

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 401 OF 1986

BETWEEN:

DAVID FREDRICK NKHWAZI..... PETITIONER

- and -

ESTHER SANDRA NKWAZI RESPONDENT

- and -

J. K. SIYAYA (MALE) CO-RESPONDENT

Coram: MAKUTA, C.J.

Ng'ombe of Counsel for the petitioner
Respondent, absent, unrepresented
Co-Respondent, absent, unrepresented
Mkumbira, Official Interpreter
Gausi (Mrs), Court Reporter

J U D G M E N T

The petitioner prays for dissolution of his marriage with the respondent on the ground of adultery. The facts are that on the 7th of April, 1975, the parties married at the office of the Registrar of Marriages at Ndola in the Republic of Zambia. Thereafter, they lived and co-habited at various places, viz:- Ndola in Zambia, Harare in Zimbabwe and finally Blantyre in Malawi. The petitioner is a working partner in an insurance company, Reliance Insurance Agents. Both the petitioner and the respondent are Malawians. I am satisfied that both parties are domiciled in Malawi and this Court has jurisdiction to hear this petition. The petition is not defended.

There are two children of the marriage, namely: Towera Nkhwazi, female, born on 14th May, 1976 and David Nkhwazi (Junior), male, born on 30th May, 1978.

There were three witnesses including the petitioner. The first witness, Mrs. Marvis Dzimbiri, a niece to the petitioner, told the Court that in 1984 she was staying with her uncle at Nkolokosa in the City of Blantyre. At that time the petitioner and the respondent were living together. On more than one occasion, the respondent was

driven to the matrimonial home by the co-respondent in his car. The co-respondent on other occasions came to the matrimonial home to drop children. On another occasion, the witness saw the respondent in the co-respondent's car in Limbe. The car stopped and the respondent came out. She asked the witness not to report to her uncle.

Another witness, Mr. Alex Mangaka works for the African Businessmen Association in Limbe as an Accountant. He knows the parties in this case. He also knows the co-respondent. He told the Court that he had seen the respondent in the company of the co-respondent at Mpingwe Motel in Limbe on more than six occasions. At Mpingwe Motel in Limbe they were seen going into a room where they remained for sometime. Early in 1986 the witness also met the respondent and the co-respondent at Balaka Motel.

The petitioner told the Court that in 1984 they were staying at Machinjili in the City of Blantyre. He was not working then. The respondent used to collect children from school in the co-respondent's car without the petitioner's knowledge. When asked how the children came home, she said she had organised transport. One day the children told the petitioner that there was a man who collects them and the respondent had told them that the man was their uncle and that whenever they came out from the car they should say "thank you". The petitioner then started hearing rumours and he also received anonymous letters about the respondent's association with the co-respondent. One weekend she went to town and returned at 10 p.m. and when asked where she had been she replied that she was with friends. When the friends were asked they denied that they were with her that particular day. On 30th August, 1984, the petitioner saw the respondent at 9 p.m. dropping from the co-respondent's car BE 1291 near a bridge at Machinjili. When asked who that man was, the respondent stated that it was just someone who found her on the road and gave her a lift.

The petitioner started working on 1st September, 1984, and in October, 1984, they moved to Nkolokosa township. On 21st December, 1984 the respondent slept out at a place unknown. When asked again where she had been, she did not reply. During this time the respondent used to have a lot of money, far in excess of her salary and she used to buy expensive clothes. The explanation she gave was that she got a loan from her employers. Enquiries revealed that this was not true. In January, 1985, the petitioner had a company car and on occasions when he went to collect the respondent he could not find her.

When the first anonymous letter was received, her relatives were called. At this time she was unruly, insubordinate and aggressive. She admitted in the presence of her relatives that she was getting lifts from the co-respondent. She was advised by her relatives to stop it, but the reason she gave for the lifts was that she was working together with the co-respondent.

She then left the matrimonial home on 1st June, 1985, and returned in October, 1985. Subsequently, she confessed in the presence of her relatives that she had been committing adultery with the co-respondent. On 10th March, 1986, she packed up all her possessions and left. She has not returned to the matrimonial home again. She continues to be seen in the company of the co-respondent. It would appear she has a child, hardly three months old, born out of this illegal association.

What have been mentioned above are just a few examples of the incidents leading to the filing of this petition. The law as regards proof of adultery is well settled. It is not necessary to prove adultery by direct facts, as it is usually done in secret. Suffice it to say that the association, coupled with the opportunity as evidenced in this case, is enough to create an inference upon which the Court can find adultery.

I am, therefore, satisfied that the allegation of adultery has been proved and the petitioner must succeed. I am satisfied that the petitioner has not condoned the adultery and there has been no collusion between the parties in the presentation of this petition. I see no bar in granting the petitioner's prayer. I, therefore, pronounce a decree nisi in his favour that the marriage be dissolved.

I now turn to the question of damages. In principle damages should be awarded by way of compensation and are not exemplary or punitive. However, the mode in which the adulterer's fortune is employed may have direct bearing on the question of damages; if it is used to seduce the wife it may greatly accentuate the outrage to the husband's feelings and it can be a blow to his honour and family pride. The main grounds for damages may be the breaking up of the matrimonial home; the need of assistance for the care of the children deprived of their mother and employing a housekeeper to take her place; and the loss of joint income of her earnings if she is earning a salary: see Keyse vs. Keyse and Maxwell (1886) 11 P.D. 100.

In the present case, there is no doubt at all that the co-respondent's actions have led to the breaking-up of the marriage. It seems he had, and still has, complete disregard of the petitioner's feelings by openly going out with her. As for the petitioner, it must have been a period of torture and mental anguish; he gave me the impression that he has borne it with fortitude. I award damages against the co-respondent in the sum of K1,000.00. The damages will be paid into Court within three months of this order. I also give custody of the children to the petitioner but the respondent shall have reasonable access to them.

I now turn to the question of costs. I am of the view that the petitioner is entitled to costs. I order that the respondent and the co-respondent should pay the costs of this case.

PRONOUNCED in open Court this 12th day of December, 1986, at Blantyre.


F. L. Makuta
CHIEF JUSTICE