



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NO. 12 OF 2015

BETWEEN:

JEMA HENDERSON.....PETITIONER

AND

MURRAY HENDERSON.....RESPONDENT

CORAM: THE HONOURABLE JUSTICE MR S.A. KALEMBERA

Mr Kara, of Counsel for the Petitioner

Mr Karim, of Co-Counsel for the Petitioner

Mr Kamchiputu, Official Interpreter

JUDGMENT

Kalemba J

INTRODUCTION

This matter was heard by Potani J who has since recused himself after realising that he is well acquainted with one of the parties. Hence, I have assumed jurisdiction for purposes of writing and delivering the judgment.

The Petitioner, Jema Henderson, prays for the dissolution of her marriage with the Respondent, Murray Henderson, on the grounds of adultery and cruelty. Despite being served with the petition and Notice of Hearing, the Respondent did not attend court for trial and the court proceeded in his absence. In fact on the 2nd day of June 2015 the Registrar, being satisfied that the requirements of Rule



29 of the Matrimonial Cause Rules have been complied with, directed that the this Cause be heard undefended.

JURISDICTION

Section 2 of the Divorce Act (Cap 25:04) of the Laws of Malawi provides as follows:

“s.25 –Nothing hereinafter contained shall authorize-

(a) The making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented:

Provided that where a wife has been deserted without cause by her husband, or where her husband has been deported from Malawi under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion without cause or deportation domiciled in Malawi, the Court shall have jurisdiction for the purpose of any proceedings for dissolution of marriage or judicial separation, notwithstanding that the husband has changed his domicile since the desertion without cause or deportation; or

(b) The making of any decree of nullity of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented or unless the marriage was solemnized in Malawi.”

In the matter at hand both the Petitioner and Respondent are resident and domiciled in Malawi. The Petitioner resides in the City of Blantyre and the Respondent in Thyolo. At the time of presenting his Petition the parties were and are still domiciled in Malawi. Thus, the requirements under section 2 of the Divorce Act have been satisfied. This court has jurisdiction to hear this petition for divorce.

EVIDENCE

The Petitioner was the only witness who testified, and she adopted her witness statement. The Petitioner and the Respondent met at Watershed College in Marondera, Zimbabwe, around March 1994. They got married in Zimbabwe on 4th

December 1999 in a small church ceremony. After they were married they lived in Mvuwi in Zimbabwe. There are three issue of the marriage, Cameron, born on 20th August 2000; Calum, born on 22nd September 2002; and James, born on 10th October 2005. After the birth of their first child they moved to Nkanta in the North of Mozambique where the Respondent was working for a company called Dimon.

During 2006 they moved to Chimoio. They moved back to Malawi in or about 2007 so that the Respondent could work on his family farm in Thyolo After they moved back to Malawi the work did not go well. It was difficult financially resulting in the Respondent becoming unhappy, not getting up in the morning, coming home late and drinking excessively. At some point the situation became so bad that they were failing to support themselves. The Respondent became more depressed and this resulted in their relationship becoming more and more distant. In January 2008 she got a job as a teacher at Phoenix International Primary School, and has been working at Phoenix ever since. Ever since she got the job she has been supporting the family in all respects.

In or about December 2013 she had her suspicions that the Respondent was not being honest or faithful with her. This resulted in them having many fights and also in his going out and not coming home, sometimes for more than a day or two. The Repondent's conduct caused a lot of stress on her and the children. Whenever she confronted the Respondent about her suspicions of infidelity he would always say that she was overreacting and being silly. Eventually she was informed that the Respondent had left La Ca Verna in a lady's car and left his car at La Ca Verna. She confronted him about this, and three times he denied it. It was only after she told him that he had been seen with this lady that he admitted to it. Further, she had also seen some text messages from this lady on his phone. Confronted about these text messages he would deny any wrong doing.

As the Respondent's drinking got worse and more frequent, she was left with no option but to give him what she thought was a simple choice between either working on their marriage and stop all communication with this other lady, or if he didn't stop talking to her and reduce his drinking she would move out with the

children. The Respondent chose not to stop talking to this other lady, so she moved out of the matrimonial home with their children in or about August 2014. As soon as she moved out this other lady immediately moved into the matrimonial home where she lives to this date with the Respondent. When she asked him about this he admitted that this other lady had moved into the matrimonial home. When she went to the matrimonial home in or about October 2014 she found a lady's clothing on the line. Since she moved out of the matrimonial home the Respondent paid six months' rent for her and gave her K100,000.00 for groceries. On 6th February 2015 he gave her another K100,000.00 for groceries.

That in view of the foregoing she has suffered mental anguish by the Respondent's behaviour and adultery. She has also suffered mental anguish consequent to the breakdown of the marriage and deprivation of her conjugal rights.

ISSUES FOR DETERMINATION

The main issues for determination are whether the marriage between the Petitioner and the Respondent be dissolved; whether custody of the issues of the marriage be awarded to the Petitioner; and whether provision be made for the maintenance and upkeep of the Petitioner and the issues of the marriage.

LAW AND ANALYSIS

Section 5(a),(c) of the Divorce Act provides as follows:

"s.5 –A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent-

(a) Has since the celebration of the marriage committed adultery; or

(b); or

(c) has since the celebration of the marriage treated the petitioner with cruelty."

And section 7 of the said Act provides as follows:

“s.7-(1) On a petition for divorce it shall be the duty of the Court to inquire, so far as it can reasonably can, into the facts alleged and where there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter-charge which is made against the petitioner.

(2) If the Court is satisfied on the evidence that-

(a) the case for the petitioner has been proved; and

(b) where the ground for the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents,

*The Court shall pronounce a **decree nisi** of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:*

*Provided that the Court shall not be bound to pronounce a **decree nisi** of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or, if, in the opinion of the Court, the petitioner has been guilty-*

- (i) of unreasonable delay in presenting or prosecuting the petition; or*
- (ii) of cruelty towards the other party to the marriage: or*
- (iii) where the ground of the petition is adultery or cruelty, of having without cause deserted, or having without cause willfully separated himself or herself from, the other party before the adultery or cruelty complained of; or*
- (iv) where the ground of the petition is adultery or unsoundness of mind or desertion without cause, of such willful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.”*

The Petitioner alleges the Respondent is committing adultery unnamed lady with whom the Respondent had been seen driving off from La Ca Verna in her car; and that she had also been texting the Petitioner. And after the Petitioner left the matrimonial home this lady immediately moved into the said matrimonial home and has since been cohabiting with the Respondent. A fact the Respondent admitted or confirmed when asked. Thus, there is undue familiarity between the Respondent and this other lady, as well as opportunity for committing adultery. In the case of **Banda v Banda, Matrimonial Cause No. 10 of 1991**, Banda, CJ had this to say:

“It is not always possible to prove adultery by direct evidence. It is indeed rare that parties are surprised in the very act of adultery. Where there is no confession the fact of adultery is inferred from circumstances which lead to a fair inference that adultery has been committed. But before such inference can be drawn the court must be satisfied that there was something more than opportunity before it will find that adultery was committed.”

In the instant case undue familiarity between the Respondent and this other lady has been established, so too an opportunity for the commission of adultery considering that they are cohabiting. And they have been cohabiting for more than one year. It is safe to conclude that they have and are still having sex thus committing adultery. The Petitioner has therefore proved that the Respondent has since the celebration of their marriage committed adultery and he is still committing such adultery.

The Petitioner has further claimed that she has been treated with cruelty by the Respondent. Cruelty can be physical or emotional. The Petitioner has also prayed for divorce on the ground of cruelty. In the case of **Malinki v Malinki [1975-77] 8ALR (Mal) 141** at p. 146 (HC), Skinner CJ had this to say:

*“In determining what constitutes cruelty, regard must be had to the circumstances of each particular case. The generally accepted legal definition of cruelty is the proposition adopted in the well-known case of **Russel v Russel [1896]** p.315 (on appeal [1897] at 322 AC 395 which is as follows [1895] at 322:*

‘There must be danger to life, limb or health, bodily or mental or a

Reasonable apprehension of it to constitute legal cruelty.'

It is not sufficient for a petitioner to establish trying and tiresome bad conduct on the part of the other spouse. It is necessary to show that the conduct had caused danger to life, limb or health or has given rise to a reasonable apprehension of such danger...."

The Petitioner has told the court that after having suspicions that she was not being faithful to her it resulted in them having many fights and also in the Respondent going out and not coming home sometimes for more than a day or two. Respondent's conduct caused a huge amount of stress to the Petitioner and the children. Their children were very angry at their father for not being at home. Sometimes it would be days before they saw him as he would come home late at night when they would be asleep. Considering the mental anguish and anxiety exerted on the Petitioner, as well as the Petitioner seeing the suffering of her children due to the Respondent's conduct, am satisfied that the Petitioner was subjected to cruel conduct by the Respondent. Furthermore it is also clear from the evidence, that the Petitioner has been denied her conjugal rights. And in the case of **Bonhomme v Bonhomme [1990] 13 MLR 70 (HC)** Makuta CJ at p.73c-e had this to say:

*"I need not, of course, overemphasize that sexual intercourse is a very strong natural instinct and it reduces marriage to a mere shadow if it is denied unless there is justification, such as, for example, illness or incapacity.....In **Sheldon v Sheldon [1966] 2 WLR 993**, it was held that conduct of a young man, having no physical or psychological infirmity, and after years of normal marital relations, in persistently refusing his young wife sexual intercourse over a long period without explanation or excuse, knowing that it is causing injury to her health, constituted cruelty in law such that the wife ought not be called to endure any longer."*

Hence the offence of cruelty has been proved in this instant case.

CONCLUSION

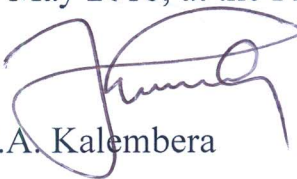
All in all I am satisfied that the Petitioner has established and proved both adultery and cruelty on the part of the Respondent. It would therefore be right in the circumstances to grant the Petitioner's petition and dissolve her marriage to the

Respondent. Consequently I dissolve her marriage to the Respondent and grant her a *decree nisi*.

As to the prayer for maintenance of the Petitioner and the issues of the marriage, it is in evidence that the Respondent paid for the Petitioner's rent as well as providing K100,000.00 per month for groceries. In the interim I order that the Respondent must continue paying rentals for the Petitioner as well as K100,000.00 per month for groceries until a separate application to the court is made for maintenance. Furthermore the issue of custody of the issues of the marriage should also be the subject of a separate application to the court.

Costs follow the event and are in the discretion of the court. The Petitioner having succeeded in her petition for divorce, the Respondent is condemned in costs in respect of the petition for divorce proceedings.

PRONOUNCED this 10th day of May 2016, at the Principal Registry, Blantyre.

A handwritten signature in purple ink, appearing to read 'S.A. Kalembera', is written over a circular stamp.

S.A. Kalembera

JUDGE