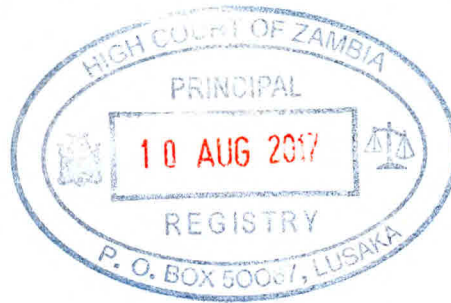


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/A0010



BETWEEN :

JOSEPH LUBASI

APPELLANT

AND

AGNESS MATE

RESPONDENT

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 10th day of August, 2017

For the Appellant : *Mr. G. Miti, Messrs L.M Chambers*
For the Respondent : *No Appearance*

J U D G M E N T

Cases Referred To:

1. *Watchel v Watchel* 1973 1 ALL E.R 113
2. *Musonda v Musonda* SCZ Judgment No. 53 of 1998
3. *Violet Kambole Tembo v David Lastone Tembo* (2004) ZR 79 (SC)
4. *Chibwe v Chibwe* (SCZ Judgment No. 38 of 2000)

Legislation Referred To:

1. *Matrimonial Causes Act No. 20 of 2007*

Other Works Referred To:

1. *Lilian Mushota: Family Law in Zambia: Cases and Materials* (UNZA Press: Lusaka, 2005)

This is an appeal against the judgment of the lower Court dated 9th December, 2016. The background to this appeal is that the Respondent (Plaintiff) sued the Appellant (Defendant) for divorce on 23rd July, 2015 in local Court. After hearing statements from both parties, the Court has established that the Plaintiff and Defendant were legally married in 1988. The Plaintiff and Defendant have six (6) children in their marriage. The Plaintiff and Defendant had been on separation for some time and that their marriage was characterized by violence and unfaithfulness.

The local Court granted the couple a divorce and ordered the Respondent to have custody of the three youngest children who were to receive maintenance from the Appellant at K600.00 on a monthly basis with effect from 30th July, 2015, which was subject to yearly review. The other three (3) elder children of the family were asked to decide who to live with. The local Court ordered the parties to share the four (4) shops in equal portion. The two houses were to be shared with the biggest house to be sold and money shared equally by the couple.

Dissatisfied by the local Court's judgment, the Appellant appealed to the Subordinate Court, where he fronted four grounds of appeal as follows:

1. **The Court erred both in law and in fact when it ordered that they share the four shops equally and the main house in Makeni to be sold and proceeds shared equally without having regard among other things all the circumstances in the case in the acquisition of the properties and how each party had discharged his or her financial obligations and responsibilities towards the other.**
2. **The Court erred both in law and in fact when it ordered the sale of the main house in Makeni and that the four shops be shared equally without having regard to who purchased the said land, who provided the finances, the sources of the finances and the conduct of the parties towards each other.**
3. **The Court below erred both in law and in fact when it ordered that the house in Makeni be sold and proceeds shared equally and that the four shops be shared equally without examining the intention of the parties and their contribution to the acquisition of the matrimonial property.**
4. **The Court below erred in law and fact when it ordered that the Appellant be maintaining the three youngest children with a monthly amount of K600.00 subject to review yearly, without having regard to her source of income and salary.**

The Learned Magistrate on appeal held that:

- a. **That the house in Makeni be given to the Appellant.**
- b. **That the shops in Linda be given to the Appellant.**
- c. **That the house in John Laing be given to the Respondent.**
- d. **That the household goods acquired during the subsistence of the marriage be shared equally between the parties.**
- e. **That custody of the last children be granted to the Respondent and the Appellant to have access.**
- f. **That the Respondent pays 40% of the children's school and costs incidental thereto. Further that he maintains them at K900.00 per month.**

The orders on maintenance and custody of the children are subject to review annually.

Disenchanted by the decision of the lower Court, the Appellant brings this appeal advancing five grounds as follows:

1. **The Learned Magistrate erred both in law and in fact by failing to make a fair and equitable adjustment of the properties acquired during the subsistence of the marriage.**
2. **The Learned Magistrate erred both in law and in fact when dividing the property by not taking into account the fact that the Appellant is a retiree while the Respondent is still in full employment with an expectation of pension benefit on retirement.**
3. **The Learned Magistrate misdirected herself both in law and in fact when she ordered that only the house in John Laing be given to the Appellant without taking into consideration the Appellant's contribution towards other properties.**
4. **The learned Magistrate misdirected herself both in law and in fact when she ordered the Appellant to pay K900.00 per month as maintenance for the children without assessing how much money is being realized from the stationery business and without regards to the fact that the Appellant is a retiree and has no formal source of income.**
5. **The learned Magistrate misdirected herself both in law and in fact by analyzing the evidence adduced by the parties in an unbalanced manner against the Appellant.**

Learned Counsel for the Appellant filed Heads of Argument on 14th July, 2017. He submitted in grounds 1, 2, 3 and 5 that the evidence before the local Court was that the parties bought Farm 4676/55, Makeni as a couple. To raise funds, they sold their plot in Chamba Valley. After the Appellant retired in February, 2012, he was paid ZMW154,000 as terminal benefits, which was given to the Respondent who was in charge of their building developments. A sum of K35,000 was used to pay off the Makeni plot and to buy a

hand pump worth ZMW13,000. The other money went towards the construction of their properties. The properties were registered in the Respondent's name but financed by the couple.

Learned Counsel submitted that there was no evidence adduced in the lower Court to show that the Respondent acquired the matrimonial property without the contribution of the Respondent and that in 2003, she built the house in New John Laing without the Appellant. Counsel contended that since the properties were acquired during the subsistence of the marriage, they were matrimonial property. He cited the case of **Watchel v Watchel**¹ where matrimonial property was defined to mean assets acquired by one or the other, or both parties married with the intention that these properties should be continuing provision for their joint lives and should be for the use and benefit of the family as a whole.

He also cited the case of **Musonda v Musonda**², where the Supreme Court stated that:

“The Court is to take into account the income of both parties, earning capacity, property and other financial resources, which each

party is likely to have in the foreseeable future, as well as financial needs, obligations and the standard of living of each of the parties.”

Counsel submitted that the lower Court misdirected itself when it held that the Respondent built the house in New John Laing alone, when the Appellant was in gainful employment and had made a contribution. Counsel further submitted that the learned Magistrate misdirected herself, when she asked the Appellant to prove his contribution for the financing of the Makeni property when the evidence of payment of ZMW35,000 had not been challenged.

Counsel submitted that part of the parties properties included four shops and that the shops were acquired by a loan that the couple obtained. This evidence was not challenged by the Respondent. Counsel called in aid the case of **Violet Kambole Tembo v David Lastone Tembo**³, where the Supreme Court stated 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.”

Counsel cited the case of **Musonda v Musonda**², where he urged the Court to note that the Appellant was a retiree as opposed to the Respondent, who is still in gainful employment. He submitted that in allocating resources, the Court ought to have considered that the Appellant had no likelihood of acquiring any other property or additional income.

In ground 4, Counsel submitted that an award of maintenance was discretionary and could only be exercised upon assessment. Counsel referred me to Section 56 (1) of the Matrimonial Causes Act and to the **Learned author Lillian Mushota, Family Law in Zambia** who states that:

(a) Earning capacity

“The Court must look at the reality of the situation and take into consideration the earning capacity of the party needing support.”

The author further states at page 279 on the age factor that:

“The age of each party is relevant because it impacts upon the earning capacity of each party and or the proximity to retirement.”

Counsel argued that the Learned Magistrate did not consider the Appellant’s limited means of generating income. Counsel

referred me to the case of **Chibwe v Chibwe**⁴, where the Supreme Court held that:

“In Zambia Courts must invoke both the principles of equity and law concurrently, and that in making property adjustment or awarding maintenance after divorce the Court is guided by the need to do justice taking into account the circumstances of the case.”

He submitted that there was no equality in the manner the properties were distributed. There was no equity in ordering the Appellant who was out of gainful employment to contribute 40% towards his children’s school fees. Counsel prayed to the Court to consider giving the Makeni House to the Appellant in order to make the share fair and equitable.

The Respondent did not contest the appeal.

I have earnestly considered the appeal and the heads of argument. Although 5 grounds of appeal have been advanced, I find that they canvass a sole issue and it is whether the matrimonial property was fairly and equitably shared between the parties after the dissolution of their marriage?

Ancillary to the issue is whether the Appellant has capacity to meet the maintenance order. I shall therefore deal with all the grounds of appeal at the same time.

According to a plethora of authorities, matrimonial property is defined as property owned or obtained by either or both married spouses during their marriage. It includes the home that a couple lived in during their marriage and other properties or assets acquired during the subsistence of that marriage. This legal principle is laid down in the case of **Watchel v Watchel**¹.

The facts of this case disclose that the property was acquired by the couple during the subsistence of their marriage. I find that there was no evidence adduced by the Respondent to show that she independently acquired the property on her own. She only found employment towards the end of the marriage and she could not in my view acquire all the property in the marriage. Having so determined, I hold that the property in casu is matrimonial and must be shared equally between the Appellant and Respondent.

Accordingly, the lower Court's decision on the distribution of the matrimonial property is reversed and set aside.

I have carefully examined the record and find that the lower Court did not state the basis upon which it arrived at the maintenance order. The case of **Musonda v Musonda**² is instructive. The lower Court should have assessed the income status of the parties before making the maintenance order and was under an obligation to consider the provision of section 56 of the Matrimonial Causes Act, which sets out thus:

- a) **The income, earning capacity and other financial resources, which each of the parties to the marriage has or is likely to have in the foreseeable future.**
- b) **The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.**
- c) **The standard of living enjoyed by the family before the breakdown of the marriage.**
- d) **The age of each party to the marriage and the duration of the marriage.**
- e) **Any physical or mental disability of either of the parties to the marriage.**
- f) **The contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.**
- g) **In the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit, such as a pension, which as a result of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.**

Accordingly, I set aside the maintenance order and refer the question on assessment to the Learned Deputy Registrar. I make no order as to costs.

Dated this 10th day of August, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE