

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA  
(Civil Jurisdiction)

Appeal No. 248 of 2022

BETWEEN:

**DAVID MUFWAYA**

Appellant

**AND**

04 SEP 2024

**DORA SHILUTE**

Respondent

**Coram: Makungu, Sichinga and Sharpe-Phiri, JJA  
on 14 August 2024 and 4 September 2024**

For the Appellant: N/A

For the Respondent: N/A

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## **J U D G M E N T**

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**SHARPE-PHIRI, JA, delivered the judgment of the Court.**

Cases referred to:

1. Examination Council of Zambia v Reliance Technology Limited [2014] ZMSC 105
2. Attorney General v Achiume (1983) ZR.1
3. Kunda v Konkola Copper Mines Plc, SCZ Appeal No. 48 of 2005 (unreported)
4. Violet Kambole Tembo Vs David Lastone Tembo (2004) Z.R. 79 (S.C.)

## 1.0 **INTRODUCTION**

1.0 This is an appeal against the judgment delivered by Sinyangwe, J of the Livingstone High Court on 12 August 2022, in cause number 2022/HLA/001.

## 2.0 **BACKGROUND**

2.1 The brief background of the case is that David Mufwaya, the Appellant herein, initiated an action as the Plaintiff in the Local Court on 18 September 2018, seeking the dissolution of his marriage to the Defendant, Doreen Shilute, now the Respondent. Upon consideration of the matter, the Local Court Magistrate Chimamba granted the divorce on 19 October 2018.

2.2 Regarding property settlement, the Court determined that the property acquired jointly by the couple should remain with the Respondent due to the Appellant's status as a polygamist. The Magistrate further ordered that the property acquired in each home should remain on the farm.

2.3 Being dissatisfied with the decision of the Local Court Magistrate, the Respondent appealed to the Subordinate Court at Namwala District, advancing two grounds of appeal as follows:

- i) *The Court completely misdirected itself by not getting a submission from the Appellant and went on to pass judgment without his submission.*

ii) *The Court made grave error by not sharing the property the Appellant acquired with her husband at the divorce time.*

3.0 **MATTER BEFORE THE SUBORDINATE COURT**

- 3.1 On appeal of the property settlement matter from the Local Court, the Subordinate Court heard the matter *de novo* on 20 December 2018, 17 January 2019 and 14 February 2019.
- 3.2 The Respondent, a 39-year-old resident at Chiwata, working as a General Worker at Namwala Hospital, testified that she was married to the Appellant on 19 September 2012. There were no children born to the family. At the time of their marriage, she was in employment, and she used to supply mealie meal to the headmen. She had bought a bicycle to ferry milk to Parmalat.
- 3.3 The Respondent further testified that at the time of their marriage, the Appellant owned 200 cattle, but the number had since increased to 360. She stated that she had contributed K10,000 for cattle medicine and had bailed out the Appellant with two animals. She requested the Court to award her 25 of the Appellant's 360 cattle.
- 3.4 The Respondent also testified that during the marriage, they had purchased two hammer mills and a Canter vehicle and that they had constructed a borehole. Additionally, she had bought blocks worth K3,000. She concluded by requesting the Court to award her twenty-five



(25) of the 360 cattle, 2,000 of the blocks, three oxcarts of maize, a bicycle and a hammer mill.

3.5 Under cross-examination, the Respondent maintained that their livestock were reproducing and that she would purchase medicines from the proceeds of milk sales. She confirmed that she had found the Appellant with two wives and whilst in marriage, she and the Appellant had acquired 160 animals. She further indicated that she had hired labourers to cultivate her fields on the farm.

3.6 The Appellant testified that he married the Respondent on 19 November 2012, according to their customs, and the Respondent became his third wife. He asserted that at the time of their marriage, the Respondent was employed at a hospital, and they resided together at her place for six months. Subsequently, they moved to Baambwe Clinic, where they lived for two years, during which they cultivated the Appellant's fields. They were later transferred to Ngabo, where the Respondent used her bicycle to visit the Appellant. Following this, the Respondent was transferred to Namwala Hospital, where she began renting a house.

3.7 The Appellant stated that he gave the Respondent one of his fields and cultivated it for her. He further contended that the Respondent never resided at his village as she was frequently transferred due to her work. He added that the Respondent did not contribute in any manner to the properties she is claiming. He maintained that he had already acquired these properties prior to his marriage to the Respondent, and it was his

first wife and children who had contributed to the accumulation of all the assets.

- 3.8 The Appellant further insisted that he did not have cattle that belonged solely to him. He also maintained that the borehole was already drilled, and the hammermill acquired, prior to his marriage to the Respondent and that the blocks that were being claimed by the Respondent were molded for his son. He added that he could not build a concrete house for the Respondent as his third wife when his second wife lived in a thatched house. He claimed that the only asset he had purchased during his marriage to the Respondent was a canter motor vehicle in 2017.
- 3.9 Under cross-examination, the Appellant denied that the Respondent's bicycle was utilized to deliver milk to Pharmalat Company. He also denied that the Respondent had given his children any maize to assist the headman or that she had purchased any maize sold to the Food Reserve Agency. He insisted that the Respondent had not provided any money to buy drugs for his cattle nor contributed anything towards his wealth. The Appellant further stated that he used to pay the Respondent's rent.
- 3.10 Moreover, he admitted that the Respondent performed household chores, gave one animal to the Chief, and provided K300 to his first wife when she fell ill. He indicated that he owned 45 cattle in 2012 when he married the Respondent and that the number had increased to approximately 90 by January 2018.



- 3.11 Roster Kaluwe, a peasant farmer from Nakasengo, and the Appellant's first wife, testified on behalf of the Appellant. She stated that she married the Appellant in 1981, at which time he owned nothing. They began purchasing and breeding animals and cultivating their fields, resulting in the animals multiplying.
- 3.12 The witness further testified that in 2013, she underwent an operation in Monze, upon her return, a borehole had been drilled. Subsequently, they purchased a hammermill and a canter truck. She stated that the Appellant had been married to the Respondent for five years. She further indicated that at the time that the Appellant married the Respondent, they already owned over three hundred animals. The witness provided a description of the cattle and identified their ownership.
- 3.13 Under cross-examination, DW2 confirmed that she had witnessed the wealth the Appellant had acquired during their marriage and that their animals had multiplied since 2012. She also confirmed that the Appellant did not work. Regarding the Respondent, DW2 confirmed that the Respondent had given her K300 when she was in the hospital, found a wife for DW2's son, and contributed to her son's wedding. She further indicated that the Respondent undertook household chores during her marriage to the Appellant, provided DW2's son with four bags of maize, and fed DW2's children at her house.
- 3.14 Soft Mufwaya, the son of the Appellant testified as DW3. He confirmed that the Appellant and the Respondent married in 2012, and following their marriage, the Respondent did not reside with them in the village as

she was employed at Baambwe clinic. He further stated that, at the time of the marriage between the Appellant and the Respondent, the hammer mill had already been acquired and solar panels had been purchased in 2011.

3.15 Under cross-examination, the witness denied being assisted by the Respondent during his marriage, he also denied eating the Respondent's food or being aware if the Appellant did. He acknowledged however that the Appellant and the Respondent were married, and that the Respondent stayed with the Appellant in his house in Baambwe. He also insisted that the number of their animals had decreased since the Respondent's marriage to the Appellant.

3.16 Freshes Mufwaya, was the fourth witness for the Appellant, who testified that all the items that the Respondent was claiming an interest, i.e. the animals, hammer mill and canter van, were acquired before her marriage to the Appellant. He also insisted that the Appellant had built a house for the Respondent.

3.17 Under cross-examination, DW4 admitted that the animals had been reproducing and that there were approximately 250 at the time. He also admitted that the Respondent used to cook food for them, and cultivate her own field, he insisted that she never gave any bags of maize and that she did not contribute to the family.



#### 4.0 DECISION OF THE MAGISTRATE'S COURT

4.1 After considering the evidence presented by the parties, the learned Magistrate held as follows:

*“Unlike criminal cases, civil cases are proven on a balance of probabilities, the question is, has the party in the case the Appellant proven on the balance of probabilities. Firstly, there is no dispute that the Appellant and Defendant [Respondent] were married. During the substance of this marriage, there were properties which were acquired. I am alive to the fact that the Respondent is married to two other women but since the Appellant and the Respondent have separated, there is need for them to share what they acquired during the subsistence of the marriage. Appellant mentioned all the items they acquired but Respondent only brought the documents later on after we adjourned for judgment. Respondent did not challenge the claims that the properties the Appellant wanted them to share did not exist. These properties are there, and I believe that [the] Appellant was already in marriage when they were acquired. Taking into account the case of Chibwe v Chibwe (2001) ZR 231. I have also taken into account that the other family members are still using the properties, and some are difficult to share and cannot be sold such as boreholes. In this case, I will look at the value and order that the Respondent give the Appellant a one-quarter of the total cost. The listed are the properties and the cost and what the Respondent will pay.*



*First borehole at the cost of K18,000 payment to the Appellant is K4,500. Second borehole at the cost of K18,000 payment to the Appellant is K6,000. The truck cost K60,000 payment to the Appellant K15,000. One hammer mill cost K36,000, payment to the Appellant K9,000. In addition, the Appellant to receive 12 animals and to the sex, 5 should be cows. As for the properties such as the ones [the] Appellant was using in her house, all the properties to the Respondent.”*

## 5.0 APPEAL TO THE HIGH COURT

5.1 Dissatisfied with the judgment of the learned Magistrate, Honourable Kanunka delivered on 5 August 2021, the Appellant appealed to the High Court on 28 August 2021 advancing three grounds of appeal as follows:

- i) That the learned trial Magistrate misdirected herself by awarding K4,500 and K6,000 to the Respondent being the cost of the two boreholes when there is only one borehole.*
- ii) That the learned trial Magistrate erred in law and facts when she included the two boreholes, a hammer mill and animals as part of the property acquired during subsistence of the marriage, when those were acquired before marriage of the Respondent and the Appellant.*
- iii) That the learned trial Magistrate erred in facts by awarding K15,000 to the Respondent, being part of the cost of the truck without due regard to the other two wives married to the*

*Appellant, who are working at the farm and that the truck was not valued to be worth K60,000 as vehicles depreciate over the years.*

6.0 **DECISION OF THE HIGH COURT**

- 6.1 Upon reviewing the appeal, the Appellate Judge in the High Court determined that, with respect to the number of boreholes drilled, there was only one borehole attributable to the family, a fact conceded by the Respondent. The Judge further noted that the receipts for the drilling and installation of the borehole, dated 14 November 2012, fell within the duration of the parties' marriage, and that the value of the borehole was K19,800. Additionally, the Court concluded that the borehole constituted family property, as it was acquired with the intention of providing water for the family's use.
- 6.2 Regarding the issue of the number of animals, the Appellate Judge observed that animals acquired prior to the marriage could not be included in the property settlement. He further acknowledged the difficulty in determining the actual number of animals acquired during the marriage due to the lack of records. Despite this, the Judge indicated a preference for the evidence provided by the Appellant's first wife, who presented a more balanced account compared to other witnesses whose testimonies were predominantly averse to the Respondent. The Appellant's first wife testified that there were 300 animals at the time of the marriage, but did not specify the number at the time of dissolution.



- 6.3 The Appellate Judge observed that the Respondent's unchallenged evidence indicated that 180 animals were acquired during the marriage. Additionally, the Judge accepted the Respondent's testimony that her bicycle was utilized for transporting milk to Parmalat, contributing to the generation of additional wealth. It was also acknowledged that the Respondent provided for the Appellant's children and contributed generally to the family. Consequently, the Judge found no grounds to alter the trial Magistrate's decision on this matter.
- 6.4 The Appellate Judge also accepted without reservation that the truck was considered family property and was originally purchased for K60,000. The Court acknowledged that the truck's value could not remain constant due to depreciation over time. While the Appellate Judge admitted to not being an expert in valuation, he recognized that depreciation must be considered. The Appellate Court determined that the trial Magistrate had failed to account for the truck's depreciation, as required by the Supreme Court's ruling in **Examination Council of Zambia v Reliance Technology Limited**.<sup>1</sup>
- 6.5 The Appellate Judge noted that although the trial Magistrate considered the Appellant's status as having two additional wives, the primary determinant for the award was the truck's value as of the date of the divorce. The Judge subsequently assessed the truck's value by applying a depreciation rate of 50 percent from its purchase price.



6.6 The Judge concluded by making the following orders in relation to the grounds of appeal:

- i) *Ground one is upheld in that it is common cause that there was only one borehole of the family and that knocks off the K6,000 allowed by the Court below as the Respondent's share in the borehole, leaving only K4,500.*
- ii) *Ground two is partially upheld in that the hammermill was acquired before the Appellant contracted the marriage with the Respondent. However, in respect of animals, there are animals that were acquired during the subsistence of the marriage and looking at the numbers of cattle in the history of the family, I find no reason to interfere with the lower Court's order allocating 12 cattle to the Respondent.*
- iii) *Ground three is partially upheld in that this Court agrees with the Appellant that the component of depreciation was not taken into consideration in the Court below. In view of this component the sum awarded to the Respondent of K15,000 is set aside and replaced with a sum of K7,500.*

**On the whole, the appeal has partially succeeded.”**

7.0 **APPEAL BEFORE THIS COURT**

7.1 Being dissatisfied with the judgment of 12 August 2022, the Appellant lodged a notice of appeal and memorandum of appeal in this Court on 6 September 2022, citing the following three grounds of appeal:

- i) *The learned Appellate Judge erred in fact when he awarded K4,500 being the share in the borehole without considering depreciation of the borehole and the evidence of the borehole being acquired before marriage was contracted.*
- ii) *The learned Appellate Judge erred in facts and law when he upheld the judgement of the lower Court on 12 cattle awarded to the Respondent as the Respondent had not stayed at the farm to do work.*
- iii) *The learned Appellate Judge erred in law and facts when he assumed the role of the valuer by awarding K7,500 to the Respondent being the value of the Hino Truck after taking into account of the depreciation; and the Respondent has never stayed at the farm to work there for buying the said truck.*

8.0 **HEARING OF THE APPEAL**

8.1 The appeal was heard before us on 14 August 2024. The parties were not before Court, but the Appellant had filed a notice of non-appearance. The Court reserved its judgment. The Court relied on the record of appeal and

the arguments filed by the Appellant on 26 October 2022. The arguments will not be recast here but referenced in the analysis section, where necessary.

9.0 **OUR DECISION ON THE APPEAL**

9.1 We have carefully considered the evidence on record in the lower Courts, the judgment being impugned, and the arguments and submissions of the respective parties.

9.2 The Appellant has raised three grounds of appeal, with grounds 1 and 3 being argued collectively and ground 2 argued separately. All grounds address factual matters. According to established legal precedent in **Attorney General v Achiume**,<sup>2</sup> an appellate court will not overturn findings of fact made by a trial judge unless it is demonstrated that such findings were either perverse, unsupported by relevant evidence, based on a misapprehension of the facts, or such that no reasonable trial court could have reached them given the evidence.

9.3 In this context, and recognizing that this Court will not readily interfere with factual findings from the lower court unless it is demonstrated that such findings were made in the absence of evidence or were so manifestly erroneous that no reasonable court could have reached them based on a proper assessment of the evidence, we now proceed to evaluate the grounds of appeal in accordance with these standards.



- 9.4 Turning to the first ground of appeal, which asserts that the Appellate Judge erred in fact by awarding K4,500 as the share of the borehole without accounting for its depreciation and without considering evidence that the borehole was acquired prior to the marriage:
- 9.5 The Appellant argues that the Judge failed to properly assess the borehole's value by neglecting to consider its depreciation. The critical issue presented by this ground of appeal is whether the Appellate Judge's factual determinations regarding the borehole's value and its classification as pre-marital property were based on an accurate interpretation of the facts and evidence presented.
- 9.6 A review of the record of appeal, particularly the proceedings in the Subordinate Court, at pages 63 and 66 where the Respondent and the Appellant gave their respective evidence in chief regarding the issue of date of marriage. The date of marriage was not properly established, whereas the Respondent stated that she got married to the Appellant on 19 September 2012, the Appellant testified that he married the Respondent on 19 November 2012. Other than these conflicting testimonies, no challenge to both testimonies were made by either party both before the Magistrate's Court and the High Court, and the Appellate Court accepted the account without valid justification.
- 9.7 In our view, the Respondent who was the initiator of proceedings before the Subordinate Court had a duty to prove his allegations as affirmed in the case of **Kunda v Konkola Copper Mines Plc**,<sup>3</sup> where it was held that:

*“He who alleges must prove the allegations. This principle is so elementary, the Court has had on a number of occasions have to remind litigants that it is their duty to prove their allegation. Of course it is a principle of law that he who alleges must prove the allegations.”*

- 9.8 In light of the foregoing, it is our position that both the trial Magistrate and the Appellate Judge should not have readily accepted that the date of marriage was 19 September 2012, as there was insufficient evidence to substantiate this claim. Although there is clear evidence that the borehole in question was drilled on 14 November, as indicated at page 57 of the record of appeal, the Respondent failed to fulfill her obligation to prove that this occurred during the subsistence of the marriage. Consequently, this ground of appeal is upheld only to the extent that the borehole should not have been included in the property settlement, as it has not been established that it formed part of the family assets acquired during the marriage.
- 9.9 In the second ground of appeal, the Appellant contends that the Appellate Judge erred in fact and law by upholding the judgment of the lower Court awarding twelve cattle to the Respondent, as the Respondent had not lived at the farm to contribute to the work.
- 9.10 As previously noted, this ground of appeal concerns a factual matter, which this Court is not inclined to disturb unless it is shown to be manifestly erroneous or based on a misapprehension of the facts presented in the lower Court. The Appellate Judge correctly observed that there was



no definitive evidence regarding the number of animals at the time of the couple's marriage in 2012 and up to their divorce. This is due to conflicting testimonies from both the Respondent and the Appellant, as reflected in the record of appeal. Specifically, at page 64 of the record, the Respondent's testimony indicated that she contributed to the family's wealth by providing her bicycle, which facilitated the transportation of milk and other supplies for the family business.

- 9.11 The Appellant's testimony in the Subordinate Court, as reflected in pages 66 to 68 of the record of appeal, indicates that during his residence at the Respondent's property in Baambwe, they jointly cultivated the Respondent's field. Additionally, the Appellant acknowledged that while the Respondent was employed at Namwala Hospital, he assigned one of his fields to her, although he managed the cultivation. He refuted the claim that the Respondent provided funds for purchasing veterinary medicine. The Appellant conceded that the Respondent performed household chores for him, and he paid rent for her. Furthermore, he stated that all chattels acquired jointly during their marriage were transferred to the Respondent.
- 9.12 However, upon review of the Appellant's first wife's testimony in the Subordinate Court, as detailed at pages 67 to 72 of the record of appeal, her evidence appears more reliable and credible. Her account provides a more balanced perspective, free from apparent bias. Notably, she conceded that the Respondent contributed to the family's wealth and well-being, including assisting with her medical expenses during an illness and facilitating her son's marriage.



9.13 Although conclusive evidence regarding the increase in the number of livestock during the subsistence of the marriage is lacking, it is undisputed that the herd grew rather than diminished. Consequently, the Appellate Court cannot be faulted for upholding the trial Magistrate's award of 12 cattle to the Respondent. The testimony of the Appellant's first wife further supports the assertion that one of the reasons for the Appellant's marriage to the Respondent was to enhance the family's wealth. In the case of **Violet Kambole Tembo Vs David Lastone Tembo**,<sup>4</sup> the Supreme Court held that:

*“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.”*

9.13 For the foregoing reasons, we find no basis to interfere with the trial Magistrate's award or the decision of the Appellate Judge to uphold it. Accordingly, this ground of appeal fails for lack of merit.

9.14 The third ground of appeal asserts that the learned Appellate Judge erred in both law and fact by undertaking the role of a valuer in determining and awarding K7,500 to the Respondent as the depreciated value of the Hino Truck, despite the Respondent not residing on the farm or contributing to its acquisition.

- 9.15 It is evident from the Subordinate Court's record that there is no contention regarding the fact that the Hino truck was acquired during the subsistence of the marriage and therefore constitutes matrimonial property subject to division upon dissolution of the marriage. The Appellate Judge, after considering the purchase value of the truck, proceeded to assess its depreciated value at 50 percent and awarded the Respondent a sum of K7,500.
- 9.16 In our view, the Appellate Judge should not have exceeded his adjudicative role by undertaking the function of a valuer, as this responsibility lies within the domain of skilled professionals. By assuming this role, the Judge risked incorporating subjective assessments that lack the technical expertise necessary for accurate valuations, thereby potentially resulting in an erroneous determination of the asset's value.
- 9.17 The Judge ought to have enlisted skilled experts to conduct a valuation, which would have allowed for an informed decision based on the accurate, current value of the truck in question. Alternatively, the Appellate Judge could have set forth the criteria for valuation and determined the proportionate share to which the Respondent would be entitled.
- 9.18 For these reasons, we hereby set aside the portion of the judgment awarding the Respondent K7,500 based on the purported value of the Hino truck. We direct that the subject vehicle be revalued by a government valuer within 14 days from the date hereof. Upon determination of the vehicle's value, the Appellant shall pay the



Respondent 25% of that value within 30 days of the valuation, considering that the Appellant is a polygamist with two other wives who may have an interest in the same.

9.19 In the event of non-compliance, the vehicle shall be sold, with 25% of the net proceeds being paid to the Respondent and the remainder to the Appellant and his household. Accordingly, the third ground of appeal is upheld.

10.0 **CONCLUSION**

10.1 This appeal having only succeeded partially, we make no order as to costs.

**C.K. Makungu**  
**COURT OF APPEAL JUDGE**

**D.L.Y Sichinga SC**  
**COURT OF APPEAL JUDGE**

**N.A. Sharpe-Phiri**  
**COURT OF APPEAL JUDGE**