REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

FAMILY AND PROBATE DIVISION

LILONGWE DISTRICT REGISTRY

MATRIMONIAL CAUSE NO. 14 OF 2021

BETWEEN:

C.S. ……. PETITIONER

-AND-

D.S. ……..……. RESPONDENT

-AND-

N. T. M. ……..……..…… CO-RESPONDENT

CORAM : THE HONOURABLE JUSTICE F.A. MWALE
: Theu, for the Petitioner
: Kaonga, for the Respondent
: Kanyama, Court Reporter
: Mpandaguta, Official Court Interpreter

Mwale, J.

JUDGMENT

Introduction

1. The petitioner C.S. petitioned this Court for an order of divorce against the respondent D.S., on the grounds of desertion, cruelty and adultery. By way of background, the

undisputed facts are that the parties were married at the office of the District Commissioner in Lilongwe on 12th April 2013, under the now repealed Marriage Act. Since the celebration of the marriage, the parties have resided at diverse places in Lilongwe and in Blantyre. There are two issue[1] to the marriage, aged 8 and 7 years.

2. It is essentially the petitioner's case that the parties have irreconcilable differences that have led to the irretrievable breakdown of the marriage. On the ground of desertion, the petitioner alleged that the respondent wrongfully deserted her since May 2019 and has been residing away from the matrimonial home. The said desertion has led to the petitioner being denied her conjugal rights, and hence the charge of cruelty. With regard to the ground of adultery, it is the petitioner's case that respondent has been committing adultery with the co-respondent, N.T.M., and that the two have a child together. The petitioner further claims that the adultery has greatly distressed, traumatized and embarrassed her to such an extent that she has been losing sleep on occasion and eventually suffered ill health. It is the petitioner's claim, in consequence, that she has suffered loss and damages as a result of the adultery.

3. The petitioner therefore prays that this Court:
   (a) dissolves her marriage with the respondent;
   (b) grants physical custody of the issue of the marriage to her;
   (c) grants her an order of maintenance against the respondent;
   (d) grants her a fair and just proportion of the matrimonial property;
   (e) orders the co-respondent to pay damages for committing adultery with the respondent; and
   (f) grants her costs of these proceedings.

4. The Petition is defended. Upon being served with the Notice of Petition, both the respondent ad the co-respondent each entered a Memorandum of Appearance and subsequently filed Answers to the Petition. Further, the respondent, cross-petitioned on the grounds of cruelty and desertion. The respondent, denied the charges laid against him in the Petition. The co-respondent in turn, through her Answer, denies ever having been with the respondent in public places or at all and finally denied all charges laid out against her in the Petition.

5. In his Answer, the respondent admits that the marriage has indeed broken down but cites his grounds for the irretrievable breakdown of marriage as cruelty and desertion. In particular, it is his claim that the petitioner's excessive alcohol and tobacco abuse as well

[1] Whilst a courts resolves issues in dispute and not grammar, I am compelled to clarify for the purposes of comprehension that in family and succession law, the term "**issue**" refers to a person's lineal descendants and remains "**issue**" even in the plural. Adding an "**s**" to the term to pluralize it as both parties have done in the pleadings sometimes raises unnecessary confusion which can easily be avoided by observing this linguistic protocol.

as her demeaning concerted insults towards are tantamount to cruelty. It is also his claim that the petitioner deserted the matrimonial home, moving to her mother's home and moving the children to another school without his permission. This is the substance of the Cross-Petition. In particular, he denied deserting the petitioner as he was employed in activities that necessitated his absence from the matrimonial home. He has also expressly denied depriving the petitioner of her conjugal rights. All in all, the charges laid out in the Petition are denied.

6. At the hearing, each party was its own witness. The petitioner called two additional witnesses, her mother, Ms. V.S. and the marriage advocate, M.G. J. M. The respondent called no additional witnesses. At the end of the hearing, each of the parties timeously submitted closing arguments for which I am most obliged.

Applicable law

7. The parties were married on 12th April 2013. The current applicable law governing marriage and divorce, the Marriage, Divorce and Family Relations Act (MDFRA) came into force on 3rd July 2015 as per Government Notice Number 20 of 2015. Section 114 of the MDFRA repeals all former laws on marriage, including the Marriage Act under which the parties herein were married. There appears to be a difference in opinion between the parties as to what the applicable law in dissolving this marriage is. This difference has been fueled by a rift in the opinion of the High Court as to what law should be applicable to dissolving marriages that existed prior to the enactment of the MDFRA in 2015. One view was articulated in the case of ***Hilliard James Cathcart Kay v Norah Nikkie Cathcart Kay and Murray Henderson***, HC/PR Matrimonial Cause No. 11 of 2015, unreported (hereinafter the "***Cathcart Kay***" case/decision). This view, arrived at after extensive use of settled principles of statutory interpretation, maintains that the applicable law for dissolving marriages entered into in dissolving marriages entered to before the MDFRA came into force is the now repealed Divorce Act, despite the fact of its repeal.

8. The contrary view evident in such cases as ***Mkulichi n Mkulichi (Nee Lupesya)*** Matrimonial Cause No. 37 of 2010, ***Sembereka v Sembereka*** HC/PR Matrimonial Cause Number 30 of 2015, **T*owera Mpando v Jackson Mpando*** HC/PR Matrimonial Cause Number 11 of 2019 and ***Henderson v Henderson*** HC/PR Matrimonial Cause No. 12 of 2015. In ***Mkulichi n Mkulichi (Nee Lupesya)*** (cited above) the court held that decisions which hold that marriages celebrated under the Marriage Act should be dissolved under the Divorce Act are per incuriam the MDFRA. This opinion was echoed in cases such as ***Sembereka v Sembereka*** (cited above) and **T*owera Mpando v Jackson Mpando*** (cited above) where the Court stated that:

"If the parties' marriage does not follow under this Act and the Divorce Act and these acts are repealed, where does that leave the parties herein?

In order to respond to the question, the decisions that hold the contrary view interpret section 3 with the saving provisions in section 114 of the MDFRA to conclude that the MDFRA is the correct law to apply.

9. A close look at the two sections, namely sections 3 and 114 of the MDFRA is the natural starting point in reopening this debate and re-examining the arguments that have gone before. Section 3 of the Marriage, Divorce and Family Relations Act (MDFRA) 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 marriage regardless of the date they were celebrated."

Further, section 114 of the MDFRA, provides for savings as follows:

"(1) The Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act are hereby repealed.

(2) A licence or certificate issued, notice published, registration effected, caveat entered or other thing done under the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act repealed by subsection (1) shall, if I force at the commencement of this Act, continue in force, and have effect as if in force at the commencement of this Act.

(3) Where a period of time specified in the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act repealed by subsection (1) is current at the commencement of this Act, this Act shall have effect as if the corresponding provisions of this Act had been in force when that period begun to run.

(4) A document referring to the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women (Maintenance) Act and the Maintenance Orders (Enforcement) Act repealed by subsection (1) shall be construed as referring to the corresponding provisions of this Act.

(5) Nothing in this Act shall affect the validity of any marriage celebrated before the commencement of this Act, under an enactment repealed by this Act.

(6) Any proceedings taken with reference to –
(a) a marriage celebrated or entered into;
(b) a register book kept; or
(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."

10. The cases in favour of applying the MDFRA to marriages celebrated before that Act came into operation overlook a number of important principles in statutory interpretation. These principles were well articulated by the Court in the ***Cathcart Kay*** case cited above. The first is the cardinal rule that, "*when called upon to construe an Act, the court takes its primary duty as being to look at the text and say what, in itself, it means*". In any plain and ordinary meaning of the text, section 3 of the MDFRA is very clear that the Act only applies to those marriages that are in existence on the day it comes into operation. Thus, with reference to other authorities, the learned judge in the ***Cathcart Kay*** case concluded that:

> *"The above-mentioned principles were fully endorsed by the Supreme Court of Appeal in* ***Royal International Insurance Holdings Ltd v. Gemini Holdings Ltd and another [1998] MLR 318****. In the words of Unyolo, CJ (as he then was), at page 32:*
>
> > *"It is trite that the fundamental rule of statutory interpretation, to which all other rules are subordinate, is that where the words of a statute are themselves plain and unambiguous, no more is necessary than to construe those words in their natural and ordinary sense. In such a case the intention of the legislature is best declared by the words themselves."*
>
> *Section 3 of the Act is in my view clear and unambiguous. It states in plain language that the Act applies to marriages entered into on or after the commencement date save for Part IX of the Act which applies to all marriages regardless of the date they were celebrated."*

11. The Court in the ***Cathcart Kay*** case also had recourse to extraneous aids to statutory intention such as the legislative history that is manifest in the Report of the Law Commission on the Review of Laws on Marriage and Divorce, 26th June 2006 as well as in the Cabinet Paper that were used to introduce the Bill in Parliament. These aids show clearly that the MDFRA was never intended to bind those who were married before it came

into operation, except in so far as he rights and obligations of marriage which are contained in Part IX are concerned. Thus, as was observed by that Court:

> "*section 114(6) falls within Part XVIII, which Part does not apply to marriages entered into before the commencement date. In the present case the parties got married on 14th September 2006. This is well before the commencement date. It is therefore, my finding that, save for Part IX of the Act, the other Parts of the Act do not apply to the marriage herein.*"

12. I concur and accordingly find that the same applies to the case at hand. It would be extremely unfair to bind couples who entered into a marriage based on the law at the time to find themselves being subjected to different rules on dissolution, such rules not having existed at the time they were married. The extraneous aids to interpretation reinforce the clear and simple meaning of the language in section 3 of the MDFRA that this Act was never intended to have retrospective effect. To buttress the point, no law can have retrospective application unless there is express statutory provision to that effect and a there is no such express statutory expression in the MDFRA.

13. By arriving at the decision that the MDFRA was never intended to have retrospective effect, another question arises as to whether a lacuna has in effect been created by which parties who celebrated their marriages before the MDFRA cannot use the Act but are doubly damned as they cannot use a law that has been repealed. The common law rule has always been that once a law has been repealed, it shall hence forth be as if it had never existed. The attempt to resolve this seeming lacuna could very well be the precise question that exercised the mind of the Court in the ***Mpando v Mpando*** case cited above when it observed that:

> *"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:*
>
> *"(6) Any **proceedings** taken with reference to-*
> *(a) a marriage celebrated or entered into;*
> *(b) a register book kept; or*
> *(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." (Emphasis supplied)*
>
> *Thus, I find that the parties' marriage, more so this petition has to be approached with reference to the corresponding provisions of this Act."*

14. Therefore, in order to avoid a situation in which there was no applicable law to resolve the matter at hand, that Court in ***Mpando v Mpando*** (cited above), had recourse to section 114 (6) of the MDFRA which at first glance seems to be the answer to the problem. However, section 114 (6) would only come to the rescue if it were a transitional provision, the purpose for which is "to facilitate change from one regime to another" (see the ***Cathcart Kay*** case). The operation of transitional proceedings is supposed to be temporary so that it becomes spent when all the past circumstances with which it is designed are dealt with. The new law, in contrast, continues to operate indefinitely into the future. To illustrate this point, the Court in the ***Cathcart Kay*** case dwelt on the word "proceeding" in section 114 (6):

> "*a perusal of section 114 (6) of the Act reveals that the subject thereof is not "**a marriage celebrated or entered into**" under the repealed Marriage Act, but a "**proceeding taken with reference to a marriage celebrated or entered into**" under the repealed Marriage Act. It is such a proceeding that shall have effect as if taken with reference to the corresponding provisions of the Act. It is thus important to (a) determine the meaning of the term "**proceedings**" as used in the context of s.114 (6) of the Act and (b) a provision in the Act which corresponds to the provision in the repealed Act under which the proceeding in question was taken.*"

Once it is understood that section 114 (6) is not a transitional provision, it is easier to follow the logic that its application,

> *"is not just limited to proceedings taken before the commencement date but it extends to any proceedings taken with reference to a marriage entered into under an enactment repealed by the Act. For example, a person whose marriage was celebrated under the Marriage Act in 1999 wishes to take any proceedings in respect of such a marriage, such proceedings shall have effect as if taken with reference to corresponding provisions of the Act (that is the Marriage, Divorce and Family Relations Act*)."

All these issues considered, I can only concur with the Honourable K.K. Nyirenda J., when he concludes that section 114 (6) cannot be a transitional provision, nor can it allow for the retrospective application of the Act when section 3 expressly only allows retrospective for Part IX. Section 114 (6) is Part XVIII. There is therefore no provision authorizing the retrospective application of Part XVIII of the MDFRA and I further concur with the learned judge in that case when he states that:

> "*s. 114 (6) of the Act , in so far as it relates to the issue at hand, is concerned with procedural steps taken in respect of marriage celebrated or entered into under the repealed Marriage Act.*"

Section 114 (6) can therefore not be interpreted as authorizing the wholesale application of the MDFRA to marriages that were entered into before it came into force.

15. Resolving the issue with regard to section 114 (6) still leaves the lingering issue as whether a law that has been repealed, namely whether a law that has been repealed can still be applied. The position put forward in the ***Cathcart Kay*** decision and others that follow it, is that the applicable law governing dissolution of marriages under the repealed Marriage Act is the repealed Divorce Act. As alluded to earlier, the common law rule is that once a law has been repealed, it shall hence forth be as if it had never existed. Thus, according to Lord Tenterden in ***Surtees v. Ellison*** [1947] F.C.R. 141 at 166. (2) [1829] 9 B & C. 752:

> *"When an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. <u>That is the general rule."</u>* (Emphasis supplied)

Further, in the case of ***Kay v. Goodwin*** [1829] 9B. & C. 750 at 752. (2) [1951] S.C.R. 228, at p. 350 Tindal C.J. adds:

> "*The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed <u>except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law</u>.*" (Emphasis supplied)

16. What should not be lost sight of is that the common law rule is only a general rule. It is not an absolute rule and has been and continues to be subject to exception. Throughout history the general rule has been modified by legislation and by qualifying judicial rules. Further, where a statute either expressly or implicitly overrides a common law rule, the statute takes precedence. Indeed, as was decided in ***R. v. Kunyambo*** (H.C.) (1923-60) 1 ALR Mal 74, the clear intention of the legislature should not be overridden by general principles of construction. Further the reasoning of the Court in the **Cathcart Kay** case with reference to section 14 of the General Interpretation Act gives weight to this position when it states:

> "(1)*Where a written law repeals and re-enacts with or without modification, any provisions of any written law, then unless a contrary intention appears –*

> *(a) all proceedings (read "cases") commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed;" Emphasis by underlining supplied*

It was the conclusion of the Court in the ***Cathcart Kay*** case that since a contrary intention only appears in respect of Part IX of the Act, then it follows that the general common law rule that a repealed statute cannot take effect is expressly overridden by section 14 of the General Interpretation Act as well as the plain and simple language of section 3 of the MDFRA.

17. Whilst the two opposing opinions of the High Court exist in parallel, it is my hope that the Supreme Court of Appeal shall soon be moved to make a pronouncement as to which of these views is the proper interpretation of sections 3 and 114 (6) of the MDFRA. Until such a time as the Supreme Court has made a contrary pronouncement, I reiterate my support for the position in the ***Cathcart Kay*** case and proceed to determine this matter on the basis that the Divorce Act is the correct applicable law. I therefore find in agreement with the respondent's submissions, that cases such as ***Mpando v Mpando*** (cited above) and ***Sembereka v Semberaka*** Matrimonial Cause No. 30 of 2015, High Court, Principal registry (unreported), were decided per incuriam sections 3 and 114 (6) of the MDFRA.

Jurisdiction

18. Before proceeding to making any pronouncement as to whether the marriage between the parties is to be dissolved, I must first satisfy myself that I have the relevant jurisdiction. In matrimonial proceedings a court must ensure that it has both personal jurisdiction over the parties as well as subject matter jurisdiction over the marriage in question.

19. With regard to personal jurisdiction, section 2 of the Divorce Act provides that

> *Nothing hereinafter contained 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:*

Both the petitioner and cross-petitioner before me have testified that they are Malawian citizens who have resided in the country since birth. On all the facts and circumstances of the case based on the profession of the petitioner as a legal practitioner called to the Malawi bar, and the cross-petitioner's circumstances, I am satisfied that the parties are both domiciled in Malawi and therefore that I have jurisdiction over them.

20. With regard to the subject matter jurisdiction, the petitioner tendered a marriage certificate as proof of the marriage celebrated by the parties under the Marriage Act. I am therefore equally satisfied that the marriage is one I have jurisdiction over.

The law

21. Section 5 of the Divorce Act provides the grounds that a party must prove in order to be granted a divorce as follows:

> "*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 the 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.*" (Emphasis supplied)

The duty of the Court when presented with a petition for divorce is set out in section 7 of the Divorce Act as follows:

> "(*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 there 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; and*
>
> *(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 in any manner condoned the cruelty; and*
>
> *(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the Court shall pronounce a decree nisi of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:…"*

22. Pursuant to section 7 of the Divorce Act, it is incumbent upon the Court to inquire into whether there is any evidence to suggest that petition has been prosecuted with collusion or whether there has been condonation or connivance by the petitioner or cross petitioner to any of the grounds of divorced raised. As was stated in the case of ***Giramata v Habimana*** High Court, LL Matrimonial Cause No. 16 of 2020:

> " *Connivance is ordinarily defined as consent to the misconduct alleged as grounds for divorce. This consent is given before the misconduct occurs. Collusion refers to agreed acts by the parties to present a petition based on fictitious causes. An example would be a staged scene in which one pretends to be committing adultery and the other walks in on him, just so they can have grounds to bring to court. Condonation is usually described as forgiveness after the act, although it entails a little more. Connivance arises in actions for divorce based on adultery. The act of adultery is frequently unlawful and always immoral, besides being an injury to the petitioner. Consent to the act is to some extent immoral and degrading; hence, the consent itself is corrupt. It is for this reason that the term "connivance" rather than "consent" is used by the courts in describing this particular conduct.*"

The manner in which the petition has been prosecuted from all the circumstances convinces me that neither connivance nor collusion took place. The contentious nature of the issues and the robust manner in which both sides have argued their respective case rules out any such possibility.

23. The burden of proving any fact alleged is placed on the person making the allegation. The applicable standard of proof is therefore the balance of probabilities. It must be more probable than not that the fact in issue occurred. Since matrimonial matters revolve around the commission of matrimonial offences, the standard of proof is slightly higher than the balance of probabilities in other civil cases, although not as high as the standard in criminal cases in which it has to be beyond reasonable doubt (see ***Eluphy Sadala v Kayisi Sadala (Matrimonial Cause No. 8 of 2016) High Court, Principal Registry (unreported)***).

24. Practically the duty of the court in civil cases can be explained in very simple terms as follows:

> "*in our legal system if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other."* (***RE B (Care Proceedings: Standard of Proof***) [2008] UKHL 35 Baroness Hale at p. 32)

The only caution being that in cases of dissolution of marriage based on the matrimonial offences, the court must find it highly more likely than not that something did or did not take place.

Court's reasoned determination

Desertion

25. In order to qualify for the ground of desertion, section 5 (b) of the Divorce Act requires that respondent should have deserted the Petitioner or cross-petitioner for a period of at least three years immediately preceding the presentation of the petition. The petitioner alleges that the marriage irretrievably broke down in May 2019 as the Respondent had deserted her and started living in Lilongwe around November 2021.

26. According to the case of **Da Silva v Da Silva**, Matrimonial Cause No. 3 of 2005, High Court, Lilongwe District Registry (Unreported), in order to prove desertion, 4 elements must be proved to the satisfaction of the Court, viz:

a. as required by the law, that there has been separation of the parties for a period of not less than three years immediately preceding the presentation of the petition;
b. there must be an intention, whether construed or direct, as the part of the deserting spouse to remain separated permanently;
c. the said absence must be without the consent of the complaining spouse; and
d. that the said desertion must be without reasonable cause on the part of the deserted spouse.

Whilst the requisite statutory period may have been satisfied, it remains for the petitioner to prove that the respondent's absence was without cause and without her consent. The undisputed evidence of the respondent is that he operated from the matrimonial home but only left for Lilongwe to attend to very specific and important business that required his presence. He subsequently got entangled in other engagements and caught COVID 19 which necessitated his isolation. He was residing in a house in Lilongwe in the course of the important business he was attending to and he remained in that house until he got another job.

27. The petitioner maintains that the desertion was for no apparent reason, which cannot be sustained in light of the respondent's evidence. With regard to the issue of consent, the respondent's evidence was that he informed the petitioner why he had to operate from Lilongwe when he secured a house there. The petitioner was not opposed to the arrangement as the respondent continued to go to the matrimonial home and the petitioner would frequent the Lilongwe home frequently and at will. If the petitioner was against the decision or had not been properly communicated with the reason for the respondent's absence, she did not take enough issue with it as she frequently visited the respondent.

Inferences of consent or condonation if there was no consent, can be made from her conduct. It is impossible to infer an intention on the part of the respondent to absent himself permanently from the matrimonial home based solely on his continued stay in Lilongwe even after the conclusion of the first set of business that kept him there, especially as he subsequently returned to the matrimonial home after securing a job in Blantyre. He could have found alternative accommodation in Blantyre had he intended to absent himself from the matrimonial home permanently. In the circumstances, the respondent's absence cannot be said to have been without cause and without consent. I must accordingly find that the conduct of the respondent cannot be construed as desertion under the law. The Petition therefore fails on this ground.

28. The cross-petitioner testified in turn that it is the petitioner who deserted him. According to him, the petitioner left their matrimonial home in Blantyre and went to live with her mother in Lilongwe without informing him. The petitioner does not dispute that she left the matrimonial me against his wishes and that she transferred the children to another school without the respondent's knowledge. The time period that this act of desertion took place has not been provided and it is not possible to state whether the statutory time limit is satisfied. The cross-petitioner testified that in July 2021 the petitioner who was then working in Dedza would travel to Lilongwe so that the couple could conceive. It would appear that that they were on terms in 2021 and if the petitioner deserted, it must have been after this which would mean the alleged desertion does not satisfy the statutory time limit. The fact that the cross-petitioner has testified that the parties tried to conceive while they were living apart can only mean he condoned the desertion. Either way, under the circumstances, I cannot make a finding of desertion against the petitioner. The Cross-Petition also fails on the ground of desertion.

Cruelty

29. It is the petitioner's claim that by deserting her in May 2019, she was denied her conjugal rights, such conduct amounting to cruelty. The respondent denies the charge. As alluded to earlier, he in fact testified that in June 2021, the parties as a couple had agreed to have another child and the petitioner even went to see a doctor to have her contraceptive device removed so that they could conceive. Further the respondent, in opposing the charge, testified that the petitioner even travelled to Lilongwe from Dedza so that they could conceive.

30. The Petitioner has not rebutted the respondent's evidence that the parties were still intimate and that in June 2021 they were even considering having another child. The question that I must consider however as to whether there were any other time periods other than the time between June and July 2021that the couple were still intimate. Counsel for the petitioner has argued that "conjugal rights are supposed to be exercised and enjoyed by a party to a marriage throughout the existence of the marriage save in circumstances which

provide justifiable reason for otherwise". Consequently, he argues that conjugal rights should not only be exercised for the sole reason of procreation as such would in itself be cruelty.

31. Ordinarily, in order for the ground of cruelty to succeed, the petitioner must adduce affirmative evidence of an intention by the respondent to be cruel. This Court, in the case of **Shenaz Peter Bhangwanji Almeida v Ricardo Andre Teixeira Almeida** (the "***Almeida***" case) (Matrimonial Cause Number 08 of 2016) High Court Lilongwe District Registry (unreported), held as follows-

> *"Thus, in order for the threshold of cruelty to be reached, the Respondent must have acted voluntarily in a manner which he foresees or should foresee would harm the Petitioner"*
>
> …
> *"The conduct complained of as cruelty must be intentional conduct by the Respondent of such a nature as to make continued cohabitation and exercise of conjugal duties unbearable or impossible…."*

The requirement to prove intention is qualified however, by situations in which the actions of one spouse readily allow the inference of an intention to be cruel. Thus, in the case of **Fowler v Fowler** (2) [1952] 2 T.L.R. @145 Hedson L.J. stated that:

> " *The word 'cruel' itself in its ordinary meaning seems to me to imply the notion of malignity, but its not necessary to prove affirmatively an intention to be cruel if the acts themselves are not such as to render that inference readily to be drawn, the court will look at whether there is an intention to injure …*"

32. Scholarly discourse on the subject describes the different types of judicial approaches to cruelty in the common law tradition as follows:

> "*The modern definition of "mental cruelty" has evolved from two different judicial techniques. On the one hand, the courts have characterized as the necessary ingredients of "mental cruelty" various factors which are commonly present in situations of marital discord. On the other hand, they have approached the problem by defining "mental cruelty" as whether a certain conduct is so antisocial or so out of harmony with our traditions of marriage that it warrants a divorce decree."* (S.I. Halberstadtler 1954 "Mental Cruelty as Grounds for Divorce." Duke Bar journal Vol. 4. No. 2 Summer 1954 pp. 85-104 at p.87.)

33. Thus, in cases involving acts of cruelty other than the mental cruelty that arises from a denial of conjugal rights, the court examines the conduct and looks for a cruel intent as well as other necessary factors before it can return a finding of cruelty. In cases of mental cruelty, the situation is different. It can therefore be safely concluded that denial of conjugal rights in our context is so out of harmony with our traditions of marriage that it warrants a decree of divorce without further ado. Such situations are per se mentally taxing. This view is supported by the decision in ***Mapyesele v Mapyesele***, Civil Appeal No. 67 of 2007. High Court, Lilongwe, where Mzikamanda J., as he was then stated that:

> "*Denying the appellant conjugal rights amounted to cruelty.*"

The statement above must be understood in context, on the basis of the circumstances. Denial of conjugal rights as a species of cruelty will not require proof of ill intent, however, not every allegation of deprivation of conjugal rights will automatically be construed as cruelty. As counsel for the petitioner conceded in his closing submissions, "conjugal rights are supposed to be exercised and enjoyed by a party to a marriage throughout the existence of a marriage save in circumstances which provide justifiable reason to a party otherwise." Obviously therefore, if there is justifiable reason for the denial of conjugal rights, such denial cannot be deemed cruelty.

34. The petitioner has provided facts that prove that the parties did not cohabit for a substantial period whilst the parties were living in different cities. The respondent's response that the petitioner did at some period travel for the two to be intimate confirms this. The petitioner does not disagree with the fact the two were planning to have a child in July 2021 however the respondent has not denied that there were no intimate relations between them at other times, outside this period; such as the period between May 2019 and 2020. Counsel for the petitioner has argued that the respondent testified that they had discussions of having another child in the month of June 2021 and also July 2021 and yet in August 2021, the petitioner commenced proceedings for divorce on grounds that included denial of conjugal rights as tantamount to cruelty. I am in agreement that these facts cast doubts on the respondent's veracity as to whether the parties were intimate at the times alleged. Nonetheless, the respondent also testified that the petitioner spent considerable amounts of time out of the matrimonial home drinking and smoking and he found the smell of smoke and alcohol so repugnant that he could not bring himself to accede to the petitioners demands for sex when she came home in a drunken state, smelling of tobacco. The respondent's evidence on this issue is unchallenged. This would therefore provide the explanation as to why the respondent did not pursue sexual intimacy with the respondent at times.

35. I find the respondent's conduct in withdrawing conjugal rights unjustifiable because, as was made clear in cross-examination, the respondent knew of the petitioner's drinking and smoking before he married her and yet the couple continued to date, After they married they did initially experience sexual intimacy as evidenced by the resultant issue to the

marriage. Although according to the respondent the intensity of the petitioner's drinking and smoking increased in 2019, his reaction of withdrawing sexual intimacy was cruel. It is on evidence that the petitioner is gainfully employed as legal counsel. There must be moments of sobriety in her life and if, as the respondent testified, the parties had been engaged in discussions to have another child, there were in his mind moments of sobriety where both discussions and sexual intimacy could have been achieved without the offensive smell of alcohol and tobacco to put him off.

36. There is evidence of one incident in which the petitioner's mother testified that after a fight between the parties, the respondent had kicked her out of the house and then proceeded to call the petitioner's mother in a drunken state to find out where her daughter was. The petitioner's mother states that her daughter had told her at the time that the reason for the altercation was that the respondent wanted to have sex with her and for her own reasons the petitioner didn't want to. This piece of evidence, taken in isolation, casts doubt to the claim that the petitioner herself makes that she was deprived of her conjugal rights. However, using the totality of the evidence principle to provide a holistic analysis of the evidence, this one incident does not change the outlook of the evidence when viewed in totality.

37. The only recorded instance at which the respondent wanted to have sex with the petitioner is when he was drunk and they had both been out drinking, meaning his earlier attempts to deny her sexual intimacy on the grounds that she had an unappealing stench of alcohol and tobacco is unsustainable. Her demands to have sexual intercourse when she was drunk were always turned down. The only other recorded times at which the respondent agreed to sexual intercourse was when they wanted to have children. Such a basis as the sole reasons for sexual intimacy objectifies the other partner and is cruelty under the circumstances. I therefore find that no proof was proffered to dispute the petitioner's claim that she was denied her conjugal rights in the marriage, and this being the case, the petitioner succeeds on the ground of cruelty as evidenced by the unjustifiable deprivation of conjugal rights. I further find no evidence that the cruelty was condoned.

38. The respondent as cross-petitioner has also petitioned on the ground of cruelty. The cross-petitioner testified as to the petitioner's suicidal tendencies every time she was upset. He also tendered a newspaper article on one of his spouse's attempts which she did not respond to in the pleadings, but only orally at the hearing. I was asked to strike out the verbal response as the petitioner did not seek the permission of the Court to do so as required under order 17 rule 5 (3) (a) of the Courts (High Court) (Civil Procedure) Rules. I am in agreement and shall have no recourse to the petitioner's oral response.

39. In assessing the evidence as to cruelty by the petitioner, I must primarily inquire into whether the acts complained occurred and if the occurred, whether they were inherently cruel so as to escape the common law requirement of proving the intent to be cruel in the allegedly cruel acts. The petitioner did not provide contradictory evidence as to the

occurrence of the incidents. The respondent in cross-examination was not consistent as to dates and times and this can easily be attributed to memory loss as to the specific dates due to the passage of time. He failed to produce any documentary evidence such as police and medical reports to support his claims which does bring some doubt as to whether the acts occurred. The respondent did however produce a newspaper clipping of one of the acts. I shall not delve into an exploration as to whether the facts occurred or not, because it is my reasoned opinion that even if they did, the nature of acts of this nature should not be construed as cruelty.

40. The acts in question are five suicide attempts ranging from attempts at overdosing herself or at cutting her wrists. Seeing a loved one in a near death situation is traumatic, but I find great difficulty in equating such trauma to cruelty. If for example, a spouse witnesses their spouse in near death experiences in the course of a chronic illness such as cancer, could it be said that that act was inherently cruel just because it caused great distress and mental anguish to the other spouse? The marital relationship by its very nature exposes each spouse to extreme vulnerabilities in the other spouse which go beyond the ordinary wear and tear of the exigencies of life in general but cannot be defined as cruelty.

41. Suicidal tendencies are often a manifestation of an underlying mental health issue, a fact the cross-petitioner acknowledged when he stated during cross-examination that he had discussed counseling with the petitioner in light of these incidents. Therefore, it is my finding that if these suicidal acts did occur, there were deeper issues at play. I cannot find that the acts were inherently cruel and the cross-petitioner should have proved a cruel intent on the part of the petitioner in her actions. There being no such evidence, I cannot return a finding of cruelty against the petitioner and the Cross-Petition fails on the ground of cruelty based on these incidents, if they occurred.

42. The cross-petitioner testified of other instances at which the conduct of the petitioner towards him was cruel. One such (mis)conduct is that the petitioner indulges excessively in excessive alcohol and tobacco, against his wishes. It was his evidence that the petitioner spends a lot of time outside the matrimonial home getting drunk and all pleas to stop her excessive drinking have fallen on deaf ears. The cruelty alleged by the cross-petitioner is not the substance abuse per se, but the resultant fracas that would ensue if the respondent denied the petitioner's sexual advances after these incidents. The disturbance was in the form of violence towards the cross-petitioner whom she would push around the house and cause great embarrassment as it was sometimes in full hearing of the children and domestic help. The cross-petitioner further testified that the petitioner is an unapologetic and self-confessed socialite who has prioritized her social life over and above the marriage. According to him, she furthers belittles the cross-petitioner with utterances to the effect that he is not man enough as he lacks the financial muscle that her mother has.

43. The petitioner conceded that she does smoke and drink but responded that the respondent already knew this before they got married, which the defendant admitted. It was his testimony that when they were dating, he asked her to stop smoking and she did until 2021 when the drinking and smoking became excessive. The respondent further stated that whilst he also drinks, it is the combination of alcohol and tobacco that he finds repulsive.

44. Based on these facts, I must state at the outset that drinking and smoking alone cannot be the basis of the ground of cruelty. According to the case of **Chesnutt v Chesnutt**, 1 Sp. Ecc. & Ad. 196, at 198, 164 E.R. 114 at 115 (per Dr Lushington, 1854):

> *"However, ... degrading habits of intoxication [may be] – however annoying to a wife, especially the wife of a gentleman and a clergyman – these facts, standing alone, do not constitute legal cruelty."*

In order for the alcohol or tobacco abuse to be considered a ground for divorce, the party alleging the cruelty must prove that the alcohol abuse had the effect of injuring him or her or caused reasonable apprehension of the same. Drinking and smoking no matter how excessively done are not inherently acts that can automatically be considered as cruelty without proof of intention to be cruel or adverse effect on the complaining spouse. This is the position taken in the case of **Baker v Baker**, [1955] 1 W.L.R. 1011, at 1015 (Liverpool Assizes, Davies, J.):

> *"In my judgment, persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse, certainly if it is known to be injuring the other spouse's health, may well of itself amount to cruelty. In any case, such drunkenness, if it is combined with other acts of ill-treatment, may obviously be of the greatest importance."*

45. The cross-petitioner has gone further to allege that the petitioner combined acts of drunkenness with violence. Such a combination would amount to cruelty. It was the cross-petitioners evidence that the petitioner would at times throw punches at him and at others she would scratch and bite him and invite him to retaliate. At other times she would shove, push and speak to him loudly in the home. The petitioner did not provide direct evidence to the contrary. During cross-examination on the issue, the cross-petitioner used the term that "the petitioner had been physical with him" and he stated that he knew the difference between being physical and being violent. Neither of the parties have attempted to analyze this evidence in the arguments. Violence in the domestic arena can be characterized as being either physical, sexual, psychological or emotional, economic, social etc. The category of physical violence includes any physical act of aggression and therefore in this context, I fail to understand the significance of the difference between being physical and

being violent when in the current context, the two are the same. If this physical acts did occur as a fact, then cruelty would be an issue.

46. Looking at the evidence in its totality, neither of the petitioner's witnesses, both her mother and a marriage advocate, state that they had ever been called upon with regard to any complaint by the respondent against the petitioner. The marriage advocate also testified that when the petitioner told him she wanted a divorce; he contacted the respondent's marriage advocate who was the one who had been dealing with matrimonial disputes. The petitioner also testified that she used to complain about all the ill treatment and matrimonial offences she experienced to the respondent's marriage advocate. The respondent has therefore never complained to the petitioner's mother or her marriage advocate about the violence nor did he call his marriage advocate to testify as to the violence. The one incident that the petitioner's mother testified about was not a complaint by the cross-petitioner. He had simply called his mother-in-law to find out where the petitioner was.

47. I have been invited by counsel for the petitioner to draw adverse inferences that this witness was deliberately not called because he could have given contrary to the case of the cross-petitioner (see ***Maonga v Blantyre Print and Publishing Company Limited*** [1991] 14 MLR 240). Such inferences can only be drawn in respect of a witness who is available and has not been called. The cross-petitioner did not explain why he did not call this particular witness who could have shed light on the issue. It is now settled that if, for credible reasons, a witness whose evidence is crucial is not going to be called to give evidence, clear justifiable reasons must be provided to the court (***Jones -v- Taunton and Somerset NHS Foundation Trust*** [2019] Med LR 384). Under the circumstances, in deciding whether there is high probability that the violence occurred or not, I must find it less likely that it did occur based on the fact that there is no supporting evidence in view of the cross-petitioner's equivocation on the issue during cross-examination and based on the adverse inference drawn from the respondent not calling the marriage advocate to give evidence.

48. The cross-petitioner's last charge against the petitioner, on the basis of her taunts as to his inferior financial status in comparison to her family background. It is the cross-petitioner's case that such concerted conduct is of a nature as to amount to cruelty. The petitioner did not respond to this claim in her testimony. Her counsel however argues in the final submissions that this could not have been the case as the petitioner filed for divorce after the cross-petitioner had risen in status. He now commands respect as the chief executive officer, as it were, of a substantive parastatal organization. It is the petitioner's counter-argument therefore, that the cross-petitioner is merely suffering from an inferiority complex.

49. If the petitioner did constantly belittle the respondent then the hurtful and demeaning words are inherently cruel and can be the basis of a finding of cruelty. The petitioner did not provide contrary evidence and the cross-petitioner was not cross-examined on this issue.

However, as with the issue of physical violence, I have examined the evidence in its totality. The petitioner's two witnesses were not aware of any problem of this nature, which if it indeed was concerted and over a long period of time and had upset the cross-petitioner to such a degree that he considered it cruelty, there must have been some trail of evidence along the way. As the petitioner's marriage advocate is of the view that his counterpart is the one who was in the know on the parties' squabbles, it is unfortunate that the cross-petitioner did not call this witness. I must again draw adverse inferences from the failure to call this witness in relation to the degrading conduct as I did in relation to the physical violence. As the petitioner's counsel has rightly argued, if the cross-petitioner's lowly status was an issue, his current elevation should have prevented the petitioner from filing the petition. I accordingly find that there was no evidence of cruelty on the part of the petitioner and the Cross-Petition fails on this ground.

Adultery

50. Finally, with charge of adultery with the co-respondent, the petitioner's evidence was that the respondent and co-respondent committed adultery and a child was born from this liaison. The basis of the charge is that the petitioner claims the co-respondent is "on record admitting that she has a daughter" with her husband. The particulars are that the co-respondent has a certain named phone number and that in October 2021, the respondent called her husband's mother asking for permission for the co-respondent to take her daughter to meet her grandmother for the first time. The petitioner goes on to aver that in the same month, in the same year she also sent a text message to the respondent's sister asking for permission for her to take her daughter to see her grandmother. The co-respondent further told the respondent's sister that she got her number from the respondent.

51. The petitioner has also charged the co-respondent with contumaciously committing the said adultery, knowing full well that the parties herein were married. Particulars are that on one occasion in 2018, she confronted the co-respondent whom she found having lunch with the respondent in the front seat of his car. During this said confrontation, the co-respondent denied the affair. Despite the denial, the petitioner nonetheless claims that on several occasions and on diverse dates in 2020 and 2021 the two were seen in public places late at night, holding hands and kissing each other affectionately. The resulting effect of this state of affairs according to the petitioner's claim, is that she suffered loss as she was greatly traumatized, embarrassed and thereby lost sleep on several occasions leading to ill health.

52. The general thrust of the common law recognizes that the very clandestine nature of the adulterous act is such that is very rare that direct evidence is available. In a court of law, evidence must be tendered nonetheless that would enable the court to return a finding that adultery has in fact been committed (see **Giramata v Habimana** Matrimonial Cause

Number 16 of 2020 (unreported)). In **Sadala v Sadala** Matrimonial Cause Number 8 of 2016, High Court Principal Registry (Unreported) the Court reiterated that the mere opportunity is not proof of adultery and therefore, adultery cannot be established merely on suspicion. Suspicion must be accompanied by evidence of undue familiarity and opportunity. There must be evidence to show that there was an opportunity for adultery to be committed (see **Ross v Ross** [1930]AC 7 and **Chirwa v Chirwa** [1996] MLR 452).

53. The co-respondent neither filed a witness statement nor appeared in court despite having filed an answer to the petition through the respondent's lawyers. The Court never had an opportunity to hear from her during the hearing. The petitioner's evidence that she confronted the two is denied by the respondent who maintains the incident never happened and even if it did, it does not constitute evidence of adultery. Finding two people having lunch in a car does not provide the sort compelling circumstances as would enable a court to infer that the requisite opportunity for committing adultery existed. The petitioner alleges the two were seen in public places in compromising positions. The respondent in denying the allegation testified that he frequented public places with CCTV cameras which the petitioner could have inspected to prove that he was in those places. There is therefore a standoff in the evidence and analysis of the evidence in its totality presents a better indication of what is more probably the more plausible version of events.

54. The co-respondent's voice though physically absent in the proceedings was shrewdly brought in through text messages that were tendered by the petitioner. I dutifully read through the petitioner's submissions inviting me not to find the evidence of the text message sent by the co-respondent to the respondent's mother and sister, admitting the adultery, hearsay evidence. I am invited to find that because the statement was sent to persons other than the petitioner, it is not hearsay since the co-respondent is on "record" as admitting that she has a child with the respondent. Before I delve into the substance of this very bold argument, the mystery I must first solve is, what "record" this is. In these proceedings, the record is the court file and the co-respondent has not made these admissions in these proceedings. She is therefore only on record in as far as the fact that she made denials in her Answer.

55. Moving on to the substance of this argument, counsel for the petitioner has used the celebrated case of **Subramanium v Public Prosecutor,** [1956] WLR 965 at 970, to support the contention that hearsay is only inadmissible when all that is to be established by the statement is that it was made, and not the truth of its contents. This far, I agree with counsel for the petitioner. However, to apply this rule to the facts at hand, the only reason for tendering the statement or the text messages that contain the statement is to prove that truth of its contents. It is the very question whether the co-respondent has a child with the respondent that has to be answered by this Court therefore the only reason for producing evidence that such a statement exists is that that statement is an admission of the very fact that is disputed. If ever there was an example of hearsay, this is it.

56. I do not doubt even if for a moment, as I have been asked to consider, that as the law of evidence develops and with technological advances in society exceptions to hearsay exist, many exceptions to hearsay will be allowed (***Malawi Savings Bank Limited v Malidade Mkandawire t/a Malangowe Investment*** MSCA Civil Appeal No. 38 of 2014 (unreported). Yes, this is undoubtedly a fact we have to accept, however the manner in which technological evidence is brought to court is well regulated. The mere mention of phone numbers without any technical evidence as to whom those numbers belong to is not sufficient to prove the facts in dispute. Technical evidence of the authenticity of those messages would also be necessary. As it is, all the Court is faced with is a number that is alleged to be the number of the co-respondent and some messages that were supposed to have been taken from the phones of persons who are not in court. Technological advances also equip scammers with the know-how to produce messages that were in fact never sent or received. No court can take such evidence at face value. At the very least, the petitioner should have provided expert evidence to support the authenticity of the messages tendered.

57. Counsel for the petitioner cites a case in which the co-respondent sent a message to the petitioner admitting having a child with the respondent and such evidence was allowed. (***Lucy Chingolo v Eskim Chingolo,*** Matrimonial Cause No. 62 of 2009, Principal Registry, unreported.). It is disappointing that I have to distinguish this case in stating that the message in that case was sent to the petitioner. It was not a message from person x to person y which the petitioner somehow intercepted. The respondent's mother and sibling to whom the messages were allegedly sent were not called as witnesses. The petitioner explained this by saying since they are related to the respondent they were unlikely to give evidence against him. However, these witnesses could have been compelled to attend and their evidence would have been analysed in the context of their relationship to the respondent. The petitioner should not have unilaterally made the decision not to call them as the mere attempt to have them brought to court should have been an integral part of the prosecution of her Petition.

58. Further, a charge of adultery must state the time within which the acts were committed as section 5 (a) of the Divorce Act requires that the acts be committed since the celebration of the marriage. Such pleading, lacking in particularity, prevents the respondent from responding to the charges levelled against him.

59. From the above therefore, I find that apart from the hearsay statement there is no conclusive proof, medical or otherwise that suggest that the co-respondent and respondent have a child together, or that such child was sired within the period of the marriage. It would be very dangerous for a court to proceed to make a finding of adultery based on the fact that a child was conceived, without conclusive evidence when there is precise science on which such findings must be based (see ***Giramata v Habimana*** High Court, LL Matrimonial Cause No. 16 of 2020). Based on the evidence before me I cannot find for the petitioner on the ground of adultery.

Order on Dissolution

60. For all I have reasoned above,
(a) I hereby grant a ***decree nisi*** of divorce on the ground only of cruelty prayed for in the petition by the petitioner on ground that the respondent unjustifiably denied her of her conjugal rights.
(b) The petitioner shall apply within six weeks from the date herein for a ***decree absolute***. Any party wishing to show cause why the decree nisi may or may not be made absolute shall do so before the expiry of the said six weeks.

Custody

61. The petitioner has sought custody of the issue of the marriage on the grounds that it is in their best interests since as a mother she can ably take care of them. The respondent is in agreement and simply prays that any order allow him the opportunity to custody should the circumstances change. In making my determination, I am guided by sections 8 (3) and 134 (2) of the Child Care, Protection and Justice Act which provides as follows:

> " 8 (3) *The child justice court shall consider the best interests of the child and the importance of the child, on account of age, with the mother when making an order for custody or access.*"
>
> "*134 (2) Where a matter involving a child is otherwise liable to be heard by the High Court, it shall be heard by the High Court but the High Court shall comply with the requirements of this Act in respect of the child.*"

I see nothing that would go contrary to the best interests of the children in this case by countenancing the proposed arrangement

Order on Custody

62. I therefore grant joint legal custody to both parties, with –
(a) full physical custody being granted to the petitioner; and
(b) visitation rights or rights of access being granted to the respondent over holidays and weekends.

The parties are free to seek variation of this order at any time should there be a change in the circumstances of any of the parties or if the current arrangement becomes unworkable or ceases to be in the best interests of the child, or for any reason permitted by the law.

Maintenance

63. The respondent has since the time the parties have ben separated been paying a monthly sum of maintenance of K400,000 for the children. The petitioner would like the monthly sum to be raised to take into account the adjustment in the cost of living, the fact that the children are growing and the fact that the respondent now earns enough to pay more.

64. The respondent is opposed to the rise in the figure of maintenance. It is his argument that this sum is over and above other expenses that he makes for the children such as school fees and medical expenses. The respondent has only made it clear that his current employment is on a contractual basis and it would be unwise to lumber him with a high fee that he may not be able to maintain if he does not continue in his current employment. He also prays that the petitioner who is gainfully employed as a legal practitioner also demonstrates her contribution to the maintenance of the children as it is a mutual parental obligation.

65. The petitioner has not particularized her claim sufficiently for the court to decide the children's needs as opposed to inflation and the respective earning capacities of both parties. As both parties are employed, both must contribute to the welfare, care and needs of the children. Since the petitioner has not provided information as to her contribution, I am reluctant to order a higher payment considering that the respondent is paying for the children's school fees and medical expenses.

Order on maintenance

66. (1) The respondent shall contribute to the children's care and welfare as follows:
   (a) He shall pay school fees and medical expenses for the children.
   (b) He pay a monthly sum of of K400,000.00 (four hundred thousand Kwacha) towards the maintenance of the children on a monthly basis by the last Friday of each month.

(2) The petitioner shall contribute towards the children's care and welfare as follows:

   (a) She shall pay for all incidental expenses associated with the children's school which are not part of the school fees.
   (b) She shall pay for any expenses incurred for the children's care and welfare which exceed the monthly fee paid by the respondent.

(3) The parties are free to seek variation of this order at any time should there be a change in the circumstances of any of the parties or if the current arrangement becomes unworkable or ceases to be in the best interests of the child, or for any reason permitted by the law.

Property Distribution

67. Only the respondent included in his evidence, a proposal as to how the property in the marriage should be distributed. His proposal was as follows:

> "*a. the petitioner retains the motor vehicle valued at MK14 million which he bought for her*
>
> *b. the petitioner retains the household items which are in the Area 43 house in Lilongwe:*
>
> *i. A black Jordin Sofa Set*
> *ii. A Samsung TV set*
> *iii. A Samsung Radio Player*
> *iv. A Defy Cooker and Oven*
> *v. A Defy upright Fridge with automatic water dispenser*
> *vi. All kitchen utensils*
> *vii. All the live music and studio recording equipment from the Blantyre house valued at MK25 million that she can continue to use for her recording business*
> *viii. The dining set from the Blantyre house*
> *ix. The black sofa from the Blantyre house.*

68. Counsel for the petitioner, in his final submissions, did not agree with this proposal for disposition as he argued, based on the evidence, that the petitioner was the one working during most of the marriage and therefore was the breadwinner. In her view the proposed scheme does not take into account her disproportionate contribution to the acquisition of the property. He therefore prays that the matter of dissolution be argued separately after the dissolution of the marriage. Counsel for the respondent opposed this position as the petitioner had ample opportunity to make submissions as to property distribution during the hearing of the divorce.

69. I am inclined to agree with counsel for the respondent that the petitioner, who was ably represented by counsel, chose not to lead any evidence as to property distribution even after being served the respondent's witness statement in which he made the proposed scheme for distribution. Whilst the court should only proceed to make determination after it has heard evidence of both parties on an issue, no party should be allowed a second bite at the cherry when it failed to seize the opportunity to present evidence on the issue. The petitioner cannot now, after the close of evidence come out with evidence when it was not stated at the outset that the matter should be determined sequentially, i.e., the dissolution first and the property disposition thereafter. The petitioner is willing to accept that the divorce and the maintenance proceedings run concurrently because she provided evidence for the same but only seeks a separate hearing for the property distribution because she

omitted to do so. This selective approach would not have been a problem if this was the stated right at the outset of the trial and was agreed to by both parties as the way the matter would proceed. As it stands, it would be unfair to the respondent who considers the matter closed, to then find that it is to be reopened.

Order of Property Distribution

70. As the respondent is the only party that has provided evidence on which property is to be distributed and no evidence was led that such distribution would be unfair, I hereby order that the property be distributed as prayed by the respondent.

Damages

71. I will not grant the order for damages against the co-respondent merely because the ground of adultery was not proved, not on the basis as the counsel for the respondent has argued, that that there is no law that provides for it. Section 23 (1) of the Divorce Act provides that:

> *"A husband may, by petition, claim damages from any person on the ground of his having committed adultery with the wife of the petitioner."*

I would also go as far as to say that the refusal in granting the order is not based on the wording of the said section 23 which only avails husbands (and not wives) such damages. The provision as it stands is discriminatory on the grounds of gender, and therefore flagrantly unconstitutional in terms of section 20 of the Constitution and the approach would be extend the right to claim damages to both husbands and wives. Had the case for adultery been made out, I would have been minded to grant the relief sought if satisfied that the loss was proved.

Costs

72. In view of the nature of the dispute, i.e. a matrimonial one, and under the circumstances I shall exercise discretion to order that each party be responsible for its own costs.

I so order.

MADE in Chambers, in Lilongwe this **8th** day of **July 2022**

Fiona Atupele Mwale

JUDGE