

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.17 OF 1988



BETWEEN:

ASED M. KAMANGA PETITIONER

AND

ESLINI KAMANGA RESPONDENT

CORAM: MKANDAWIRE, J.

Kadwa, Counsel for the Petitioner
Respondent not present, unrepresented
Kadyakale, Official Interpreter
Phiri, Court Reporter

JUDGMENT

The petitioner, Ased Mikaya Kamanga, prays for the dissolution of his marriage to the respondent, Eslini Kamanga, on the grounds of alleged cruelty. The petition is undefended and that being so it is the duty of the court to satisfy itself that there is no collusion. After reviewing the evidence before me I am satisfied that there is no collusion in instituting these proceedings.

The parties were lawfully married at the office of the Registrar of Marriages in Lilongwe on 22nd July, 1983. Thereafter they cohabited in Area 47, Lilongwe and then Nyambadwe, Blantyre. The petitioner comes from Kasichi Village, T.A. Kapelula, Kasungu District while the respondent comes from Chiradzulu District. Both parties are therefore domiciled in Malawi and this Court has jurisdiction to hear this petition. There are three children of the marriage; Chifundo Kamanga born in March, 1980; Malita Kamanga born in June, 1982 and Jacob Kamanga born in February, 1984.

The petitioner told this Court that since the celebration of the marriage, the respondent has turned to heavy drinking of beers including kachasu. Not only does she drink heavily, but once drunk she is very quarrelsome and fights with the petitioner. On one occasion in 1986, the parties were travelling in a car from Zingwangwa. It was the petitioner who was driving. As usual a heated argument ensued and the respondent got hold of the steering wheel and violently swerved the car. It was the petitioner's evidence that it was only by golden chance that he controlled the car and avoided colliding into a tree by a hair's-breadth. Worse still the respondent is in the habit of damaging household property once drunk. The petitioner tendered in evidence a pair of long trousers which the respondent tore.



The petitioner testified further that he referred such incidents to the Police and at times the respondent would be locked up. On another occasion the respondent almost took her own life. This was some time in 1984. What happened is this. As usual, on a certain night the respondent came home drunk. There was a fight in which the petitioner was injured. In the morning he decided to refer the matter to Police. By some chance he returned to the house to collect some money he had forgotten on a table only to find the respondent hanging on a rope. The petitioner quickly cut the rope, thereby saving the respondent's life and the matter was referred to Police in Lilongwe. It was the petitioner's testimony that because of his wife's behaviour, he did not have the peace of mind. He feared for his life and this was adversely affecting his health.

The petitioner cited two recent incidents. On 9th July, 1988 the respondent came home at about 11.00 p.m. while very drunk. The result was a fight in which the respondent struck the petitioner with a bottle sustaining a big cut on his left arm. He showed the court a big scar on his left arm. This matter was reported to Police. Again in August, 1988 the respondent came home at night drunk and a fight ensued in which the petitioner sustained a sprained thumb. This incident was again reported to Police. Since the petitioner was living in perpetual fears he decided to sleep in a separate bedroom and he used to lock himself up in case the respondent should come to attach him.

Turning to house chores, the petitioner testified that the respondent did nothing as she spent all her time on beers. Sometimes she would be away from the matrimonial home for weeks or even a month on drinking sprees. He then employed a grown-up nanny to look after the children and a boy to take them to school. The petitioner concluded his evidence by saying that he never condoned the cruelty. As a matter of fact he did appeal on several occasions to M.C.P. officials to talk to the wife but she said she could not stop drinking.

Such was the evidence before this court. As I said this petition is undefended. It is possible that the petitioner has exaggerated in certain aspects of his evidence. I am however satisfied that what he has told the court is substantially true. The question now is: has legal cruelty been established? In the case of Agatha Kamzingeni vs. Micah Kamzingeni Civil Cause No.362 of 1977 (unreported) Banda J. was considering the question of cruelty and he said:

"Cruelty as a ground of divorce is defined as conduct of such a character as causes danger to life, limb or health or such as gives rise to reasonable apprehension of such danger. While courts have expressed their reluctance to grant a decree of divorce on account of one isolated act they will, however, grant it where the act is of sufficient gravity."

In that case there was one isolated incident in which the respondent gave the petitioner a thorough beating resulting in severe injuries. Although there was just one isolated act, the learned Judge found that it was of such a grave nature as to amount to legal cruelty. In the instant case, the petitioner was not as badly and severely injured as in the Kamzingeni case, but as can be noted from the evidence, there were several incidents. As a matter of fact, quarreling, fighting and injuries to the petitioner were the order of the day. The wife was the cause of all this because of her heavy drinking of beers and coming home late in the night. The petitioner **is** living in fears. As a matter of fact he **has** been reduced into a fugitive in his own home for he used to **locks** himself up in his bedroom for fear that the respondent might attach him when she returned from her drinking errands.

Before concluding this judgment perhaps I should refer to the English case of Baker vs. Baker 1955 1 WLR 1011 which is very much on point. In that case the husband was a habitual hard drinker. He could not stay away from the bottle. As a result of the husband's persistent drinking, the wife suffered serious mental torment which affected her health. The husband had been talked to on several occasions to make amends, but he only made promises which he never honoured. In granting the decree nisi Davies J. said this among other things:

"In my judgement, persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse certainly if it is known to be injuring the other spouse's health, may well of itself amount to cruelty. In any case, such drunkenness, if it is combined with other acts of ill-treatment, may obviously be of the greatest importance..... On the whole of the evidence in this case, I am abundantly satisfied that this charge of cruelty has been made out. The husband caused his wife great mental distress by his persistent drinking, despite warnings from both her and from others that she would not be able to stand to it."

In that case although the husband was a hard drinker, he was not of a violent nature except on two occasions. In the instant case, however, the wife was not only drinking heavily, but she was also violent and destructive. The petitioner and M.C.P. officials talked to her on several occasions to change her conduct, but she would not. In consequence of her conduct, the husband **has** no peace of mind, suffered mental distress and on certain occasions he suffered bodily harm. Putting all the evidence together I am satisfied that the respondent's conduct **amounts** to legal cruelty and I therefore grant the petitioner a decree nisi as I see no bar.

Normally the question of custody of children is dealt with in Chambers under a separate application. In the circumstances of this case, however, I do not see why the question of custody

should pend. When it comes to the custody of children, their welfare and proper upbringing are matters of paramount importance. Having regard to the facts of this case, I think that the children would be properly looked after if they continue staying with the petitioner. I therefore grant custody of the three children of the marriage to the petitioner. The respondent is to have reasonable access.

The respondent is to pay the costs of these proceedings.

PRONOUNCED in open Court this 23rd day of April, 1990 at Blantyre.


M. S. Mankwira
JUDGE