SYDNEY USHE
versus
DOROTHY VIOLET MADZONGA

HIGH COURT OF ZIMBABWE
UCHENA AND MWAYERA JJ
HARARE, 2 October 2014 and 28 January 2015

Civil Appeal

Appellant in Person
Respondent in Person

UCHENA J: The appellant sued the respondent, in the Magistrate's Court, seeking a decree of divorce and ancillary relief. They were married in terms of the Customary Marriages Act [*Cap 5.07*]. The trial court granted him the decree of divorce and orders granting custody of their minor children to the defendant and distribution of their matrimonial property.

The appellant was aggrieved by the granting of custody to the defendant and the distribution of their matrimonial property. He appealed to this court against the Magistrate's decision on those aspects.

In his grounds of appeal the appellant attacked the magistrate's decision on custody on the following grounds;

1 The misquoting of the Guardianship of Minors Act.

2 The misapplication of precedents in the cases of *Mutetwa* v *Mutetwa* 1993 (1) ZLR 176 (H) and *Sakupwanya* v *Sakupwanya* SC 180/88.

3 That she erred in holding that there is a legal principle against the separation of siblings when granting custody.

4 That she erred by not finding that the respondent was irresponsible and neglected her duty to care for the children.

5 That she erred by not finding that the children's negative attitude towards him were due to the respondent denying him access to them.

6 That she misdirected herself by finding that the respondent's trip to Botswana was a result of the appellant's failure to adequately provide for the family.

In respect of the distribution of the matrimonial property the appellant in his grounds of appeal criticised the trial Magistrate's decision for the following;

1 For finding that the respondent had a legal right to property acquired by the appellant out of community of property during and before their marriage.

2 That the respondent was due to her adultery which the appellant had not condoned not entitled to a substantial share of the matrimonial property.

3 That she erred by concluding that the appellant had a proven case of adultery and that both parties contributed, to the break- down of the marriage.

4 That she erred when she held that the legal position arrived at in *Takapfuma* v *Takapfuma* 1994 (2) ZLR 103 (S) and *Mpofu* v *Mpofu* 2005 (2) ZLR 228 (H) on the conduct of the parties did not apply to this case.

5 That she misdirected herself when she held that the respondent was a faithful house wife who made significant indirect contributions to the matrimonial estate.

6 That she erred when she held that the appellant had any legal rights, title and interests in stand 184 Nyatsime Phase 3 Chitungwiza.

At the hearing of the appeal the appellant persisted with his criticism of the magistrate's decision on the above mentioned grounds. He relied on what he believed was the law and precedents on the respective aspects of his appeal.

In her response, during the hearing of the appeal, the respondent, supported the decision of the Magistrate on custody and the distribution of their matrimonial property. She relied on the record of proceedings which I will refer to below.

Guardianship of Minors Act.

The appellant's criticism is based on the Magistrate having in her judgment referred to the Guardianship of Minors Act, as the Guardianship and Minors Act which he correctly said does not exist. The Magistrate was obviously referring to the Guardianship of Minors Act [*Cap 5;08*] which is an Act of Parliament and is relevant to the determination of custody issues. Nothing turns on the mere misnaming of a statute which exists and is applicable to the issue to be determined.

Mutetwa v *Mutetwa* 1993 (1) ZLR 176 (H) and *Sakupwanya* v *Sakupwanya* SC 180/88.

The Magistrate's reference to the case of *Mutetwa* v *Mutetwa* 1993 (1) ZLR 176 (H) is on p 38 of the record where she said; "The same case also stated that were the father of the children makes an application for custody the onus is on him to show that it is in the best interest of the children that custody be awarded to him". This is a correct statement of our law for which the finding of the Magistrate need not be criticised. It is trite, that the best interests of the minor children, is the determining factor in custody disputes.

In respect of the case of *Sakupwanya* v *Sakupwanya*, the Magistrate on pp 39 to 40 of the record commented on what the Supreme Court said about the circumstances when a mother can be denied custody, and the circumstances of each party and came to the conclusion that the respondent was a suitable custodian and would best serve the interests of the children. The appellant sought to discredit the respondent because of the affairs she admitted. The Magistrate was aware of that hence her relying on MANYARARA JA's decision that "custody will only be granted to the father when the mother's character had been rendered so undesirable to leave the children in her care". The Magistrate considered the appellant's own misdemeanours and came to the conclusion that the children's best interests will be served by granting custody to the respondent. She had over and above assessing the suitability of the parents interviewed the children who preferred to be in their mother's custody. I find no fault in the Magistrate's decision.

Separation of siblings.

The appellant criticised the Magistrate's comment on p 40 where she said,

> "Whilst plaintiff was not claiming custody of the youngest child who is 2 months of age it is important that I take this child into consideration as granting custody of his siblings to the plaintiff would amount to separating the children which would not be in their best interest."

The magistrate, as is clear from the above quotation, considered the best interests of the children which she was entitled to do. While separation of siblings is not absolutely prohibited it is not desirable where it can be avoided. In the present case I agree with the Magistrate that it would not be in the best interests of the children, two of whom told the magistrate that they preferred to be in the custody of their mother. It is infact desirable that siblings stay together if separating them can be avoided. In my view separation can be considered if it is for the benefit of one or more of the children. A child's separation from siblings, so that, he may, pursue, his education which is only possible, while he is in the

custody of the other parent would be a good example. See the case of *Mpofu* v *Mpofu* 2005 (2) ZLR 228 (H) at 230 C-D. In this case the two months old child cannot be separated from the mother and there are, no beneficial interests, to the other children which justifies the separation of the children. I am therefore satisfied that the magistrate did not misdirect herself on this aspect.

Respondent's irresponsibility.

The appellant submitted that the respondent should not have been granted custody of the children because she is not a responsible parent as demonstrated by her extra marital affairs and going to Botswana leaving the children without anyone to look after them. The respondent submitted that she left the children in the care of the appellant and her niece who was a form 3 student. The magistrate on p 38 of the record found that the respondent left the children under the care of her niece and was therefore not irresponsible. She also took into consideration the respondent's extra marital affairs and balanced them with the appellant's own misdemeanours. She interviewed the children who indicated their preferred custodian. The children explained to her the reasons for their preferring the respondent. I am satisfied that the Magistrate properly assessed the issue of custody. The fact that the respondent had extra marital affairs during the marriage does not make her an unsuitable custodian. The letter of confession by Samuel clearly indicates that they went, to far away locations from Zengeza to have sex in Machipisa Highfield. They both contributed towards booking fees, indicating a consciousness to avoid being exposed to the appellant and the children. See p 97 of the record. The alleged telephone exposure of the boyfriend to Onai was not proved on a balance of probabilities and can thus not be used against the respondent. It must also be stated that custody is not only granted to saints. It can be granted to a parent with a bad history provided the granting of custody to such a parent serves the best interests of the children. A distinction should be made between being a bad spouse and being a bad parent.

In this case the two older children preferred to be in the custody of the respondent who they said was always there for them. The alleged abandonment of the children by the respondent when she went to Botswana was not accepted by the court *a quo*. It found that she went to Botswana so that she could fend for the children, leaving the children under the care of her niece and the appellant.

The children's negative attitude.

The appellant submitted that the negative attitude against him by the two children who were interviewed by the court *a quo* was due to the respondent denying him access. The respondent denied that she denies him access to their children.

A reading of the children's interview does not support the appellant's allegation. On p 91 of the record Onai said she wants to be in the custody of her mother because, "As our mother is always there for us, provides for us, does home work with us, plays with us". She on the same page said her relationship with her father is average. She said she does not want to be in his custody because "he assaults my mother it offends me, he however caters for our needs". She gave a balanced reasonable background from which she chose who will be a better custodian.

Malvick was also interviewed and he on p 92 of the record said he would want to be in the custody of his mother, as "she is always there for us". He on p 93 said he does not want to be in the custody of the appellant because, "He assaults our mother and is strict on us". The Magistrate recorded that Malvick became "Uneasy, looking down and about to cry" when she asked him why he does not want to be in the custody of the appellant. The children's interviews do not show that the children's attitude was due to his not being given access to them. They simply do not like his violent and strict behaviour. There is therefore no merit in this ground of appeal.

Trip to Botswana.

The appellant submitted that the court *a quo* misdirected itself by finding that the respondent's trip to Botswana was a result of the appellant's failure to adequately provide for the family. The respondent said she went to Botswana while 7 months pregnant because the appellant did not want her to have other children after Onai, and as a result she had to personably look after the newly born child. The appellant confirmed that he did not like the respondent's failure to exercise birth control. On p 80 of the record the appellant put it to the respondent,

"Correct when I told you not to have children it was in the best interests of children?" Faced with this admission the trial court cannot be criticised for concluding that the respondent went to Botswana to raise money for the child she was about to give birth to as the appellant did not want her to have that child and would as he had done previous not buy things for children conceived against his will.

Infidelity.

The appellant in grounds of appeal numbers 8, 9, 10 and 11, criticised the Magistrate's decision for;

1. Awarding the respondent matrimonial property in spite of her having admitted that she committed adultery during the marriage.

2. Finding that the appellant also committed adultery during the marriage.

3. Finding that both parties contributed to the break-down of their marriage therefore the dicta in the case of *Mpofu* v *Mpofu* 2005 (2) ZLR 228 (H) was not applicable in this case.

The Magistrate's judgment fairly deals with the parties' infidelity leading to a conclusion that both parties contributed to the break-down of their marriage. Where both parties were unfaithful to each other the principle that the guilty party should not be seen to be substantially benefiting from the break-down of the marriage does not apply as neither party would be entitled to the matrimonial property. In such circumstances other factors relevant to distribution of matrimonial property should guide the court. The respondent in her evidence gave details of how the appellant would suffer from sexually transmitted diseases due to his extra marital affairs with several women. She spoke of how he would phone his girl friends from home. The magistrate who had the benefit of properly assessing her evidence believed her. This court does not have any basis for interfering with her findings. Once it is established that the magistrate correctly arrived at the decisions on these aspects, the grounds of appeal should not succeed.

Stand 19582 Zengeza 5.

The appellant submitted that the Zengeza stand should not have been distributed to him and the respondent as he bought it and their marriage was out of community of property. The respondent submitted that she directly and indirectly contributed towards the purchase and development of that property. The Magistrate commented on the distribution of this stand on page 13 where she said,

> "Plaintiff also did not deny that at a point in time when he was repaying the loan for acquisition of their stand, the defendant is the one who was catering for their bills that is rentals and food provisions.----------. It is also not in dispute that the defendant managed to erect a 3 roomed house that she is residing in with the children currently---".

> The fact that the respondent was responsible for the payment of rentals was confirmed by the appellant on p 69 of the record where he was cross-examined as follows;
>
> Q. Is it not correct when you paid for stand I shouldered rentals?
>
> A. Yes that is true, but I bought the stand,."

This exchange confirms that the respondent enabled the appellant to buy the stand by taking care of other responsibilities while he was paying for the stand. On p 70 of the record the appellant did not dispute that the respondent made indirect contributions by cooking and cleaning for him.

The magistrate therefore correctly considered the above factors and the fact that she had allocated the Nyatsime stand to the appellant, in distributing the Zengeza stand. She properly exercised her discretion in distributing the Zengeza stand. There is therefore no merit in this ground of appeal.

The Nyatsime stand.

The appellant submitted that the court *a quo* erred when it found that he owns the Nyatsime stand. The respondent insisted that he does but could not produce any proof because she said the appellant left the matrimonial home with all the documents on their ownership of various stands. In arriving at her decision the Magistrate on p 12 of the record said,

> "I thus afforded the defendant an opportunity to go and seek evidence of other properties that the parties had acquired, and she came with a letter showing the stand in Nyatsime is registered in plaintiff's name though plaintiff stated that the property was not his as he had failed to raise the money required for the stated property. I find plaintiff's explanation hard to comprehend as the relevant authorities would not give a real right to a person not entitled to same thus for the purposes of these proceedings I will consider the stipulated piece of land.

The Magistrate's reasoning is supported by what the appellant said on page 89 where he said, the "stand is just an allocation, I have not yet received title deeds or a right. I have only paid US$100 and I am yet to pay $2200 to have a right to the stand. The Nyatsime stands are not yet available that is why I am reluctant to finish payments". The appellant's own account proves that he was allocated the Nyatsime stand for which he has made part payments. Once that was established the Magistrate was entitled to take that stand into consideration and award it to the appellant as he did. She did not misdirect herself.

Distribution of movable properties.

The appellant did not state which movable properties were wrongly awarded to the appellant. This court cannot determine an unspecified allegation, That is why Order 31 rule 2 (4) (a) and (b) of The Magistrate's Court Civil Rules 1980, requires an appellant, to state the party of the judgment and findings appealed against. It provides as follows;

> "2 (4) A notice of appeal or of cross-appeal shall state—
> (*a*) whether the whole or part only of the judgment or order is appealed against and, if part only, then what part; and
> (*b*) the grounds of appeal, specifying the findings of fact or rulings of law appealed against."

If this was the only ground of appeal it would have rendered the appellant's appeal fatally defective.

It is therefore, not enough, for the appellant, to allege, that some property, was wrongfully, awarded to the respondent. He must specify the property. A reading of the record does not reveal that he gave such evidence to the trial court. There is therefore no merit in the appellant's generalised allegation.

In view of this court's findings, on the appellant's various grounds of appeal I am satisfied that the appellant's appeal has no merit.

It is dismissed with costs.

MWAYERA J agrees ----------