

CIVIL CAUSE NO.187 OF 1979



BETWEEN:

VIOLET THERESA NAMATE.....PETITIONER

- and -

GOMIWA BINGALA NAMATE.....RESPONDENT

- and -

DR. PAUL KAPAPA.....PARTY CITED

Coram: Topping, Ag. Judge

For the Petitioner:	Makhalira of Counsel
For the Respondent:	Fachi of Counsel
For the Party Cited:	Kaliwo of Counsel
Official Interpreter:	Sonani
Court Reporter:	Caffyn

J U D G M E N T

In her petition dated 20th March, 1979, Mrs. Violet Theresa Namate, the petitioner, who is a nurse, prays that her marriage may be dissolved on the ground that since the celebration of the marriage the respondent, Gomiwa Bingala Namate, has treated her with cruelty and caused injury to her health.

The particulars of the cruelty complained of are that on the 13th February, 1979, at Kanjedza, the respondent struck and grabbed the petitioner's throat when he hit her hard with his fists, as a consequence of which she became unconscious for no less than an hour, and was later admitted to Queen Elizabeth Central Hospital, Blantyre, with injuries to her forehead, jaw, and part of her neck. She was in hospital for seven days.

The respondent denies treating the petitioner with cruelty but admits, in paragraph 6 of his answer and cross-petition, beating her. He also seeks the dissolution of the marriage on the ground that the petitioner has, since the celebration of the marriage, committed adultery with Dr. Paul Kapapa, the party cited, and in particular that she has habitually committed adultery with the party cited at various places in Blantyre and Mangochi.

It is alleged that from the 17th March 1979 to the 31st March 1979, the petitioner and the party cited stayed together as residents of the Muona Inn at Mangochi. The respondent claims damages against the party cited, and costs.

The parties were married on the 9th August 1969. It seems clear from the evidence that prior to that date the parties had



been traditionally married in about 1962. At the date of the marriage in the Registry Office, Blantyre, on the 9th August, 1969, the certificate shows that the petitioner was 23 years old. It would appear that when she was married traditionally she must have been about 17 years of age. The respondent is some fourteen years older than the petitioner. The evidence is that the parties, who are both Malawi nationals, are domiciled in Malawi. The Court has jurisdiction to entertain the petition.

The evidence shows that shortly after the traditional marriage the petitioner went to Germany to study for a nursing qualification. It is common ground that the party cited was also in Germany at that time and that an acquaintanceship developed. The petitioner's evidence is that the respondent was a jealous husband who was frequently accusing his wife of infidelities. Matters came to a head with the return of the party cited from South Africa in January, 1979. According to the respondent the petitioner received a post card from the party cited in which he invited her to meet him at Chileka Airport. She did not tell the respondent about the post card.

For her part the petitioner denies that there was such a post card and says that she knew the party cited was returning because of the staff movements notice in the Queen Elizabeth Central Hospital. It is alleged that the petitioner admitted receipt of the post card in an interview with Legal Aid.

The respondent says that the petitioner had previously admitted some sort of relationship with the party cited, and that he had found letters from the party cited, and another gentleman, which he described as love letters. However, he forgave the petitioner in connection with those matters, and if his evidence is accepted the marriage continued on a reasonable basis until the return of the party cited. The documents he referred to from the party cited were not produced.

The petitioner says that she went to see the party cited at the airport to ask him about stories which were currently circulating that she was having a relationship with him. Whatever the truth of the events leading to the petitioner's visit to the airport there is no doubt, and she admits it herself, that she did go to the airport to see the party cited. She was unsuccessful and, hearing that the party cited had gone to the Shire Highlands Hotel, she followed him there.

There is a conflict of evidence as to what happened at the Shire Highlands Hotel. The petitioner's version of events is that she was waiting in the doorway of the hotel when she saw the party cited coming towards the reception desk, but the respondent's version is that the petitioner and the party cited were standing together at the reception desk. No evidence was led that the party cited had a room or as to whether any arrangements were being made by the parties in connection with their friendship. The respondent arrived and they all went into the garden. There, a somewhat heated discussion took place which resulted in a visit to D.W. 3, Mr. Kansawa. D.W. 3, was said to be a relative of the petitioner, and when the parties visited him at his office the respondent reported that he found the petitioner and the party cited embracing in the Shire Highlands Hotel. If this was so the respondent did not give this fact in evidence.

When the petitioner and the party cited were questioned by the witness they said they were in love with each other and wished to marry. The petitioner, the respondent, and the party cited then returned to the Shire Highlands Hotel where the party cited said he wished to discuss the matter. The respondent refused and took the petitioner in his car to go home. They were followed by the party cited. It was now quite late. The petitioner was due back in the hostel at the Queen Elizabeth Central Hospital where she was residing. The respondent again refused to discuss the matter with the party cited and claims that the petitioner got out of his car and into the car of the party cited. The petitioner's version of this event is that the respondent said to the party cited: "She is now your wife; you may take her." Whichever version was true the petitioner and the party cited left together.

The marriage dispute became more serious. The petitioner instructed Messrs. Wilson & Morgan, and the respondent went to Legal Aid. A meeting was arranged and the petitioner was presented with the terms in the form of Exhibit B. These were guidelines drawn up for her as to her conduct, and can only be described as most restrictive. The petitioner was to declare that she must be bound by the conditions. She was to regard them as "my family life golden rules for a reconciliated family, and from deep down my heart." The exhibit continued: "I requested my husband and without word of fear or shame and pleaded for reconciliation in the Office of the Principal Legal Aid Advocate, Blantyre, on 29th January, 1979, where above all I admitted that I was very untrustworthy woman with full of immoralities towards my family". It is not surprising that the petitioner refused to sign these conditions which would have amounted to an admission of misconduct and which counsel for the petitioner has described as harsh.

On the 11th February, 1979, the petitioner was at the hospital. She says she was offered a chance to go to Mulanje to see her relative. She left without telling her husband and without leaving any message as to her whereabouts. She returned on the 13th February. Her conduct, which was ill-advised, resulted in a major family dispute.

It is clear from the evidence that her husband wished her to leave the hostel. He had written to the Midwifery Senior Tutor on the 12th February, 1979, telling the Sister Tutor the reason. He asked his wife to sign a copy of the letter saying that she agreed to withdraw from the hostel. The petitioner wrote: "Senior Tutor, I have discussed this issue with my husband that I am staying in the hostel until I finish my course." In the letter the respondent alleged that the petitioner was misbehaving with the party cited and described how he found them redhanded at the counter of the Shire Highlands Hotel, and claimed that they were lovers. It is not surprising that the petitioner refused to accept the truth of this matter. A serious disagreement arose between them which resulted in the respondent beating the petitioner. He beat her very severely: there can be no doubt about this. The respondent claims that he beat her for two to five minutes. I accept that. In that period he beat her so severely that she was admitted to hospital for a week, and indeed it is clear from the medical report that the doctor suspected she had a

fractured skull. The respondent claims that he was provoked into doing this. There is not one iota of evidence to suggest that he was provoked. It is abundantly clear from the evidence that he had decided to teach his wife a lesson and to make sure that she would not have anything to do with the party cited in the future. In his evidence about the matter he described how he beat her. He said, "I am going to beat your face so that when you go to school people will see you." He described how he told his wife that she had disgraced him at the Shire Highlands Hotel by saying she was the party cited's lover. According to him, he said: "My wife, I have no alternative", and he went on, "I beat her for two or three, if not five minutes." The respondent claimed to have been provoked on a sort of cumulative basis, starting with the receipt by the wife of her post card, her visit to Chileka, and the meeting with the party cited at Shire Highlands Hotel. He was further provoked by her admission before D.W.3, and her leaving with the party cited in his car. Although a considerable time lag occurred between these events, I am asked to find that when the petitioner absconded from the hostel without telling the respondent where she was going, the cumulative effect of such conduct was to provoke him into giving her a severe beating, and that he was entitled in law to do so.

It is perfectly clear from his evidence, above cited, that he was not provoked, but decided to teach his wife a lesson. He was fully in control of himself. Even if he had been provoked the beating bore no reasonable relationship to the provocation which he received.

The beating which the respondent gave the petitioner was most severe. I accept her evidence that she became unconscious. It is trite law that a party is not entitled to a decree on the grounds of cruelty if that party has provoked the acts complained of, unless the violence of his retaliation is out of proportion to the provocation he or she received. I have already found that the respondent was not in fact provoked. Even if I am wrong in such a finding it is abundantly clear that the violence he used was excessive and well beyond anything which might be considered reasonable.

I am satisfied on the evidence that the petitioner has proved cruelty against the respondent and that she is entitled to a decree. I find the petitioner has not condoned the cruelty or connived it. The petitioner has filed a discretion statement admitting an act of adultery during the marriage and asking for the Court's discretion. I exercise my discretion in favour of the petitioner in respect of the adultery which she committed, as set forth in her discretion statement, and grant her a decree nisi on the grounds of the respondent's cruelty.

Turning now to the cross petition, the respondent must establish the adultery of the petitioner. I accept the respondent's evidence that the party cited was an old acquaintance of the petitioner and that they had some sort of relationship whilst they were in Germany, for which he forgave her. If adultery was committed, which must be a matter of doubt, it was condoned. However, I also accept the respondent's evidence that correspondence in the form of a post card, passed between the party cited and the petitioner, in which the party cited invited the petitioner to meet him at the airport. I do not accept the petitioner's reasons for her visit to the airport. The petitioner did not tell the respondent about this. I accept the evidence of the respondent



that he found the petitioner and the party cited together at the Shire Highlands Hotel, but I do not accept the evidence of the respondent that there was any impropriety, at that stage, between the petitioner and the party cited. I accept the evidence of the respondent and his witness, D.W.3, that in the evening of that day, both the petitioner and the party cited admitted they were lovers, and that later the petitioner left voluntarily with the party cited in his car. I accept the evidence of the respondent and his witness (D.W.2), that the petitioner stayed for a period of about one week at Muona Inn, and that she was seen with the party cited in the bar and other places on at least two occasions. There is no direct evidence that the party cited was staying with the petitioner, but it can hardly be coincidence that he was there on at least two occasions.

The standard of proof imposed by the law on the respondent in respect of his allegation of adultery is higher than the standard in normal civil cases, but not so high as in criminal cases. It is not necessary to prove adultery by direct evidence, and indeed it is usually difficult to do so as such matters are not committed openly. Association, coupled with opportunity and illicit affection may, however, create an inference in respect of which a Court can infer the commission of adultery.

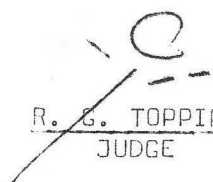
Given the admissions that the parties made to the relative of the petitioner, and the conduct and background to the petitioner's and party cited's association, and the visit of both parties to Muona Inn, I find that I am satisfied that the party cited and the petitioner committed adultery at Muona Inn during March, 1979. I find that such adultery was not condoned or condoned to by the respondent, and I grant him a decree nisi of divorce on the grounds of his wife's adultery with the party cited.

I now consider the claim as to damages. The respondent must establish this claim by positive evidence. The evidence adduced shows that the respondent, by his conduct, drove the petitioner from the house by injuring her severely so that she was admitted to hospital. It is scarcely surprising that she did not return home as there was a possibility of a second beating. I find therefore that the respondent was mainly responsible for the break-up of the marital home and is not entitled to damages. If I am wrong in this, it is perfectly clear that the respondent alleges that his wife was an immoral and unfaithful woman, and no evidence has been led to suggest that the damages should be other than nominal. Damages are compensatory and not punitive. The respondent has not proved that he has suffered any real loss. Both the petitioner and the respondent were working. The only damage which the respondent may have suffered has been the break-up of the matrimonial home, and the existence of this seems somewhat tenuous as it appears the petitioner was frequently absent for training; and I have already held that the responsibility for the break-up rests mainly with the respondent. It is true that the respondent will have lost the benefit of the petitioner's earnings, but there is no evidence as to how these were applied or how much they were. No evidence has been adduced as to any financial consequence of the break-up of the marriage.

In view of the lack of evidence it would not have been possible to establish the amount of damages even if an entitlement had been proved, which it has not. I dismiss the claim for damages.

The party cited will pay the costs of the cross-petition and the respondent will pay the costs of the petition. These will be taxed if not agreed.

Pronounced in Open Court this 22nd day of March, 1980, at Blantyre.

  
R. G. TOPPING  
JUDGE