

BANDA J.

IN THE HIGH COURT OF MALAWI, BLANTYRE

CIVIL CAUSE NO. 49 OF 1985

BETWEEN:

ENID K. KAM'MALERE.....PETITIONER

-and-

MATHEW A. M. KAM'MALERE.....RESPONDENT

-and-

NOREEN MHANGO.....CO-RESPONDENT

CORAM: MBALAME, J.

Ng'ombe of counsel for the Petitioner

Chiudza Banda of counsel for the Respondent and Co-Respondent

Respondent and Co-Respondent not present

Kalimbuka-Gama: Official Interpreter

Mkandawire: Court Reporter

J U D G M E N T

By her amended petition, Enid Kathleen Kam'malere, the Petitioner in this case, prays for the dissolution of her marriage with the Respondent, Mathew Amon Master Kam'malere on grounds of cruelty and the Respondent's adultery with the Co-Respondent, Noreen Mhango.

The petition is undefended and although both the respondent and the co-respondent filed memoranda of appearance they did not defend the proceedings. However, Mr. Chiudza Banda of Chiudza Banda and Company appeared on their behalf at the proceedings just to hold their brief. The petitioner was represented by Mr. Ng'ombe of Lilley Wills and Company.

It was the petitioner's case that she was married to the respondent on the 19th day of January 1974 at the offices of the Registrar General in the City of Blantyre, Malawi. A marriage certificate, Ex. P1, certificate No. 2035/3477 was tendered in evidence to prove the said marriage. I am satisfied that the marriage contracted between the petitioner and the respondent on the 19th day of January 1974 was a valid marriage under Cap. 25:01 of the Laws of Malawi. I am also satisfied by the evidence adduced by the petitioner at the trial that both the petitioner and the respondent are domiciled in Malawi and that this court has the competent jurisdiction to hear the petition. There is one child of the marriage, David Richard Kam'malere born on 2nd February, 1975.

In proving the charge of cruelty the petitioner said that during the month of September 1983 on a date she could not remember the respondent hit her with his boots. She sustained injuries on her back and was bedridden for about six weeks. She said she also sustained a slipped disc. She said she attended hospital at Mzuzu but could not produce the hospital tickets because these were destroyed by fire when their matrimonial home was burned down in Mzuzu. Again, on a date she could not remember but during the month of June 1984 the respondent beat her with his clenched fists on her face and neck. She sustained a swollen face and a stiff neck as a result of the beating. She said she did not attend hospital but she took pain killing tablets at home.

It was further her evidence that on many occasions the respondent would leave her and their child without any food or sufficient money to live on. This, she said, was more so from the month of June 1984 to the month of October 1984 when the petitioner finally left the matrimonial home as she could not stand the respondent's behaviour any longer. This, she said, caused her and the son a lot of suffering and depression.

The petitioner claimed that the assaults occasioned on her and the unbearable rough treatment she underwent up to the day of her departure from the matrimonial home have physically wasted her and that she is now very unhealthy. Indeed I had the opportunity of seeing her giving evidence in the witness box. She is a pathetic sight. She looked very feeble and completely wasted and could hardly speak audibly. She tendered a medical report on her by Dr. A.D. Swaan of Thyolo District Hospital in which he said that she was admitted at that hospital from 31st October 1984 to 2nd November 1984. He also said that besides the malaria treatment she received during that period, it was necessary to treat her for psychical and her wasted condition which in the opinion of the doctor were caused by mental maltreatment.

Regarding the allegation of adultery, it was her contention that the respondent had since the celebration of the marriage committed adultery with the co-respondent. It was her evidence that on or about the 4th of September 1984 the respondent brought the co-respondent to the matrimonial home in Mzuzu and that the two lived and co-habited together as man and wife sharing a spare bedroom in the same house. She said she had no where to go and therefore stayed in the same house during this period of one month and that she finally left in October 1984 to live with friends. It was her evidence that the respondent and co-respondent were still living together as man and wife in Area 3 in the City of Lilongwe up to now.

She further said that on or about the 19th of April 1984 the respondent and the co-respondent purported to get married by registering a marriage at the Lilongwe District Council offices. A letter confirming this, Ex.P3, was tendered in her evidence. That letter was written by an official of the said Council. Her evidence is uncontroverted and I believe in toto. In spite of her weak and sickly condition she gave her evidence calmly and she convinced me to be a very truthful witness narrating the facts of the case as they were.

The law regarding what constitutes cruelty is well settled in this Court. To constitute cruelty there must be conduct of such a character as to have caused danger to life, limb or health, bodily or mental so as to give rise to a reasonable apprehension of such danger. Indeed as it has been said in preceeding numerous cases, it must be shown that the respondent has either inflicted bodily injury on the petitioner or so conducted himself as to render future co-habitation more or less dangerous to life, limb, mental or bodily health. It does not matter what the state of mind of the offending spouse was if the conduct complained of and its consequences are so bad that the complaining spouse must have a remedy. An intention to injure is not necessary for a finding of cruelty, nor need the conduct complained of have been aimed at the other spouse. See Gollins v. Gollins (1964) A.C. 644.

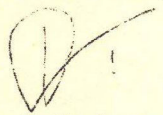
In the instant case I am satisfied, and I so find and hold, that during the month of September 1983 the respondent hit the petitioner with his boots on her back and that resulted in the petitioner suffering permanent backaches and a slipped disc. That some time during the month of June 1984 the respondent again did hit the petitioner on her neck and face with clenched fists and that she as a result of this attack sustained a stiff neck and a swollen face. I am also satisfied and I again so find and hold that the

respondent's conduct and ill-treatment on the petitioner has occasioned and resulted in her poor health. This is more so from the month of June, 1984 to the month of October 1984 when the petitioner finally fled the matrimonial home. I hold that these three incidents constituted acts of cruelty by the respondent towards the petitioner and that the petitioner has not condoned such cruelty.

Turning to the ground of adultery again the law regarding proof of adultery is well settled. It is not necessary to prove adultery by direct evidence, as it is usually done in secret. Association, coupled with opportunity and evidence of illicit affection or familiarities, creates an inference upon which the court can find adultery. If the alleged adulterers occupy the same bed or bedroom, the inference of adultery is drawn. In the instant case there is ample evidence that not only was there an association coupled with opportunity and evidence of illicit affection between the respondent and co-respondent but further more they lived as husband and wife in the matrimonial home and even purported to register a marriage. In my judgment there is more than ample evidence to prove that the respondent has committed adultery with co-respondent since the celebration of his marriage with the petitioner and I so find as a fact.

I am therefore satisfied that both allegations of cruelty and adultery have been proved and the petition must succeed. I am also satisfied that the petitioner has not condoned the cruelty or the adultery and that there has been no collusion between the parties in the presentation of this petition. I see no bar to granting the petitioner's prayer. I pronounce a decree nisi in her favour as prayed for and order that the marriage between the petitioner and the respondent which was celebrated on 19th January 1974 at the Registrar General's offices in Blantyre be dissolved. I order that the respondent pay the costs of this case. The issues of alimony, maintenance and custody will be heard in chambers.

PRONOUNCED in open court this 18th day of June, 1985 at Blantyre.


Rod Mbalame
JUDGE