



IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 520 OF 1979

BETWEEN:

SAMUEL TIMON CHIBWEYAPETITIONER

and

DOROTHY CHIBWEYA RESPONDENT

and

LENNARD NAMWERACO-RESPONDENT

and

FINLESS SUKA PARTY CITED

Coram:

Banda, J.

For the Petitioner

:

Chiudza Banda of Counsel

For the Respondent

:

Mbalame, Chief Legal Aid Advocate

Co-respondent not present

:

Unrepresented

Party Cited present

:

Unrepresented

Official interpreter

:

Sonani

Court Reporter

:

Mazibuko

JUDGEMENT

The petitioner prays for the dissolution of his marriage to the respondent on the grounds of alleged adultery and cruelty. The respondent denies both the adultery and the cruelty alleged and she has, herself, cross petitioned for the dissolution of her marriage to the petitioner on the ground of his alleged adultery with the party cited.

The parties were married in or about June, 1967, at the Registrar General's office in Blantyre. They have lived in various places including Chiromo, Chikwawa, Lilongwe and Mponela. There are four children of the marriage and **I am satisfied on the evidence before me that both parties are domiciled in Malawi.** I am equally satisfied on the evidence before me that **there is no collusion by the parties in instituting these proceedings.**

The only evidence on which the petitioner grounds his allegation of adultery is the letter, Exhibit 2, which the respondent admits she wrote to one Lennard Namwera who is the co-respondent in

these proceedings. That letter was not, it must be noted, accidentally found but was intended as the respondent admitted, that it should be seen and read by the petitioner. It was therefore, deliberately put in the petitioner's bedroom. The letter is very affectionate in tone and I am being asked to infer from its terms that adultery was committed by the respondent with the co-respondent. There is no other evidence apart from that letter. There is no evidence, for example, to suggest that the respondent was seen together with the co-respondent in some compromising, circumstances except the one incident to which the respondent deposed when the co-respondent is alleged to have given her a lift to go to the doctor's. The respondent, although denying committing adultery with the co-respondent, conceded knowing him and that she has known him since her childhood. She further testified that on the, day the co-respondent gave her a lift to the doctor's, he expressed his amorous towards her and that he evinced those feelings by kissing her on her arm. She, too, apparently reciprocated her feelings by kissing his hand and that she told him that she would think over what he had said to her. She stated that she had written Exhibit 2 in the hope that after the petitioner had read it, it would invoke a feeling of jealousy in him and that it might induce him to be more loving towards her because, she alleged, the petitioner was -always spending nights away from home.

It is not necessary to prove adultery by direct evidence as it is an indulgence, which is done in private. However, **association coupled with opportunity and evidence of illicit affection or undue familiarities** will create an inference upon which a court can, quite properly, find that adultery has been committed. But in my judgment, such circumstantial evidence must do more than create suspicion. It must be such as to satisfy the court *beyond reasonable* doubt that from the nature of things adultery must have been committed. A court will not draw the inference of guilt unless the circumstantial evidence relied on is not reason ably capable of any other explanation vide Beer v Beer (1948) P.10. As **Lord Merrivale P.** said in the case of Farnham v Farnham (1925) 133 L.T. 320:

"The inference of adultery arises when there is proof of the disposition of parties to commit adultery together the opportunity to commit it."

In my judgment, the evidence adduced by the petitioner to support the allegation of adultery falls far short of proving disposition and opportunity from which I can infer that adultery was committed. The letter written by the respondent is affectionate in tone but it does not by itself prove circumstantial facts on which I can properly conclude that adultery was committed. The respondent, in what I consider was a frank admission, explained her relationship with the co-respondent and explained why she wrote Exhibit 2. The respondent struck me as a truthful witness and I am prepared to accept her explanation. Consequently, I am not satisfied, that the petitioner has proved his allegation of adultery against the respondent. I did not think the petitioner was a truthful witness. He struck me as a very temperamental man and this perhaps explains his evasiveness, in his testimony.

The second ground on petition is founded is the allegation of cruelty against petitioner. The only evidence on this ground was the evidence relating to one single incident, which occurred at Kawale in Lilongwe when the respondent is alleged to have assaulted the petitioner with a radio. The respondent admitted assaulting the petitioner but stated that she was acting in self-defence because the petitioner was biting her breasts. It would appear that no serious injury was. occasioned to the

petitioner and there is no evidence that whatever injury, if any was suffered, necessitated medical attention. **In order to succeed on the ground of cruelty the petitioner must show that the respondent had inflicted bodily injury upon him or that the respondent so conducted herself towards him as to render future cohabitation dangerous to his life, limb, mental or 'bodily health. Russel v Russel (1895) P. 315.** No evidence was adduced to support the allegation that the respondent is a person of violent temper nor was any evidence adduced to prove that the respondent beat the children in the petitioner's presence in order to cause danger to the mental or bodily health of the petitioner. There is no evidence before me on which I can find that cruelty has been established and so the petitioner has failed to establish the second ground on which he based his petition and I dismiss it with costs.

The respondent cross-petitions for the dissolution of her marriage to the petitioner on the ground of adultery with the party cited. The petitioner initially denied the allegation on of adultery the party cited but those denials are now more of academic value because in course of the trial of this case, learned counsel for the, petitioner informed the court that he had been instructed to withdraw the reply to the cross-petition and further informed the, court that he would not challenge any evidence in support of the cross-petition and so it was. The party cited gave evidence and she denied that she has ever carried on an adulterous association with the petitioner. I direct myself to the rule that a confession or admission is only evidence against the party who makes it. Therefore, any apparent admission of adultery by the petitioner which arises from his withdrawal of the reply to the cross-petition is no evidence that the party cited has committed adultery with the petitioner: **Rutherford v Rutherford** (1923) A.C.1

I find in my judgment that there are circumstantial facts on which it is proper to find that the petitioner has committed adultery with the party cited. There are sufficient facts, which prove disposition and opportunity on the part of the petitioner to commit adultery with the party cited. It will be necessary only to make a brief reference to some of these facts. In September, 1977, the petitioner was seen at midnight at the house of the party cited and in December that year, the petitioner was again seen with the party cited in his own car and this was after he had refused to give a lift to his wife who was going to attend a political meeting at Lilongwe airport. In February, 1978, the petitioner was seen with the party cited when he was dropping her at her place of work after, apparently, they had spent the night together. In April, 1978, the petitioner and the party cited were seen at 5.00 a.m. coming out of the petitioner's bedroom at Mponela. The petitioner was again seen with the party cited doing some shopping in Limbe in June 1979. In addition, it was the evidence of the respondent that she had picked up a letter which the party cited wrote to the petitioner. The respondent told the court that the party cited was expressing in her letter how she loved the petitioner and that she was also asking him to prove his love to her. The respondent testified that the letter was destroyed by the petitioner and it was not, therefore, produced in court. However, what was significant was that the party cited did not challenge the evidence of the respondent on the issue of that letter. There was also the evidence that some clothes of the party cited were found in the petitioner's bedroom. It was the petitioner's contention that the clothes (a dress and a skipper, Exhibit 4) belonged to his sister. The petitioner's sister gave evidence ostensibly to prove that the clothes belonged to her. That pretence did not last long because it was effectively exposed in cross-examination and it is quite clear to me that she was put up to it. There can be no doubt, in my judgment, that the clothes belong to the party cited. A record player belonging to the petitioner was found in the house of the party cited. These circumstantial facts

are only capable of one explanation. They prove that there was association with opportunity and they provide evidence of illicit affection between the petitioner and the party cited. These factors, in my judgment, create an irresistible inference upon which a court can find adultery. I am, therefore, satisfied that the respondent has established that the petitioner has committed adultery with the party cited and I accordingly grant her the relief prayed for. I pronounce a *decree nisi* of divorce in favour of the respondent. The question of custody of the children will be adjourned to chambers. PRONOUNCED in open court this 6th day of April, 1981, at Blantyre.

R A. BANDA
JUDGE