

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NO. 11 OF 2019

[BEFORE HONOURABLE JUSTICE N'RIVA]

BETWEEN:

TOWERA MPANDO.....PETITIONER

-AND-

JACKSON MPANDO.....RESPONDENT

Coram: Justice Jack N'riva

Mr. M. Nkhoma of Counsel for the petitioner

Mr. J. Chiume of Counsel for the respondent

Ms. D. Mtegha Court Reporter

### JUDGMENT

This is the petitioner's petition for divorce. The petitioner prays for the dissolution of her marriage with the respondent on the ground that since the celebration of the marriage, the respondent has treated the petitioner with cruelty. The parties have a child together aged 4. The respondent indicated to this Court that he will not contest the petition.

### JURISDICTION

The parties were married on the 29<sup>th</sup> of July, 2012 at area 3 Seventh Day Adventist Church in Lilongwe. Since the celebration of their marriage, the parties have lived as husband and wife in various places here in Malawi. Both parties are domiciled in Malawi. Section 3 of the Marriage, Divorce and family Relations Act, 2015 (hereinafter referred to as the "Act") provides that

*'This Act shall apply to marriages entered into on or after the day it comes into operation, but Part IX shall apply to all marriages regardless of the date they were celebrated.'*

The parties' marriage does not therefore fall under this Act. Further, section 114(1) of the said Act repeals the Marriage Act, the African Marriage (Christian Rites) Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act.

The question is if the parties' marriage does not follow under this new Act, and the Divorce Act and these other Acts that have been repealed, where does that leave the parties in this matter? Section 114(6) of the said Act provides that:

*'Any proceedings taken with reference to*

- (a) a marriage celebrated or entered into;*
- (b) a register book kept;*
- (c) any warrant issued,*

*under an enactment repealed by this Act, shall have effect as if taken with reference to the corresponding provisions of this Act.'*

Thus, I find that the parties' marriage, more so this petition has to be approached with reference to the corresponding provisions of this Act. Section 60 of the said Act provides that:

*'(1) Nothing in this Act shall authorize-*

- (a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented; or*
- (b) the making of any decree of nullity of marriage unless-*
  - (i) the petitioner is domiciled in Malawi at the time when the petition is presented; or*
  - (ii) the marriage was celebrated in Malawi.'*

In the present matter, both parties are resident and domiciled in Malawi. Thus, the requirements under section 60 of the Act have been satisfied. This Court therefore has jurisdiction to hear this petition for divorce.

#### ISSUES FOR DETERMINATION

The main issue for determination is whether the marriage between the parties be dissolved.

## THE LAW AND ANALYSIS

Section 61 (1) of the Act provides that:

*‘(1) The Court may upon satisfying itself that a marriage has irretrievably broken down-*

- (a) grant a decree of judicial separation to provide for the separation of parties to a marriage; or*
- (b) grant a decree of divorce to dissolve the marriage.’*

A marriage is said to have irretrievably broken down when a situation arises where either or both spouses are no longer able to live with each other, thereby destroying their husband and wife relationship with no hope of resumption of spousal duties. In other words, when the relation between husband and wife has broken down beyond repair. (see Justice Kalembere in the case of *Jonathan Thandizo Sembereka and Tafwa Sembereka* Matrimonial Cause No. 30 of 2015 [2016]).

It is the petitioner’s story that the respondent is violent in nature especially when he is drunk. The petitioner has tendered exhibits to prove that she was subjected to cruelty. On the other hand, the respondent has indicated that he is not going to contest the petition due to the fact that he pleaded guilty to the offence of domestic violence in the lower court.

For cruelty to be established there must be serious conduct by the guilty party of intolerable nature so as to cause danger of bodily or mental hurt or a reasonable apprehension thereof. In the circumstances of this case, the conduct complained of, namely, repeated beatings satisfies the legal definition of cruelty as a ground for dissolution of marriage. The repeated beatings actually resulted in bodily harm to the petitioner and she must have lived in mental distress for fear of further beatings.

In these circumstances, this Court finds that the petitioner has proved that the respondent was indeed cruel to her. The parties in this matter are no longer able to live with each other, consequently it can easily be concluded that the marriage between the parties has irretrievably broken down.

I, therefore, order that the marriage between the parties is dissolved.

## CUSTODY OF THE CHILD

The petitioner prayed to this Court to be awarded sole custody of the parties' child. The respondent in his answer to the petition disputes that the petitioner is entitled to sole custody of the child on the basis that the petitioner is not fit to properly take care of the said child. The respondent also stated that he has mostly been the one taking care of the child. Further, he said that under Ngoni *lobola* custom, as *lobola* was paid, the respondent should be the one to have custody of the child.

In custody proceedings, the best interest and the welfare of the child shall be the paramount or primary consideration and not the interests of the disputing parties to a divorce. See Section 23 of the Constitution and section 8 Child Care, Protection and Justice Act. This is also the principle under international instruments on the rights of children. We do not follow parties' egos or their cultural prescriptions. Children are not objects. They have rights. 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.

The respondent has raised a point that under Ngoni *lobola* custom, custody of the child should be given to him. Practically, the position of the court has most invariably been that unless in exceptional circumstances, custody of young children is granted to the mother.

In *Kamanga v Kamanga* 13 MLR 165 custody of the children was granted to the petitioner (the husband) after the court noted that the respondent took to heavy drinking and at times resorted to violence. In *Andrew Katimba v Getrude Katimba* Matrimonial Cause Number 6 of 2008 the respondent used to suffer repeated violence from the petitioner and the Court was of the view that it was important to ensure that the child involved in that case was brought up in an environment of love, and care so he could grow up to be a responsible boy and that it was also good for his psychological and emotional development. The Court was of the considered opinion that this love and care and peaceful environment considering the age of the child, could only be given by the mother, the respondent in that petition.

Further, the position of the law is that there must be serious grounds that show that the mother is unsuitable to be granted custody of the child. It must be shown, which in my considered judgment has not been, that the petitioner is so

irresponsible. The respondent has stated that the petitioner is not fit to properly take care of the child, however there is no such evidence before me to prove this.

DISPOSAL OF THE ISSUE OF CUSTODY OF THE CHILD

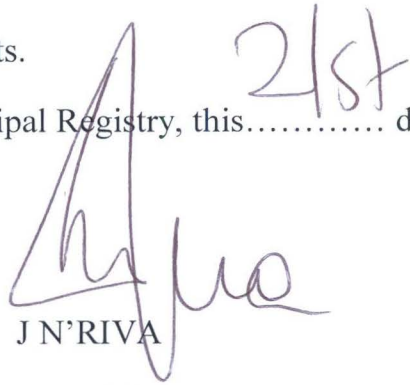
Section 8 (3) Child Care Protection and Justice Act expressly places mothers in a special position by directing the Court to consider "the importance of the child, on account of age, being with his mother when making an order for custody." Section 8 (3) Child Care Protection and Justice Act. This Court, as dictated by statute, considers that the more immature the child the more important it is that the mother has custody. However, as it has been earlier indicated, the court must consider all the practical aspects or circumstances of the cases.

After considering the circumstances of this case, this Court makes the following conclusion:

- This Court finds that both parties have means to look after the child.
- This Court consequently, orders that the petitioner shall have full custody of the child and that the respondent have visitation rights with the child.
- The petitioner and the respondent shall equally provide for the school fees and school related expenses for their child.

Each party will pay their own costs.

Pronounced in Chambers at Principal Registry, this..... day of June, 2019

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J N'RIVA

JUDGE