IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

M.S.C.A. CIVIL NO. 2 OF 197§

BETWEEN
ELVIE KAZIMA ……...APPELLANT
and
SAMSON KAZIMA ……... RESPONDENT

Before: **The Honourable the Chief Justice (Mr. Justice Skinner)**
The Honourable Mr. Justice Mead, J.A.
The Honourable Mr. Justice Jere, J.A.

For the Appellant : Mbalame, Principal Legal Aid Advocate
Respondent present : unrepresented
Official Interpreter : Machisa

JUDGMENT

Mead. J.A.

The appellant Elvie Kazima appeals from the order of the High Court made on the 23rd of May 1978 that the respondent Samson Kazima do have the custody of the two children of the marriage between the appellant and the respondent, which marriage was dissolved by the High Court on the 16th of November 1977 on the ground of the respondent's adultery with the co-respondent Lizzie Shonga, a cousin of the appellant aged sixteen years living with the appellant and the respondent at the matrimonial home in Lilongwe.

The two children of the marriage are both boys, Wayne born on the 21st of December 1973, and Thumbiko born on the 21st of July 1975.

The appellant discovered the respondent's adulterous association with the co-respondent sometime in the middle of 1976. In the result she decided that she could no longer remain in the same house with the respondent. At that time the appellant was working for Bookers (Malawi) Limited. It is the appellant 's evidence that she obtained a transfer to the Blantyre office of that company so that she could be away from the re respondent. She left the matrimonial home on the 30th of August 1976 and moved to Blantyre. It was stated, to this court by the respondent that the appellant's transfer to Blantyre was by mutual arrangement of the parties in anticipation of the respondent's transfer to Blantyre Whether or not this was so being immaterial. The only accommodation in

Blantyre the appellant was able to find was at the Grace Bandawe Hostel. Residents at the Hostel were not allowed to have children staying with them. The appellant says that it was for that reason she left the children with the respondent. The respondent was later transferred to Blantyre. There is no evidence of the date when this occurred. The respondent lived at Ndirande: the children were with him. It is common ground that the appellant had access to the children. The appellant left the Hostel on the 12th of April 1977 for the reason that the Hostel closed. Before that date, again there is no evidence of when, the respondent informed the appellant that he was having difficulty in properly looking after the children, especially the younger boy, because of the nature of the attention young children required, and that he considered the children should be looked after by a woman. The appellant was then still at the Hostel and unable to take the children to live with her. The appellant did not agree with the children being sent, as the respondent proposed, to the respondent's mother. The children were sent on the 11th of October 1976 to live with the appellant's mother, who was living with the appellant's father at Manora, Mzimba. The appellant's parents were already looking after a child of the appellant born to the appellant in 1973 of a father whose identity is not disclosed. It is the appellant's evidence that her parents regard this child, a boy, as being their child, and that in effect they have adopted him.

In April 1977 the appellant, being obliged to leave the Hostel, sought other accommodation in Blantyre, which she found at the house of a Mr. Macholowe with whom she had become acquainted. At that time Mr. Macholowe was divorced from his wife, by whom he had two children. Those children were and still are living with their mother at Bangwe, Blantyre, and are supported by Mr. Macholowe. The appellant formed an adulterous association with Mr. Macholowe, to which association the appellant confessed in a discretion statement filed in the divorce proceedings. The court exercised its discretion in the appellant's favour in granting her a dissolution of the marriage. It is common ground that since the date of the order from which the appellant now appeals she has married Mr. Macholowe.

Mr. Macholowe's house, where the appellant lives and where she proposes to keep the children it granted custody of them, is at Kanjedza, Blantyre. It comprises three bedrooms, sitting-room, kitchen and toilet facilities. The appellant is employed earning a monthly salary of K220. If granted custody the appellant proposes to place the children in a nursery school at Kanjedza.

The children were removed from the care of the appellant's parents on the 26th of April 1978, when they were taken to live with the appellant and Mr. Macholowe. During the time the appellant's parents had been looking after the children the appellant had paid her mother about K30 a month for the children's upkeep.

It is common ground that the respondent had been twice married before his marriage with the appellant, and that he has two children by the first wife, three children by the second wife, and one or two children by a woman whom he had not married. The child or children of the unmarried mother are with the mother. The respondent is maintaining the five children of the two marriages, three at boarding school and two living with him at the house he occupied at Zomba. At the date of the hearing of the appellant's application for custody the respondent had a sister living with him. It is common ground that since the date of the order from which this appeal stems the respondent has married. There is no evidence before the court as to whether the respondent's present wife has children or whether she is living with him. The respondent is a Government servant; his monthly

salary is K144.25. If the respondent retains custody of the children, the subject matter of this appeal, he proposes to have the children to live with him and to place them in a nursery school at Zomba.

The of an order for custody is a discretion matter. The decision of the learned judge should not be interfered with unless it can be shown that he is wrong in principle, or that the order made would be to the detriment of the children. The children are aged six years and rising four years respectively.

It is well established law that in cases of this nature the welfare of the child is of paramount consideration, but that it is not the sole consideration; the welfare of the child as a whole must be considered. In support of this proposition the appellant cites **Lord Hanworth** in **Re Thain (an infant); Thain v. Taylor** (1926) 1 Ch. 676 at 689. This was an application for custody by a father as against relatives involving consideration of the Guardianship of Infants Act 1925. That Act does not apply in Malawi. In **Thain** it was held, *inter alia*, that section 1 of the Act introduced no new principle of law, but merely enacted the rule that thitherto had been acted upon in the Chancery Division, namely, that the first and paramount consideration is the welfare of' the child whoever may be the contesting parties.

The appellant submits that the learned judge found that by leaving the matrimonial home and not taking with her the children the appellant in effect abandoned the children. The appellant's sudden departure from the matrimonial home on discovering the respondent's adultery with her young cousin aged sixteen years who was living with the respondent and the appellant is understandable. The only accommodation available in Blantyre was the Hostel where the appellant took up residence in August or early September 1976, but where she was prevented by the rules of the Hostel from having the children with her. After the respondent moved into Blantyre he found he was unable properly to take care of the children. The appellant rejected the respondent's suggestion that the respondent's mother should look after the children, and the children were sent to be in care of the appellant's parents. If the appellant had abandoned the children, in our view, she would not have rejected the respondent's suggestion that the children be sent to the respondent's mother. The fact that the appellant paid her mother about K30 monthly for the upkeep of the children is not consistent with abandonment of the children. The appellant moved from the Hostel when that was closed in April 1977 and went to live with Mr. Macholowe. The children were taken to live with the appellant and Mr. Macholowe in April 1978. The respondent submits that this was solely because of the proceedings the appellant had instituted seeking custody of the children. This is denied by the appellant. She says the reason was that in the intervening period she had been deciding what her future relations with Mr. Macholowe would be, and that when she was satisfied that Mr. Macholowe would be marrying her she removed the children from her mother's care and took them to live with her and Mr. Macholowe. The appellant's application for custody was filed on the 15th of March 1978; it was set down for hearing on the 19th of April 1978. The children were brought to Blantyre on the 26th of April 1978. In cases of this nature it is not unusual for the court to require that the child or children should be seen by the court. The learned judge did in fact see the children in court and was favourably impressed by their physical appearance.

We find that the conduct of the appellant, first, in leaving the children with the respondent; secondly, in placing the children in the care of her mother and providing monetarily for their

upkeep and, thirdly, delaying taking the children to live with her and Mr. Macholowe until she was satisfied as to what would be her relations with Mr. Macholowe was reasonable. Her conduct did not constitute abandonment of the children.

The learned judge found that the children had been brought to Blantyre for the purpose of the custody proceedings. The appellant did not claim that the children had been living with her at the time of the application. She frankly said that they had been with her mother. It is apparent that the presence of the children in Blantyre was in case the court should wish to see them, and because the appellant had finally decided that she would be marrying Mr. Macholowe. We find no intention on the appellant's part to induce the court to believe that the children had been living with her prior to the application for custody.

The learned judge took the view that the appellant's grandparents were adopting the children. We agree with the submission of the appellant that there is no evidence to support this view.

The learned judge rejected the evidence of the appellant that she intended to formalize her relationship with Mr. Macholowe by marrying him. He held that it would not be right to allow the children to be brought up by the appellant whilst she was living with Mr. Macholowe in an unmarried state. The learned judge found that the welfare of the children would be guaranteed if custody were given to the respondent. The learned judge's reason for granting custody to the respondent is that he considered the appellant morally unsuitable to be granted custody. The learned judge overlooked that it had been the respondent's conduct that resulted in the breakdown of the marriage, and that that conduct had been committing adultery with a young girl of sixteen years of age, a cousin of the appellant, living in the matrimonial home. The balance on the ground of the morality of the parents does not favour the respondent. In considering the welfare of the children in the light of the appellant's association with Mr. Macholowe the decision in **Willoughby v. Willoughby** (1951) P. (C.A.) 184 is of assistance. In that case the marriage had been dissolved on the ground of the wife's adultery: she had since married the co-respondent, and the father had re-married. On the father's application for custody **Wallington J.** gave custody to him of the child of the marriage, a girl of two years of age, on the ground that it could never be in the interests of a child to be entrusted to the care of a mother who had committed adultery once, and therefore might commit it again. On appeal it was held that the judge had erred in principle in exercising his discretion on the ground stated, the appeal was allowed, and the order was varied to give custody of the child to the mother. **Cohen L.J.** at 190 said:

> *. . . . . there is no suggestion and no evidence that the mother was promiscuous or a bad mother. I think that the reasons she gave for her failure to see the child in the past eighteen months are such that the father cannot complain of them, having regard to his failure to support the mother at any stage in the latter part of the matrimonial life.*
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> *There is no evidence that she was a bad housekeeper or that she was unclean. On the other hand, we are dealing with a girl of two years, and to a child of that tender age I do not think a stepmother, however anxious to do her best for the child - and it is accepted that the father's second wife can be so described - can take the place of the mother."*

Singleton L.J. at 192 said:

> *"I have yet to learn that the fact that a woman commits adultery prevents her in all circumstances from being a good mother."*

We are considering the situation as it was when the learned judge was considering the application when neither party had been remarried. At that time the appellant was living in an irregular manner with Mr. Macholowe; the respondent had his sister living with him. Was it in the best interests of the children, both of tender age, that they should be under the care of the respondent and the female care of his sister rather than that they should be under the appellant's care as mother notwithstanding her irregular association with Mr. Macholowe? There is no evidence of promiscuity on the part either of the appellant or of Mr. Macholowe. In the same case **Cohen L.J**. at 190 said:

> *. . . . . it seems to me that the mother is more likely to give the attention to this child that the child needs, rather than a stepmother who, however anxious to perform her duties, will naturally be more interested in the needs of a child who is her own child."*

There is no evidence as to the age of the respondent's sister. There is no evidence as to how long she could have been expected to be staying with the respondent. In the event of her ceasing to live with the respondent the respondent would have been placed in a situation similar to that in which he had previously found himself, in need of a woman to look after the children. In our view, the remarks of the learned Lords Justices when comparing the suitability of a mother as against the suitability of a stepmother having care of a child of the marriage are even more apposite when applied to the respondent's sister, an aunt to the children.

In all the circumstances we reluctantly conclude that the learned judge erred in principle in making the order he made. The main reason for the learned judge's decision is that he was of the opinion that it could not be right to place the children in the appellant's custody because of her irregular association with Mr. Macholowe. That irregularity has since been cured, and it is
probable that had the irregularity been cured before the hearing of the application the learned judge would have arrived at a different decision.

There are other factors that weigh in favour of the appellant being granted custody. The children will be the only children the appellant has to look after. Mr. Macholowe's children by a previous marriage are in the custody of their mother. Should the appellant have children by Mr. Macholowe those children will be children of the same mother. As against that., the respondent has in his custody five children by previous marriages, and the children whose custody is now under consideration would, if in the respondent's custody, be under the care, as the situation is now, of the respondent's wife, a stepmother to the children who could not be expected to give the children the same care, love and attention that the appellant as the mother could be expected to give. These additional factors fortify our conclusion in the situation as it is now, but we have, as stated, considered the appeal in the light of the situation at the time the application was heard.

We allow the appeal, we set aside the order of the 23rd of May 1977. We order that custody of the two children Wayne and be given to the appellant. The appellant has expressed her willingness to give access to the respondent. There is no necessity for any order thereon. Should dispute arise on the question of access it is open to the respondent to apply to the
High Court.

Costs of this appeal to the appellant. DELIVERED at Blantyre this 30th Day of March, 1979.

SKINNER: CHIEF JUSTICE

MEAD : JUSTICE OF APPEAL
JERE : JUSTICE OF APPEAL