



IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 201 of 1977

BETWEEN:

BEATRICE IVY CHIMWAZAPETITIONER

and

KAISON EFFERSON CHIMWAZA RESPONDENT

and

URIAH SAMSON NYONDO..... PARTY CITED

Coram: MEAD, J.

Fachi of Counsel for the Petitioner
Mbalame of Legal Aid for the Respondent
Party Cited not present : unrepresented
Namasani: Official Interpreter
Kelly: Court Reporter

JUDGEMENT

The petitioner, Beatrice Ivy Chimwaza, prays for a decree of dissolution of her marriage with the respondent, Kaison Efferson Chimwaza, on the ground of cruelty on the respondent's part, and further prays for the custody of the two children of the marriage. The respondent denies the allegations of cruelty and by cross-petition prays for a decree of dissolution of the marriage on the ground of the petitioner's adultery with Uriah Samson Nyondo joined as the party cited. The petitioner in her reply to the cross-petition does not deny the averment of her adultery, she prays the court to its discretion to grant a decree in her favour notwithstanding adultery on her part. In her petition, the petitioner appears to raise desertion as a further ground for her petition but in the course, of the trial the petitioner made it clear that desertion is not a ground and that reference to desertion is made to explain the circumstances under which the petitioner avers she left the matrimonial home. The date the parties separated was the 15th 1976, so that in any event desertion could not be a ground, the statutory period of three years not having been achieved.

Uriah Samson Nyondo entered appearance and gave notice that he did not intend to defend the proceedings in any respect.

The parties were married on the 5th August 1970 at the Registrar General's Office, Blantyre church ceremony was subsequently performed the 7th June 1974. I am satisfied on the evidence before the court that the parties are domiciled in Malawi. The petitioner is employed by the Commercial Bank of Malawi as a ledger clerk, the respondent is employed by Southern Bottlers Limited.

There are two children of the marriage, Elsie born on the 30th June 1972 and James born on the 14th April 1974.

The petitioner relies on two incidents to support her averment of cruelty on the respondent's part. The first occurring in February 1976 at the Commercial Bank, where the petitioner works, and in the streets of Limbe, the second occurring in March 1976 on an omnibus when the parties were travelling together from Blantyre to Balaka. The cruelty averred in each incident consists of abusive language publicly used by the respondent directed to the petitioner. In her petition, the petitioner avers that as a result of this conduct on the respondent's part she suffered injury to her health. In her evidence, the petitioner said the respondent's conduct caused her to fear what he might do to her, and her health deteriorated in consequence. In cross-examination, she said the respondent's conduct resulted in her being depressed, that she is still in that depressed condition and that she expected to remain in that condition until the conclusion of these proceedings. The petitioner called one witness, Mrs. Isabel Alfonso, secretary to the bank manager at the Commercial Bank of Malawi, Limbe. The respondent did not call any witness.

On a morning in February 1976, there is no evidence to identify the day, it is immaterial, the petitioner obtained permission to leave the Commercial Bank to take some material to a tailor. Whilst out of the bank she met a Mr. Mtifukanji and talked with him. Mr. Mtifukanji became known to the petitioner through the respondent after the marriage. It is common ground that that the respondent had told the petitioner not to associate with Mr. Mtifukanji. The petitioner said she did not know why she was given this advice, the respondent said he gave the advice because he suspected the petitioner, in effect, to be forming an improper fondness for Mr. Mtifukanji. There is no evidence to support such suspicion. The respondent chanced to be driving through Limbe at this time and saw the petitioner talking with Mr. Mtifukanji. He stopped his car, left it and walked towards them. It is the respondent's evidence that on seeing him approach Mr. Mtifukanji ran away and the petitioner hurried to the Bank. The petitioner denied that she and Mr. Mtifukanji had seen the respondent. In cross-examination the respondent was unable to differentiate between running and walking and from his sudden inability at that stage to express himself adequately in English, which he had been doing with considerable fluency until then, and his inability to explain the difference in Chichewa, I find that the respondent's account of the petitioner and Mr. Mtifukanji hurriedly parting company at his approach not to be true. The petitioner returned to the Bank followed by the respondent. It is the evidence of the petitioner that she had not been aware of the respondent following and that she only realised this as she was entering the Bank. The petitioner said that on entering the Bank the respondent abused her calling her a bitch and a prostitute, there were many

Bank customers in the Bank. The petitioner said the respondent remained in the Bank about half an hour abusing her, and that the Bank accountant told she should go home. She left the Bank followed by the respondent who, she said, continued to call her a bitch and a prostitute through the streets of Limbe until they both boarded an omnibus at the market to return home. The petitioner said the respondent did not give any explanation for abusing her. The petitioner said she was embarrassed and distressed by the public performance of the respondent. In cross-examination the petitioner said the respondent told her he wanted to speak to the accountant, the accountant at that time was speaking on the telephone, the petitioner went to her place of work upstairs leaving the respondent downstairs. The petitioner said the respondent continued shouting downstairs. After a short time, the accountant went upstairs and told the petitioner to go home.

Mrs. Alfonso said her place of work was outside the manager's office on the first floor of the Bank where the petitioner worked. For the petitioner to reach the ledger room where she worked she had to pass Mrs. Alfonso. Mrs. Alfonso saw the petitioner and the respondent on the stairs leading to the ledger room and heard the respondent shouting at the petitioner "what kind of a woman are you, you are a bitch." From Mrs. Alfonso's evidence, I find that the incident on the stairs was of a very short duration. Mrs. Alfonso said she heard the respondent shouting at the petitioner when they went down the stairway but could not hear the words he was saying. Mrs. Alfonso said that two customers came up to enquire what was the trouble. Mrs. Alfonso said she did not see the accountant go to the ledger room where the petitioner worked.

The respondent denied having abused the petitioner at the Bank. He said he caught up with the petitioner after she had left Mr. Mtifukanji and asked her why she had been talking to Mr. Mtifukanji, and she had told him they had only exchanged greetings. He said he was angry because she had been talking with Mr. Mtifukanji, because he had told the petitioner not to have anything to do with Mr. Mtifukanji. The respondent said he asked the accountant to give permission for the petitioner to go home as they had, in effect, personal matters to discuss. He said the accountant telephoned to the petitioner and the petitioner came to the accountant's office. He said he did not see Mrs. Alfonso. From the description, Mrs. Alfonso gave in cross-examination of the position of her desk she may not be readily visible to a person walking up and down the stairway engaged in heated talk as was the respondent. The respondent denied having abused the petitioner in the streets.

The accountant, Mr. Jackson, was not called as a witness by either party. His absence is not explained. If, as the petitioner said, the respondent shouted abuse at her whilst they were walking through the public banking hall there must have been Bank employees who heard this. As a Bank employee the petitioner would have ample opportunity to inquire of her fellow employees as to who heard her being so loudly and disgracefully abused, one or more could have been called as witnesses.

Mrs. Alfonso impressed me as a truthful witness. If, as the petitioner says, the accountant went to her at the time of this incident Mrs. Alfonso must have seen him. There is no reason for her to say she did not see him, for her to say she had seen him would have been to support the petitioner for whom she gave evidence. I find that the accountant did not go to the ledger room but telephoned through to the petitioner. Mrs. Alfonso does not support the petitioner to the full extent of the abuse the petitioner says the respondent levelled at her. I disbelieve the respondent that he did not abuse

the petitioner. He admits to have been angry and in the circumstances, he was likely to have been rude to the petitioner. I do not believe the petitioner that the respondent called her a prostitute. I believe her to the extent that the respondent called her a bitch. I do not believe the petitioner that the respondent abused her in the banking hall.

In his angry mood, the respondent was likely to have continued his abuse of the petitioner for a time after leaving the Bank. There is no support for the petitioner that this abuse was so loud as to attract the attention of passers-by. I reject the petitioner's evidence that in the streets the abuse was of a public nature.

It is common ground that in March 1976 the parties went to Balaka to visit the petitioner's family. The petitioner said she did not know the purpose of the visit, other than that her brother had summoned them. The respondent said the purpose was to discuss the matrimonial differences between the petitioner and the respondent. It was the petitioner's evidence [that they had arranged that the] petitioner was to visit her family travelling alone. On the day the petitioner was to make the journey she attended a dance practice at Kudya Entertainment Centre. The respondent said he went to the centre where he saw the petitioner with Mr. Mtifukanji in a bar. He did not make his presence known and decided to join the petitioner on the journey to Balaka. When the dancing practice had ended he took the petitioner to the Blantyre omnibus depot where they boarded the omnibus for Balaka. He did not tell her that he had seen her and Mr. Mtifukanji together at the Entertainment Centre. He did not say the petitioner expressed surprise at seeing him as could be expected, if he is to be believed that it has been arranged for the petitioner to travel alone. Arriving at Zomba the respondent said he saw outside the Rest House Mr. Mtifukanji's motorcar, he drew the petitioner's attention to this and the petitioner did not show any undue interest. The respondent said he then saw Mr. Mtifukanji get in the omnibus and that Mr. Mtifukanji caught sight of him and left the omnibus immediately. It was not put to the petitioner in cross-examination that Mr. Mtifukanji had been with her at the Kudya Entertainment Centre. She admitted that the respondent had told her he had seen Mr. Mtifukanji enter the omnibus at Zomba and leave when he caught sight of the respondent. It was not put to the petitioner that the respondent had also told her he had seen Mr. Mtifukanji's car at Zomba. It is the petitioner's evidence that it was between Zomba and Liwonde that the respondent abused her. There is no reason why the respondent at Zomba should suddenly invent the story that he saw Mr. Mtifukanji's car and that he had seen Mr. Mtifukanji enter and leave the omnibus at Zomba. I find that the respondent did see Mtifukanji's car and did see Mr. Mtifukanji enter and leave the omnibus at Zomba. In the circumstances it was a likely conclusion for the respondent to make that Mr. Mtifukanji had boarded the omnibus at least to talk with the petitioner. Having regard to the respondent's previous reaction and conduct at Limbe it is a probable consequence that the respondent should have become angry and would have again abused the petitioner. From my observation of the respondent in the witness box in my view he is susceptible to sudden outbursts of emotion. I believe the evidence of the petitioner that the respondent did abuse her. The petitioner said there were over a hundred persons on the omnibus. She said she was afraid that what the respondent was saying would be heard by the other passengers. There is no evidence that any other passengers showed any interest in or concern at the respondent's conduct. On the evidence I find that, the respondent spoke abusively to the petitioner on the omnibus but not in such a manner as to attract public attention.

I have found that in both incidents the respondent spoke abusively to the petitioner. In the first incident in Mrs. Alfonso's presence, which must have caused the petitioner embarrassment, in the second incident on a public omnibus, which again must have caused the petitioner embarrassment, she being anxious in case any other passengers should hear what the respondent was saying, but of which over-hearing I have found there is no evidence. Learned advocate for the petitioner cited as apposite to the present case the case of a wife being insulted by her husband in the public street so grossly that a passer-by took her to be a prostitute, which conduct -was held to be cruelty, referring to **RAYDEN ON DIVORCE** (12th edn.) 1147. The case is **Milner v. Milner** (1861) 4 Sw & Tr : 164 E.R. 1508. In that case the court did not grant a decree on the evidence of cruelty alone but on that evidence coupled with the evidence of the husband's adultery. That case was considered in **Russell v. Russell** (1887) A.C. 395 by **Lord Hershell**, who delivered the majority opinion of the House of Lords, saying, at 459-460:-

"adopted this view or thought that, having regard to the previous conduct of the husband, the wife's safety was endangered, it is impossible to say... Such a decision obviously cannot be having any important bearing on the question."

The question, in **Russell v. Russell**, being whether relief could be granted to a petitioner on the ground of cruelty other than danger to person or to health. *The effect of the **Russell v. Russell** decision is to define the matrimonial offence of cruelty as being conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of danger.* In the present case the petitioner does not raise the ground of bodily injury, or the threat of such injury, the sole ground is that of mental injury. The extent of the injury the petitioner says she has suffered is depression. There is no evidence as to the degree of the depression, or whether it has any effect on her health or on her work. There is no evidence of apprehended injury to the petitioner's health. The petitioner gave me the impression of being a normal, healthy young woman. It is difficult to imagine that the abuse to which I find her to have been subjected could have resulted in any danger or apprehended danger to her health.

I find the petitioner has failed to satisfy the court on the evidence that she is entitled to the relief sought. I dismiss the petition. My finding would have been the same had I found proved the full extent of the abuse the petitioner said the respondent used and the public circumstances in which she said it had occurred, for the reason that it not been proved the petitioner suffered any resultant danger to her health or that there is any apprehension of such danger.

The respondent cross-petitions on the ground of the petitioner's adultery. I am satisfied on the evidence, and on the petitioner's admission that the petitioner has committed adultery with the party cited over the period from 1976 down to the institution of these proceedings. I am satisfied that there is no bar to the granting of a decree in the respondent's favour.

I order that that a decree nisi be granted in favour of the respondent for the dissolution of his marriage with the petitioner. I order that the respondent's costs of these proceedings be paid to the respondent by the petitioner and by the party cited, Uriah Samson Nyondo.

The two children of the marriage, Elsie and James, are at present in the custody of the petitioner. There is no evidence before me that continuation of that custody for the time being will be harmful to the children. In the interests of the children I make a formal order that custody of the two children, Elsie and James, be granted to the petitioner until further order. I adjourn into chambers the respondent's application for custody of the two children.

Pronounced in open court this 16th day of September, 1977 at Blantyre.

J.W. MEAD
JUDGE