



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NUMBER 128 OF 2016**

BETWEEN:

LONELY BOSCO-----APPELLANT

AND

STANLEY BOSCO-----RESPONDENT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Mataka, Counsel for the Appellant

Salima, Counsel for the Respondent

Itai, Court Interpreter

JUDGMENT

This is an appeal from the decision of the second grade magistrate court sitting at Lilongwe delivered on 19th of May, 2016. The appeal is fundamentally centered on the ground that the principle of constructive desertion was wrongly applied by the trial court. The appellant has also argued that the trial court did not consider most of the evidence that had been given. It is being argued that the trial court down played most of the evidence and this should therefore necessitate a re-trial of the case.

An appeal from the lower court is by way of re-hearing. This therefore means that the appellate court has to go through all the evidence that was adduced in the trial court.

I have gone through the evidence on record. My observation is that this case was anchored on two issues:

- 1) The discovery of messages on the respondent's phone by the appellant led her to conclude that the respondent was in adulterous relationship with other women.
- 2) Denial by the petitioner to have sexual intercourse with the respondent on the ground that the petitioner was using contraceptives which diminished her sexual desire.

According to the evidence on record, it is clear that the appellant and the respondent had a problem in their family. One of the marriage advocate one Ruth Kabichi who was Pw No 2 told the trial court that the appellant was refusing to have sex with the respondent. The problem was that the appellant was menstruating continuously. The second issue had to do with the infidelity messages that the appellant had discovered on the respondent's cell phone. The appellant was advised to stop using contraceptives if they were giving her problems. It later on transpired that the respondent later on left the matrimonial home because he claimed that the appellant was abusing him. From the evidence as given by the respondent, it was clear that the respondent did not want to continue with this marriage because of two main reasons:

- a. The appellant had been scolding him that he had multiple friends.
- b. The appellant was depriving him of conjugal rights.

The above grounds were also confirmed by the respondent's witness Mr James Masakatira.

I have looked at the evidence that was adduced in the lower court. It is settled as a fact that the appellant was denying the respondent any opportunity to have sexual intercourse with her. As per the evidence on record, this type of conduct by the appellant started shortly after their marriage. The appellant had told the court that she had lost interest in sex due to the use of contraceptives. It is however to be recalled here that her own witness Pw No 2 had informed the court that the appellant was advised to stop using those contraceptives and to avail the respondent an opportunity to have sexual intercourse with her. This she did not do. The appellant did not even produce any medical evidence to back her claim if at all she was having any health challenges hence her sticking to the contraceptives which she later on blamed for affecting her sexual desire. There is

also evidence on record that the appellant had actually stopped caring for the respondent as a husband.

I have addressed my mind towards section 48(1) of the Marriage, Divorce and Family Relations Act which was also referred to by counsel for the appellant. As already pointed out, I am unable to find any justification as to why the appellant was depriving the respondent enjoyment of his conjugal rights. The assessment by the lower court that the appellant had no basis was well founded as I have also come to the same conclusion. On the issue that the respondent was unfaithful, having looked at the totality of the evidence, I find that apart from suspicion which the appellant had on the messages and the other issues, there was no cogent evidence on that. I also find that there is no basis in saying that the lower court had down played the evidence that was given. I am therefore unable to appreciate the prayer for re-trial. Looking at the totality of the evidence that was before the trial court, the issue of constructive desertion was well founded. I therefore uphold the decision of the lower court. The appeal is dismissed with costs.

DELEVERED THIS DAY OF NOVEMBER 2017 AT LILONGWE

**M.C.C. MKANDAWIRE
JUDGE**