



JUDICIARY

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 11 OF 2005**

BETWEEN:

CHRISTINA DATCHPLAINTIFF

- AND -

DANIEL DATCHRESPONDENT

LIZZIE MAGELACO – RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Tembo, of Counsel, for the plaintiff

The Respondent – Absent

Mr Jere – Court Interpreter

J U D G E M E N T

Manyungwa, J.

This is a petition for the dissolution of the marriage between the petitioner and the respondent on the grounds that the respondent was committing adultery with the co – respondent. The petitioner in these proceedings is Christina Datch and she prays to have her marriage to Daniel Datch, the respondent, herein dissolved on the grounds of adultery. The petitioner was represented by Mr Maxwell Tembo, while the respondent neither appeared

nor forwarded any reason as to why he could not appear, so I ordered after being satisfied that there was due service, for the trial to proceed. The record however shows that the respondent was represented by Lawson and Company but on the date of the hearing the lawyers did not show up.

The petitioner and the respondent were married under the Marriage Act Chapter 25:01 of the Laws of Malawi at the Office of the Registrar of Marriages at Blantyre in the Republic of Malawi on 9th March 2001 under Certificate number 5306 and after the celebration of the said marriage, the two lived and cohabited at Nkolokosa house number KS312. There is one issue of the marriage a daughter namely, Yankho Datch who was born on 15th September 2001. Both the petitioner and the respondent are Malawians resident and domiciled in Malawi and as such this court has undoubted jurisdiction to hear and determine the petition. I am satisfied on the evidence on record that there have been no previous proceedings in the High Court or any court in Malawi with reference to the marriage either by the petitioner or the respondent. This being an undefended matter I must also 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.

The petitioner grounds her divorce on grounds of adultery. The evidence in support of the petition is that after the celebration of the marriage the couple lived at Nkolokosa, and that by the time of the hearing the two parties had separated in August, 2002. The petitioner told the court that she was seeking divorce against the respondent because the respondent had an affair

with the co – respondent. The petitioner stated that in 2003, there was a scene, when she found the respondent with the co – respondent at Moneymen Club in Blantyre. The petitioner further testified that at the time of the hearing of these proceedings the respondent and the co – respondent were staying together at Nkolokosa at house number KS312. The petitioner further stated that at the time of the hearing the respondent was only assisting her with school fees in the amount of MK6, 500.00 which was not enough as the petitioner spends about MK30, 000.00 on the child alone per month. The petitioner therefore prayed for an order of maintenance of the child, and that her marriage to the respondent be dissolved and that she be given custody of the child. The petitioner therefore further told the court that the respondent works for National Bank of Malawi, Head Office in the Finance Department, whilst she works in Head Office Operations Department.

This was the evidence before me and despite the fact that the respondent and co – respondent were served with the notice of petition and notice of hearing on two occasions, they never bothered to attend the hearing nor gave any reason as to why they could not attend.

THE LAW

Adultery is defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other. In order that adultery should constitute a good ground for a complaint therefore, the respondent must have had sexual intercourse with someone other than the petitioner since the celebration of the marriage. According to the case of

Bastable V Bastable¹ the standard of proof is that of a degree of probability commensurate with the occasion. Further Section 5 of the divorce Act provides for the grounds for divorce. The said section is in the following terms:-

- S5 “A petition for divorce may be presented to the court either by the husband or the wife on the ground that
- a) Has since the celebration of the marriage committed adultery or...”

In the case of ***Munthali V Munthali and Kalilani***² the petitioner one Felix Munthali sought a divorce from his wife Catherine Munthali, the respondent herein on the ground of her adultery with the co – respondent namely Gerald Kalilani. The facts of the case were that at the time when the parties’ marriage was troubled and they frequently quarrelled, the petitioner discovered a letter written by his wife, the respondent, to the co – respondent in which she appeared to refer to past acts of adultery with him and addressed him in loving terms, though not by name. When confronted with the letter, she admitted having written it, said that she was in love with the co –respondent and confessed to having committed adultery with him on several occasions. The petitioner told her that the marriage was at an end and she immediately returned to her parents’ home.

The respondent entered an appearance to the petition in which she stated that she did not wish to oppose the granting of the decree. At the hearing, the petitioner, who was unrepresented, did not propose to call any evidence in

¹ ***Bastable V Bastable*** [1968] AIIER 701

² ***Munthali V Munthali and Kalilani*** 8 MLR 101

corroboration of his own, but when advised by the court to do so, called the respondent as a witness and she repeated on oath her previous admissions and confession of adultery. The court considered the proper procedures to be followed in weighing the evidence in the absence of any further independent testimony as to the ground of the petition and also considered the standard of proof to be applied. The court in that case considered the provisions of Section 7 of the divorce Act, Chapter 25:04 which provides:-

S7(1) “On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and where whether has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter – charge which is made against the petitioner.

(2) If the court is satisfied on the evidence that –

- (a) the case for the petitioner has been proved
- (b) where the ground for the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not condoned.”

In delivering his judgement, Justice Mead had this to say at page 102:

“The wording of the Section is the same as the wording of Section 4 of the Matrimonial Causes Act 1950 of England. In considering the degree of proof of adultery required to satisfy a court that the petitioner’s case had been proved,

Hudson L. J. said in *Galler V Galler*¹ after considering the judgements of the Divisional Court in *Fairman V Fairman*² and the speeches of the House of Lords in *Preston – Jones V Preston - Jones*³

‘I think the courts of this country may be taken to have come down on the side of the view that there was no distinction to be drawn between the word ‘satisfied’ standing alone and the word ‘satisfied’ accompanied by the words ‘proof beyond reasonable doubt’...

In divorce as in crime, the court has to be satisfied beyond reasonable doubt because as was stated by Lord Mac Dermott in *Preston – Jones V Preston - Jones*⁴

‘... the true reason, as it seems to me why both [divorce and criminal jurisdiction] accept the same general standard – proof beyond reasonable doubt – lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned’

With respect, I am in agreement with the conclusions of learned Lord Justice.”

In the instant case the respondent despite being served with the notice of the petition and despite his indication that he wished to defend the proceedings neither appeared at the hearing nor forwarded any reason as to why he failed to attend. Even his lawyer, who was said to have been seen within the court premises on the date of the hearing bothered not to attend, hence the matter proceeded to trial.

¹ *Galler V Galler* [1954] 1 AllER 450

² *Fairman V Fairman* [1949] P 341

³ *Preston – Jones V Preston – Jones* [1951] AC 391

⁴ *Preston – Jones V Preston – Jones* (ibid)

In the case of *Pidduck V Pidduck*¹ it was held that a memorandum of appearance signed by a co – respondent that he did not intend to defend the case by denying a charge of adultery made against him amounted to a confession of adultery. In the instant case the respondent entered an appearance but did not bother to appear at the hearing nor forward any reason why he was absent. In any case it would appear clear to me that the respondent was not really keen to defend his matter.

On the evidence before me especially considering that at the time of the hearing of these proceedings the respondent and the co – respondent were living together in the same house in Nkolokosa, I am satisfied that the petitioner has proved her case against the respondent and co – respondent beyond reasonable doubt and that therefore adultery is proved. Further I am satisfied that the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery. There is, in my view no bar to the petitioner being granted the reliefs sought. Accordingly, I pronounce and grant the petitioner a *decree nisi* for divorce.

Further, I also order that the respondent is responsible for the education and general maintenance of the only issue of the marriage, namely Yankho Datch until the said child finishes her education. Further, I do grant custody of the child to the petitioner, but that the respondent should have reasonable access to the said child, for example during school holidays, and over week – ends. Apart from the respondent being responsible for school fees and

¹ *Pidduck V Pidduck* [1961] 1WLR 1313 at 1315

other needs of the child I order that he pays a monthly MK20, 000.00 for maintainance of the child until the child is through with her education.

As regards costs, each party shall bear its own costs.

Pronounced in Open Court at Principal Registry, this 23rd day of January, 2008.

Joseph S Manyungwa
JUDGE