



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE NUMBER 12 OF 2004**

BETWEEN:

LIMBANI MPHANDEPLAINTIFF

- AND -

RENNIE MPHANDEDEFENDANT

CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA
The Petitioner – Absent
Mr Mulemba, of Counsel, for the respondent
Mrs M. Mthunzi – Official Court Interpreter

J U D G E M E N T

Manyungwa, J

INTRODUCTION

This is a petition for the dissolution of the marriage between the petitioner and the respondent on the ground of cruelty. The respondent cross-petitioned on the grounds of cruelty and adultery. The petitioner in these proceedings is Limbani Mphande and he prays to have his marriage to Rennie Mphande, the respondent herein, dissolved on the ground of cruelty. The respondent was represented at the hearing by Mr Mulemba while the petitioner who the record shows was being represented by Mr Trouble

Kalua, neither appeared nor forwarded any reason as to why he could not appear, so I ordered the matter to proceed to trial after being satisfied that there was due service.

The petitioner and the respondent were lawfully married under the Marriage Act,¹ at the office of the District Commissioner in Zomba in the Republic of Malawi on 22nd December, 1997 under Certificate number 432 and after celebration of the said marriage the couple lived and cohabited in the cities of Lilongwe and Blantyre. The petitioner is a motor vehicle mechanic who at the time of the hearing was residing at Chimwankhunda in the City of Blantyre while the respondent was residing at Nkolokosa in the same city. The respondent on 28th June 2004 petitioned this court for judicial separation with the petitioner and on 3rd day of June, 2005, the respondent was granted custody of the only issue of the marriage namely Jessie Mphande by my learned brother, Justice Maclean Kamwambe. On this score I am satisfied that there are no proceedings continuing in any country outside Malawi which are in respect of the marriage or are capable of affecting its validity or substance. Further, being an undefended matter I must satisfy myself that there is no collusion between the parties. I must say that I am satisfied on the evidence on record that there is no such collusion between the parties. This is important bearing in mind, and fearing that the danger of collusion is greater in uncontested cases than contested ones. Both the petitioner and the respondent are Malawians.

The petitioner grounds his petition on grounds of cruelty and stated that since the celebration of the marriage, the respondent has treated the

¹ The Marriage Act, Chapter 25:01 of the Laws of Malawi

petitioner with cruelty. The petitioner alleged in his petition that the respondent behaved rudely and violently towards the petitioner as evidenced by an incident that occurred in or about November 2002 where the respondent charged straight at the petitioner and grabbed him by his pair of shorts and pulled them down exposing the petitioner naked in public. Since May 2002 the respondent had continually alleged that the petitioner is HIV positive and would infect her thereby causing great stress, anguish and moral suffering to the petitioner. The petitioner further alleged that the respondent has always forcefully demanded that the petitioner goes for an HIV test if he wished to continue their conjugal relationship; thereby forcing the petitioner to use condoms so as not to infect her with HIV. The petitioner further stated that at one time the respondent reported to Soche Police Station that the petitioner had stolen her child with a view that the respondent gets arrested and detained. Further the petitioner averred that the respondent had continually deserted and deprived the petitioner of his conjugal rights. The petitioner further stated that in or about April, 1999 the respondent deserted the matrimonial home in Lilongwe for 2 months and went to stay with her brother in Mangochi for a period of over two months without any apparent reason to the petitioner thereby depriving him of a wife and his conjugal rights. Further, in February, 2003, the petitioner so alleged that the respondent left the matrimonial home in Zingwangwa Township and has since never returned to cohabit with the petitioner thus being guilty of constructive desertion, and that at the time of her leaving the respondent took all the matrimonial property except a television set, a Hi – Fi, a refrigerator, a deep freezer, 2 old and tattered blankets, a set of old bed sheets which she had also indicated that she would come later to collect and thereby deprived the petitioner the use and enjoyment of such property

which has until this day not been returned to the matrimonial home. The petitioner also alleged that the respondent had also displayed threatening behaviour, in that the respondent had been telling the petitioner's and respondent's friends that she will do away with the petitioner in any possible manner and fit for her so that she has custody of the child hence her reporting of the petitioner to Soche Police and raising fears on the petitioner. The petitioner therefore prayed in the petition that he be divorced from the respondent on the grounds of cruelty, and he further prayed that he be granted custody of Jessie Mphande. I must however mention that the issue of custody is now settled, since my brother judge, Kamwambe, J already granted custody of the said child to the respondent. I must also state that neither the petitioner nor his legal practitioner appeared at the hearing to prosecute the petition.

As I mentioned earlier on, the respondent cross – petitioned, and in her cross – petition, the respondent's petition showed that the couple was indeed lawfully married on 22nd December, 1997 at the District Commissioner office in Zomba, and that after celebration of the marriage the respondent and the petitioner resided in both Blantyre and Lilongwe aforesaid. The said cross – petition further showed that the respondent is a dental therapist who now resides at Nkolokosa while the petitioner is a motor vehicle mechanic and resides at Chimwankhunda in Blantyre. On 28th June 2004, the respondent petitioned this court for a decree of judicial separation from the petitioner which was subsequently withdrawn. The respondent alleged in her cross – petition that the petitioner had always treated her with cruelty and stated that throughout the marriage the petitioner had treated the respondent with lack of affection or consideration and had

shown little interest in the respondent or the child, and had refused to assist her in the running of the house. Further, the respondent stated that throughout the marriage the petitioner had spent an undue proportion of his earnings on other things and frequently failed to pay for household bills or to provide adequate housekeeping money for the respondent. Further, the respondent states that throughout the marriage the petitioner frequently displayed a violent temper in his treatment of the respondent and abused, threatened and assaulted the respondent. It was the respondent's testimony that in or about 2000 the petitioner assaulted, insulted and threw the respondent out of the matrimonial home in Chilobwe in the City of Blantyre together with her belongings in the night because the respondent had taken some of the petitioner's money to purchase food items for the house. On many occasions in or about 2001 the petitioner returned to the matrimonial home at night in a drunken condition and severely assaulted the respondent, charging that the respondent was useless and that he had obtained sexual satisfaction from other women. The respondent further stated that sometime in or about February 2003 at Zingwangwa in the City of Blantyre the petitioner locked the respondent out of the matrimonial home for more than one week, and also that in November, 2003 the petitioner locked the respondent outside the matrimonial home at night causing the respondent to sleep on the veranda. The petitioner therefore had behaved in such a way that the respondent can not reasonably be expected to live with the petitioner.

In the respondent's own statement which she adopted, during the hearing the respondent told to the court that on 22nd December, 1997 she got married to the petitioner at the offices of the District Commissioner's Zomba, Malawi.

The respondent stated that problems in their marriage began when they started living together in Lilongwe after their daughter was born. The witness explained that the incidents are not in sequence as she could not take note of their occurrences. She further explained that there was a time in Lilongwe at Lumbadzi when the petitioner had an affair with a certain girl. She said she did not notice anything at first as the girl was coming to their house until one time when she heard people discussing it. The respondent said she went home and after sometime she asked the petitioner only to be told that the girl was merely a workmate and no more, and the said girl then stopped coming to the couple's house. The respondent further stated that at one point the petitioner had gone to Blantyre and that when he came back, the respondent was sleeping, and when she woke up she found the petitioner in the housemaid's bedroom fondling her breasts. When the respondent asked the petitioner as to what it was that he was doing, he just left for their bedroom and said he was sorry. The respondent said she phoned the petitioner's parents and later she went to tell them of the incident, and they said they would talk to him.

The respondent stated that the couple later moved from Lilongwe to Blantyre and stayed at Chilobwe where quarrels and misunderstanding fast because the order of the day. The respondent stated that at one time she raised a complaint with the petitioners parents only to be told by her mother in – law who is now deceased that a man is like a dog and should be allowed to move any how so long as he eventually comes back to the house. The respondent further stated that every time she asked the petitioner for money for household needs the answer was always that he did not have any and that the petitioner could not even buy clothes for the child as he said that

was the respondent's responsibility. The petitioner further said that one time when the petitioner discovered that the respondent had taken money from his pockets, the petitioner came home late and abused the respondent in all sorts of dirty words and then chased her out of the matrimonial house, beat her up and threw her things out of the said house. The respondent said she slept outside as the petitioner said that he was fed up with her since she was a thief and he said that she had to go to her home village. The respondent told him that she had no problems going to her home village but that she needed the marriage advocates before she could leave, as she was not picked from the road. In the morning the respondents brother came to bid her farewell as he was going to Zomba and the petitioner told the said brother that it was good that he came, because the respondent was a thief and that he did not want her in the matrimonial home. The respondent said she seized the opportunity and asked her brother to inform her parents of the condition in which he found her with a swollen face and bloodshot eyes. The respondent then went to the petitioner's parents to inform them of the situation. The concerned people responded to her call, the issue was discussed and settled by the petitioner's father who told the respondent that he should learn to be responsible, to provide for his family. The respondent insisted on leaving but was told to stay. Then the petitioner told his cousin to put back into the house the respondent's belongings he had thrown away. The respondent said she later begun a small business of selling samoosa to generate some income and that she used the proceeds to buy some basics like beds etc. However the petitioner did not change much, and that life still continued the way it was until the couple moved to Naperi. Later the respondent went to Ghana for nine months, and when she came back she told the petitioner that she was not prepared for another child so they had to

use condoms and the petitioner agreed. He later changed his mind and advised the respondent to go for another family planning method as he could no longer use condoms. The petitioner said he saw no reason for using condoms when he was using the same with other women. Further, the respondent also heard from the houseboy that sometimes he could find used condoms as he cleaned the vehicle in the morning. The respondent stated that she thought she had enough and she began refusing conjugal relations with the petitioner unless they both went for HIV tests. Later the couple moved to Zingwangwa and things did not improve. The petitioner told the respondent that if she continued refusing him conjugal relations he would go out and sleep with other beautiful women.

One day the petitioner came back from his usual outings, at night, and he knocked when the respondent tried to open up she informed him that the door had jammed due to the hard knock. She asked him to try to open from his side, the petitioner refused and he then hit the door so that it broke. When he entered the bedroom he began assaulting the respondent saying he was coming from other beautiful ladies as the respondent was useless. The respondent then began hitting back with anything that she came across. The petitioner left at around 12:00 midnight and came back around 03:00 hours, with the respondent's father whom the petitioner had gone to pick up from Zomba. The petitioner's parents came later in the morning and the petitioner the respondent's father to take the respondent out of the house because the respondent was rude and disrespectful of the petitioner. The elders then counselled the couple to be responsible, however the respondent did not tell them the main problem as she considered it to be a problem between the two. The respondent explained that there was a day when there was a show

at Kabila club, and the petitioner asked to take the respondent out, the respondent told the petitioner that she would go but not with the petitioner as she did not want to be taken for a ride since it had been a taboo for the petitioner to take her out.

The respondent further explained that one night during sexual intercourse she realised that he had removed the condom, that he was putting on, upon which she pushed him. Another occasion the respondent realised that the petitioner had cut the tip of the condom, and when the respondent realised this a fight broke out between the two and the petitioner forced the respondent to suck his penis by forcibly opening her mouth upon which she refused, then the petitioner forced her to sleep on the floor, after he had locked her in the bedroom and took the keys. The following morning at around 10:00 hours the petitioner told the respondent that if she really wanted to go out then she only had to go with the clothes she was putting on which she obliged and locked the bedroom again. Later the petitioner left the house while the bedroom was locked. When he came back in the evening, he locked himself in the bedroom. The respondent said that she hoped that since the following day was a Monday, the petitioner would open up, so that she could access her office keys and a pass book for the bank, but the petitioner refused. So the respondent borrowed money from her cousin who was staying with the couple and went to work in the same clothes that she was putting on over the week – end. However, before she left the house for her office, she called her father in – law and explained everything to him. When the respondent came back in the evening, she found that the bedroom door was still locked. Later the petitioners’ father called to find out if the bedroom now open, it was not. On Tuesday morning, the petitioners’ father

again called but nothing happened. Then the respondent's mother in – law came to persuade the petitioner to open so that the respondent could take some clothes as they waited for the marriage advocates. She failed and consequently she went back. On the following Saturday the concerned people from both the petitioners and the respondent's sides including parents came and asked him to open the door but nothing happened. On the following Sunday, people from both the petitioners and the respondent's families came to the matrimonial house and after a lengthy discussion, the respondent resolved that she would move out of the matrimonial house, which she did in the week that followed together with her daughter, Jessie.

The respondent concluded by saying that the marriage has completely broken down such that she can never live happily with the petitioner again on account of his unbearable cruelty.

This was the totality of the evidence that the court heard during the trial and as I said, the petitioner did not show up to prosecute his petition nor did his legal practitioners. In the circumstances, the respondent's evidence went unchallenged, it was not rebutted, and that is the evidence that the court is going to consider.

THE LAW

The law is clear. What constitutes legal cruelty as a ground for divorce has been well articulated in a number of cases. Further Section 5 of the divorce Act¹ recognises cruelty as one of the grounds for divorce. In the case of

¹ Divorce Act, Chapter 25:02 of the Laws of Malawi

*Namalomna V Namalomba*¹ Unyolo J, as he then was, stated that a husband is guilty of cruelty towards his wife where he has inflicted bodily injury upon her or where he has conducted himself towards her so as to render continued cohabitation dangerous to her. In the case of *Chokani V Chokani*², Justice Mead stated thus:

“Our courts adopt the accepted legal definition of cruelty as being that set in *Russell V Russell*³ which is as follows at p 322

‘There must be danger to life, limb or health, bodily or mental or a reasonable apprehension to constitute legal cruelty.’”

And in *Gollins V Gollins*⁴ Lord Reid had this to say:

“No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouses and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life limb or health.”

Generally though, each alleged incident when analysed one by one may seem trivial, but where the incidents complained of are said to be inspired by the respondent’s intention to impose his will upon his wife without

¹ *Namalomba V Namalomba* 13 MLR 287

² *Chokani V Chokani* 8 MLR 219, 220

³ *Russel V Russel* (1895) P 315

⁴ *Gollins V Gollins* (2) (1963) 2AllER 969

consideration of her feelings or health, then cruelty is said to have been established. See *Jamieson V Jamieson*¹. Further the Malawi Supreme Court of Appeal cited with approval in *Malinki V Malinki*² the statement that was made by Lord Reid in the case of *Gollins V Gollins* (supra)³. It is very clear, in my view, that both the Supreme Court of Appeal and the High Court are agreed on the point that cruelty is established by conduct, actual or probable, threatening the other spouse's mental or bodily health. As was pointed out by Sir William Scot in the case of *Evance V Evance*⁴ that the court never looks at mere abuses and altercations normal in any marriage but a threat to health, mental or bodily and actual or perceived. This is what the learned Sir William Scot said at p 467;

“Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty, they are high moral offences in the marriage – state undoubtedly, not innocent surely in any state of life but still they are not cruelty against which the law can relieve.”

However, it was held in *Chokani V Chokani* (supra)⁵ that a single act of physical cruelty was sufficient to support the petitioner's case for divorce and the court granted a *decree nisi* pending the dissolution of the marriage. On the evidence available before me, I do find that the respondent's evidence established cruelty by the petitioner towards the respondent. The

¹ *Jamieson V Jamieson* [1952] AC 525 at 535

² *Malinki V Malinki* 8 MLR 14

³ *Gollins V Gollins* (supra)

⁴ *Evance V Evance* 1 Hag. Con 38, 161 ER 467

⁵ *Chokani V Chokani* (supra)

petitioners physical abuse of the respondent coupled with his total neglect of the marital obligations and threatening and abusive behaviour amounted in my considered view, to matrimonial cruelty. I therefore grant the respondents cross – petition for a *decree nisi*.

As regards the issue of custody, the position of the court has always been that unless in exceptional circumstances, custody of young children is granted to the mother. When a question relating to the custody of a child arises, the primary consideration is the welfare happiness and interest of the child, and in considering this the court must consider all the practical aspects or circumstances of the cases. In the case of *Chilingulo V Chilungulo and Another*¹ while a petition for divorce was pending, the wife brought an application before this court for custody of the four minor children pending suit. The children ranged between 13 and 4 years in age and they ranged approximately nine years and infancy when the respondent left the matrimonial home. Within two years after departing to another area, where the respondent initially took up residence with another lady, the co – respondent, the children followed him there. Five months later, the petitioner came to stay with the respondent but she was asked to leave within a month thereafter. The children continued to stay with the father. Some time later however they returned to the petitioner where they remained until Christmas season of 1998 when they once more went to be with the respondent after which he apparently refused to let them go once more. In the papers before the court the petitioner alleged that the respondent had lured the children away because he had a motor car, had acquired a video recorder and she alleged, he gave them money to dissuade them from joining

¹ *Chilungulo V Chilungulo and Another* [1990] 13MLR 110

her. Although the petitioner was unemployed, she sold firewood, stitched dresses and sold crochet work. She earned approximately MK300.00 a month and she did not deny that the children were also sent to the market to sell firewood in order to augment her income from this source. The respondent was a businessman, and from time to time this necessitated that he was called away from home in Blantyre to South Africa and Mangochi. The respondent stated that his business netted MK25, 000.00 personal profits in the preceding six months. He denied ever attempting to lure the children to him, stating they came of their own accord. It was not disputed that he was a caring and good father. The court held that the paramount consideration is the children's interest, welfare and happiness. No other consideration should be entertained above these and neither the interest of the parties to the dispute. In delivering his judgement, Justice Banda, as he then was, had this to say at page 113.

“I direct myself that in any application for custody of the children the paramount consideration that I must bear in mind in exercising my discretion is the welfare and happiness of the children. I must not take into consideration whether the claim of the father or that of the mother is superior. It is only the welfare, interest and happiness of the children which I must consider. And the issue of the guilty party does not arise and there can be no question of the guilty party in the present application because the substantive issue of the dissolution of the marriage is yet to be resolved.

It is usual, although there is no settled rule of law, that a child of tender years should remain with the mother. The

evidence I have before me is, the respondent is living with a co – respondent who has four children of her own from a previous marriage. There is no evidence as to the ages of those children but it is important in my view, always to bear in mind that a relative, still less a stepmother, no matter how anxious or how best she may try to do for the children, can not take the place of a real parent.

In the instant case the child, namely Jessie is aged about 10 years old. She has been living with her mother and she goes to school. There is no doubt, in my view, that 10 years is a very young age indeed and has been stated in ***Chilingulo V Chilingulo*** custody of a child of tender years should remain with its natural mother. What matters is the welfare, interest and happiness of the child. Furthermore my learned brother Kamwambe, J already ordered that custody of the child herein namely Jessie Mphande, be granted to the respondent. I see no reason to depart or disturb the said order. Consequently I order that custody of the child be granted to the respondent, and that the petitioner should have reasonable access to the child for example, during week – ends and school holidays.

As to costs, I order that each party do bear its own costs.

Pronounced in Open Court this 12th day of January, 2008.

Joselph S Manyungwa
JUDGE