

IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE No. 577 of 1979

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B E T W E E N:

LILLIAN ESTELLA PATEL	<u>PETITIONER</u>
and			
CHARLES PATEL	<u>RESPONDENT</u>

Coram: JERE, J.

For the Petitioner Alufandika of Counsel
Respondent in person, unrepresented
Court Clerk: Kadyakale:
Court Reporter: Kelly

J U D G M E N T

Lillian Estella Patel petitions this court for the dissolution of her marriage with Charles Patel on the grounds of cruelty.

The parties were married at the office of the Registrar General's Department by the Registrar General on the 30th March 1974. Both of them were single and they come from Machinga and Mangochi districts respectively. Both of them are Malawians.

Since the celebration of the marriage the parties have lived and co-habited at Kanjedza. They have two issue of the marriage, namely, Mercy Patel born on the 17th October 1974 and Carol Patel born on the 26th September 1977. On the evidence before me I find that the parties are domiciled in Malawi and that this court has jurisdiction to entertain the petition.

The evidence of cruelty comes from the petitioner herself, supported with two witnesses. The respondent does not actually deny these acts of cruelty. In his long statement in court he seems to present his grievances to this court that his wife had provoked him either by insulting him when he wanted to have free time or that she was uncomfortable when he returned late from his nocturnal escapades and he really did not deny the acts of cruelty charged by the petitioner. The evidence of the petitioner is that for a period of three years since the celebration of the marriage the parties lived a happy life. However, the trouble started in 1977, the first incident being that when the couple was invited to a wedding party and after they had had a lot of drink she asked him to return to the matrimonial home. He was unwilling to do so and she took her mother in the car to drop her at her home, so as she

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was driving around to Kanjedza she found her husband lying in the middle of the road, she was shocked it being nearly midnight, she thought he was dead. However, when she came out of the car she found he was alive and brought him into the car. They started driving home but he was very difficult indeed in the car. He then hit her and accused her of misbehaving. She started screaming. The fight was stopped by servants, she then went and hid herself, he slept until the next morning. There does not seem to have been any incident the next morning.

In September 1977 the petitioner was admitted at the Queen Elizabeth Central Hospital in Blantyre and after an operation she did not wish to stay in the hospital and asked for permission to go to her home. She was allowed by the doctor and was asked to attend as an out-patient. When she went home she informed her husband and he agreed. However, he failed to turn up to collect her to take to the hospital. When she missed two days the respondent came and when she asked him he slapped her and the matter ended there. He denied however in his answer to the petition that he slapped her. He stated in court that the car had broken down, that was the reason why he did not go to pick her up. I am inclined to believe the respondent's story rather than that of the petitioner on this particular question.

In May 1979 both parties returned from work for lunch. The husband produced an income tax assessment and began grumbling, stating that it must be paid by the petitioner. He threw it into her face. He again got a tomato sauce bottle and threw it to her but it missed her. He told her to pay the income tax. When he had finished his lunch and his temper cooled down they both went for work. He picked her up from work at 4 o'clock and they went home. She then left to go to her mother's place. I believe the petitioner's story that this was the treatment she received and then she went to her parents home, came back to the matrimonial home by 9 o'clock and locked herself up. The following morning she went with her father and mother to their farm in Namwera. When she came back to the matrimonial home there was trouble and the parents were called because he threatened to kill her. She was only lucky because both the Chairman of the Party and the house servant helped her out. I accept her evidence. There is also another incident in June involving her husband, the respondent. I believe what she told the court.

Finally in August 1979 there was a big party at the house of the petitioner. This was a farewell party in honour of the petitioner's sister, who was leaving for the United Kingdom. They started drinking and eating fairly early in the evening until the next morning around 1 a.m. One of the guests, Mr. Limbani, wished to leave and the couple as required by tradition took the Limbani's out of the house to see them into the car. When the Limbani's were about to go the petitioner and the respondent returned to the house, he held her by the right hand in a sort of loving manner and went behind the house taking the other door, he started beating her, raining blows on her, she was unconscious. She was then taken away, she realised she was in Ndirande in the house of Mr. Limbani. The following

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day she attended at Queen Elizabeth Hospital and documents have been produced. This evidence too is uncontraverted by the respondent. All he says in his reply to the petition is that he was provoked. He does not touch it in evidence at all. After this incident the petitioner left the matrimonial home and went to stay with her father and mother. She has not since returned to the matrimonial home.

This in a nutshell is the evidence for the petitioner and I have already touched on the respondent's defence, which is not material. However, I have seriously considered all the incidents apart from the one in August, and I find that with the exception of the August incident the rest were condoned. No evidence was led by counsel to show that there was no condonation at all. Counsel said that he relied on the words of the petitioner to the effect that she wants a divorce and according to counsel this negates condonation. With respect this is far from the law and counsel is well advised to acquaint himself with condonation as contained in FAMILY LAW by BROMLEY (3rd edn.) pp.135-144. A classical and earliest definition of condonation is that by Sir Cresswell Cresswell, who defined it as:-

"Blotting out of the offence imputed, so as to restore the offending party to the same position as she or he occupied before the offence was committed."

And the modern definition of condonation is contained in Bernstein v. Bernstein (1893) p.292 by Lopes, L.J. who said:-

"Condonation ... in my judgment means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the past offence forgiven."

Applying these principles to the facts I think it is clear that the lady each time there was a fight, brutal or gentle, she would leave for a while to her parents home, who did not live very far away, and after the parties had discussed the matter they would reconcile and she would return home. Certainly this is the evidence of Mrs. Karim, who spoke of the second incident as narrated above. So the evidence is such that the rest of the acts complained of, while they constitute cruelty, were in my view condoned. However, the same cannot be said of the incident of August 1979. Cruelty was defined in the famous case of Gollins v. Gollins by Lord Pearce as follows:-

"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to endure it."

In these circumstances the defence is provocation. I can hardly find any excuse for the behaviour of the respondent towards the petitioner on that fateful night. After the party had gone on well he started brutally beating her. I can hardly see any evidence or excuse for such type of conduct. In my view the conduct is such

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that it can be termed cruel and there is no excuse for it whatsoever. She has not condoned it. She left for her mother's place and never came back. I am satisfied on the evidence that she has proved her case on the balance of probabilities.

In these circumstances the petition succeeds. I grant a decree nisi in favour of the petitioner for the dissolution of her marriage with the respondent.

Costs of the petition to the petitioner.

I adjourn to chambers the question of custody and maintenance of the children.

Pronounced in open court this 24th day of May 1980 at Blantyre.


N.S. JERE
JUDGE