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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NO. 8 OF 2001

BETWEEN:

JO-ANNE MARIE DURANTE.....PETITIONER

-and-

DAVID ARCHANGELO DURANTE.....RESPONDENT

-and-

MONICA BESSONE.....CO-RESPONDENT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Mr Makiyi, of Counsel for the Petitioner

Respondent and Co-Respondent, Absent and unrepresented

Mrs Katunga, Official Interpreter/Recording Officer

Date of hearing : 5th December 2001

Date of judgment : 5th December 2001

Kapanda, J

JUDGMENT

Introduction

On 5th December 2001 this court ordered that a *decree nisi* should issue in respect of the marriage between the Petitioner and the Respondent. This court also granted custody of the only child of the marriage to the Petitioner. It was the further order of this court that the Respondent shall

provide maintenance, to the said child, in the sum of K10,000.00 but that this figure shall be varied depending on the cost of living. Moreover, it was ordered that the costs of, and occasioned by, the Petition are to be borne by the Respondent. The court further ordered that there will be no limit as to the costs that were recoverable.

I reserved my written judgment on this Petition. I shall now give my written reasons for the judgment which was delivered on the said 5th day of December 2001.

The Petitioner, Jo-Anne Marie Durante, wants her marriage dissolved on the ground of Respondent's adultery with the Co-Respondent one Monica Bessone. It is also prayed by the Petitioner that she should have custody of the child of the marriage. Further, the Petitioner prays that she should be awarded the costs of this Petition.

Both the Respondent and Co-Respondent acknowledged service of the Petition. In their respective memorandum of appearance the two indicated that they did not intend to defend the Petition. The Respondent, however, pointed out in the said memorandum of appearance that he wanted to be heard on the question of custody of the child and the costs of the Petition. To this end he filed an affidavit. It will suffice to put it here that as regards the question of custody of the child of the marriage it was deponed by the Respondent that he does not wish to have custody of the said child Jade Mia Durante. The Respondent further deponed that there was an agreement between him and the Petitioner to the effect that the Respondent would be paying maintenance for the child at the rate of K10,000.00 per month and that the rate would be renewable if there is a rise in the cost of living.

In spite of his intention to be heard on the issue of custody and maintenance of the child the Respondent did not appear at the hearing of this Petition. Further, it is observed that both the Respondent and the Co-Respondent did not file answers to the Petition in these divorce proceedings before this court.

The Petition

As mentioned earlier, the Petitioner wants her marriage with the Respondent dissolved on the grounds of the Respondent's adultery. In this regard she filed a Petition which has been verified by an affidavit sworn by the Petitioner. The pertinent parts of the Petition are in the following terms:-

- "1. That on the 21st day of February 1998 the Petitioner (then Nee Bagshaw) lawfully married Davide Archangelo Durante, a bachelor at Limbe Cathedral, Limbe in the City of Blantyre.**
- 2. That since the celebration of the marriage the parties have lived and cohabited at Area 47 in the City of Lilongwe in the Republic of Malawi.**
- 3. That there is one (1) sibling of the marriage: Jade Mia Durante, a girl born on 16th February 2001; and who is now staying with the Petitioner.**
- 4. That the Petitioner is employed by Plessely (Malawi) Limited whereas the Respondent is employed by Southern Fried Chicken Limited.**
- 5. That both the Petitioner and the Respondent are domiciled in Malawi.**
- 6. That there have been no previous proceedings in the High Court of Malawi or any subordinate court in Malawi with reference to the marriage by or on behalf of the Petitioner or the Respondent.**
- 7. That since June 2000 or thereabouts, the Respondent has committed adultery with the Co-Respondent.**
- 8. That the Respondent has committed, and continues to commit adultery with the Co-Respondent, one Monica Bessone.**

Particulars of Adultery

- 8.1. That in June 2000 or thereabouts the Respondent brought the Co-Respondent into the matrimonial where she has been staying ever since; and cohabits with the Respondent.**
- 9. That the Petitioner has not in any way been accessory to or connived at or condoned the adultery alleged herein.**
- 10. That this Petition is not presented or prosecuted in collision with the Respondent or the said Monica Bessone.**

Wherefore the Petitioner humbly prays this honourable court will decree that:-

- (a) her said marriage to the Respondent be dissolved;**
- (b) the Respondent do have custody of the child of the marriage;**
- (c) costs.”**

In the light of the fact that the Respondent, and the Co-Respondent, did not file any answers to this Petition these proceedings are for all intents and purposes undefended. They will be treated thus notwithstanding the affidavit of the Respondent. I will comment upon this later in this Ruling. So much with the Petition. It is now necessary that the evidence that was adduced should be narrated and reviewed. It is only the Petitioner who testified in this matter. She was not even cross-examined.

Evidence

The Petitioner told the court that she came to Malawi ten (10) years ago and that her husband was born within the jurisdiction. It was her further testimony that she married the Respondent in February 1998. The marriage certificate that she tendered in evidence shows that the Respondent and the Petitioner got married on 21st February 1998 at the Roman Catholic Cathedral, Limbe, in Blantyre district of the Republic of Malawi. She continued to testify that after their marriage they have been residing in Lilongwe.

It was the further testimony of the Petitioner that there is a child of the marriage who was born on 16th February 2001. A Birth Certificate in respect of the said child was tendered in evidence. The Petitioner further testified that the said child of the marriage is staying with her.

The Petitioner has told this court that she wants her marriage dissolved on the ground of the Respondent's adultery. She testified that, on a date since forgotten, her husband told her that the marriage was over and she was asked to move out of the house they were residing. It was the further testimony of the Petitioner that before this incident she started suspecting that her husband was having an affair with a girl friend of the Respondent's cousin. The Petitioner testified that the Respondent used to go into the

bathroom together with the Co-Respondent. It is also said that the Respondent was fond of touching the Co-Respondent's breasts in the presence of the Petitioner. The Petitioner continued to testify that two weeks after she moved out the Co-Respondent moved into the house she was staying with her husband where the Respondent and the Co-Respondent are living as husband and wife. As a matter of fact, the Petitioner further told the court that at the said house there is now a sign post that reads "David and Monica Durante" representing the names of the Respondent and the Co-Respondent.

The Petitioner continued to testify that she does not want any money from the Respondent but that she wants full custody of the said child of the marriage. When she was shown the Respondent's affidavit she told the court that she agrees with the Respondent on the question of custody and the payment of K10,000.00 towards the maintenance expenses of the said child. As mentioned earlier, the Petitioner was not cross-examined. As a result of this her testimony is uncontroverted. It will therefore have to be treated as correct in all respects.

Issue For Determination

In my considered opinion there is only one issue for determination in these divorce proceedings. The question that arises, and falls, to be adjudicated upon is whether the marriage between the Petitioner and the Respondent should be dissolved on the ground of adultery. Put in another way, this court is to decide on whether there is proof that the Respondent has committed a matrimonial offence of adultery.

Law and Consideration of the Issue

Collision

As indicated earlier, the Respondent did not file an answer to the Petition for divorce. The Petition is therefore undefended. Be that as it may, the Petitioner still bears the burden of proving adultery because the position at law is that there is always a presumption of innocence on the part of the person who is being accused of committing adultery.

An instructive case authority on this is **Redpath -vs- Redpath and Milligan** [1950]1 All ER 600 [Court of Appeal] which was cited, with approval, by this court in the case of **Surtee -vs- Surtee** Matrimonial Cause No. 4 of 2001 [unreported]. Further, in the circumstances of this case, where the Petition is not defended, it is trite law that the court must warn itself about the danger of collusion. In the matter before me there is no evidence which suggests that there was such collusion in the presentation or prosecution of this Petition.

Domicile and Jurisdiction

It is a settled principle of law that a court will only assume jurisdiction in matrimonial proceedings if it is satisfied that the parties are domiciled within the jurisdiction. In the light of the evidence on record I am convinced that both the Petitioner and the Respondent are domiciled in Malawi. Thus I have jurisdiction to entertain these divorce proceedings.

Proof of Adultery

The position at law, with regard to proof of any matrimonial offence, is that the standard of proof is the one obtaining in all civil matters i.e. it is proof on a preponderance of probabilities - **Maclune -vs- Maclune** 9 MLR 409. As stated earlier, since the Petitioner is the one who has made the allegation of adultery against the Respondent, the Petitioner bears the responsibility of proving the allegation of adultery she has made against the Respondent. At the same time I wish to observe that adultery is mostly committed in private thus it is not always proved by direct evidence. In point of fact, it is very rare that a married person will be found committing this matrimonial offence in *flagrante delicto*. In this regard the fact that there is no direct proof of adultery on the part of the Respondent that in itself is not fatal to the Petitioner's case against the Respondent.

Further, it is trite law, and I need not cite an authority for it, that where adultery is a ground upon which a party is seeking divorce it is incumbent upon a court to enquire whether the Petitioner has not in any manner been accessory to, or connived at, or indeed condoned the Respondent's adultery with the Co-Respondent. The record will show that the Petitioner confronted the Respondent the moment she realised and/or suspected that the Respondent had shown undue familiarity with the Co-Respondent. It is

further in evidence that the Respondent was asked again about the relationship that was there between the Respondent and the Co-Respondent when the Petitioner observed that the Co-Respondent was frequenting the offices of the Co-Respondent. All this, in my considered view, shows that the Petitioner did not connive or condone the Respondent's adultery with the Co-Respondent. I am also satisfied, on the evidence on record, that the Petitioner was not an accessory to the Respondent's adultery with the Co-Respondent. Further, it is the judgment of this court that there is nothing on record to suggest that this Petition has been presented or prosecuted by the Petitioner in collusion with the Respondent.

Further, it is my finding and conclusion that the Petitioner has proved that the Respondent has committed adultery with Monica Bessone (the Co-Respondent). This court has come to this conclusion because where a married man and a woman are living together, like the Respondent has been doing with the Co-Respondent, it would be fair and reasonable to infer, in the absence of direct evidence, that the Respondent has committed adultery. After all there is no evidence to suggest that the Respondent's cousin is at the house. Moreover, it is to be observed that there is undisputed evidence that the two are not only staying in one house but have gone a step further in advertising that they are a husband and wife by putting a sign-post at the gate to the house they are residing showing that the occupants of the house are Davide and Monica Durante and not Davide Durante and Monica Bessone. This is clear testimony of the fact that the two are living in the house as husband and wife. Indeed, the fact that the two are staying under one roof means that the Respondent has had a good opportunity to commit adultery with the Co-Respondent. This time around it is not only a question of touching the breasts of the Co-Respondent. It is reasonable to infer that the Respondent is doing something more.

Furthermore, the failure by the Respondent to defend this Petition is enough corroboration of the evidence of the Petitioner that the Respondent has committed adultery with the Co-Respondent. An illuminating case authority on this observation is that of **Njikhoh -vs- Njikhoh** Matrimonial Cause No. 828 of 1996 [High Court] [unreported].

It was for these reasons given above that this court found that the Respondent was guilty of the offence of adultery. This court found no reason why it could not grant the Petitioner the relief she was seeking of the dissolution of her marriage on the ground of the Respondent's adultery with the Co-Respondent. Following from these observations the court ordered that a *decree nisi* for the dissolution of this marriage was to be granted. The Petitioner was also awarded costs of, and occasioned by, these divorce proceedings. I refused to put a limit as to the costs that were recoverable for there was no good reason to order so. Costs follow the event and a court is not supposed to allow a successful party to fail to recover fully the costs incurred by reason of coming to court and winning his/her case.

In view of the fact that there was an agreement between the parties herein, as regards the question of custody and the payment of maintenance expenses of the child by the Respondent, this court could do no better but endorse and confirm the arrangement that was entered into between the parties. There were no reason why this court could order otherwise.

Pronounced in open Court this 5th day of December 2001 at Principal Registry, Blantyre.


F.E. Kapanda
JUDGE