

IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.339 OF 1985

BETWEEN:

PHILLIP KONDOWOLE (MALE) PETITIONER

- and -

LINDIWE EUNICE KONDOWOLE (FEMALE) RESPONDENT

- and -

E.A. SANKHULANI (MALE) IST CO-RESPONDENT

- and -

W.L. MACHAISA NGULUBE (MALE) 2ND CO-RESPONDENT

Coram: BANDA, J.

Kumange, Counsel for the Petitioner
Kalimbuka, Court Clerk
Gausi (Mrs), Court Reporter

J U D G M E N T

The petitioner, Phillip Kondowole Banda, prays for the dissolution of his marriage to the respondent, Lindiwe Eunice Kondowole. On 7th October, 1969, the petitioner was lawfully married to the respondent at the Resident Magistrate's Court in Hermanus District, Cape Province in the Republic of South Africa. After their marriage the petitioner and the respondent lived and cohabited at Divers places and finally settled at Nkhotakota township. The parties returned to Malawi in 1976. I am satisfied that both parties are domiciled in Malawi and the court has jurisdiction to hear this petition.

There are four children of the marriage namely Lusina, a girl born in 1970 and is now married; Menard, a boy born in 1971 and he is at school at Lake View Primary School doing standard six; Shadreck, a boy born in 1979 - he is in Class 1 at Nkhotakota and he is staying with the petitioner, and Linda, a girl born in 1982 and is also under the care of the petitioner.

Notice of these proceedings were served on the respondent and all co-respondents. No answers were filed in reply to the allegations made in the petition. This petition therefore is undefended. Accordingly, I direct myself to the dangers of collusion in such undefended cases. I am satisfied, however, that there was no evidence of collusion in bringing these proceedings.

The basis of this petition is adultery and cruelty. The petitioner stated that he was hearing rumours that the respondent was sleeping in hotels in Lilongwe but did not see her with anybody. He stated that the respondent was in the habit of sleeping out from the matrimonial home and that she was drinking excessively. Clearly the evidence of rumours to which the petitioner referred is inadmissible hearsay and I would disregard it in this case. The only evidence which the petitioner has adduced in proof of the allegation of adultery are two letters addressed to the respondent from men the petitioner alleges committed adultery with the respondent.

The first letter is written by a Mr.W.L. Machonisa Nguluwe, who would appear to be the second co-respondent. The letter refers to the fact that the writer of the letter had met the respondent at Lilongwe but in some parts of it it is couched in affectionate terms. There is no passage, in my judgment, to show that sexual intercourse had taken place. In the second letter which was also a letter addressed to the respondent but it is signed with an alias. The petitioner has told this court that that letter is from the first co-respondent who works with the National Library Service. That letter too has passages which are affectionate in content but there is no passage which would again suggest that any sexual intercourse took place. The petitioner alleges in paragraph 8(a) that the respondent "lived and cohabited and habitually committed adultery of excessive degree with the first co-respondent". That allegation would appear to be based on one sentence which is found in Exhibit 3. In that letter, the writer states "at the end of the game I was exhausted ..." that sentence, in my view, is ambiguous. It can mean a lot of things and the only inference which can be drawn from it cannot be that sexual intercourse had taken place.

In Exhibit 4 which is also another letter which the petitioner has stated was written by the first co-respondent. To that letter is attached a piece of paper on which there is the name of E.A. Sankhulani and in broad letters NATIONAL LIBRARY SERVICE and it gives the address of the Headquarters Library. I have carefully considered the contents of that letter and again I can find no passage which would suggest that sexual intercourse had taken place.

It is not necessary to prove adultery by direct evidence as it is an indulgence which is committed in privacy. It is rare that parties are found in the direct act of adultery. In nearly every case the fact of adultery is inferred from circumstances which lead to it by a fair inference as a necessary conclusion. The court must be satisfied that there must be something more than opportunity before it will affix guilt. There must be a combination of strong inclination with evidence of opportunity in order to infer strong prima facie evidence of adultery. Association.....


coupled with opportunity and with the evidence of illicit association, affection or familiarity create an inference upon which the court can find adultery. In my view, the evidence adduced by the petitioner lacks evidence of illicit association. There is no evidence that the respondent was found with either of the co-respondents in circumstances in which it can be inferred that adultery had been committed. In those circumstances and having regard to the onus of proof which is cast upon the petitioner to prove the allegations against the respondent and co-respondents, I am satisfied that the petitioner has not proved that the respondent committed adultery with either of the co-respondents.

On the cruelty allegation the petitioner has stated that the respondent was in the habit of drinking excessively and that she became violent attacking people indiscriminately. He stated that on a number of occasions he was himself a subject of such attacks which he avoided by running away. He further stated that as a result of the respondent's violent behaviour she was on two occasions taken to court and that on one of these occasions she was sent to prison for 12 months and was only released after she had served 10 months.

Cruelty is conduct of such a character as to have caused danger to life, limb or health; bodily or mentally or as to give rise to a reasonable apprehension of such danger. Before a court can find the respondent guilty of legal cruelty it is necessary to show that the respondent has either inflicted bodily injury on the petitioner or has so conducted herself as to render future cohabitation more or less dangerous to life, limb, mental or bodily health. Although the petitioner gave evidence to the violent conduct of the respondent there was no evidence to show what effect, if any, such conduct had on the health of the petitioner. There was no evidence that the imprisonment of the respondent by her violent conduct had affected the health of the petitioner or that it had given rise to a reasonable apprehension of such danger. There is no evidence that the alleged violent conduct of the respondent affected the health of the petitioner bodily or mentally.

Indeed according to the petitioner the respondent and the petitioner at the material times were living separately about 3 miles from each other. I am therefore satisfied that here too the petitioner has failed to substantiate the allegation of cruelty against the respondent. Consequently, this petition must fail and it is dismissed.

PRONOUNCED in open Court this 30th day of December, 1986 at Blantyre.


R.A. Banda
JUDGE