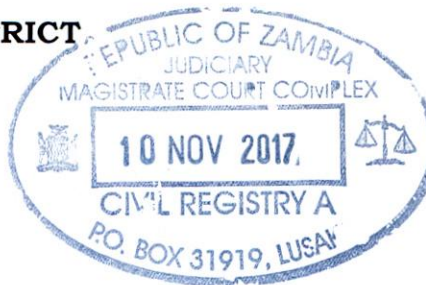


IN THE SUBORDINATE COURT OF THE FIRST 2016/CRMP/LCA/0081

CLASS FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Appellate Jurisdiction)



BETWEEN:

**ESTHER SIBAJENE
AND
OBRIAN MUSAKA**

PLAINTIFF

DEFENDANT

**Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, in open court
at 09:00 hours this 12th day of October, 2017.**

For the Appellant: In Person

For the Respondent: In Person

JUDGMENT

LEGISLATION REFERRED TO:

1. Local Court Act, Cap 29 of the Laws of Zambia, ss: 35, 56, 58

CASES REFERRED:

1. Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000

2. Violet Kambole Tembo v David Lastone Tembo (2004) ZR. 79

This matter was commenced by way of an appeal from the local court. On the 30th December, 2015 the respondent sued the appellant in the Chawama local court for divorce on the ground of marital disputes. I will maintain the parties

in this matter as they appeared in the court below. The respondent and appellant shall herein be referred to as plaintiff and defendant respectively.

The local court on the 30th December, 2015 dissolved the customary marriage. At the conclusion of the matter, the local court made the following pronouncements:-

1. Divorce granted;
2. Defendant to compensate the plaintiff with the sum of K10, 000 by K500 every month with effect from 30th January, 2016 until the whole amount is paid;
3. Plaintiff to have custody of the children and the defendant to be maintaining his children by K600 every month with effect from 30th January, 2016 subject to yearly review;
4. School requirements, medicals and clothing are defendant's responsibilities; and
5. The parties to share the properties acquired together during marriage equally.

The defendant aggrieved by the decision of the lower court appeals to this court in accordance with section 56 of the Local Court Act, Chapter 29 of the Laws of Zambia. The grounds of appeal advanced by the defendant are not clearly spelt out but it would appear the defendant complains that:

1. The matter was determined not on merit as the respondent was not given an opportunity to be heard on account of his use of Tonga language which the court did understand.
2. That the marriage was dissolved at the instance of the plaintiff and that the grounds advanced by the plaintiff were not sufficient to warrant dissolution of the marriage. That the defendant has always wanted reconciliation in the interest of the children and the institution of marriage which is sacrosanct.
3. That the defendant was denied custody of the children

4. That the order to compensate the plaintiff with huge amount of money K10, 000 to be liquidated in K500 monthly instalment and further K600 per month towards maintainance of the children is unjustified as the respondent is not in gainful employment on one hand and the dissolution of the marriage was prayed for by the petitioner on the other hand.
5. That if anything, the respondent feels it is him who should be compensated since it is him being divorced unjustifiably. That the law is very instructive on this one.

This appeal from the local court was dealt with by way of rehearing the matter in accordance with section 58 of the Local Court Act, Chapter 29 of the Laws of Zambia.

In civil matters the plaintiff bears the burden of proving her claim on the balance of probabilities.

The plaintiff Esther SibaJENE, PW1 gave evidence on oath and she called no witnesses. According to the plaintiff in the year 2006, she got married to the defendant under Tonga customary law. That the defendant paid two cows as bride price or lobola. It was submitted that the parties cohabited together in Choma in the Southern Province of Zambia but later moved to Lusaka at 10 Miles in the Lusaka Province of Zambia. It was further asserted that there are now living four children of the family namely: Orient Musaka a girl born on the 13th November, 2007 in grade 6 at Kamulenga Primary School; Oscar Musaka and his twin brother Oberty Musaka both boys born on the 24th May, 2010 not in school; and the other baby child was not mentioned. It was submitted that the plaintiff is keeping custody of the four children of the family.

According to the plaintiff, she recalled after the marriage the couple was happy until 2012 when the defendant started acting violent toward her. That he would leave the family hungry without food. It was stated that the plaintiff would go round looking for piece work but that when she would come back the defendant would beat her. The plaintiff narrated an ordeal which happened on

the 6th December, 2015 she had travelled for a funeral in Kabwe. That when she came back on the 12th December, 2017 she found Orient had sustained a broken arm. The plaintiff stated that the defendant did not inform her of the incident. That at around 14 00 hours the defendant started beating her with a cable. It was submitted that after the beating the defendant went to spend a night with the girlfriend. It was further submitted that the plaintiff went to report the matter at Chawama Police Station where she was issued with a medical report form. That the defendant was apprehended but that the police decided to handle the matter in an amicable way but that the parties could not settle on anything. According to the plaintiff she would be sick but the plaintiff would spend nights away from the matrimonial home with another woman leaving the plaintiff alone. It was asserted that the defendant's perpetual adultery led to an irrevocable breakdown of the marriage. It was further stated that the defendant has since married and moved on with his life.

It was stated that the defendant works as a bricklayer. As such he is able to pay the compensation ordered by the local court. According to the plaintiff she does not work but that she has the custody of the four children of the family.

The plaintiff submitted that during marriage the couple acquired property together. That the local court ordered the couple to share the property equally. It was submitted that the property include: a plot in Monze, one cow, household goods such as sofas, bed, television, DVD player, radio and kitchen utensils. It was submitted that the couple to date have not shared the said property. The plaintiff urged this court to make a formal order committing the children into her custody with reasonable access granted to the defendant. That the defendant must be ordered to make financial provision towards his children.

The testimony of the plaintiff was not controverted in any way.

The defendant Obrian Musaka, DW1 gave evidence on oath and he called one witness. According to the defendant he married the plaintiff under Tonga

customary law. That problems started in 2012 when the defendant received a phone call from his mother that his sister was unwell. It was submitted that defendant brought home his sister from Kabwe. That the defendant got the sister into school in Chawama compound. It was asserted that in July, 2012 the defendant's mother visited the couple from the village. According to the defendant when schools opened the plaintiff started calling people in the village indicating that the defendant's sister should not go back to Lusaka. The defendant submitted the mother brought the sister to Lusaka from her holiday in the village. It was submitted that when the mother and sister reached the couple's home the plaintiff left them home and went to church. It was asserted that the defendant's mother was angry at the plaintiff's conduct of leaving them alone. According to the defendant he concluded that the failure by his wife to prepare a meal for his mother confirmed the plaintiff's intention to chase the defendant's sister from the matrimonial home. The defendant submitted that he called the plaintiff's father who came and discussed the matter with the couple. That during the discussion the plaintiff demanded without any reason for the defendant's sister to be chased from the house. That the plaintiff put a condition that if the sister one Dyna would be allowed to continue living with the couple she would be cooking for herself. It was stated that the plaintiff's father ordered for the Dyna to remain with the couple. According to the defendant at around 21 00 hours the plaintiff ordered the defendant's mother and sister to leave the home. It was asserted that the defendant's mother and plaintiff's father started crying at cruelty exhibited by the plaintiff. It was stated that the same night at 21 00 hours the defendant saw the landlord and borrowed K200 which he used to send the mother and sister back to the village.

It was submitted that the defendant appealed because he was not given custody of the children. According to the defendant he had asked the plaintiff to be taking his children at his sister's place in Jack compound. It was submitted that the defendant started searching for his children. That the

defendant was told by his sister that Orient Musaka got burnt. That the sister further informed the defendant that the children were sick and in hospital. It was stated that when the defendant located his children he discovered all his children were sick. According to the defendant he asked the plaintiff to let him have custody of two children to ease the burden on her. That the plaintiff refused and became annoyed. According to the defendant he would like to have custody of the children because the plaintiff does not work. The defendant submitted that he is self-employed and able to look after his children. That the plaintiff is tramp without a fixed abode. The defendant requested to be granted custody of Orient Musaka aged 10 years or in the alternative the parties must share equally the custody of the children.

On divorced spouse maintenance, the defendant submitted that he is not in gainful employment and has no regular income. That the defendant cannot maintain his divorced spouse at K10, 000 as ordered by the local court.

In cross examination, the defendant stated that it took him one month for him to go and see his burnt child because he travelled to Choma. It was further stated that when the defendant went to see his children he found all of them were sick but that he could not continue visiting his children because the plaintiff got a police call out alleging that she was assaulted by the defendant. It was submitted that from the time the couple divorced the defendant had only given the plaintiff K200 to buy mealie meal.

The second defendant's witness DW2, was Anna Mpota the former land lady to the couple. According to DW2 in 2015 the couple had problems which started when the defendant's mother visited the couple. That the defendant asked DW2 for K200 so that his mother could use the money to go back to the village after she had differed with the plaintiff. That PW1 was not paying rent or doing any income generating activity.

In cross examination DW2 stated that she did not know the couple's marital problems. That the plaintiff asked the DW2 for a piece work but that she was beaten by her husband for doing so.

Having heard all the evidence in this matter, I now consider the grounds of appeal or issues raised by the facts or evidence on record.

The first ground of appeal is that the defendant was not given an opportunity to be heard on account of his use of Tonga language which the lower court did understand. In this court this issue did not arise as throughout the hearing of the matter the proceedings were interpreted in Tonga. This ground of appeal was necessarily abandoned.

Considering the second ground of appeal that there were no grounds upon which the local court dissolved the customary marriage and that the parties were not given an opportunity to reconcile. On the 14th February, 2017 the plaintiff and defendant were afforded an opportunity to try and resolve their marital differences by way of reconciliation. On the 16th March, 2017 the couple reported that they had failed to reconcile as indicated. Moreover, the divorce was not contested by either party in this court. The defendant has since married another woman and moved on with his life. It follows therefore, that the marriage has broken down irretrievably. As such ground of appeal number two naturally has failed.

It would appear from the facts or evidence on record that the only issues for determination are:

1. Child custody;
2. Maintenance of divorced spouse;
3. Maintenance of the children of the family; and
4. Property adjustment.

On child custody, the local court ordered the plaintiff to have custody of the four children of the family. I recognize and respect the rights of the child in

making decisions regarding their welfare. However, the oldest child one Orient Musaka is aged 9 years and rest very young to make rational judgment involving their welfare. On the ground of the ages of the children I will not disturb the current custody arrangements as it is in the best interest of the children. I accordingly order and direct that the four children of the family are placed into the custody of the plaintiff with reasonable access granted to the defendant.

In this appeal, I will address the issues of maintenance of divorced spouse and the children of the family together. The local court ordered the defendant to compensate the plaintiff with K10, 000 to be liquidated in K500 monthly instalments and further K600 per month towards maintenance of the children. In deciding the issue of the maintenance of the children of the family and divorced spouse (plaintiff), I am guided by the provisions of **section 35(1)(d) and (e) of the Local Court Act, Chapter 29 of the Laws of Zambia** which reads as follows:

“S.35(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;

(e) make an order for the maintenance of any child below the age of eighteen years whether born in or out of marriage.....”

In considering maintenance in divorce cases the court should not look at or treat the parties' reasonable requirements as a determining factor. It is the available financial resources which the court must consider. In my view, it was

unjust and unreasonableness to order the unemployed brick layer defendant without a regular income to compensate or maintain the plaintiff with a sum of K10,000 to be liquidated in K500 monthly instalments. Given the means and circumstances of the unemployed parties, in my view the compensation of K10,000 must necessarily be quashed and in its place I order that the defendant compensates the plaintiff with a sum K3,000 to be liquidated in 6 equal monthly instalments of K500 beginning the 30th day of November, 2017. The order for the defendant to pay K600 monthly maintenance towards the four children of the family was just and reasonable. As such, I uphold the decision of the court below.

I now come to the last issue of property adjustment. It is not controverted that during the subsistence of the marriage the couple acquired a plot in Monze, one cow, household goods such as sofas, bed, television, DVD player, radio and kitchen utensils. It is not in dispute that the parties acquired the said property acquired so that the same should be continuing provision for them and the children during their joint lives and should be for the use for the benefit of the family as a whole. It was submitted that the couple to date have not shared the said property. The local court was very clear on the issue of property adjustment. The local court held:

“All properties and household goods acquired together whilst in marriage to be shared equally.”

The Supreme Court has been very clear on what type of properties are ordinarily subject of property adjustment after the dissolution of marriage. In the case of ***Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000*** in which case the Supreme Court, *inter alia* stated:

“What was the issue before the High Court and us was the percentage of sharing the family assets. Family assets have been defined in Watchtel v Watchtel as items acquired by one or the other or both parties married with the intention that these should be continuing provision for them

and the children during their joint lives and should be for the use for the benefit of the family as a whole. Family assets include those capital assets such as matrimonial home, furniture, and income generating assets such as commercial properties.”

The Supreme Court in the subsequent case of ***Violet Kambole Tembo v David Lastone Tembo (2004) ZR. 79*** provided guidance to the courts on what to take into consideration when sharing properties after divorce and held *inter alia* as follows:

“The court examines the intentions of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement then the court must make a finding as to what was intended at the time of the acquisition.”

I do not see any reason to warrant the disturbance of the order by the local court sharing equally between the parties the property acquired during the subsistence of the marriage. In default of agreement on how a plot in Monze, one cow, household goods that is; sofas, bed, television, DVD player, radio and kitchen utensils shall be shared between the parties the same shall be sold at market price and the proceeds of the sale shall be shared equally between the plaintiff and the defendant.

I do not order any costs.

Delivered in open court this 12th day of October, 2017.

HUMPHREY MATUTA CHITALU

RESIDENT MAGISTRATE

