

IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 73 OF 1985

PRINCIPAL REGISTRY

BETWEEN:

FLORENCE KAPITO

PETITIONER

- and -

JOHN KAPITO

RESPONDENT

- and -

MISS PALIANI

CO-RESPONDENT

Coram: UNYOLO, J.

Nyirenda, Counsel for the Petitioner
Respondent, unrepresented
Manda, Court Reporter
Chalunda, Official Interpreter

J U D G M E N T

The petitioner, Florence Kapito, prays for the dissolution of her marriage with the respondent, John Kapito, on the ground of the respondent's adultery with the co-respondent, Redeta Paliani.

Pausing there, it is to be observed that although the respondent did file an answer in these proceedings the matters raised in the said answer are limited to the question of maintenance of and access to the children of the marriage and the issue of costs. In other words, the petition is, strictly speaking, not defended.

The parties were first married under customary law and subsequently were married under the provisions of the Marriage Act on the 7th February, 1981, at the Office of the Registrar General in Blantyre. Thereafter they lived and cohabited at Ndirande, in the City of Blantyre. There are three children of the marriage namely Chikondi Kapito, a girl born on the 21st October, 1978, Jonathan Kapito, a boy born on the 6th February, 1980, and Dorothy Kapito, a girl born on the 30th July, 1984.

I am satisfied on the evidence that the parties are domiciled in Malaŵi.

I have duly warned myself that even in an undefended petition the onus still lies upon the petitioner to prove his/her case against the respondent and I would cite Nyangulu v. Nyangulu, Civil Cause No. 108 of 1982 (unreported) as regards the standard of proof in a divorce case, as here. I have likewise warned myself of the danger of collusion in undefended petitions.

I now turn to the evidence. The story told by the petitioner as I will show presently is not one about the sanctity of marriage. She testified, as a background presentation of her marriage with the respondent, that right from the young years of the marriage each time she became pregnant the respondent sent her packing from the matrimonial home and told to return only after she had given birth. She said that she complied and went to stay with her mother and that the first two children of the marriage were born under those circumstances. Then she also became pregnant for the third child in 1983 when again she was told to go; she obliged. The petitioner told the court further that when she went to the matrimonial home one day the respondent disclosed to her that he had "married" another woman and that then and there the co-respondent was sent for from the bedroom and introduced to her. Finally, the petitioner testified that she went to the matrimonial home on a number of occasions thereafter and that she found the co-respondent at the house on all those occasions. Having therefore confirmed that the respondent was serious in the matter she finally went to the Department of Legal Aid and eventually launched the proceedings in this case.

The petitioner's mother also gave evidence. Briefly, she testified that the respondent confirmed in her presence that he had "married" the co-respondent and that he did not want the petitioner to come back to the matrimonial home.

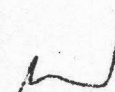
The first observation to be made is that the evidence of the two witnesses in this case went in unchallenged. Secondly, both the petitioner and her mother impressed me as truthful witnesses and I accept their evidence.

It has been said time and again and I say it for the umpteenth time that adultery may be inferred from the totality of the facts presented before the court and on the evidence before me in the case in hand, I cannot but infer that the respondent committed adultery with the co-respondent. I am therefore satisfied that the petitioner has proved her case against the respondent and the co-respondent. There is no bar, in my judgment, to granting the relief sought.

Accordingly, I pronounce a decree nisi of divorce in favour of the petitioner.

The respondent has indicated that he would like to be heard on the question of costs. I therefore adjourn that question and the question of custody and maintenance of the children of the marriage to chambers.

PRONOUNCED in open court this 25th day of April, 1986,
at Blantyre.


L.E. Unyolo
JUDGE