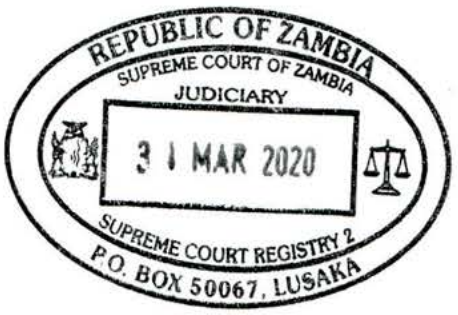
IT

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 20/2017
SCZ/8/012/2016



BETWEEN:

CONNIE MUNALULA **APPELLANT**

AND

DONALD MWABA **RESPONDENT**

Coram: Musonda, DCJ and Kaoma and Kajimanga, JJS

On 3rd March, 2020 and 31st March, 2020

For the Appellant: Mrs. M. Marabesa – Legal Aid Counsel
For the Respondent: Mr. B. Luo – George and Bwalya Advocates holding a brief for Mwack Associates

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J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chibwe v. Chibwe (2001) Z.R. 1**
2. **Watchel v Watchel (1973) 1 All ER. 829**
3. **Noah Bwalya and another v Idah Namwalizi - Appeal No. 12 of 2014**
4. **Richard Chimuka v Nomusa Sibanda – Appeal No. 126 of 2016**
5. **Matthews Chishimba Nkhata v Esther Dolly Mwenda Nkhata - Appeal No. 60 of 2015**
6. **Joseph Musonda v Ruth Zulu - Appeal No. 173 of 2012**

Legislation referred to:

1. **Local Courts Act, Cap 29, sections 5(1), 12(1)(a), 35(1), 46 and 58**
2. **High Court Rules, Cap 27, Order 47 rule 20**
3. **Subordinate Courts Act, Cap 28, section 16**

1 Introduction

1.1 This is an appeal against a decision of the High Court at Lusaka delivered by Mchenga, J (as he then was) on 7th October, 2015 concerning property adjustment and compensation after divorce in a local court.

1.2 This judgment discusses the approach the subordinate court, High Court and Court of Appeal must take when dealing with appeals emanating from the local court concerning compensation, maintenance or property adjustment where the parties celebrated the failed marriage under customary law.

2 Background facts

2.1 The parties to this appeal were married under customary law for thirty-one years. The appellant was a nurse while the respondent was a secondary school teacher. They had five children who at the time of the divorce were adults, the youngest being twenty years old. The local court dissolved the marriage in 2011 but it is not clear what led to the divorce.

2.2 Following the divorce, the local court ordered the respondent to surrender the matrimonial home situated at 12 Kapumpe

Road, Lusaka to the appellant; to pay a sum of ZMW150,000 to the appellant as compensation; to pay a sum of ZMW500 per month as maintenance for their five children; and to pay ZMW30,000 towards the awarded compensation.

2.3 Aggrieved by that decision the respondent appealed to the Subordinate Court on four grounds as follows:

2.3.1 **That the court below erred in law and fact when it ordered that the matrimonial home be the sole property of the respondent without considering the true value of the said property which value if shared could afford the appellant shelter as the said appellant is now homeless.**

2.3.2 **The court below erred in law and fact when it ordered that the appellant pays One hundred and fifty million (K150,000,000) (unrebased) lump sum to the defendant without taking into account the respondent's own income by way of salary and rentals from a guest wing of the matrimonial home.**

2.3.3 **The court below erred in both law and fact when it ordered the appellant to maintain his children without taking into account the fact that the said children are well above the ages of 18 years and three of them are married and live in their own homes.**

2.3.4 **The plaintiff was coerced to pay and he did pay K30,000,000 (unrebased) by the court below and requests the honourable court to consider this amount as adequate compensation to the defendant.**

2.4 The Subordinate Court heard the matter *de novo*. The respondent's main argument was that the value of the house was over ZMW100,000 and the guest wing, was on rent at ZMW1,600 per month. Therefore, the fair thing was to sell the

house and to share the proceeds equally for them to buy their own houses and have shelter.

2.5 The respondent also contended that the compensation of ZMW150,000 out of his pension was high considering that his retirement marked the end of his working career, while the appellant was in employment and earning a salary of over ZMW2,000 and getting rentals from the house. He urged the court to consider the down payment of ZMW30,000 he was directed to make to the appellant by the local court before his appeal could be processed as adequate compensation.

2.6 On maintenance, he argued that he could not maintain children who were above 18 years and living on their own.

2.7 Further, he agreed that he built two houses at his home village in Mwense, during the subsistence of the marriage, one for his mother in 2008 and the other for himself, in 2009, before he was paid his benefits, and without the appellant's knowledge.

2.8 He agreed that from 2001 to 2004, after the appellant's retirement in 1998, she worked in the United States of America (USA) and used to send money to him for the family's upkeep. He used part of the money to renovate the

matrimonial home and to turn the servant's quarter into a guest wing. She also bought two motor vehicles, which she sent back home to him and he was using them in her absence.

2.9 He conceded too that from 2007 to 2009 the appellant worked in the United Kingdom (UK) and continued to send money to him. She returned home in 2009 upon his request as he was about to retire. He retired in 2010 but before his retirement package came out problems started in their marriage.

2.10 According to the respondent, he was paid a pension of slightly over ZMW500,000 in October, 2011 while the local court order was made in September, 2012. He claimed that he did not know about, see, or share the pension the appellant was paid when she retired back in 1998.

2.11 The appellant's evidence was that they were still married when the respondent was paid his pension. She asked the court to give her half of the respondent's pension because her pension of ZMW15,000, which she received in 1999 was shared between them but when her money finished, he left her.

2.12 She also urged the court to give her the matrimonial home because the respondent had the two houses he built in

Mwense, she had also spent a lot of money on the house, and had built a chicken-run for the purpose of rearing chickens as a source of her livelihood.

2.13 The appellant admitted that she was receiving monthly rent of ZMW1,500 from the guest wing at the matrimonial home and earning a monthly salary of ZMW1,800 from Coptic Hospital where she was working temporarily. She also disclosed that the respondent had bought trucks from his pension and was running a trucking business and working as a teacher in Mufulira but she had no proof that he was working.

3 **Decision by the Subordinate Court**

3.1 The acting Senior Resident Magistrate considered the evidence before her. First, she found that maintenance for the children was not applicable. The appellant on appeal to the High Court did not challenge this holding.

3.2 As regards the compensation, she opined that since the appellant did not prove that she shared her benefits with the respondent, she could not claim half his pension. According to her, since the marriage was a customary marriage, the law applicable was that laid down in **Chibwe v Chibwe**[1] that a

spouse is entitled to a reasonable share in the property. Therefore, the appellant was only entitled to a reasonable sum of the respondent's pension.

3.3 Consequently, she held that the ZMW30,000 the appellant was already paid was reasonable considering that she also had been collecting rentals of ZMW1,500 from the servant's quarter at the matrimonial home, from which she had benefited alone following the judgment of the local court.

3.4 Concerning the matrimonial home, the learned magistrate found that the appellant was entitled to a share since she contributed to its improvement. She also found that the house the respondent built for himself in Mwense was matrimonial property subject to property adjustment.

3.5 As to the house the respondent built for his mother, the magistrate found that it was not part of the matrimonial property as the respondent's intention from the beginning was to build the house for his mother and no law stops a child who is in marriage from building a house for their parent.

3.6 She further stated that the appellant indicated that she knew about the house; that she had no proof that her money was

used to build the house; and that she did not personally do any improvements to the house to acquire an interest in it.

3.7 Ultimately, the learned magistrate ordered that the matrimonial home, the guest wing, and the respondent's house in Mwense should be sold and the proceeds shared equally. Government valuers were to value the houses and all necessary steps were to be done within 60 days.

4 Appeal to the High Court and arguments by the parties

4.1 Unhappy with the decision, the appellant moved the High Court on four grounds of appeal framed as follows:

4.1.1 **The Honourable trial court erred in law and fact when it held that ZMW30,000 already paid to the appellant from the respondent's pension and the ZMW1,500 rentals collected from the servant's quarter was sufficient.**

4.1.2 **The court erred in law and in fact when it held that the appellant was not entitled to 50% of the respondent's pension.**

4.1.3 **The honourable trial Court erred in law and fact when it held that the houses that the respondent secretly built for his mother and himself in Mwense District were not subject of property adjustment as the court record reveals that the respondent used matrimonial income, to secretly build the said house (*sic*).**

4.1.4 **The honourable trial court erred in law and in fact when it held that the intention of the parties from the beginning was that one house be built in Mwense for the respondent's mother as the court record does not indicate that the appellant had consented to use of the matrimonial resources for building a house for the respondent's mother and himself.**

4.1 The gist of the appellant's arguments in ground 1 was that it was improper for the subordinate court to hold that paying her ZMW150,000 was excessive as she was the one who sued for divorce. Based on **Chibwe v Chibwe**[1] and **Watchel v Watchel**[2], it was argued that the underlying principle was placing the parties in the position they were prior to divorce.

4.2 In ground 2, she contended that she was entitled to 50% of the pension since it was earned during the subsistence of the marriage and was part of the matrimonial income.

4.3 In respect of grounds 3 and 4, the appellant's submission was that the building of the houses in Mwense was meant to deprive her of matrimonial property; and that the court should consider the value of the Mwense properties but recognise that it was the respondent's intention to go and settle there. Therefore, it would be unfair to order that the matrimonial home, where she had lived for 20 years be sold.

4.4 It was her prayer that since both parties needed shelter, she must be awarded the Lusaka houses and the respondent the Mwense houses. She should also be awarded a reasonable lump sum as the ZMW30,000 awarded was inadequate.

4.5 In contrast, the respondent supported the orders made by the learned magistrate. His submission was that it was unreasonable for the appellant to demand 50% of his pension when she did not share hers with him.

4.6 Concerning the real property, it was argued that his mother's house was not matrimonial property and could not be subject of property adjustment. Based on **Chibwe v Chibwe**[1], it was submitted that in making a property adjustment order or an award of maintenance, the court is guided by the need to do justice taking into account the circumstances of each case. Hence, giving him the Mwense houses and the appellant the Lusaka houses would be unjust as the values were different.

5 Decision by the High Court

5.1 From the evidence on record, the learned High Court judge found that the parties had retired at the time the appeal was being heard by the magistrate but the evidence did not indicate how much either party was earning as monthly pension. He also found that the appellant received

ZMW30,000 from the respondent after the divorce and continued to receive rentals from the guest wing.

5.2 The judge further accepted that while the respondent purchased the matrimonial home, the appellant financed the renovations to the house and construction of the guest wing even if the total amount she spent on the renovation or the current value of the second house were not known.

5.3 In addition, he found that the respondent built two houses in Mwense during the subsistence of the marriage; and that he had been paid his pension of between ZMW500,000 and ZMW700,000 but evidence was not led at the hearing of the appeal of what had become of the money.

5.4 On ground 1, the judge found that since there was no evidence that the respondent had continued to draw a steady income from the time he retired or that he still had the lump sum pension money, the magistrate was on firm ground when she ordered that he should not be required to make the monthly contribution or pay the ZMW150,000. In the judge's view, it would be unjust to order him to do so when he had no capacity.

5.5 In respect of ground 2, the judge observed that the evidence did not indicate which customary law was applicable to the marriage and that the appellant had not indicated how under customary law she was entitled to 50% of the pension. As a result, he concluded that the magistrate was right to make an order for property adjustment and not to award the appellant any portion of the pension.

5.6 On grounds 3 and 4, the judge upheld the finding by the magistrate that the house the respondent built for his mother was not matrimonial property. He opined that it was immaterial that it was built with "matrimonial money" as there was no intention that it be used by the family.

5.7 The judge also confirmed the learned magistrate's finding that the respondent's house in Mwense and the Lusaka houses were matrimonial property and must be valued, sold and the proceeds thereof shared on a 50–50 basis as that was what was just in the circumstances of the case, and would enable the parties to have sufficient funds to purchase alternative houses for themselves. He rejected the appellant's

argument that the court should award the matrimonial home to her as she had lived there for over 20 years.

5.8 However, the judge adjusted the order for sale of the houses. In his view, since the Mwense house was built in the respondent's village, selling it would be impractical, as no stranger or relative would want to buy such a house. Instead, the house was to be valued and after the Lusaka houses were valued and sold, the respondent would get 50% of the proceeds less the value of the Mwense house, which was to be paid to the appellant. Consequently, the appeal was dismissed and the parties were to bear their own costs.

6 Appeal to this Court and arguments by the parties

6.1 The appellant has escalated the appeal to this Court on the same grounds she had put before the High Court with a slight addition to ground 1 that the ZMW30,000 already paid to her from the respondent's pension and the ZMW1,500 rentals collected from the servant's quarter was sufficient "**maintenance for the appellant's lump sum payment**". The appellant filed heads of argument, which her learned counsel augmented orally at the hearing of the appeal.

6.2 In ground 1, the appellant's contention, is that the ZMW30,000 paid to her from the husband's pension and the ZMW1,500 rentals she collected from the guest wing were not sufficient lump sum payment considering the facts and that the husband received more than ZMW700,000 as pension from which he bought trucks and was running a viable business.

6.3 It was submitted that the court must not ignore the malice on the part of the respondent when he secretly diverted matrimonial property for his personal benefit to her detriment. As authority for this argument, counsel cited **Chibwe v Chibwe**[1] about the need to do justice by taking into account the circumstances of the case.

6.4 According to counsel for the appellant, justice would be served by awarding the appellant a reasonable lump sum payment that could be deducted from the respondent's share of the proceeds of sale of the matrimonial home considering that he acted with malice by calling the appellant back from abroad where she was earning some income and upon her arrival, he made the marriage impossible.

6.5 In ground 2, the gist of the appellant's arguments, based on **Chibwe v Chibwe**[1] is that the pension received by the respondent during the subsistence of the marriage qualified to be matrimonial property to be shared on a 50-50 basis. Counsel contended that the judge misdirected himself when he concluded that even if the appellant was entitled to 50% of the pension, he could not order the respondent to share the pension because he would not have the money.

6.6 She reiterated that the respondent has property including the trucks he purchased after receiving the pension, which could be sold for him to pay the appellant's share or she could be paid from his share of the proceeds of the sale of the matrimonial home.

6.7 In ground 3, the appellant's contention is that she was the one sending money to the respondent when she was abroad. He had no source of income before he received his pension, so he could not have built a house for his mother from his own resources.

6.8 About the second house in Mwense, counsel for the appellant conceded at the hearing of the appeal that it was

an error to refer to both houses, as the other house was included in matrimonial property.

6.9 In respect of ground 4, counsel submitted that the appellant was not aware of the Mwense houses because the respondent built them secretly using the money she was sending to him. Consequently, the judge misdirected himself in holding contrary to the facts of the case.

6.10 We did not receive any heads of argument from the respondent. Mr. Luo, who at the hearing of the appeal represented the respondent, simply supported the High Court judgment.

7 Decision by this Court

7.1 We have perused the record of appeal and the arguments by the parties. We shall deal with the grounds of appeal in the order the appellant has argued them.

7.2 In ground 1, the appellant faults the trial court for holding that the ZMW30,000 paid to her from the respondent's pension and the ZMW1,500 rentals she was collecting from the servant's quarter was sufficient maintenance for her lump sum payment.

7.3 Under the proviso to **section 5(1)** of the **Local Courts Act, Cap 29** a local court has no jurisdiction to determine civil claims, other than matrimonial and inheritance claims, of a value greater than one hundred and twenty five units.

7.4 However, the local court has jurisdiction under **section 35(1)** of the Act to award compensation, to make orders for maintenance for a divorced spouse or child below the age of 18 years, and to make any other order, which the justice of the case may require. In terms of **section 46** of the Act, the local court may order that the compensation be paid at such time or times or by such instalments as it shall think fit.

7.5 Therefore, since matrimonial claims are not limited to the value stipulated under **section 5(1)**, of the Act, the local court had jurisdiction to award to the appellant, the lump sum payment of ZMW150,000 and to order that part of that compensation be paid before the appeal to the subordinate court could be processed.

7.6 Now, the respondent's grievance in the Subordinate Court with the lump sum compensation was that the local court did not take into account the appellant's own income by way

of salary and rentals from the guest wing at the matrimonial home. In the High Court, his complaint was that the appellant could not share his pension because she had not shared hers with him.

7.7 As we have said above, the magistrate opined that as the appellant did not prove that she shared her benefits with the respondent, she was estopped from claiming half his pension and that since the marriage was a customary marriage, she was only entitled to a reasonable sum of the pension.

7.8 For that reason, she concluded that the ZMW30,000 the appellant was paid was reasonable considering that she also had been collecting rentals from the guest wing from which she benefited alone after the local court judgment.

7.9 Conversely, the judge found that because there was no evidence that the respondent had continued to draw a steady income from the time he retired or that he still had the lump sum pension, the magistrate was right when she ordered that he should not be required to make the monthly contribution or pay the ZMW150,000 and that it would be unjust to order him to do so when he had no capacity.

7.10 However, the magistrate did not base her decision on lack of capacity on the respondent's part to pay the ZMW150,000 compensation as found by the learned judge and we cannot comprehend how the judge reached that conclusion, without conducting a means assessment.

7.11 Moreover, the learned judge had found that the parties had retired at the time the magistrate was hearing the appeal; and that the evidence did not indicate how much either party was earning as monthly pension. Further, there was evidence by the appellant, which the magistrate seems to have accepted, that the respondent bought trucks from his pension money and was running a viable business.

7.12 There was also evidence that the appellant was working at Coptic hospital and earning a monthly salary of ZMW1,800 and receiving rent from the guest wing at the matrimonial home. However, there was no evidence of how much rent she had received from which she benefitted alone following the local court judgment.

7.13 In **Chibwe v Chibwe**[1], we said that in making financial provisions, the court is duty bound to take into account all

the circumstances of the case, for instance, the income of both parties, earning capacity, property and other financial resources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of each party and the standard of living of each of the parties.

7.14 Later, in **Noah Bwalya and another v Idah Namwalizi**[3] we emphasised that both the trial court and the High Court had an obligation to conduct a means assessment since the evidence tendered by the parties did not sufficiently disclose the income and expenditure of the parties, including their earning capacity.

7.15 Recently in **Richard Chimuka v Nomusa Sibanda**[4] we reiterated that in order to discharge the duty stated in paragraph 7.13 above, the court must conduct a means assessment. We said as follows at pages J28 to J29:

> **"It was clear from the record of appeal that the High Court did not conduct a means assessment of the parties in this case. By the time that the High Court was seized with the appeal from the Subordinate Court, the circumstances of the Appellant had changed. He was no longer working and the order, which had been granted to attach his earnings at source, had become otiose. Before the High Court, the Appellant submitted that he was now depending on farming which was a seasonal**

undertaking. In these circumstances, it was imperative that the High Court conducts a means assessment. It was, therefore, a misdirection on the part of the High Court judge to have upheld the maintenance order granted by the Subordinate Court, without conducting a proper assessment of the means of the parties and their reasonable expenses. On this premise, the order of maintenance that the appellant should continue to pay the Respondent K600.00 per month for the two children is set aside. This aspect of the matter is remitted back to the High Court for a proper assessment of the means of the parties".

7.16 In this case, too, with so many gaps in the evidence, which we have alluded to above, both the magistrate and the learned judge were obliged to conduct a means assessment. As rightly submitted by counsel for the appellant, the underlying principle is to put the parties in the position they were prior to the divorce and not to enrich one of the parties.

7.17 A question may arise as to how the High Court could conduct a means assessment if the evidence tendered in the Subordinate Court was insufficient. **Section 58(1)** of the **Local Courts Act**, empowers any court exercising appellate jurisdiction under the provisions of the Act to take, or cause to be taken, additional evidence for reasons to be recorded; and to set aside the proceedings of the lower court and order the case to be retried in any court of competent jurisdiction.

7.18 Further, in terms of **section 58(2)**, an appeal from a local court must be dealt with by way of rehearing unless the appellate court, in its discretion, shall see fit to dispense with all, or part of such rehearing.

7.19 It is quite clear to us from the above provisions, that the High Court judge had power to take, or cause to be taken, additional evidence in the appeal; to set aside the proceedings of the subordinate court and order the case to be retried in the subordinate court or local court; or to deal with the appeal by way of rehearing.

7.20 In addition, **Order 47 rule 20** of the **High Court Rules**, **Cap 27** provides for the High Court powers in civil appeals from the Subordinate Court as follows:

> **"The Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the court thinks fit to determine before final judgment in the appeal, and, generally, shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as a court of first instance, and may rehear the whole case, or may remit it to the court below to be reheard, or to be otherwise dealt with as the court directs."**

7.21 Clearly, the judge had wide powers under this provision to inquire into and verify the magistrate's findings on any

question, which he would have thought fit to determine before final judgment in the appeal, particularly on issues where evidence was lacking. He also had full jurisdiction over the whole proceedings as if they had been instituted and prosecuted in the High Court as a court of first instance.

7.22 We fail to understand why the learned High Court judge shied away, or indeed, why generally High Court Judges shy away from invoking any of these wide powers when dealing with appeals from local courts and subordinate courts in matters such as the current one.

7.23 We hold in ground 1 that it was erroneous for the magistrate to conclude that the ZMW30,000 the appellant was paid and the rentals she had received were sufficient compensation without conducting a means assessment. In the same way, it was wrong for the learned judge to conclude that it would be unjust to require or order the respondent to make the monthly contribution or pay the ZMW150,000 when he had no capacity. Hence, we find merit in ground 1 of this appeal.

7.24 In ground 2, the appellant faults the learned judge for refusing to give her 50% of the respondent's pension. The

learned magistrate also declined to do so and held that since the marriage was a customary marriage, the appellant was only entitled to a reasonable sum of the pension.

7.25 On the contrary, the judge [wrongly] found that the magistrate was correct by not awarding the appellant any portion of the respondent's pension as the evidence did not indicate which tribe's customary law was applicable to the marriage and the appellant did not indicate how under customary law, she was entitled to 50% of the pension.

7.26 It is quite clear that both the local court and subordinate court are empowered, under **section 12(1)(a)** of the **Local Courts Act** and **section 16** of the **Subordinate Courts Act**, **Cap 28** respectively, to administer the customary law applicable to any civil matter before them provided such customary law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.

7.27 In relation to the subordinate court, unless the circumstances, nature or justice of the case shall otherwise require, customary law is deemed applicable in civil matters where the parties are Africans, particularly, in matters

relating to marriage under African customary law, and to the tenure and transfer of real and personal property, where it shall appear to the court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law.

7.28 Therefore, in **Chibwe v Chibwe**[1] we held, inter alia, that customary law in Zambia is recognised by the Constitution provided its application is not repugnant to any written law and that courts must invoke both the principles of equity and law, concurrently.

7.29 In that case, we accepted from the record of proceedings before both the local court and subordinate court that it was common ground that the marriage was conducted under Ushi customary law. Thus, we were surprised that both the local court and subordinate court, which sat with assessors who were the experts of the Ushi customary law, did not refer to Ushi customary law in dissolving the marriage and in property adjustments. We concluded that that was improper and a misdirection.

7.30 However, the High Court Commissioner did consider the Ushi customary law, after which he ordered a lump sum payment of K10,000,000 (unrebased) as maintenance and property adjustment. According to Ushi customary law, the appellant was entitled to a reasonable share in property acquired during the subsistence of the marriage.

7.31 Because we had noted a worrying tendency by magistrates and High Court judges to ignore customary law when dealing with appeals from local courts, we were compelled in **Noah Bwalya and another v Idah Namwalizi**[3], referred to in paragraph 7.14 above, to state that:

> **"We should not lose sight of the cardinal fact that Chibwe v Chibwe was decided on the basis of customary law or that the trial magistrate sat with assessors in Ushi customary law, but nevertheless failed to apply the customary law which was brought to the fore, which we said was a serious misdirection".**

7.32 In this case, as rightly found by the learned judge, there was no evidence of the applicable customary law or the appellant's entitlement under customary. Yet again, nothing stopped the judge from getting the missing evidence or sending the matter back to the subordinate court for that

purpose under **section 58** of the **Local Courts Act** or **Order 47(20)** of the **High Court Rules**.

7.33 The appellant has argued in ground 2 that in **Chibwe v Chibwe**[1] we said that anything acquired during the subsistence of the marriage is matrimonial property. Indeed, in that case, we adopted the definition of "family assets" in **Watchel v Watchel**[2] as items acquired by one or the other or both parties married with 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.

7.34 We accept that naturally a spouse will receive a share of the other spouse's pension earned during the subsistence of the marriage. For that reason, the respondent's main grievance in the High Court was that the appellant could not get half of his pension, not that she was not entitled to receive a share of his pension. However, the lower courts were required to consider the appellant's entitlement under customary law before turning to principles of law and equity.

7.35 In **Chibwe v Chibwe**[1] we stated that a party to divorce proceedings provided he or she has contributed directly or in kind has a right to financial provision; that the percentage is left in the court's discretion; and that in the exercise of that power, the court is statutorily duty bound to take into account all circumstances of that case.

7.36 In this case, the evidence disclosed that the respondent retired and received his pension during the subsistence of the marriage. Before he retired, he asked his wife to return home from the UK where she was working. Their intention was to spend their life after retirement and the pension money together. Sadly, upon her return, the marriage of three decades failed and as we said at the beginning of our judgment, it is not clear as to what led to the divorce.

7.37 Following the divorce, the local court awarded the appellant ZMW150,000 as compensation, at a time when the respondent had just received his pension and in the local court the respondent claimed that he received ZMW300,000. However, in the Subordinate Court he said he got a little over

ZMW500,000 while the judge found that it was between ZMW500,000 and ZMW700,000.

7.38 With these varying amounts, it is not clear how much the respondent actually received. The learned judge should have determined the exact amount he received, what percentage to apportion to the appellant and what had become of the money at the time the judge was dealing with the appeal.

7.39 In our view, it was erroneous for the magistrate to refuse to give the appellant half of the respondent's pension on ground that she did not prove that she shared hers with him, without the magistrate even establishing the appellant's entitlement (if any) under customary law.

7.40 Further, we do not appreciate how the appellant should have proved that she shared her pension with the respondent since she got her pension in 1999 when the couple had not anticipated a divorce and circumstances were very different.

7.41 As to whether the appellant was entitled to 50% of the pension, we pointed out in **Matthews Chishimba Nkhata v Easter Dolly Mwenda Nkhata**[5] that:

> **"Equal rights between husbands and wives do not necessarily translate, in every case, into equal portions of family property. Each case should be determined in terms of how much each party contributed and an appropriate percentage of the matrimonial property apportioned on that basis. It should follow that in a property adjustment application, a spouse making the application should demonstrate his or her own contribution to the matrimonial property either materially financially or in kind."**

7.42 We repeated the above statement in the case of **Joseph Musonda v Ruth Zulu**[6].

7.43 In the present case, there was undisputed evidence that the appellant contributed directly and considerably to the welfare and upkeep of the family by sending money to the respondent regularly while she was away. If, indeed, she had spent her entire pension money alone, or towards meeting her own needs as implied by the magistrate, she would not have been sending money to the respondent or purchased the motor vehicles, which he was using alone in her absence.

7.44 We also conclude that it was erroneous for the judge to find that the appellant was not entitled to a portion of the respondent's pension without even establishing her entitlement under customary law or applying the principles of law and equity. To that extent, ground 2 has some merit.

7.45 We come now to grounds 3 and 4, which relate to the Mwense houses. Because the two grounds are intertwined, we shall deal with them as one. We hasten to say that at the hearing of the appeal, counsel for the appellant agreed that the lower courts excluded from matrimonial property only the house the respondent built for his mother and that it was incorrect to refer to both houses in ground 3.

7.46 However, we agree with the appellant that it was erroneous for the magistrate to say that she knew from the beginning of the respondent's intention to build a house for his mother when the respondent had admitted that she was not aware.

7.47 Therefore, the only question is whether the disputed house was subject to property adjustment. Without doubt, the respondent built the house during the subsistence of the marriage but he claimed that he used his own resources. The magistrate found that there was no evidence that he was not allowed under customary law to build a house for his mother or that the appellant's money was used to build the house. On the other hand, the judge found that it was immaterial that the respondent built the house with matrimonial money.

7.48 We are inclined to agree with the appellant that the respondent used matrimonial money, particularly, the money she was sending to him, to build the house for his mother and the second house in Mwense. Had he had enough income of his own, he would not have relied on the appellant to send him money for the family's upkeep and for renovation of the matrimonial home and servant's quarter.

7.49 We do not accept as true that the respondent was at liberty to divert matrimonial money and use it to build a house for his mother without the appellant's knowledge or consent.

7.50 Furthermore, as we have repeatedly said, there was no evidence of the applicable customary law and both the learned magistrate and the learned judge failed to invoke any customary law. On the disputed house, the judge simply looked at the husband's intention in building the house.

7.51 Moreover, in his evidence in cross-examination, in the subordinate court, the respondent had offered that all the houses, including his mother's house must be sold and the money shared. We do not understand why both the magistrate and the learned judge ignored this evidence.

7.52 When this Court brought this evidence to his attention during the hearing of this appeal, Mr. Luo who appeared on behalf of the respondent informed us that it is still the respondent's wish that all the houses must be sold. Hence, we find merit in the appellant's argument that the disputed house is subject to property adjustment.

8 Conclusion and orders

8.1 This appeal has substantially succeeded. We set aside the orders of both the High Court and the subordinate court on both compensation and property adjustment.

8.2 We send the matter back to the High Court for the court to determine first, the applicable customary law and the appellant's entitlement under that customary law in respect of both compensation and property adjustment. For this purpose, the High Court judge is at liberty to sit with Assessors if he or she deems fit. If the customary law is found not to be repugnant to natural justice or morality or incompatible with the provisions of any written law, to invoke or apply the same. Should the High Court establish otherwise, it should apply principles of law and equity.

8.3 Secondly, for the High Court to determine the exact amount the respondent received as pension benefits and the percentage to apportion to the appellant (if any) as lump sum payment, after taking into account all of the circumstances of the case.

8.4 Thirdly, for the High Court to conduct a proper means assessment to establish the respective means of each one of the two parties and their respective outgoings or reasonable expenses. This should help to inform the court's decision whether to apportion any lump sum payment to the appellant as compensation, be it the ZMW150,000 awarded by the local court or any lesser or higher amount.

8.5 We reiterate what is stated in paragraph 7.16 above, that the underlying principle is to place the parties in the position they were prior to divorce.

8.6 Fourthly, for the matrimonial home, the guest wing, and both Mwense houses to be valued before the High Court could properly apportion them. In the event that the houses are to be sold, since the parties are willing to share the

proceeds equally, they shall have an equal share of the proceeds of sale.

8.7 Lastly, should the High Court apportion any lump sum payment to the appellant as compensation but find that the respondent has no funds to pay the compensation; the amount to be apportioned or awarded to the appellant must be deducted from the respondent's share of the proceeds of sale of the real property.

8.8 Because of the circumstances of this case, we order each party to bear their respective costs of this appeal.

HON. M. MUSONDA
DEPUTY CHIEF JUSTICE

HON. R.M.C. KAOMA
SUPREME COURT JUDGE

HON. C. KAJIMANGA
SUPREME COURT JUDGE