

**IN THE SUBORDINATE COURT OF THE FIRST CLASS**

**2017/CRMP/LCA/295**

**FOR THE LUSAKA DISTRICT**

**HOLDEN AT LUSAKA**

**(Appellate Jurisdiction)**

**BETWEEN:**

**DICK SNAPPER**

**APPELLANT**

**AND**

**GETRUDE MATONGO**

**RESPONDENT**

**FOR THE APPELLANT**

**IN PERSON**

**FOR THE RESPONDENT**

**IN PERSON**

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**JUDGMENT**

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**CASE LAW REFERED TO:**

1. Rosemary Chibwe V. Austin Chibwe (2001) ZR (sc)

**LEGISTRATION REFERRED TO:**

1. Section 15 of the Subordinate Court Act cap 28 V. 3 of the laws of Zambia.
2. The Afflilation and maintenance of children Act cap 64 V. 5 of the laws of Zambia.

**WORK REFERED TO:**

1. L. Mushota 2005, Family law in Zambia; unza press.

This is an appeal from a local court in Lusaka district. The appellant appealed the decision of the court below on 5 grounds which he itemized. Upon examination of the said grounds, what tends to come out clearly are 2 grounds namely:

- a) That the court below erred and misdirected itself when it granted divorce and ordered sale of the matrimonial house to the parties who were not married but merely cohabiting.
- b) That the court erred and misdirected itself when it ordered maintenance of one of the parties' children who is 20 years old and a working class.

When the matter came up for appeal hearing I heard it de novo. I shall therefore refer to them as plaintiff and defendant which is how they stood at the court of first instant. And only the parties testified.

The evidence in brief is to the effect that in December 1996 the parties came to know each other at a funeral. They started having an affair. The defendant lived in Olympia in a servant quarter. According to the plaintiff, she was advised by the defendant's mother to accept marrying him. She accepted and was taken by her cousins to his home. After some time their stay was characterized by fights. They had 2 children in due course and built 2 houses at plot number 22/84 garden compound Lusaka. One is 5 roomed while the other is 6 roomed. They shifted to the plot in the year 2001. They lived there until they allegedly divorced. The defendant still lives in one of the 2 while one is on rent. According to the plaintiff the defendant paid K200 in the year 2000. This was after her mother demanded to take her away following their fights.

The plaintiff testified that those present when the payment of K200.00 was made were her deceased mother, deceased brother, her aunt who lives in Chisamba and her elder brother. She contended, it appears this amount was for dowry not pregnancy damages.

She is demanding for maintenance of the 2 children aged 20 and 14 respectively. She explained that the boy was supposed to start studying medicine at Apex University but could not. And that the other girl child is in grade 7. She demanded K300.00 for their clothes, K500.00 at least for food, K250.00 per month for the young one and medical needs support each time they are sick. The plaintiff further complained of having contracted HIV aids during her stay with the defendant in 2010. She finally demands for 50 percent share of money to be realized from sale of their houses as ordered by the local court.

On cross examination she maintained that the defendant married her and dowry was paid.

On his part, the defendant essentially argued that the K200.00 he paid was for the damage of her pregnancy. They never married but cohabited. He does not deny that he is the father of the 2 children aged 20 and 14. He confirmed that he build a house and moved to live in it in the year 2001. He recalled that he took 3 years to finish building. Before that they were renting. He acknowledged that their stay was full of fights. He recalled an incident when he followed her to her village in Pemba after she ran away as a result of frequent fights and squabbles during their stay.

On cross examination, the plaintiff asked a very pertinent question as to whether or not she fell pregnant before he got her to his house. In response the defendant acknowledged in the affirmative. She then asked a follow up question as to whether anybody approached him over that pregnancy. The defendant denied having been approached. From what it appears, the plaintiff's argument is, assuming she fell pregnant before he moved her to his home, how come nobody approached him to lay the



case of the pregnancy for which he subsequently paid the sum of K200.00 which she believes was dowry.

Now I must state that I had the privilege to observe the demeanour of the parties when they testified. What I noted is that the plaintiff was quite consistent as such find her creditworthy. It has not been shown how and why she could have created the story of a long period of stay with the defendant. She was quite clear in her evidence. The 2 came to know each other in 1996. They allegedly divorced only in May 2017. This was after she left him in 2012 following unceasing beatings. The 2 lived together for over 20 years.

It is my observation that the defendant could not have been following her each time she left their house if they were merely cohabiting without any marriage. The excuse that he followed her to Pemba at her village on one occasion because of the child appears to be a mere excuse.

I thus make a finding that the K200.00 paid to the plaintiff's mother as a parent was towards dowry. The law is very clear on what constitutes a customary marriage. L. Mushota 2005 family law in Zambia identifies 2 essential elements of a customary law marriage. These are:

- i) Consent of the parties and their families.
- ii) Marriage payments.

On the matter before me, there is evidence that the plaintiff as a bride was approached and advised by the defendant's mother to accept marrying him. She accepted and was handed over to him by her cousins presumably on behalf of her family. This reaction by her family and the role played by the defendant's mother signifies consent. The sum of K200.00 was paid whether a party payment or not. There is evidence that the defendant paid it to her mother when she threatened to withdraw her owing to their fights.

I will thus hold that the parties were married under customary law. The plaintiff is thus entitled to an equal share of the house built during the subsistence of their marriage as held in Rosemary Chibwe V. Austin Chibwe (1).

I must state that even assuming the 2 were not married but merely cohabiting, the plaintiff would still be entitled to whatever property was acquired during her stay on equitable grounds. Section 15 of the subordinate court Act cap 28 V.3 of the laws of Zambia is quite clear. It requires the subordinate court to administer law and equity concurrently. It is totally unacceptable by any standard that the defendant expected to give no share of a property built during his stay with the plaintiff with whom they have 2 children aged 20 and 14 years. It is my view that the spouse contributed in kind even if she did not put in any resources in terms of finances.

Judicial notice is taken that while the defendant was away for work the plaintiff remained home washing for him, cooking for him and generally managing the home and the children.

This type of abuse of spouses cannot be encouraged by courts. People must learn to be fair to others.

To this end, I will uphold the decision of the court below that the 2 houses on plot number 22/84 garden compound be sold. The money to be realized to be shared on 50 percent basis for each party. The senior clerk of court civil to auction the said house or allow the parties to secure buyers. Once the money is paid to be shared to them by the Senior Clerk of Court. Turning to the issue of children, am guided by the affiliation and maintenance of children Act cap 64 of the laws of Zambia which requires courts to consider the best interest of children. They are undoubtedly a



consequence of a customary law marriage divorce. They are entitled to good life after parents have divorced. The defendant cannot escape the need to take care of them. At the same time they are entitled at their ages to choose with whom to live with especially the 14 year girl child. I order that she lives with the mother as before. The defendant is to provide the following for her.

- a) K150.00 per month for her clothing
- b) K250.00 for her school requirements per term.
- c) K200.00 per month for her food and to be providing for her medicals whenever she falls sick.

As for the 20 year old boy, I note that he has reached the majority age of 18 currently, I order that he lives with the father if he cannot fend for himself.

All in all the appeal is dismissed with costs. Costs to be agreed or taxed in default.

Delivered at Lusaka in Open court this 12th September 2017.



**G. MALUMANI (ESQ)**

**SENIOR RESIDENT MAGISTRATE**

**12/09/2017**

