

IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 562 OF 1979

BETWEEN:

SELENA KUMITSONYO PETITIONER

and

A.B.Z. KUMITSONYO RESPONDENT

Coram: Skinner, Chief Justice

For the Petitioner: Fachi of counsel

For the Respondent: Alufandika of counsel

Official Interpreter: Kaundama

Court Reporter: Brown

JUDGMENT

This is a petition for nullity of marriage brought by the petitioner Mrs. Selena Kumitsonyo, who was married on 6th September 1978 to the respondent at the office of the District Commissioner at Chikwawa. The grounds for nullity are stated to be that the respondent was at the time of the marriage incapable of consummating the same and has been so incapable ever since and that the marriage has never been consummated. It is pleaded in the alternative that the respondent has wilfully refused to consummate the marriage.

Section 12 of the Divorce Act allows a court to give a decree of nullity of marriage where the respondent was permanently impotent at the time of the marriage or where the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it.

If I am satisfied on the evidence that the respondent has abstained from intercourse with the petitioner the inference of incapacity is strong and the onus is on him to rebut the presumption that he is incapable of sex.

An appearance for the respondent was entered by Messrs. Lilley, Wills and Company on 9th October 1979. No answer has been filed and I have been informed by Mr. Alufandika that the respondent does not seek to defend the proceedings.

I have had evidence from the petitioner in which she told me that after the marriage the parties lived together for about eighteen



months but that during that time they never had sexual intercourse. She said that when she asked the respondent to have sexual intercourse with her he ran away and that he was not able to perform the carnal act. She described a number of occasions when she made advances to him but that these advances were of no avail to her. He told her that he never had sexual intercourse with a woman. The question of his impotency was discussed between them and she suggested that he should go to a doctor but he said that he would not do so.

I accept the petitioner's evidence, and it satisfies me that the respondent abstained from sexual intercourse with the petitioner, and the inference of incapacity is strong, and of course the respondent has not rebutted the presumption that he is incapable of sex. In addition to the evidence that he abstained from sexual intercourse I have evidence that he admitted that he never had sexual intercourse with a woman and that he discussed his impotency with the petitioner. I am satisfied that the petitioner has proved the allegation of impotency as alleged in her petition.

I am satisfied that there is no bar to my granting relief and I pronounce a decree nisi in accordance with the prayer in the petition, and I order that the respondent pay the costs of these proceedings.

Pronounced in open court this 15th day of September 1980 at Blantyre.


J. J. SKINNER
CHIEF JUSTICE