



REPUBLIC OF MALAWI  
MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

SITTING AT LILONGWE

MATRIMONIAL CAUSE NUMBER 01 OF 2018

**BETWEEN:**

**CYNTHIA PHIRI ..... PETITIONER**

**AND**

**JAMIESON PHIRI ..... RESPONDENT**

**CORAM** : **MWALE, J.**  
: Tembo, of Counsel for the Petitioner  
: Respondent absent, of Counsel for the Respondent, absent  
: Mpandaguta, Court Clerk  
: Jere, Court Reporter

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**Mwale, J**

**JUDGMENT**

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## **A. Introduction**

1. The Petitioner seeks the dissolution of her marriage with the Respondent on the ground that since the celebration of her marriage to the Respondent in 2009, the Respondent has committed adultery and desertion. The Petitioner and the Respondent have one child together, a boy, born in Malawi on 16<sup>th</sup> October 2009. The Respondent is a soldier in the British Army and is resident in the United Kingdom, while the Petitioner is resident in Malawi. After the celebration of their marriage in Malawi, the Respondent returned to Britain to continue his army service. The Petitioner attempted to obtain a visa in 2010 on two separate occasions to move to Britain but was denied both times. Since this time, the Petitioner and the Respondent have not cohabitated together and have rarely communicated. When communications have been made, they have been made through the intermediary of the Respondent's family.
2. It is the Petitioner's prayer that the Court dissolve the marriage between the parties that took place in Blantyre on 14<sup>th</sup> August 2009. As this marriage was contracted before the coming into force of the Marriage, Divorce and Family Relations Act in 2015, the Divorce Act which was the applicable law at the time the marriage was entered into, applies (see *Hilliard James Cathcart Kay v Norah Nikkie Cathcart Kay and Murray Henderson*, Matrimonial Cause No. 11 of 2015, High Court Principal Registry (unreported)).
3. The Respondent has despite being duly served failed to make an appearance and has filed no process in response to the Petition.

## **4. Court's Reasoned Determination**

5. Section 5 of The Divorce Act requires specific grounds for a marriage dissolution.

*"A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent-*

- (a) has since the celebration of the marriage committed adultery; or*
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or*
- (c) has since the celebration of marriage treated the petitioner with cruelty; or*
- (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation*

*of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy, or bestiality.”*

Petitioner has filed for divorce on the basis of section 5 (a) and section (b) of the Act.

**(a) Adultery**

6. Adultery is defined as a voluntary act of sexual intercourse between one of the spouses and another person (*Hayter v. Hayter* [1991] 14 MLR 94.) Direct proof of commission of the marital offence is rarely available and the courts have determined the commission of the offence by either by a confession or drawn inferences from the circumstances (*Banda v Banda*, Matrimonial Cause No. 10 of 1991).
  
7. The Petitioner has provided evidence that the Respondent has confessed to adultery. On two separate occasions, the Respondent informed the Petitioner that he had moved on with his life and was living with a new woman. In October of 2011, The Respondent informed Petitioner that he had moved on with his life and was sexually involved with a woman named Yoleni Minostrar. In January of 2012, Respondent told Petitioner he had moved on again and was having a sexual relationship with a different woman named Maclina Nysalu. These confessions which the Petitioner received through mobile telephone text messages as well as a Facebook post have not been disputed by the Respondent. In view of this undisputed evidence, I find the Respondent guilty of adultery.

**(b) Desertion**

8. I now move to discuss the Petitioner’s claim of desertion. In the case of *Da Silva v. Da Silva* Matrimonial Cause No. 3 of 2005 High Court Lilongwe (unreported), the Court set out four elements a petitioner must prove in order to succeed in a claim of desertion.

*“Before dissolution of marriage based on desertion is granted, it is necessary that four main elements be proved by the petitioner:*

1. *that there has been separation of the parties for a period not less than three years immediately preceding the presentation of the petition.*
2. *there must be an intention, where construed or direct, on the part of the deserting spouse to remain separated permanently*
3. *the said absence must be without the consent of the complaining spouse.*

4. *that the said desertion must be without reasonable cause on the part of the deserting spouse.*”

9. The Court in this case relied on the sole evidence of the petitioner, as just as in the present case, that case was undefended. The petitioner in that case claimed that the respondent left their matrimonial home for eight years while the petitioner made efforts to locate the respondent's whereabouts. The respondent refused to take the petitioner's calls or emails. No amount of pleading by the petitioner to have the respondent return to take care of their child resulted in any success. The Court granted the Petitioner's claims for desertion based on this testimony.
  
10. The Petitioner in the case has testified that the Respondent left the Petitioner to go to Britain in 2009. The Petitioner claims that after 2010 she stopped receiving support from the Respondent. After this time, the Petitioner only was able to communicate with the Respondent through the Respondent's relatives. It has now been over three years since the Respondent abandoned communication and cohabitation with the Petitioner. Further, the Respondent has made his direct intention to remain separate from the Petitioner very clear. The Respondent has sent the Petitioner multiple messages stating he no longer wants the Petitioner as his wife and has moved on as should she. These statements show a clear and unambiguous intention on part of the Respondent to desert the marriage. The Petitioner has on the other hand made multiple attempts to contact the Respondent with no success. The Petitioner's attempts at contact coupled with her attempts to obtain a visa to stay with Respondent in Britain show that the Petitioner never consented to the absence on part of the Respondent. I therefore find that the ground of desertion has been made out in this case.
  
11. As already indicated the Respondent did not file an answer to the petition herein neither has counsel appeared on his behalf. Such circumstances put the Court on the lookout for collusion. As such, I took some time to examine the Petitioner and further scrutinize the evidence. I am satisfied from the evidence that this Petition has not been prosecuted in collusion with the Respondent.

12. Based on all I have reasoned above, I hereby grant a decree of divorce as sought in the petition.

13.

I so order.

Made at Lilongwe this 20<sup>th</sup> day of June, 2019.

A handwritten signature in black ink, appearing to read 'Fiona Atupele Mwale', is written over a horizontal line. The signature is somewhat stylized and cursive.

The Honourable Justice Fiona Atupele Mwale

**JUDGE**