

IN THE HIGH COURT OF MALAWI

21st November, 1980 Blantyre 9.00 a.m.

CIVIL CAUSE NO. 331 OF 1979
(IN DIVORCE)

BETWEEN:

JEAN JEROME FOY PETITIONER

- and -

KULSUM FOY RESPONDENT

- and -

LESLIE CHRISTINE BRIGHTBARD PARTY-CITED

Coram: Villiera, J
Savjani of Counsel for the Petitioner
Osman of Counsel for the Respondent
Kadyakale - Official Interpreter
Mkandawire - Court Reporter

J U D G M E N T

The Petitioner prayed for the dissolution of his marriage to the Respondent on the ground of numerous allegations of cruelty. He prayed further that he should be granted custody of the two children of the marriage. The Respondent filed an answer denying the cruelty allegations but in addition, she prayed for the dissolution of her marriage to the petitioner on the ground of his adultery with the Party-cited. There was no reply to the counter allegation and counsel for the Petitioner informed the court immediately before withdrawing from the case at the hearing, that the Petitioner had abandoned his petition. The cross petition then proceeded as an undefended matter and the only person who has given evidence in the entire proceedings is the Respondent. This state of affairs may not be unusual but it does mean that I shall have to scrutinize the evidence to ensure that there is no collusion between the parties.

The Petitioner and Respondent were married at the office of the Registrar of Marriages at Blantyre on the 24th November, 1972. The marriage certificate was produced and is marked Exhibit 1. The parties have for the most part of the marriage lived in Malawi although they also lived for a period of about 18 months at Nairobi, Kenya. There are two children of the marriage, both boys born in 1973 and 1976 respectively. I shall have to make a specific finding as to whether the parties are domiciled in this country because the Petitioner holds a Mauritian passport. The evidence shows that the Petitioner was born in what was then the Belgian Congo. It is not clear whether the Petitioner's parents were Belgian. They may have been French but the evidence goes on

to show that the Petitioner was brought to this country when he was about five or six years old. The Petitioner's mother died and is buried in this country and his father still works for the Lonrho Group of Companies at Limbe. It appears that the Petitioner was brought up and educated in this country. He has lived and worked almost continuously in this country and he does not appear, at least from the evidence, to have any other home. The Respondent sought to show that the Petitioner has never left Malawi except for the short stay at Nairobi, Kenya. I do not think I ought to believe this. He holds a Mauritian passport and it is almost certain that he has been to that country. The relevant question however is, what is the Petitioner's present permanent home? Where does he intend to live for the rest of his life? Domicile should not be confused with nationality and the Petitioner's holding of a Mauritian passport should not be held against him if he has manifested a present intention to reside permanently in this country. The fact that he may change his mind at a future indeterminate date is wholly irrelevant. I am satisfied from the evidence before me that the Petitioner is domiciled in this country and that therefore this court has jurisdiction to try the Respondent's cross-petition.

The Respondent has refuted in strong terms all the cruelty allegations against her. She need not have done so since the petition was abandoned. The implication is that the Petitioner realised he would not be able to prove any of the allegations. Some of them are very puerile. It was alleged for example that the Respondent was lazy and failed or neglected to look after the children with the result that the Petitioner was obliged to prepare their milk bottles, change their nappies and get up during the night to look after them. The Respondent has denied this allegation but even if it were true, that would hardly amount to cruelty. Looking after children is the responsibility of both the wife and husband. They should help each other and it appears from the Respondent's evidence that the Petitioner helped out when she was tired or was not feeling well. That is as it should be.

The other allegation was that for a period of twelve months immediately before the presentation of the petition, the Respondent refused to allow any marital relations with the Petitioner. The Respondent has admitted this allegation but has stated that she refused to allow marital intercourse when she discovered that the Petitioner was consorting with the Party-Cited. It appears that for a period of three to four months prior to April, 1979, the Petitioner was in the daily habit of going out every evening and not returning home until the early hours of the following day. Sometimes he would spend whole weekends away from home and would only return on the Monday morning to change before going to work. When the Respondent asked where he had been, the Petitioner would answer that it was none of her business. The Respondent was naturally very upset but then she heard rumours that the Petitioner was going around with the Party-cited. On a certain day in April, 1979, the Petitioner came home for lunch and suddenly announced that he wanted a divorce. He further ordered the Respondent to leave the matrimonial home. He went out in the evening as usual and the Respondent decided to check on the story she had been told about the Petitioner and the Party-cited. At about 8.30 p.m. she

drove to Mandala Flats here in the City. This is where she had been informed the Party-cited was residing. She found the Petitioner's car in the parking lot next to the flats. She parked her own car directly facing the flats and prepared to wait for the Petitioner. At about 2.30 a.m. a door creaked open and she saw the Petitioner who was with a woman in a night dress. The door was closed because the Respondent suspects that the Petitioner had seen her car. The Respondent went up to the door and knocked and she distinctly heard the Petitioner ordering the woman inside to go into the bedroom. The Petitioner then came out and asked the Respondent what she wanted and what she could do after what she had observed. The Respondent returned home and immediately thereafter the Petitioner also returned. He informed the Respondent that he loved the Party-cited and that he wanted to marry her.

The Respondent then consulted solicitors and a number of letters, Exhibits 2, 3 and 4 were exchanged between the parties' solicitors. The Petitioner made allegations of the same nature as those contained in the petition. These were vigorously denied by the Respondent but in addition she charged the Petitioner with having committed adultery with the Party-cited. The Petitioner did not specifically deny the charge but eventually the petition which has now been abandoned was filed. The Respondent was ordered out of the matrimonial home at about the same time but left sometime in September 1979. She is now living on her own. She has temporarily relinquished custody of the children to the Petitioner because according to her, the Petitioner is in a much better position financially to look after them. The Petitioner initially agreed to pay maintenance at the rate of K75 per month. He paid maintenance for a period of three months and stopped doing so in September or October, 1979.

It is clear in my view from the evidence that the Petitioner has committed adultery with the Party-cited. The standard of proof was recently reiterated by Topping, Ag.J. in *Namate vs. Namate and Kapapa* - Civil Cause No.187 of 1979. The Acting Judge stated as follows:-

"The standard of proof imposed by 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."

There was opportunity in the instant case for the Petitioner to commit adultery with the Party-cited. He was found at her flat early in the morning. The Party-cited was in a night dress. It can hardly be supposed that she was having an innocent drink with the Petitioner, in a night dress, at that hour. Immediately afterwards, the Petitioner confessed he was in love with and wanted to marry the Party-cited. They were seen

driving around town together. The inference is irresistible and I am satisfied that adultery was committed.

The final issue on which I have to make a specific finding is as to whether there has been collusion between the parties. I do not think so. The Petitioner has abandoned his petition because as I have indicated earlier, he realised that he would be quite unable to substantiate the cruelty allegations. He has not likewise defended the cross petition because it seems to me that the evidence is overwhelming. If there had been any collusive agreement, it would be expected that the Respondent should somehow gain some benefit. She seems to have lost out entirely. She has been ordered out of the matrimonial home and does not even have the compensatory maintenance.

I am satisfied accordingly that there is no bar to my granting the Respondent the prayer in her cross petition. I pronounce a decree nisi of divorce in her favour. The Petitioner's petition is hereby dismissed and he is ordered to pay the costs of these proceedings. The question of custody of the children and their maintenance and the maintenance of the Respondent is adjourned into Chambers.

Pronounced in open court this 29th day of November, 1980 at Blantyre.


J. B. VILLIERA
JUDGE