



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
BLANTYRE PRINCIPAL REGISRTY  
CIVIL DIVISION  
CIVIL CAUSE NO. 204 OF 2016

BETWEEN

NYUMA MANDA.....PLAINTIFF

-and-

WINNIE NOFUNOFU PHIRI.....DEFENDANT

**Coram: Honourable Mr. Justice D. Madise**  
Mr. W. Hara Counsel for the Plaintiff  
Mr. Sauti Counsel for the Defendant. Not present  
Mr. M. Manda Official Court Interpreter

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**Madise, J**

JUDGEMENT

## **1.0 Introduction**

1.1 On 27<sup>th</sup> October, 2016 the plaintiff in this matter commenced these proceedings by way of a writ claiming from the defendant damages for adultery as the main head, loss of consortium, emotional distress and humiliation to the dignity of his family. On the appointed day for the hearing of the matter the defendant did not show up despite due service and no reasons were given for his non-attendance. His legal counsel apparently ceased to represent him. I allowed the plaintiff to proceed and this is the judgment of the court on the merits.

## **2.0 The Facts**

- 2.1 The plaintiff contracted a lawfully constituted marriage with one Kettie Mughogho in 1988 and there are two issues from the union.
- 2.2 However, since 2015 the defendant has been enticing the plaintiff's wife to commit adultery resulting in the plaintiff losing affection and affection. The plaintiff's wife eventually abandoned her marital and parental obligation as a result of this unholy union with the defendant.
- 2.3 That the defendant knew at all material times that he was going out with a married woman. The plaintiff produced call records as evidence that the defendant and his wife have been communicating through text messages.
- 2.4 The plaintiff and his wife finally separated due to the actions of the defendant. The story as told by the plaintiff has been supported by Alex Khanyina from Malawi Police services. He recalls receiving a complaint from the plaintiff regarding the defendant and his wife. He then obtained a search warrant from court and served it on

Telecom Malawi the service provider of the defendant's phone. When the call log arrived it was confirmed that there was contact communication between the defendant and the plaintiff's wife.

2.5 The last witness for the plaintiffs was Ben Kaluwa. He told the court that he was asked by the plaintiffs to find out about the defendant at Rumphu Boma. When Kaluwa confronted the defendant he admitted having an affair with the plaintiff's wife. That marked the close of the plaintiff's case.

2.6 As earlier stated the defendant did not defend this action and he did not attend the hearing. I now proceed to pass my judgement on the merits.

### **3.0 The Law**

3.1 The burden and standard of proof is this. It is trite law that in civil matters the burden of proof rests on the one alleging or asserting the claim and wants the court to believe that a particular fact exist i.e. the burden of proof is upon the party who would fail if no evidence at all is adduced on which he bases his claim. The standard of proof is on the scale of probabilities.

3.2 He who asserts a matter must prove and he who denies need not to prove anything. If the claimant is to succeed the court must think his story to be more probable than not. If the probabilities are equal the claim must fail.

3.3 Section 22 Constitution

The family is the natural and fundamental group of the society and is entitled to protection by society and the state.



Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.

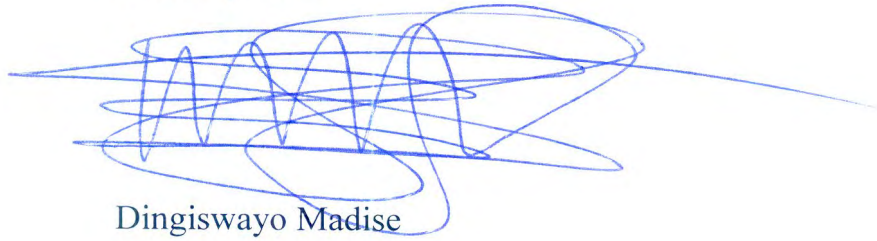
**4.0 The finding**

- 4.1 There is no dispute that the plaintiff and Kettie Mughogho were lawfully married. There is no dispute that the parties have two issues born out of the union.
- 4.2 The defendant has not defended the allegations levelled against him by the plaintiff that he was having an affair with the plaintiff's wife. The call logs tendered in Court tells a story of man (defendant who was obsessed with someone's wife. The amount of traffic of calls and text messages between the two cheaters are alarming. There is no doubt that the two were having a secret affair.
- 4.3 The plaintiff's need not to prove adultery. It automatically follows in my view that sexual intercourse did take place between the two cheaters as evidenced by the frequent communications.
- 4.4 Adultery is rarely proved by direct evidence. The claimant must only prove acts which leave no doubt in the eyes of right thinking members of society that adultery did take place. There must be established instances, inferences and circumstances which point to one logical conclusion that adultery did take place (See **Ross vs Ross [1930] AC7**)
- 4.5 There is no doubt in my mind that the plaintiff has made out a good case on a balance of probabilities and I enter judgement in his favour on all the reliefs sought in the summons plus costs.

Registrar within 14 days.

It is ordered.

**Pronounced** in open Court at Blantyre in the Republic on 20  
February 2018.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dingiswayo Madise

**Judge**