WOMAN WITHOUT "ANKHOSWE" IN MALAWI

A discussion of the legal position of women who enter into informal marital relations

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Simulikundisamala ngati mkazi wanu, simulikusamala ana

(You do not look after me, your wife, and you do not care for your children)

(From the Complaints Book, in *Mhango* v. *Ali*)

As noted by Chatsika, J., marriage in traditional Malawian society is a special type of contract which is governed by well established principles. It is not sufficient for the parties to such a union merely to agree on cohabitation without consulting the *ankhoswe* (marriage guardians). It is essential for the *ankhoswe* from both sides of the union to get together and formally agree to the marriage. Absence of the *ankhoswe* renders such a union invalid. No matter how long they live together, and whether or not they have children, the parties cannot subsequently institute divorce proceedings to dissolve the marriage, for it is inconsistent with common sense to dissolve a marriage that never existed. Therefore, a lower Traditional Court cannot order compensation against the party who has broken the union. Such is the strict custom. In this paper an attempt will be made to expose the harshness of this rule, and to reveal its inapplicability in the urban setting. The norms that are sacred in the village create incongruence in the fast growing towns and periurban centres. Social realities and the security and dignity of women must be considered by any court that administers customary law.

The word *nkhoswe* has not been satisfactorily defined in the cases that follow. He is variously referred to as "marriage guardian," "marriage advocate," or "surety." To understand the term, it is better to look at the utility of the office of the *nkhoswe*. He is often a close and senior relation of the party to the marriage, a maternal uncle or brother in the matrilocal systems, a brother or a paternal uncle in the patrilineal systems. Sometimes, but not very often, the *nkhoswe* is a woman of similar authority and status. After the immediate parties have reached agreement, the girl refers the boy to her *nkhoswe* who informs the girl's parents and finds out if they are agreeable to the marriage proposal. It is the woman's *nkhoswe* who then tells the man to ask his people whether the marriage proposal is acceptable, and who indicates the date when the woman's family will be ready

to open up talks. After the necessary consultations, it is the woman's nkhoswe who negotiates and settles the amount of wealth the man should give (pay is not the appropriate terminology). It is her nkhoswe who will play host when the man and his family come for the handover ceremony. If the marriage materializes, the ankhoswe on both sides are informed of any serious disagreement in the new family, of serious illness, and of death in the family. The husband must inform his wife's nkhoswe of difficulties leading to divorce proceedings and the tribunal is entitled to expect that the ankhoswe on both sides should not take the issue to court unless they have tried to settle the dispute and failed. If there are divorce proceedings, the ankhoswe are expected to give testimony as to the dispute and the court will not hear the parties in their absence. In these varied situations, the nkhoswe might be assisted by the more agile thenga (Tumbuka), a kind of go-between for the nkhoswe on either side, but one who lacks any executive posers. What is said of the wife's nkhoswe could also be said of the husband's. It is a responsible office, and sometimes marriage advocates lamentably fail to carry out their duties, stating that they are "tired with the two parties" and that they wish to be released from their responsibilities. It is in the light of this analysis of the position and functions of the nkhoswe that the cases below must be understood.

Christina Mhango v. Ali is one of the many cases on this subject. Christina was an ordinary nanny wheeling a pram in Nyambadwe, Blantyre. Her father was from Rumphi, but she was born of a South African mother. There was no evidence that she spent any time at home in Rumphi. Ali, from the name, is Yao (matrilineal). He was a driver working for the United Transport Company at the salary of K33.00 per month by 1970. Back in September of 1964, the two met and Ali proposed marriage to Christina. She accepted the proposal and thereafter left her job to stay with Ali at Mount Pleasant, again in Blantyre. No other formality occurred. By 1969 they had had four children, the first of which died. Ali then chased Christina away and took another woman in her place. At the Blantyre Urban Traditional Court the "marriage" was "dissolved" and Ali was ordered to pay K60.00 compensation to Christina. This order was confirmed by the Traditional Appeal Court sitting at Kwacha in Blantyre. On a further appeal to the High Court the appellant argued that he had not been married to the respondent since the union had not been supported by ankhoswe. Chatsika, J., accepted the opinion of the three assessors in favour of Ali's contention. He set aside the order of dissolution but stated, nevertheless, that in equity some relief should be granted to Christina who had lived with the appellant for six years and had now lost her chances of marriage. So the appellant was ordered to pay K30.00 "to enable her to start a new life." In respect of each of the three children still alive, the appelant was ordered to pay K3.00 a month for their upkeep in addition to school fees if and when they fell due. Chatsika, J., confirmed the order of the court below that certain household items should be shared between the appellant and Christina, presumably on the "half-half" basis.

In finding that there was no marriage between the parties, Chatsika, J., was merely following his own earlier opinion in Brown Elliasi v. Beatrice Magaisa,[2] decided three months previously. But in this earlier opinion, the learned Judge had disagreed with two of the three assessors, who had invited him to find that a marriage existed notwithstanding the absence of the ankhoswe. I need not add that in both cases, neither the Blantyre Urban Traditional Court nor the Blantyre District Traditional Appeal Court had laboured the point. They dissolved the marriage and granted compensation in favour of the innocent party.

There are only two other cases that illustrate the view held by the High Court about the property rights of parties to a union without ankhoswe. In Nelson v. Magombo,[3] Southworth, then Acting Chief Justice, refused to accede to a prayer of a deceased's sister, Agnes Magombo, for possession of the deceased's house and for custody of his two adult sons on the ground that his widow was not entitled to live in the house since she had not been properly married to the deceased. Although they had been married there had been no ankhoswe. The High Court considered it "just and proper" to uphold the decision of the lower appeal court that the "wife" should be treated kindly and be allowed to live in her "husband's" house with her children. So also in R. v. Damaseki[4] Cram, J., considered that it was not arson for a man to burn a house in which he lived, and which belonged to his "wife," even though there was no true marriage.

The view of Chatsika, J., is currently held by the National Traditional Appeal Court, the final appeal court in matters concerning traditional law and Traditional Courts. In Namasina Joni v. Kambeta[5] the facts were as follows: The parties purported to marry in 1963. The husband had no nkhoswe because his senior wife refused to let him marry a second wife until she was herself given a house. Meanwhile the junior wife had been erecting a house. The husband assisted in roofing the house with iron sheets, and provided windows and doors. In 1971 the wife (appellant in the case) obtained a "divorce" from the Makungwa Traditional Court after alleging that the respondent used to come home late and beat her, and that he was rude to her brothers and sisters. In 1972 this dissolution of the marriage was confirmed by the District Appeal Court at Thyolo, which also ordered that the husband should demolish the house and remove all his materials. The wife appealed to the National Traditional Appeal Court against the order that the house be demolished and that the husband recover his materials. In this appeal the judges focussed their attention on the fact that the marriage was irregular, there being nc nkhoswe. The Chairman stated in judgement:

> You behaved as one who has a girl-friend in town and spent money on the girl. Similarly you wasted much on that house... You knew that there was no proper marriage because advocates did not know about your marriage.... That is why

(i) The house which you wanted to demolish, you cannot demolish.

(ii) The court of first instance ordered K16.00. We set aside that order. Your girl-friend should not pay that because that was not a proper marriage....

The only difference, so far as the National Traditional Appeal Court is concerned, is that it will not make a full order affecting property in favour of a party to a nugatory marriage union.

In Kanduwa v. Thompson,[6] the court simply ordered the husband to pay a lump sum of K30.00 in lieu of support for his child until the latter reached school

> ...because your marriage was just an ordinary marriage and you just took one another without advocates. If the marriage had advocates, you could have been ordered to pay more than K30.00.

The court consistently rejects the prayer of the wife that the husband should build a house for her and treats her almost with contempt. This position should be compared with the stand which Chatsika, J., took in the High Court cases on this point. The High Court's position was that, in equity, protection should still be granted to the wife. The husband was therefore ordered either to build a house for the wife or to give her a lump sum in order to enable her to start afresh. This order was always in addition to the order of maintenance in respect of the children.

Unfortunately, the National Traditional Appeal Court has not been consistent in these situations. In a number of other cases the court has ordered compensation as well as maintenance in irr gular unions. In Thomsen v. Demba[7] the court stated that although there were no ankhoswe, the parties had lived together for ten years and had five children, and that therefore there was a marriage. The court awarded substantial compensation because the appellant "cruelly divorced his wife." This order was contrary to the finding made by the District Appeal Court at Nsanje to the effect that there was no marriage. Again, in Gadama v. Chilanga,[8] the court stated that its duty was not to dissolve marriages but to find a means of preserving them. The court advised the parties to proceed to arrange for ankhoswe. This case is not necessarily inconsistent with the proposition that absence of nkhoswe renders the union void because both parties in this particular instance were willing to reconcile. We can therefore say that the National Traditional Court was seized of a case in which what had been a matrimonial dispute ceased to be so. The position in another contrary case is also explained by saying that the marriage was in fact validated when the parties, after co-habiting, had arranged for advocates to meet. Therefore a proper marriage in fact existed at the time of the divorce and the court was entitled to order that the marriage be dissolved, that compensation be paid to the wife who was thrown out of the matrimonial house, and that

the husband pay K30.00 for the purpose of building her and his children a house.[9] Some of these cases, however, cannot be rationalized except on the basis of the number of years during which the parties cohabited and the number of children involved. If this distinction is accepted, it will be difficult to explain in principle.

A way out of the problem, it is submitted, is to hold that the status of women would be impaired if courts failed to recognise what at common law was called marriage by repute. The law would fail to protect women if it were to dwell on the formalities. Particularly in the towns there may be need to take cognizance of social realities and to say that only where the consent of either party to the marriage is lacking will a court consider the union invalid. In the Blantyre Urban Traditional Court, Chairman Phombeya and Chairman Chope have consistently held a marriage to exist even where there were no advocates. In other traditional courts, the evidence is divided. The National Traditional Appeal Court has very recently attempted to put an end to this by ordering that a copy of its judgement reversing the finding of Chairman Phombeya be sent to him for noting. Yet to hold that a marriage exists where there are no nkhoswe in certain urban situations would not open the door too widely or dilute traditional norms. It would only accept the actual behaviour in urban settings and carry out the expectations of the parties. Would Ali not be competent to sue a third party who had sexual intercourse with Christina during their period of cohabitation? Current opinion would uphold such a suit.

There is a second factor, which is illustrated by the case of Mhango v. Ali (No. 2).[10] In 1973 Ali took up summons in the High Court in an attempt to obtain modification of the order of K3.00 per month in respect of each child. In support of this summons Ali stated that Christina was now fully employed; that since the children had no nanny during the time Christina was at work they stayed at his house, and that it was his task to take the children back home to their mother in the evenings. Two factors are evident from this. Traditionally, children who were left with their mother were the responsibility of the mother's family. They would be fed and clothed by the relations of the mother. In the towns, on the other hand, an order of custody in favour of Christina meant that Christina would personally be responsible for the children. Secondly, according to custom, no order of maintenance was made against the man in a situation where custody of the children was vested in the mother. Today, changed social factors justify the order of maintenance in favour of the wife.

Yet, though the court recognizes some changed conditions, it fails to recognize another social reality: the fact that the so-called mtsukamapota (dish washer, or the woman entering marital relations in the absence of the nkhoswe) is socially recognised as a spouse in the town notwithstanding the absence of ankhoswe. If the courts had taken these issues into account no fuss would arise out of their recognition of the marriage with-

out *ankhoswe*. If such marriages were recognised the husband would not abandon his wife at will. Courts would ask the parties to regularize their unions by the appointment of *ankhoswe* on each side. The *ankhoswe* would in most cases mediate and quite possibly save a number of such marriages. Christina Mhango would be saved from the possible embarrassment of turning to the oldest profession in the world in order to support herself and her children. She would be saved the gossip that she is now living in sin when, long after Chatsika, J.'s, initial judgement, she finds herself entertaining Ali. In other words, the law would have done social justice. In the particular circumstances of the *Mhango* v. *Ali* case, there was in fact evidence that Christina's relations knew of the long cohabitation between Christina and Ali; that in fact Ali had attempted to visit a close relation of Christina. If breakdown of the marriage was irreversible, Chatsika, J., would not have halved the amount of money ordered by the courts below. Even this additional K30.00 would provide greater social justice than the final order made by the High Court. The order for division of property would be properly supported by law since, at tradition, the *mtsukamapoto*, when rejected by her man, must leave the household empty-handed. Such a step, let it not be misunderstood, is not a complete departure from tradition. It will be recalled that the National Traditional Appeal Court itself was initially erratic on the question of recognition of marriages without *ankhoswe*. The lower Traditional Courts also hold conflicting views. In certain parts of Lilongwe, for example, the man's plea that he is not married because the union is not supported by *ankhoswe* is rejected by the elders by means of the fiction that "the children are the *ankhoswe*." It is true that the children of a marriage cannot fulfill the role of the *ankhoswe*, but the elders adopt this fiction to prevent the husband from arguing against the existence of the marriage and thereby avoiding his marital obligations. It is submitted that this is done because of the compelling need to do social justice to the wife. In today's urban setting, adoption of such a course would be justified by social expectations and by the justice of the situation.

FOOTNOTES

[1]Christina Mhango v. Amani Ali, Civil Appeal (T.C.) No. 15, 1970, (High Court) September. This case is reported and commented on by the present writer in (1972) Journal of African Law 176.

[2]Civil Appeal (T.C.) No. 7, 1970, (High Court) June.

[3](1964-66) 3 African Law Reports (Malawi Series) 134.

[4](1966-68) 2 African Law Reports (Malawi Series) 69.

[5]Civil Appeal (National Traditional Appeal Court) No. 29, 1971. This case originated from Thyolo District where Chairman Chingakule had permitted the man to remove his materials from the house.

[6]Civil Appeal (National Traditional Appeal Court) No. 35, 1971.

[7]Civil Appeal (National Traditional Appeal Court) No. 87, 1972.

[8]Civil Appeal (National Traditional Appeal Court) No. 55, 1972.

[9]See Kamtengeni v. Kamtengeni, Civil Appeal (N.T.A.C.) No. 60, 1972.

[10]The High Court may not have had jurisdiction to hear this case. It is to be remembered that in 1970, Parliament passed the Traditional Courts (Amendment) Act, (Act No. 38). Section 3 of the Act repealed Section 34 of the Traditional Courts Act and provided as follows:

S.34 - (1) Any person aggrieved by any judgment in any proceedings, civil or criminal, before a Traditional Appeal Court, a Regional Traditional Court, an Urban Traditional Court or a Grade A.1 Traditional Court may within thirty days of the delivery of such judgment appeal to the National Traditional Appeal Court. No appeal shall lie from any judgment of the National Traditional Appeal Court.

(2) Any person aggrieved by any judgment in any proceedings, civil or criminal, before any Traditional Court other than a court referred to in Subsection (1) may

> within thirty days of the delivery of such a judgment appeal to the Traditional Appeal Court having jurisdiction to hear such appeal.

Section 6 of the 1970 amendment provided further that:

> The National Traditional Appeal Court shall have jurisdiction in all appeals whether civil or criminal from any Traditional Court begun or pending before the High Court in its appellate jurisdiction at the date of coming into operation of this Act.

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RESUME

Dans la coutume du Malawi le mariage est un contrat spécial dont l'une des conditions fondamentales est la présence pour chacun des deux partis d'un nkhoswe ou 'gardien de mariage'. Après avoir expliqué les fonctions sociales et juridiques du gardien de mariage, cet article examine plusieurs causes pour l'attitude des tribunaux quant à la proprieté, les enfants nés du mariage et d'autres aspects de la terminaison d'un mariage célébré sans gardien et donc considéré par le cour d'appel dans Mhango v. Ali comme étant sans validité. Il suggère que les mariages sans gardiens devraient être reconnus comme valides, au moins dans les zones urbaines où l'évolution de la vie sociale et de la jurisprudence ignore le rôle coutumier du 'gardien de mariage'.