Judgment No. HB 15/2004
Case No. HCA 16/02

SIPHO NCUBE

Versus

BRENDA MOYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU JJ
BULAWAYO 9 AND 25 MARCH 2004

Appellant in person
Respondent in person

Civil Appeal

NDOU J: After a brief trial a Bulawayo Magistrate awarded custody of the parties' child to the respondent and divided the property between the parties as follows:

(a) Awarded to the appellant

A wardrobe
A heater
A motor vehicle
A WRS radio
A cupboard
A Wallwatch (clock)

(b) Awarded to the respondent

Kitchen property pots
A two plate stove
A steam iron/board
A colour television set
A fan
Curtains
A bed
Blankets

It has been observed that magistrates generally keep very scant record of civil, maintenance and custody proceedings. On the other hand very detailed records are kept in respect of criminal proceedings. More often that not it is very difficult to

discern what transpired in the court *a quo* in such family law proceedings. I think it is equally important for a trial magistrate to keep a satisfactory record of proceedings in such maintenance, custody, guardianship of minors and civil court proceedings generally. The quality of the record should be such that the appeal court can follow what transpired in the court *a quo*. The proceedings should at the very least show:

(a) what the issues were

(b) evidence led and examination of witnesses

(c) findings of fact (where oral evidence is led)

(d) judgment or order of the court

These seem mundane but we frequently encounter records that give the impression that the parties were giving evidence more or less at the same time and not one after the other, where there is no record of cross examination of witnesses; where there are not findings of fact or where the exact terms of the order granted are not clear. The courts should take these domestic proceedings seriously. I am not advocating for lengthy proceedings but even compact proceedings must cover all the above crucial aspects. Basic court procedure and enquiry rules must be followed. The principle of natural justices must be followed and this should be apparent from the record of the proceedings. The record of proceedings meets these requirements substantially.

The appellant's submissions before us had rather a comic sequel premised on his conception of Ndebele customs. Although fairly young the appellant is obdurate and relies heavily on his understanding of Ndebele customs in support of his case. He shamelessly submitted that because a wife does not bring property to the matrimonial home she ought to leave empty handed upon dissolution of the customary marriage.

He lectured us on the advantageous position of the husband in a Ndebele customary set up. His submissions tended to ignore the sharp distinction between law and custom that is enjoined by positivism. Some of the rituals that the appellant highlighted though deeply rooted in tradition, have a purely cultural, and not legal significance. What I think should be emphasised is that over the years customary law has been reformed. In *A Source Book of African Customary Law for Southern Africa* by T W Bennett [1995] at page 194 the learned author stated:

> "In contrast customary law was always flexible and pragmatic. Strict adherence to ritual *formulae* was never absolutely essential in close knit, rural communities, where certainty was neither a necessity nor a value." *Mabuza* v *Mbatha* [2003] I ALL SA 706 (C) and section 3 of the Customary Law and Local Courts Act [Chapter 7:05].

The salient facts are that the parties were married under an unregistered customary law union. The parties married in 1994. In 1996 their union was blessed with a daughter. The parties did not have a home of their own on account of the exigencies of poverty and shortage of housing. They stayed with the appellant's parents. They acquired certain movable assets during their marriage. The dispute in the court *a quo* centred around the time and circumstances of acquisition of such assets. The parties were given an opportunity by the trial court to lead evidence on this issue and documentary evidence was also adduced. At the end of the trial the court a quo made the determination reflected above. For all practical purposes, the dissolution of the union necessitated the definition of the matrimonial rights. I will now deal with the issues raised by the appellants in turn.

Custody of the child

The parties' child a girl, was aged six years at the time of the trial. The appellant is a self confessed drug dealer as evinced by the following extract of his testimony in the court *a quo*.

"We sell dagga as a way of living. We have been selling it."

With such a background one wonders why the appellant sought custodial rights of such a minor girl. He submitted that his own mother would look after the minor. Once again the basis was Ndebele culture. Looking at the facts of this case it is indisputable that the best interests of the minor girl will be served by leaving her in her mother's custody. Section 5 of the Customary Law and Local Court Act, *supra,* provides as follows:

> "In any case relating to the custody or guardianship of children, the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied."

In *Jeche* v *Mahovo* 1989 (1) ZLR 364 (S) it was held that in customary law, as in the general law, in any case relating to the custody of children, the interests of the children are the paramount consideration. The fact that the father may have paid *roora* or *chiredzwa* [*lobola* or bridewealth] is irrelevant, as are such questions as whether the father can afford to pay maintenance to the mother for the up-keep of the children or whether the mother might marry a man who could not afford to look after the children - *Nugent* v *Nugent* 1978 RLR 66 (GD); 1978 (2) SA 690 (R).

The court *a quo,* believed the respondent's version. It is trite that such assessment of credibility is the province of the trial and I cannot see anything grossly irregular in the proceedings to warrant our interference on appeal – *S* v *Mlambo* 1994

(2) ZLR 410 (S); *Soko* v *S* SC-118-92 and *Mbanda* v *S* SC-184-90. In any event I do not think I would have reached a different conclusion on the best interests of the child. On the one hand you have a responsible mother who struggles to make ends meets (with adequate support from her own family). On the other hand you have a father who boasts of surviving on criminal activity of selling dagga. There is really no legal contest here, this is a mismatch. The appellant is a very irresponsible father, whereas the respondent is a responsible young mother with her own family to fall back in cases of contingency. The order of the court *a quo* cannot be faulted.

Distribution of property

Like most of the women from this part of Zimbabwe the respondent adduced evidence of her trips to Botswana and South Africa to buy goods for resale in the country. From this activity she realised sufficient funds to support her young family and acquired most of the household property distributed by the court *a quo*. The court *a quo* believed her version and distributed the property accordingly. Customary law, which the appellant is obsessed with, in its raw form provided that nearly all the property acquired by a wife becomes house property, which is deemed to belong to the husband. The result is that on divorce the wife leaves home empty-handed. Drastic changes have been effected in our jurisdiction to this customary law regime. It is high time that the appellant and similar minded African men acknowledge these legal changes. The Matrimonial Causes Act [Chapter 5:13] expressly provides that it is applicable to registered customary law marriages. The courts have extended such distribution to property acquired during the subsistence of unregistered customary law unions – *Chapeyama* v *Matinde & Ano* 1999 (1) ZLR 534 (H); *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H); *Ntini* v *Masuku* HB-79-03 and *Muringaniza* v *Munyikwa* HB-102-

03. The distribution by the court *a quo* cannot be faulted. The trial magistrate heard evidence from the parties on the dates of the acquisition of the assets, in some instances documentary proof was produced and came up with the above determination. There is no legal basis for interfering with the findings. There was no misdirection. The appeal is, accordingly dismissed with costs.

Cheda J …………………………. I agree