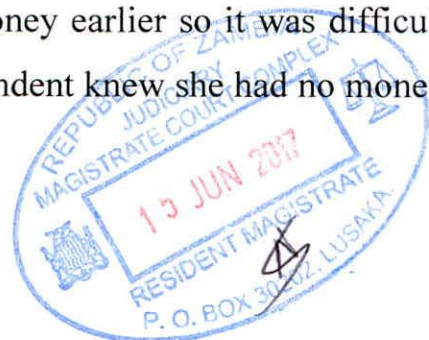
The appellant was **Progress Mumba**, an accountant aged 31years. She narrated that she was unhappy with the Judgment of the Local Court which granted custody of their two female children aged 6 and 7 years respectively to the respondent.

She went on to state that she was the biological mother of the said children and wanted to look after them. She further narrated that the respondent was not capable of raising the said children properly as he was very violent and would usually spend most of his time away from home. She produced into evidence a Medical Report form which indicated that she had been assaulted by a known person who was the respondent. She further explained that the respondent had been arrested for assaulting her and that this was not the only incidence of violence that she had experienced during the marriage.

When cross examined, she stated that she wanted custody of the children. In continued cross examination, she stated that she narrated to the court the bad things the respondent had done to her. She also stated that the respondent had locked the children and her in the house. When cross examined further, she stated that the respondent only allowed her to see the children during school holidays. She also stated that she was currently working as an assistant accountant.

She further stated that the violence exhibited by the respondent also affected the children as it was in full view of the children. When cross examined further, she stated that, she was currently living in a two roomed house along Ngwerere road in Chelstone. In continued cross examination, she explained that she had not been in a position to help the children financially earlier because she had not been working and that the respondent did not give her anything from what they acquired together.

In re examination, she stated that she had no money earlier so it was difficult for her to take care of the children and that the respondent knew she had no money but he did not help her.



PW2 was **Denard Chileshe**, a farmer aged 81 years. He narrated that the appellant was his grand daughter. He went on to state that the parties married under Bemba customary law and according to their customs, upon dissolution of marriage, custody of the children is granted to the mother because she is the one who can pass on the tradition of the Bemba custom to them.

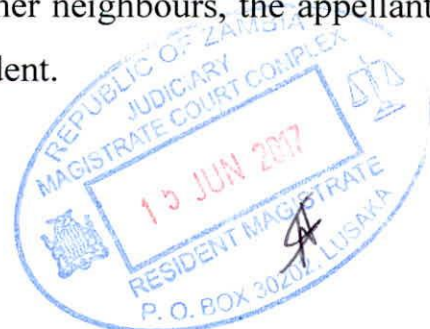
When cross examined, he stated that in the Bemba tradition, female children should be raised by their mother. When cross examined further, he stated that the children could know the Ushi tradition of the respondent but the Bemba tradition was supposed to dominate.

There was no re examination.

PW3 was **Chisha Ninde**, an operator aged 37 years. She narrated that the parties were her neighbours during the subsistence of their marriage. She went on to state that the respondent was a violent man and that at one point, she escorted the appellant to the police station after she had been beaten by the respondent.

She narrated further that the respondent had approached her with an axe in his hands and threatened violence on her. She only refrained from reporting the matter to the police after she was assured by the compound committee members that they would talk to the respondent.

When cross examined, she stated that she knew the respondent as a violent man. She also stated that at the time the parties were her neighbours, the appellant was unemployed and heavily depended on the respondent.



In continued cross examination, she stated that the appellant was her good friend and that she had never mentioned to her that she pays school fees for her children. She also stated that she never saw the respondent beating the appellant. She also stated that the appellant currently lives in a two roomed house in Kamanga

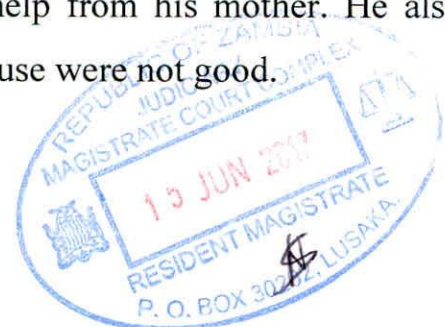
There was no re examination.

This was the close of the appellant's case.

The Respondent testified and called two witnesses.

The **Respondent** was **Progress Kalebaila**, a systems operator aged 37years. He narrated that he married the appellant under Ushi customary law in 2008 when she fell pregnant. He went on to state that there were times the appellant would live the house and he had to look after the children. At some point the children lived with his mother and later with his sister. In March 2015, the appellant left the children for nearly a school term and he had to look after them.

He explained that at one point, the appellant had restrained him from leaving the house after he had told her that he had a long day at work and would spend a night at barn motel. He then pushed the appellant and she fell down. He was then picked up by the police and detained. The matter was later resolved by Chelstone police and referred to the Victim Support Unit. He deposed further that in 2012, the appellant went to live with her mother in Kitwe for 4 months and he was left to look after the children alone. He had to ask for help from his mother. He also stated that the living conditions at the appellant's house were not good.



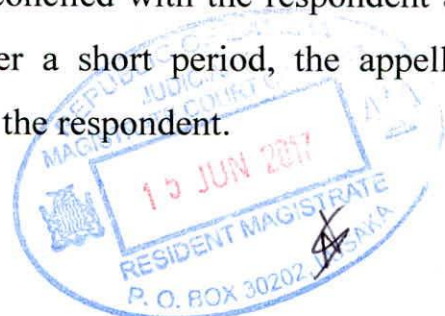
He submitted that he had spent a lot of time with the children when their mother was absent and that he had not failed to look after the children. He went on to state that he provided food and clothing for the children and that they were in school and he was constantly in touch with their teachers. He also submitted that he was currently married to a woman who was a student in the USA.

When cross examined, he stated that he had been there for the children since birth. When cross examined further, he stated that he had beaten the appellant before but could not remember how many times. He also stated that he had been violent towards the appellant and not the children.

In re examination, he stated that he officially married the appellant in 2008 and that prior to this, they had been co habiting. He also stated that he beat the appellant for a few years or months prior to the divorce. He also stated that the children never witnessed a fight between the appellant and him.

DW2 was **Rhoda Mwape Kalebaila**, a business woman aged 58years. She is the mother to the respondent. She narrated that the parties got married in 2008 and have two children together. She went on to state that she started looking after the children when the first born was 3years and the second born was 2years. This was after the parties differed and the appellant had gone away.

The children lived with her for about a year and during that period, the appellant never visited the children. Later the appellant reconciled with the respondent and the children went back to live with them. After a short period, the appellant deserted the home and the children remained with the respondent.



When cross examined, she stated that she had kept the children for some time and that during this period, she did not receive any phone call from the appellant or her relatives. In continued cross examination, she stated that it was unusual for a married woman to run away from home and leave the children. She further stated that she never received any complaint from the appellant but that she was aware the respondent was detained by the police for assaulting the appellant. She also stated that the respondent had since remarried and that the children could be looked after by their step mother.

In re examination, she stated that it was not her duty to ensure that the appellant visited the children.

DW3 was **Bridget Musemuna**, a teacher aged 29years. She narrated that she knew the respondent as he had a daughter in her class at Silver Spring School. She taught the child namely Kasumba Kalebaila from 2015 to 2016. She went on to state that the respondent had two children at the said school.

She explained that she met the appellant twice during the time she taught their daughter. The first time was when the appellant had gone to the school to find out if the children had reported at school and the second time is when she took fruits for the children. She narrated further that the time she taught the child from 2015 to 2016, the child would always go to school with food.

When cross examined, she stated that Kasumba Kalebaila was a happy child at school. In continued cross examination, she stated that it was not unusual for a parent to check up on a child at school.



In re examination, she stated that the appellant checked up on the child twice in the two years that she taught the child.

This was the close of the respondent's case. Both parties were given time to file in written submissions. However, only the appellant filed in written submissions within the stated time frame. The appellant submitted that whenever the court is determining a custody application, it ought to take into account the best interest of the child.

Counsel for the appellant made reference to Section 15 (2) of the Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia which provides that:

"In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother or vice versa".

Counsel further submitted that the Supreme Court has also had occasion to deal with custody appeals and it was worth noting that the above position had been strictly followed and applied in those cases.

In the case of Elizabeth Nadine Wesson v Brian Sydney Stroud SCZ No. 35 of 1998, the appellant appealed against the joint custody order given by the lower court. The Supreme Court observed as follows:

"We are satisfied that in the best interest of the child and considering that the child is of tender age, we will allow this appeal and set aside the order of joint



custody and we award custody and care and control to the mother the appellant.”

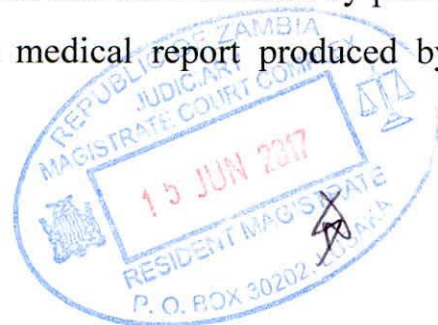
Counsel also submitted that the fact that the respondent has been maintaining the children of the family and paying for their education should not influence the court in granting an order of custody to the respondent. He went on to state that Section 9 of the Affiliation and Maintenance Act Chapter 64 of the Laws of Zambia provided that:

“The court may make a maintenance order in respect of a marital child on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter.”

I wish to state here that I am indebted to counsel for the appellant for his submissions and for the authorities cited.

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 under customary law in the year 2008 and they were divorced by the local court in the year 2016. They have two female children together aged 6 and 7 years respectively. It is also a fact that at the time the parties were divorced by the local court, the appellant was unemployed. The appellant is now currently working as an assistant accountant. The respondent is employed as a systems operator.

It is not in dispute that at one point, the respondent had been arrested by police for assaulting the appellant. There is on record a medical report produced by the



appellant showing that she had been assaulted by a known person who was the respondent. It is also a fact that the respondent has since re married.

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.

I will determine the first three grounds of appeal together. The appellant stated that the lower court erred in law and fact when it made an order granting custody of the two children to the respondent when it failed to take into account the age and sex of the said children, compelling circumstances which would render the appellant incapable of having custody of her two children and also the fact that the appellant who is the biological mother of the two children is now in full and payable employment and therefore capable of taking care of the said children

Section 15 (2) of the Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia, provides guidance on what the court should consider when making an order for custody or access for children.

The importance of this provision of the law is that in granting custody, the court's consideration must be the best interest of the child. It is trite and practical that children below the age of 7 years are best taken care of and in the care and custody of the mother although the father can be ordered to meet all the children's maintenance requirements such as education, health, wellbeing and so on.



When the appellant testified, she stated that the respondent was a violent man and would exhibit violence towards her in full view of their children. In her testimony, PW2 stated that the respondent was a violent man and she once escorted the appellant to the police after she had been beaten by the respondent. She also explained that the respondent had once threatened her whilst holding an axe in his hands.

When the respondent testified, he confirmed that at one point when he had differed with the appellant, he pushed her and she fell down. He was later picked and detained by the police. When he was cross examined, he stated that he had beaten the appellant before but could not remember how many times he had beaten her. He also stated that he had been violent towards the appellant and not the children.

There is on record, a medical report form stamped by Chelstone Police station and Chelstone Clinic indicating that upon examination, the doctor's findings were consistent with the alleged circumstances and that the appellant had painful and tender leg and wrist joints.

This documentary evidence is accepted as evidence of a professional man, being the doctor, who gave factual evidence of what he had seen. During cross examination of the appellant as well as during the giving of evidence by the respondent, the medical report evidence was not challenged. I have accepted such evidence and find that the respondent indeed exhibited violence towards the appellant during the subsistence of their marriage.



According to the learned authors of Raydens Practice Law on Divorce 9th Edition at page 136, even threats of actual personal violence constitute cruelty. The respondent's actions and dispositions clearly point to a violent and cruel man. This could therefore explain why the appellant sometimes ran away from home.

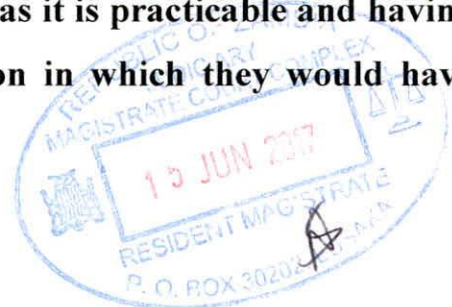
There is no evidence on record to suggest that the Appellant is an unfit mother or that the best interest of the children lay with custody being granted to the Respondent.

The fourth ground of appeal is that the trial court erred and misdirected itself both in law and fact when it made a finding that property acquired by the appellant and respondent should be shared equally without taking into account the inventory of the said property.

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 a 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.”

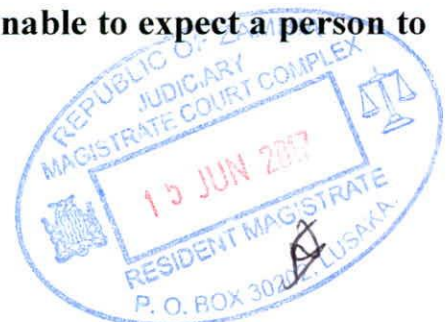
In the present case, when the appellant was cross examined, she stated that she had not been in a position to financially help the children as she had earlier been unemployed and that the respondent had not given her anything from the property they acquired together. The respondent did not adduce any evidence to challenge this.

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. It is therefore clear that in making property adjustments, the court is guided by the need to do justice taking into account the circumstances of the case.

I must also state that Section 9 of the Affiliation and Maintenance Act Chapter 64 of the Laws of Zambia provides guidance on when maintenance orders can be made by the court. Further, the court is guided by the provisions of Section 11(2) of the same Act which state 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;”



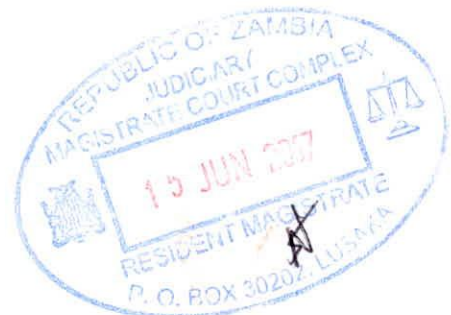
The appellant is employed as an assistant accountant and the respondent is employed as systems operator. This therefore demonstrates that both parties have income earning capacities and they are both expected to provide for their two children financially. I must also state that each parent has parental responsibility over the two children.

I have addressed my mind to the fact that the parties were married under customary law in 2008 and were subsequently divorced by the local court in 2016 and that they have two female children together aged 6 and 7 years respectively. I have also addressed my mind to the fact that the respondent has been providing the needs of the children including paying for their education and medicals. It is also evident that during the subsistence of their marriage, the respondent exhibited violence towards the appellant. In addition to this, I have considered the fact that the appellant is now working as an assistant accountant and also that there is no evidence on record to suggest that the Appellant is an unfit mother or that the best interest of the children lay with custody being granted to the Respondent.

I am satisfied that in the best interests of the children and considering the fact that the children are female and of tender ages, I will allow this appeal and award custody, care and control to the appellant, who is the biological mother of the said children.

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

1. That the two children will reside with the appellant but shall be allowed to visit the respondent during school holidays.



2. That an inventory be done of the property acquired during the subsistence of the marriage and that the said property be shared equally between the parties. This should be done on or before 15th July 2017.
3. That the respondent maintains their two children by giving the appellant K3, 000.00 on or before the 30th of every month. This takes effect this month end.
4. That the respondent will be responsible for the children's education requirements and medication.
5. That both the appellant and respondent will provide clothing for the said children.

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

In the circumstances of this case, I order that the respondent bears the costs.

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

DELIVERED IN OPEN COURT THIS 15th DAY OF JUNE, 2017


HON. N.M SAKALA - CHABALA
RESIDENT MAGISTRATE

