IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NUMBER 09 OF 2018

BETWEEN:

JAYI-MURIMA MLALIKI **PETITIONER**

AND

JACQUELINE MLALIKI (Nee MAGOMBO) **RESPONDENT**

CORAM: JUSTICE M.A. TEMBO,

Chokotho and Frazer, Counsel for the Petitioner

Kalanda, Counsel for the Respondent

Mankhambera, Official interpreter

JUDGMENT

1. This is the decision of this Court on the petition for the dissolution of the marriage between the petitioner and the respondent. The petitioner filed the petition seeking dissolution of the marriage on the ground of desertion on the part of the respondent since 2014. The respondent cross-petitioned for divorce on the ground of cruelty.
2. This Court heard the evidence from both parties after being satisfied that it has jurisdiction in the matter, the parties having previously married under the Marriage Act and being domiciled here.
3. The petition states that:

i) On 20th March 2008 the petitioner was lawfully married to the respondent by a celebration of the marriage at the Registrar General in Blantyre.
ii) Following the celebration of the marriage, the petitioner and the respondent lived together in their matrimonial home at Namiwawa and Njamba in Blantyre.
iii) There is only one issue of their marriage born in July 2007.
iv) Both the petitioner and the respondent are domiciled in Malawi.
v) Between 13th and 15th February, 2015, the respondent deserted the petitioner without any cause and such desertion has continued from more than three years and presently the respondent is still outside the matrimonial home without cause until the petitioner moved out of the jurisdiction where he is employed.
vi) At no time since the celebration of the marriage has the petitioner willfully neglected or misconducted himself regarding the respondent to have in any way induced the respondent's desertion.
vii) The petitioner now seeks to have the marriage dissolved on the ground that the respondent has deserted him without cause for a period of over three years.
viii) The petitioner presents and prosecutes this petition without collusion with the respondent.
ix) Therefore the petitioner seeks that this Court exercise its discretion in his favour and decree that:
    a) The marriage in fact celebrated between the petitioner and the respondent be dissolved
    b) The petitioner be granted sole custody of the issue of the marriage.
    c) The respondent pays costs of this action.

4. The respondent filed an answer and cross-petition which states that:

    i) She admits paragraphs i to iv of the petition.
    ii) She avers that on or about 18th February 2018, for no reason at all, the petitioner severely beat her up, chased her from the matrimonial home and threatened her that if she dared go back to the matrimonial home, she would do so at her own risk.
    iii) She avers that all her attempts for reconciliation were unsuccessful.

iv) She further avers that before the beating, the petitioner had repeatedly told her to leave the matrimonial home because she was not cooking for him, was not attending church on Saturdays and was uneducated.
v) She, in the premises, denies the allegations in paragraph vi of the petition and denies deserting the matrimonial home as alleged in paragraph v of the petition or at all.
vi) She asserts that it was in fact, the petitioner's own unreasonable behavior and cruelty as aforesaid that forced her out of the matrimonial home.
vii) Save as hereinbefore expressly admitted, she denies each and every allegation contained in the petition.

CROSS-PETITION

viii) Since the celebration of the marriage, the petitioner has treated the respondent with cruelty.

Particulars of Cruelty

a) On or about 18th February 2014, the petitioner, without cause, mercilessly beat the respondent up and told her to leave his house.

ix) The respondent therefore cross-petitions that the marriage be dissolved on the ground of the petitioner's cruelty.
x) That the cross-petition is presented and prosecuted without any collusion with the petitioner.
xi) Wherefore the respondent prays that this Court rejects the petitioner's prayer and exercises its discretion in her favour and decree that:
    a) The marriage celebrated between the petitioner and the respondent be dissolved.
    b) The respondent be granted sole custody of the issue of the marriage.
    c) The petitioner be pays the respondent costs of this action.

5. The petitioner replied to the cross-petition and stated that:

i) The petitioner joins issue with the respondent on the respondent's answer.
ii) The petitioner refers to paragraph viii of the respondent's cross-petition and denies the contents thereof and puts the respondent to strict proof of the same.
iii) The petitioner states that the petitioner and the respondent fought in the heat of passion after the petitioner was extremely insulted, provoked and hit by the respondent and the petitioner did not chase the respondent out of their matrimonial home after the incident neither did the fighting amount to legal cruelty.
iv) Paragraph ix of the cross-petition is denied and the petitioner further states that the affray between the petitioner and the respondent, following the respondent's act of provocation and insults, does not at law amount to cruelty warranting dissolution of the marriage on the ground of cruelty.
v) Paragraph x of the cross-petition is only admitted to the extent that the cross-petition is presented and prosecuted with no collusion between the petitioner and the respondent.
vi) Save as hereinbefore specifically admitted, the petitioner denies each and every allegation contained in the cross-petition as if the same were specifically set out herein and traversed *seriatim.*

6. This Court heard the evidence of both the petitioner and the respondent.
7. The petitioner filed a sworn statement in which he stated that he married the respondent in 2007 and had the marriage registered on 20th March 2008 as evidenced by a marriage certificate to that effect.
8. He also indicated that the only issue of their marriage is a girl born in July 2007. He added that at the time of their marriage the respondent already had another child.
9. He stated that as a couple they would have times of peace and disagreement like every normal family. But that in all times of disagreement the respondent resorted to violent conduct and provocation which he never responded to as he saw such conduct as not being in the best interest of the family.
10. He stated that he was committed to the best for his family at all times such that in January 2009 he enrolled the respondent at the University of Free State in Bloemfontein in the Republic of South Africa where she studied Bachelor of Commerce in Investment and Banking and he supported her studies until she finished in 2013.
11. He then stated that the material occasion leading to the respondent's desertion was premised on interviews he attended in 2013 for a job while

the respondent was away at school. He stated that on the interview forms, he indicated his sister as his next of kin as it meant to him that it had to be his nearest relation who could be easily contacted in case of anything and at that time the respondent as away while his sister was close to the place where he attended the interviews.

12. He stated that on the material day in February, 2014 he found the respondent in their bedroom with papers scattered all over their bed. And that when he inquired why the papers were scattered on the bed, the respondent rudely replied that he better be talking to his elder sister who was his next of kin. He said he realized that the papers were the 2013 interview forms.
13. He stated that he then tried to explain but the issue became very heated and as usual the respondent became violent, started throwing jabs and shoes at him saying that he did not consider her first by not indicating her as his next of kin and she continued with further provocation.
14. He stated that previously, he would leave the house in the respondent's times of violence. But that on this day he resolved not to and for the first time he responded in the heat of passion and in self defence by pushing the respondent out of the house.
15. He said that the respondent then called her sister who came and they left the house that same night with the two children who were brought back the following morning following a family discussion involving both sides.
16. He said that however the respondent continued staying away for over six months while discussions and efforts to reconcile were ongoing. He said it became clear from the family discussions that the respondent was not willing to return to their matrimonial home and was resolute on abandoning the marriage.
17. He stated that he continued to stay alone with the two children until later when the respondent's child from the earlier relation was taken away and he carried on staying with his child from 2014 to 2016. He added that around 2015 the respondent rented a house in Nkolokosa and he used to drop their daughter there on weekend to stay over and he would pick her up on Sundays.
18. He stated that in 2016 he got a job in Kenya. And that when the respondent knew he was leaving the country, she insisted on having custody of their daughter. He stated that he was advised not to fight over custody and that he would not travel out of the country with the child without the respondent's consent so he left the child with the respondent and supported her up to now.
19. He stated that it is now five years since the respondent deserted their matrimonial home and has continued in such desertion without any intent of returning or terminating the desertion.

20. During cross-examination he stated that he beat up the respondent due to the misunderstanding that led to the fight between the two of them. He stated that by the time of the fight the two were not on speaking terms and they slept a separate beds.
21. He stated that they had a discussion at the police station and it was agreed to settle the issues amicably. He said he did not know that the respondent has a scar from the assault in issue. He stated that there had been many discussions.
22. During re-examination he stated that during the fight it was more about him defending himself and pushing the respondent out of the house of the house because there were children in the house and the respondent was screaming. He reiterated that for a long time the marriage was not functioning well as the respondent was not doing chores and attending work on church days. They would not be together as a couple as she was always tired.
23. He said they had a meeting the day he got released from the police station and again on another day. He stated that he asked for forgiveness for pushing the respondent out. He added that he asked the respondent to come home but she refused saying she was not safe.
24. The respondent filed a sworn statement in which she stated that she met the petitioner on 3rd April 2006. In October the same year she got pregnant. Then got engaged on 4th March 2007 and started living together as husband and wife before later getting married in 2008 after their child was born in July 2007.
25. She stated that the petitioner started showing signs of not wanting her while she was pregnant. And that he used to tell her that she was not of his level due to insufficient education. She added that he said he wanted to marry an educated lady but had married her because she was pregnant.
26. She stated that around February 2008 the petitioner's cousin phoned her to ask for money which he wanted for the petitioner's farm at Zalewa. And when she relayed the request to the petitioner, she said the petitioner got furious and started accusing her of not wanting to live with his relatives. She stated that this happened whilst the petitioner was driving her to the Polytechnic. And that when they reached around Metro Shop in Blantyre, the petitioner stopped his car and ordered the respondent out of the car and to go to her parents.
27. She stated that she left and went to the petitioner's mother who advised her against leaving and strongly talked to the petitioner. She added that it is after she went back home to the petitioner that they went to have the marriage at the Registrar General.
28. She then stated that their marriage continued to have problems. And that the petitioner used to complain that the respondent did not want his relatives to live with them.

29. She confirmed that in 2009, the petitioner sent her to school in the Republic of South Africa where she finished her studies in 2012. She stated that during this time there was relative peace in the home because of her stay at school but whenever she visited home the petitioner complained that she did not love his relatives four of whom lived with them.
30. She stated that in December 2013, her late sister was getting married. And she was supposed to go to the wedding meeting together with the petitioner. But that, however, due to work pressure she arrived home slightly late. And that he left for the meeting leaving her behind. She added that after the wedding the petitioner told her to leave the house. She added that she did not know why but that his reaction seemed to be related to the misunderstandings above. She stated that they sorted out their differences and started living together peacefully.
31. She stated that in January, 2014, the petitioner called for a meeting of representatives from his side and her side. And that his complaint was that she was not cooking for him and was not attending church on Saturdays and therefore that she should leave. She said she did not know that the petitioner had called for the meeting and just received a call from her sister asking about the agenda of the meeting.
32. She stated that during the meeting she told the family representatives that she was unable to cook for the petitioner as he pleased because of assignments at work and by then she was only two months old at her job. She also said she indicated that she was unable to attend church because she had to work on Saturdays.
33. She stated that the issue was resolved but despite that the petitioner told her to leave that same evening but she refused. She added that despite the resolution of the issues things did not work to the extent that they were sleeping on separate beds.
34. She stated that as a result of this, two weeks later, on 9th February, 2014, the family representatives from both sides of their family convened another meeting to try to resolve their differences. And that during this meeting both the petitioner and herself presented their grievances but no resolution was made and the meeting was rescheduled to another day.
35. She stated that they met again on 15th February 2014. And that the petitioner insisted that she should go, because according to him, she was not performing her household chores like cleaning the house and cooking despite the fact that she could, during weekends, cook and wash the petitioner's clothes. She pointed out that they had two servants, a garden boy and a maid both of whom were living with them. And that the maid used to do household chores and cooking. She stated that the family representatives did not see any reason for ending the marriage and advised the two of them to continue living together as husband and wife.

36. She stated that on 18th February, 2014, in the evening, she was sitting on the bed reading papers in preparation for a job interview. She indicated by way of background that previously in 2013 she had come across the petitioner's insurance policy in which he had indicated that he was single and that she was his dependent which displeased her but she never asked the petitioner. She said instead she alerted her relatives who raised the issue with the relatives of the petitioner. She then said immediately the petitioner entered the bedroom, and without explanation, he started shouting and insulting her that she was illiterate despite him sending her to school. And that he went on to state that just to show how illiterate she was she was insisting on being his next of kin on his insurance policy.
37. She stated that she did not answer him. And then he went to have supper and upon finishing he came back and continued with the accusations. She stated that she decided to answer and told him that she did not tell her relatives what he was claiming. And that she told him that by indicating on the policy document that he was single and she was his dependent, it meant he did not regard her as his wife.
38. She then stated that the next thing was that the petitioner was hitting her and telling her to pack up her things and leave the house. And that he beat her in full view of the two children who tried without success to stop him. Further, that she run away to the boys' quarters and the petitioner followed her there and continued to beat her up in full view of their servants who tried without success to restrain him.
39. She stated that it took their neighbour's intervention to stop the onslaught. But that by then she had been savagely beaten and was bleeding from the nose and mouth with a swollen face and covered in mud. She said at this point the petitioner went in the house and closed all the doors. And that one of her children, upon seeing the sorry state she was in, took a pair of trousers and threw it at her through the window. She added that when their neighbour asked the petitioner to her a phone and change of clothes he refused and told her to leave the house. Adding that he did not want a wife who was just there to eat his food and sleep.
40. She said that the petitioner said if she attempted to go back into the house he would kill her. She then said she phoned her mother for help using their maid's phone but by then the petitioner had already called her sister to come to pick her up as he had badly beaten her. She stated that her sister came with police who took her and the petitioner to Soche Police Station and gave a letter to her to go to hospital. She added that she went to get treatment at the hospital whilst the petitioner was locked up.
41. She stated that she still has a scar on the right side of her nose which bleeds whenever it is cold. She tendered a medical report that showed that on the material day she presented at Queens Hospital and had a bruise on the nose with a history of an assault.

42. She stated that the petitioner was released the following day on 19th February, 2014.
43. She was given a letter by the police to go to court and get a protection order but decided not to do so as she thought the matters could be resolved amicably.
44. She indicated that the police advised her, the petitioner and their marriage advocates to go to the victim support unit for resolution of the issues herein. She added that from the hospital she went to her cousin's house where she operated from. She said she attended a meeting at the police a week after the incident herein. And that at that meeting the petitioner apologized for beating her up. And that he called her the same day to go back to the matrimonial home after knocking off from work which she refused because she was afraid of being assaulted again. She said she insisted that if she was to go back the petitioner had to pick her up from her cousin's house.
45. She specified that before meeting at the police, the petitioner's representatives had called for a meeting at their house where it was resolved that she should still be going to their house to see the two children.
46. She then indicated that, two months later she called the petitioner to find out if he still wanted reconciliation and he responded that he would come back to her on that. And when she called him again two weeks after that he told her that he was no longer interested in reconciliation because he did not trust ladies.
47. She then stated that the petitioner agreed to give the child she had before she met him but retained their child and indicated that he would only release her when she reached 10 years of age. She confirmed that he however let their child visit her on weekends and during holidays. She stated that however when she asked him about the status of their marriage he said he did not want her back.
48. She then indicated that in 2016, she heard that the petitioner was leaving for work in Kenya and that when she confronted him about their marriage he reiterated that he did not want her back. She added that she then asked him to divorce her in that case, to which he replied that he could not go to court for divorce because his lawyers had advised him that the reasons he did not want her for were trivial and not valid. And that he further said that his lawyers had advised him to wait for a period of three years and that then he can seek divorce.
49. She stated that in 2016, the petitioner left for Kenya. And that from that time she never heard from him until she received the petition for divorce herein on Friday, 19th October 2018.
50. She then indicated that she purposely went at length to chronicle her married life to show that the petitioner is the one who openly demonstrated that he did not want her. And that although their differences were what would be considered normal, the petitioner's solution was always that she

leave. And that when he discovered that she did not leave upon mere words he resorted to physical violence.

51. She stated that despite being savagely assaulted by the petitioner she personally tried without success to reconcile and so too the family representatives tried. She added that she therefore finds it difficult to understand why the petitioner says she deserted him when in fact it is him who deserted her.
52. She therefore asked this Court to dissolve the marriage on the ground of the petitioner's cruelty in view of the intensity of the beating she endured at the hands of the petitioner.
53. She also pointed out that she is not of violent temper. She asserted that she always ended an argument crying and never threw shoes or jabs at the petitioner as alleged. She denied that the petitioner simply wanted to push her out of the house but asserted that he stomped on her with his feet and pulled her by her hair braids.
54. During cross-examination she reiterated that she has never been violent to the petitioner. And she stated that she controls herself by crying. She reiterated that the issue from 2013 was raised by the petitioner on the fateful night of the beating.
55. She stuck to her narrative of how she got beaten up and how she did not return to the matrimonial home after that. She then stated that the petitioner was a caring person whom she met when she was a student and he paid for her studies. She indicated that however she raised a concern with her uncle that the petitioner indicated that he was single and she was his dependent. She agreed that the said document was not in court.
56. She stated that the petitioner was generally not violent and was violent once.
57. She indicated that she could explain her contradictory statement that she feared to go back to the matrimonial home and that at the same time she tried reconciliation with the petitioner. She said after she left the matrimonial home she felt reconciliation was possible. She said she tried it but the petitioner did not give her a chance to go home. She said when she got a permanent job she knocked off late and went home late. But she never went back to her matrimonial home because the petitioner had kicked her out. And that the petitioner had asked her to go home but she did not. She explained that their marriage had problems and they would sit with family representatives to resolve the same. She felt it was not wise for her to just go back to the matrimonial home. And that the petitioner had to come to her representative's house to pick her up to go back to their matrimonial home as per custom.
58. She then said that at the point of the trial she never saw any prospects of reconciliation and did not want the marriage.

59. During re-examination she stated that she could explain her contradiction. She stated that the first time the petitioner called her after the police incident and she felt it was better to discuss at which point the petitioner apologized and said he did not know what came over him. She said she could not be sure if the petitioner would not suffer the same anger again. And she asked the petitioner to visit her but he did not.
60. She then stated that the petitioner allowed the children's visits on weekends but did not give her a chance to go back to his house. She said she had asked for one on one discussions which looked promising but then the petitioner said they would discuss and weeks went by.
61. She said one time she visited the children at the matrimonial home and the petitioner said he does not trust ladies. And another time they met at an ATM he said their family representatives would meet them.
62. She then said before the family representatives she said she still wanted the petitioner but he said she had left the matrimonial home and he was not allowed back.
63. She added that she could not just go back to the matrimonial home due to the beating for which counselling was needed. She said immediately after the police incident the petitioner asked her to go back home and she refused. And that later when she asked the petitioner to go back home he refused her. And that at that point the petitioner said he was advised to wait for three years since there was no valid reason for divorce.
64. Both parties then filed submissions on the main issue for determination, namely, whether the respondent deserted the petitioner without cause for three years and whether the petitioner treated the respondent with cruelty warranting an order of divorce.
65. Both parties submitted on the burden of proof which in civil cases rests on the one who asserts the affirmative. See *Commercial Bank of Malawi v Mhango* [2000-2001] MLR 43. The standard of proof in matrimonial matters is slightly higher than that in ordinary civil proceedings in which it is on a balance of probabilities but it is lower than in criminal matters in which it is beyond a reasonable doubt. See *Yotamu v Yotamu* [1995] 2 MLR 702, *Maosa v Maosa and Msiska* matrimonial cause number 4 of 2011 (High Court) (unreported). This Court agrees with this statement of the law on the burden and standard of proof applicable in the present matter.
66. The parties also submitted that the applicable law in this matter is the Divorce Act considering that although the same was repealed by the current Marriage Divorce and Family Relations Act, the latter Act specifically provides in section 3 thereof that it only applies to marriages entered into after its coming into force on 3rd July 2015 as per Government Notice No. 20 of 2015. They added that the only part of the latter Act that applies herein is Part IX on rights and obligations of parties to a marriage that

applies to all marriages entered into before or after the coming into force of the latter Act. This is a correct statement of the law.

67. The petitioner then submitted as follows on the ground of desertion. He correctly asserted that section 5 (b) of the Divorce Act provides that a petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition.
68. He next correctly submitted that in *Chafukira v Chafukira and another* [1997] 1 MLR 446 at 448 the Court stated that in order to establish desertion, four elements must be satisfied and that these are

    i. *De facto* separation of the spouse for a period of not less than three years immediately preceding the presentation of the petition.
    ii. The *animus deserendi*, that is, the intention on the part of the deserting spouse to remain in separation permanently.
    iii. The absence of consent on the part of the deserted spouse.
    iv. The absence of any reasonable cause for abstaining from co-habitation on the part of the deserting spouse.

69. The petitioner correctly submitted further that as a ground of divorce, desertion is said to be established if there is evidence that shows that there exists between the parties a factual separation intended by the respondent without cause and without consent of the petitioner for a period, in terms of section 5 (b) of the Divorce Act, of at least three years immediately preceding the rejection by one party of all the obligations of marriage. And that it is based on the rejection by one party of all the obligations of marriage. See *Perepeczko v Perepeczko* [1997] 1 MLR 454 at 457.
70. The petitioner then submitted that, in the present matter, the evidence before this Court is clear that the respondent deserted her matrimonial home in February 2014, and has since remained outside the home with no intent of returning there such that there is over three years since the desertion.
71. He submitted further that the respondent admitted that she knew that she could have gone back to her matrimonial home at any time while their discussions were ongoing as she was still married to him. He added that it would be illogical that a married woman like the respondent needed the permission of a third party to return to her matrimonial home where there was nothing barring her from doing so from or at the matrimonial home.
72. He asserted that the respondent has desperately tried to justify her desertion by a fishing narrative of incidents meant to justify her desertion

when neither of the incidents can justify a finding of cruelty against him. He noted that, the respondent in her evidence admitted that he is generally a caring man and prior to the one instance he had never laid his hand on her. He added that such a fishing narrative as presented by the respondent cannot justify a finding that the petitioner was cruel and may have induced the respondent's desertion.

73. He asserted further that the evidence shows that he has never conducted himself towards the respondent in a way that would have induced her desertion nor did he at any time consent to the desertion. And that, if anything, the evidence shows that he avoided the respondent's violent tendencies on more than one occasion before leaving the house.
74. He submitted that the respondent deserted him intentionally and without reasonable cause. Further, that she remained in such desertion for over three years and it is clear that she intends to remain in desertion from the petitioner permanently. He added that her evidence is that she does not want the marriage and sees no prospects of reconciliation such that it can be said that the marriage has irretrievably broken down as far as she is concerned.
75. He asserted that the respondent is therefore absent from her matrimonial home without cause other than the intent to remain permanently deserted from him. And that she admitted that despite knowing that reconciliation as possible, she just chose to remain outside the matrimonial home.
76. He concluded that this a proper case for this Court to make an order of divorce on the basis of the respondent's desertion.
77. On her part, the respondent correctly submitted that, in its essence, desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse to bring cohabitation permanently to an end without cause and without the consent of the other spouse. *Perry v Perry* [1952] P.203, 201-211. And that desertion is not a withdrawal from a place but from a state of things. *Pulford v Pulford* [1923] P.18, 21 and *Pardy v Pardy* [1939] P. 288, 302.
78. She asserted correctly that the law on the subject was beautifully summarized in the case of *Lang v Lang* [1954] 3 All E.R 571 at 573, where Lord Porter said:

> At this point, and before proceeding with any summary of the facts, their Lordships think it desirable to make certain general observations about the law (a) of desertion; (b) of so called "constructive desertion." Both in England and in Australia, to establish desertion two things must be proved; first, certain outward and visible conduct-the "factum" of desertion; secondly the "animus deserendi"- the intention underlying this conduct to bring the matrimonial union to an end. In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case

> will be almost entirely as to the "animus". Was intention of the party leaving the home to break it up for good, or something of, or different from that?
> Since 1860 in England and for a long time in Australia, it has been recognised that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be, by reason of conduct on his part, making it unbearable for a wife with reasonable self-respect, or powers of endurance, to stay with him , so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her: by driving her out. In such a case the factum is the course of conduct pursued by the husband-something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them, but she would not be justified in doing so such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying, and taking the partner of the marriage " for better, for worse". The course of conduct- the "factum"-must be grave and convincing.

79. She then correctly submitted that a refusal of an offer to return made in good faith where there is no right to refuse it converts the deserted party into the deserted party. She observe that in *Pratt v Pratt* [1939] 3 All ER 437 at 438, the court said**:**

> In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion.

80. She added that, this foregoing passage, although not necessary for the decision of that case, was expressly approved and adopted by Lord Romer in *Cohen v Cohen* [1940] 2 All ER 331 at 335**.** And that it was also applied in *Brewer v Brewer* [1961] 3 All ER 957 at 963.
81. She then contended that desertion becomes a ground for divorce if it is done without cause. She noted that it is not in dispute that she left the matrimonial home due to the savage beating she suffered at the hands of the petitioner. She argued that there was cause therefore for her leaving the matrimonial home. She submitted that, if anything, it is the petitioner who is guilty of constructive desertion.
82. She observed that, once desertion has been started by the fault of the deserting spouse, it is not necessary for the deserted spouse to show that during the three years preceding the petition he or she actually wanted the other spouse to come back. *Beigan v Beigan* [1956] 2 All E.R. 630 at 632.

83. She then submitted as follows on reconciliation. She asserted that both parties allege to have made futile attempts at reconciliation and that both accuse the other of shunning the said attempts.
84. On her part, she admitted that the only time the petitioner asked her to go back to the house was a day after the beating. And that she refused to go back because she was afraid of being beaten again.
85. She asserted that the only condition she required of the petitioner was for him to go to the respondent's cousin who was keeping her then and tell him that he wanted to take his wife back home. She noted that this was not a difficult thing to do for one who really wanted reconciliation. She stated that during one of the meetings when representatives from both sides met, she offered to go back to the house but the petitioner refused.
86. She then submitted that when the Court is looking at the issue of reconciliation, it should not lose sight of the parties' relationship before the assault. She pointed out that her evidence shows that before the assault, the petitioner was always complaining about her. He was complaining about the way she was living with his relatives; he was complaining that she was not cooking for him and doing household chores.
87. She pointed out that, at one time, she arrived late for her sister's wedding preparations meeting. They were supposed to go together to the meeting. And that the petitioner went to the meeting alone but a few days after the wedding, he told her to leave the house.
88. She pointed out further that, a month before the beating, the petitioner called for a meeting for representatives from both sides where he complained that she was not doing household chores and not going to church on Saturday and that she should therefore leave. And that it had to take the intervention of the representatives for her to remain in the matrimonial home. But that despite the said intervention, the same night, the petitioner told her that she should leave but she refused.
89. She then noted that, two weeks later, another meeting was convened by the parties' representatives to try help the parties sort out their differences. And that during this meeting, the petitioner repeated the same complaints against her and insisted that she should leave his house. And that again, it had to take the intervention of the representatives to stop the Petitioner from chasing her from the house.
90. She pointed out that the assault happened three days after this last meeting. And that the petitioner did not dispute all this evidence either in his evidence. And that it is clear therefore that it was the petitioner who consistently expressly demonstrated that he did not want her at the matrimonial home. She added that it is quite improbable that such a person can be heard to say that he seriously championed calls for reconciliation after the assault.

91. She then submitted that the other thing the Court should not forget is that condonation is an absolute bar to a charge of cruelty. And that if she had gone back to the matrimonial home and resumed cohabitation with the petitioner, she would have condoned the cruelty.
92. She then observed that the law did not and does not place any burden on her to condone the petitioner's cruelty. And that it follows therefore that if she shunned reconciliatory efforts, there was nothing wrong with that.
93. This Court observes that the law on desertion has, as earlier observed, been correctly stated by both parties.
94. On the evidence in this matter, this Court is not persuaded that the petitioner has proved the ground of desertion to the requisite standard. As submitted by the respondent, the petitioner always told the respondent that she had to leave the house whenever there was matrimonial discord. This culminated in the petitioner assaulting the respondent on 18th February 2014. After assaulting the respondent the petitioner told her to leave the matrimonial home. It is the petitioner who therefore told the respondent to leave the matrimonial home.
95. After the respondent left, the petitioner apologized soon thereafter and asked the respondent to come back. Understandably, in the considered view of this Court, the respondent was fearful and refused to return in the immediate aftermath of the assault by the petitioner.
96. This Court is persuaded on the evidence that thereafter the petitioner never wanted the respondent to come back to the matrimonial home. He refused to show he really meant to get the respondent back to the matrimonial home by going to pick her up from her cousin's place since it is the petitioner who had chased her away in the first place. He also told the reconciliation meetings that he did not want the respondent to go back to the matrimonial home.
97. All in all, this Court is persuaded by the respondent that the petitioner did not accept to take her back after initially chasing her despite the respondent inviting him to pick her up from her cousin's house.
98. The petitioner has therefore failed to prove that the respondent separated from him without cause and without his consent for a period, in terms of section 5 (b) of the Divorce Act, of at least three years preceding the present petition.
99. The petition for divorce, on the ground of desertion, is accordingly dismissed.
100. This Court will next consider whether the ground of cruelty has been made out by the respondent.
101. With regard to cruelty, she submitted as follows. She referred to section 5 (c) of the divorce Act which provides that a petition for divorce may be presented to the Court either by the husband or the wife on the

ground that the respondent has since the celebration of the marriage treated the petitioner with cruelty.

102. She also referred to section 7 (2) of the Divorce Act which provides that if the Court is satisfied on the evidence that-

a. The case for the petitioner has been proved; and
b. 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 ,

The Court shall pronounce a decree nisi of divorce, but if the Court is not satisfied with respect to any aforesaid matters, it shall dismiss the petition.

103. She then submitted that Malawian courts have adopted the accepted legal definition of cruelty as being that set out in *Russell v Russell* [1895] P 315, at 322, where Lopes LJ said there must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty.

104. She pointed out that the matter was carried a little further by the definition given in the House of Lords by Lord Davey in *Russel v Russel* [1897] AC 395, at 467- 468 where he said:

> The general idea which, I think underlies all those decisions is that, while declining to lay down any hard and fast definition of legal cruelty, the courts acted on the principle of giving protection to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health.

105. She pointed out that despite the seemingly simple definition of cruelty above, in Malawi, three schools of thought have emerged on what the petitioner must prove in order to succeed on a charge of cruelty.

106. She noted that the first school of thought is what she shall call the Makunje v. Makunje school of thought named after the case of *Makunje v Makunje* 7 MLR 387 which stands for the proposition that a single act of cruelty is not a sufficient ground for divorce. She noted further that this case was decided on 15th May, 1974. And that the petitioner in that case was hit on the right eye and had to receive medical attention. She sustained a swollen eye and some blood inside the eye.

107. She asserted that the second school of thought is what she shall call the Kamlangila v Kamlangila school of thought named after the case of *Kamlangila v Kamlangila* [1966-68] ALR 301 which, according to some later cases, is said to stand for the proposition that one act of cruelty can be

a sufficient ground for divorce if it is gross and there is likelihood of the cruelty being repeated. She observed that in the *Kamlangila case*, Smith Ag. J., cited a number of English cases like *Milner v Milner* 164 ER 1508; *Holden v Holden* 161 E.R. 614 and *Reeves v Reeves* 164 E.R. 1227 which stood for the proposition that for one act of cruelty to amount to legal cruelty, it must be gross as to raise apprehension of further acts of the same kind.

108. The respondent indicated that it is worth noting however, that despite citing the English decisions aforesaid, Smith Ag, J., did not draw any conclusions from the said decisions. She then noted that in 1946, the Supreme Court in England decided the case of *Meacher v Meacher* [1946] 2 All ER 307 which, impliedly, reversed the reasoning in the cases cited in the *Kamlangila v Kamlangila* case. And that at page 308, Morton L.J. said:

> Here then was actual violence and physical ill-treatment, and I can find nothing in sect 176 of the 1925 Act or in the authorities to justify the view that, if a wife has suffered assaults on her person, she is not entitled to a decree unless she can show that these assaults are likely to continue.

109. The respondent then pointed out that the reasoning by Morton LJ in the *Meacher v Meacher* case was adopted by Mead J in *Chokani v Chokani* 8 MLR 219. And that this case, decided two years after the *Kamlangila v Kamlangila case*, held (and stands for the third school of thought) that one act of cruelty is sufficient as a ground for divorce. And that there is no need for the petitioner to demonstrate reasonable fear on her or that further acts of cruelty will be committed. She observed that at page 222, Mead J said:

> Cruelty as a ground for the dissolution of a marriage has not to be persistent. Section 5 (c) of the Divorce Act lays down the requirement of cruelty, not persistent cruelty. In Kamlangila v. Kamlangila Smith Ag. J. considered English decisions involving the proposition that an isolated case of cruelty is sufficient to enable a court to grant the petitioner relief provided there is a reasonable apprehension of further acts of the same kind. The learned judge did not draw any conclusion from such decisions, nor did he show he considered himself to be bound by such decisions. Having regard to the decision of Meacher v. Meacher, I do not consider those decisions thereafter to have been good law. There is no need for a petitioner to prove the reasonable fear on her part that further acts of cruelty will be committed. In my view, a single act is sufficient.

110. The respondent then observed that Unyolo J.(As he then was) in *Hayter v Hayter* [1991] 14 MLR 94, followed the reasoning of the English decisions cited in *Kamlangila v Kamlangila* notwithstanding the earlier clear stand taken by the same court in *Chokani v Chokani*. She observed further that both the *Meacher v Meacher* and *Chokani v Chokani* cases were not cited in the *Hayter v Hayter* case.

111. The respondent asserted that, one thing to note however, is that all the cases above, were decided before the advent of the current Constitution. Or that put crudely, these decisions were made in a less enlightened age; an age when it was believed that marriage is all about endurance, at least on the part of ladies; an age when ladies were viewed as property.

112. The respondent pointed out that section 19(1) of the Constitution provides that the dignity of all persons shall be inviolable. And that section 19(2) requires the court in judicial proceedings to guarantee respect for human dignity. Further, that section 19(3) prohibits subjecting any person to cruel, inhuman and degrading treatment.

113. She also pointed out that section 46(2) (a) of the Constitution enjoins the court to protect a person whose rights under the constitution have been violated or threatened.

114. She then submitted that, with the advent of the Constitution, what might well in a less enlightened age or under different circumstances merely constitute inter-spousal chastisement could constitute cruel and inhuman treatment. She therefore submitted further that the proper approach to follow is that taken by the Court in *Chokani v Chokani*.

115. The respondent submitted further that, in view of the clear Constitutional provisions above, the decisions in the *Makunje v Makunje* and *Kamlangila v Kamlangila* cases, should, in our view, be followed with great caution. And that besides, these were High Court decisions and therefore not binding on this Court.

116. The respondent added that it would be retrogressive for the Court to refuse her relief on the ground that she should have waited to be battered again or show that she could be battered again before rushing to court.

117. The respondent then submitted on whether she was treated with cruelty. She noted that there are a number of facts that are undisputed, namely, that she was beaten; that as a result of the assault, she sustained bodily injuries; that, as a result thereof, she received medical treatment: that the beating left her with a permanent scar on the nose and that the petitioner was locked up at police as a result of the beating.

118. She then submitted that this, therefore, is the clearest case where the Court should find the charge of cruelty against the petitioner duly proved. The Court should therefore proceed to grant divorce to the respondent on that ground.

119. She observed that, the fact that the beating was done in the presence of the parties' children, servants and a neighbour made it a humiliating experience for her. Put in other words, that the beating was not only cruel treatment; it was also degrading and caused indignity to her.

120. She asserted that, in any case, even if it was agreed that the *Kamlangila v Kamlangila* case still represents good law, the beating she suffered at the hands of the petitioner was, as demonstrated above,

undeniably gross. She noted that the petitioner himself did not dispute that. She added that the fact that police officers locked the petitioner up and advised the respondent to get a protection order bears testimony to the seriousness of the injuries suffered by the respondent.

121. She submitted that it follows therefore that, whether we take the *Kamlangila v Kamlangila* or the *Chokani v Chokani* approach, the respondent is entitled to divorce on the ground of cruelty.

122. The respondent then submitted on whether the petitioner was provoked. She noted that in paragraph iii of his reply to her cross-petition, the petitioner contends that the parties fought in the heat of passion after the petitioner was extremely insulted, provoked and hit by her.

123. She noted that if a petitioner has deliberately provoked the respondent into cruel acts towards her, divorce is not granted. See *King v King* [1952] 2 All E.R. 584.

124. She observed that in *R v Thornton* [1992] 1 All E.R. 306, Beldam L.J said the following at pages 312 to 313:

> Against that background the appellant argues that the judge misdirected the jury on the question of provocation. His direction was as follows:
> 'I come now to the question of loss of control and provocation. It is my duty to mention this to you, members of the jury, [because] you will notice that [counsel] did not address you on the basis of provocation and it will I think be obvious to you why in a moment when you have heard what I have to say to you about it. Members of the jury, the word "provocation" in ordinary language is used pretty freely and not always very appropriately.'
> The judge went on to give an example of the inappropriate use of the word 'provocative'. He continued:
> 'You are not being asked to consider "Did he lead her miserable life?", whether you think he did or not on the evidence, nor are you asking yourself "Does she deserve sympathy?", because that is not the issue in the case. For the purposes of the charge of murder, provocation consists of some act or series of acts done or words spoken or a continuation of words and acts which causes in the particular defendant a sudden and temporary loss of self-control and which would have caused a reasonable, sober person to lose her self-control and to behave as the defendant behaved. So there are two questions. The first question is whether the provocative conduct, such as it was, if there was any, caused the defendant to lose her self-control. There has to be a sudden loss of self-control. The defendant herself asserts that there was no sudden loss of self-control. Members of the jury, that no doubt is why [counsel] did not address you and invite you to consider provocation. But, even if that were the case, there would still be the second part. The second question is whether the provocative act would have caused a reasonable, sober person to lose her self-control and behave as the defendant behaved and on this, of course, you would take into account the whole picture, the whole story, everything that was said, possibly anything that was done, if there was anything done, on this night, according to the effect it would have on a reasonable, sober woman in the position in which

> the defendant believed herself to be and, of course, a reasonable sober woman, like a reasonable, sober man, is expected to have ordinary powers of self-control, normal powers expected of a person of the sex and age of the particular defendant and sharing her characteristics as you have been able to discover them. Members of the jury, so far as this aspect is concerned, even if Mrs Thornton had lost her self-control, you would still have to ask whether a reasonable woman in her position would have done what she did and, if you think (and this is for you to say) that she went out and found a knife and went back into the room and as a result of something said to her stabbed her husband as he lay defenceless on that settee deep into his stomach, it may be very difficult to come to the conclusion that that was, and I use the shorthand, a reasonable reaction. There are … many unhappy, indeed miserable, husbands and wives. It is a fact of life. It has to be faced, members of the jury. But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs.'
>
> The judge then reminded the jury that the burden was on the prosecution to prove that the appellant was not provoked or acting under provocation.
>
> ....
>
> It is convenient to deal with the last criticism at the outset. Lord Gifford suggested that the legal concept of provocation did not require loss of self-control to be sudden, and that such a requirement had been incorporated into the law by a too literal adoption of the words used by Devlin J in his summing up to the jury in R v Duffy [1949] 1 All ER 932, which was emphatically approved by Lord Goddard CJ on appeal. The passage in the summing up in that case from which the words are taken reads (at 932–933):
>
> 'Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation … Provocation being, therefore, as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection.

125. She observed that the Court of Appeal found nothing wrong with the preceding Judge's direction and dismissed the appeal. To complete the picture, this Court wishes to note that in England the defence of provocation on a charge of murder was abolished on 4th October 2010 by section 56 (1) of the Coroners and Justice Act 2009 and replaced by the defence of loss of control. And in *R v Thornton (No.2)* after considering new evidence, a retrial of the defendant was ordered and she was convicted of manslaughter on the ground of diminished responsibility.

126. The respondent then noted that it was held in *Stick v Stick* [1967] 1 All ER 323 that in determining whether, in a divorce suit brought by a wife for cruelty, force used on her by her husband was excessive, it was essential

to a defence that she was the aggressor that the provocation on her part must bear a direct relation to the husband's retaliation.

127. She also observed that in *Phillips v R.* (1968) 53 Cr App Rep. 132, at the appellant's trial for murder in Jamaica, the Judge directed the jury as follows:

> If you are satisfied, if you find that the accused did commit the act as a result of provocation you will have to consider the retaliation as against the type of provocation that he received. You have to determine whether the provocation under which the accused was labouring was enough to make a reasonable person do as the accused did. In deciding this question you must consider the provocation received and the manner of the retaliation, and ask whether a reasonable person provoked in the way that the accused was provoked would retaliate in the way that the accused retaliated. If a reasonable person would not retaliate in the way that the accused retaliated, the defence of provocation cannot avail the accused because the standard fixed by law is that of the reasonable man, and you, the jury must be satisfied not only that the accused was so provoked that he lost his self-control and retaliated, but that a reasonable person would have lost his self-control in the same circumstances and do as the accused did.

128. The respondent pointed out that the preceding direction was upheld on appeal by the Privy Council. See also *Mancini v Director of Prosecutions* [1942] AC 1.

129. The respondent then submitted that the burden to prove provocation was on the petitioner. And that, in other words, the onus was on the petitioner to satisfy the Court that he was provoked. She stressed that the burden is slightly higher than proof on a mere preponderance of probabilities.

130. She then asserted that, during cross examination, she consistently denied the fact that the parties were fighting or that she provoked the petitioner. And that she denied the fact that she was violent and that on previous occasions, she had similarly provoked the petitioner. According to her, she was not the fighting type. Whenever she was unhappy, she would cry and the petitioner knew this. She added that the petitioner never gave any tangible evidence to prove that he was extremely insulted as alleged in his reply.

131. The respondent then observed that the parties agree that the issue that gave rise to the commotion on the material day concerned some Form. She observed further that the petitioner says it was an interview Form, whatever he was still doing with it, whilst she says it was an insurance Form. She opined that the type of Form is immaterial. She added that what is material is the fact that there was a disagreement.

132. She then asserted that the parties differ on who started what. She noted that she asserted that the petitioner found her on a bed preparing for

the next day's job interviews and started shouting at her then he started beating her. And, on the other hand, that the petitioner, in paragraphs vii, viii and ix of his witness statement, states that when he found papers scattered on the bed, he asked why the papers were so scattered. And that in response, she told him rudely that he should be talking to his sister who was his next of kin. Further, that he tried to explain to her but the issue became very heated and she started throwing jabs and shoes at him saying that he did not consider her by not indicating her as his next of kin and she continued with further provocation. And that he responded in the heat of the moment and in self-defence by pushing her out of the house.

133. The respondent then submitted that supposing that the petitioner's version is true, she fails to appreciate how one could conclude from this evidence that he was extremely insulted. She noted that he says that she continued with further provocation but falls short of giving details of the alleged further provocation or insults. She noted further that he stated that she had previously provoked him but does not say how.

134. Coming to the allegation that the petitioner was hit, the respondent notes that his evidence was not that he was hit as alleged. Rather, that his version was that she was throwing shoes at him. She noted that there was no indication that the said shoes hit him and where.

135. She noted that, in his witness statement, the petitioner alleges that she was throwing jabs at him. And that a jab is a punch. She observed that, it transpired however during cross examination and re- examination that she was simply pointing fingers at the petitioner and not throwing jabs, that is, if the petitioner's version is to be believed. She submitted that these acts could not amount to provocation.

136. The respondent submitted that, further to the matters above, the petitioner's evidence sounds improbable and is contradictory. She noted that the petitioner said that when she turned violent, he simply wanted to get her out of the house and that he hit her because she was throwing arms at him. She observed that, in his witness statement in paragraph ix, he says that he pushed her out of the house in self defence. She observed that there is no mention in the petitioner's witness statement of the fact that he beat her. And that this only came out during cross examination.

137. She then observed that, however, the petitioner did not deny the fact that the parties' children tried without success to stop him beating her. Further, that he did not dispute the fact that she run out of the house to the servants' quarters and that he followed her there. And that, he did not dispute the fact that at the servants' quarters, the servants tried without success to stop him from beating her. Also, that he did not dispute the fact that it took their neighbour's intervention to stop the beating.

138. The respondent then contended that, in all probability, the petitioner's conduct does not look like that of someone who simply wanted

to get her out of the house because, if, indeed, that was his intention, he would have stopped beating her the moment she run out of the house to the servant quarters.

139. She observed that, further to that, in one breath, the petitioner says he was acting in the heat of passion whilst in the next breath, he says he had resolved not to go out of the house as he had previously done. She contended that the mere fact that the petitioner had time to make a decision on what to do means that he was not acting under provocation. And that the petitioner had time to reflect on his next action.

140. She pondered that, indeed, if there was a fight and not a beating, why did the petitioner apologize to her the following day? Further, that suppose that the petitioner was indeed provoked, would a reasonable man act the way the petitioner did? She argued that, in the first place, reasonable men don't batter their wives for simply pointing a finger at them. Secondly, that reasonable men are expected to have powers of self-control. She asserted that the moment she allegedly became violent, a reasonable man would have left the house the way the petitioner had previously allegedly done. She observed that on this particular night, the petitioner admitted that the door was open and there was nothing stopping him from leaving the bedroom. Thirdly, that a reasonable man would not have reacted the way the petitioner did, that is, beating his wife to a pulp simply because she had thrown shoes and pointed fingers at him. And that the reaction, supposing he was indeed provoked, was disproportional to the provocation.

141. She submitted that there being no provocation, this is a proper case where the Court ought to intervene by granting her a decree of divorce nisi.

142. On his part the petitioner submitted as follows on the issue of cruelty. He submitted that a court can find husband guilty of cruelty towards his wife only if it is satisfied that he has either inflicted bodily injury upon her or that he has conducted himself towards her so as to render future cohabitation dangerous to her. See *Mhango v Mhango (2)* [1993] 16 (2) MLR 617, 618.

143. He observed that the evidence shows that he only fought the respondent once in all their married life and in the heat of the passion following acts of extreme provocation by the respondent. Further, that his evidence is clear that the respondent got provocative and violent and started throwing shoes and jabs at him. He observed further that in her evidence, the respondent does not dispute that she was provocative.

144. He added that, further buttressing the point that the respondent was provocative her counsel in cross-examination of the petitioner reiterated a suggestion that the petitioner could have avoided the respondent by leaving the house like he did on prior occasions. And that such a suggestion amounted to admission of the alleged provocation.

145. He then submitted that although the respondent alleged that she suffered bodily disfigurement, there is no evidence that he inflicted any such injury on the respondent in their fight that can be considered as a disfigurement. He asserted that instead his evidence was that his aim in retaliating to the respondent was to push her out of the house and not necessarily hurt her. He added that he is not a man of cruel character and that this single incident could not constitute cruelty to render future cohabitation impossible.

146. The petitioner then submitted that it is worth taking into account that contrary to the respondent's claims that there was a one-sided beating of the respondent, the evidence is that the parties were actually in a fight which the respondent started herself with throwing shoes and jabs at the petitioner who retaliated in self-defence. And that it is illogical and false to suggest that the respondent was beaten.

147. The respondent then pointed out that in *Malinki v Malinki* 9 MLR 441, the Court stated that it is not sufficient for a petitioner to establish trying and tiresome conduct on the part of the other spouse. But that it is necessary to show that the conduct has caused danger to life, limb or health, or has given rise to a reasonable apprehension of danger.

148. He submitted that a single act is not sufficient to constitute cruelty as a ground of divorce as per the case of *Makunje v Makunje* 7 MLR 387. He added that in the present matter there is no history of his being previously cruel to the respondent. He added that it is only after the respondent's provocation that the parties actually fought in the heat of the passion as opposed to him merely beating the respondent. And that it cannot therefore be said that he was guilty of any act of cruelty sufficient as a ground to justify a divorce.

149. He then submitted that legal cruelty is only established if the act complained of was gross, not slight and of such a nature as to raise a reasonable apprehension of further acts of the same kind. See *Hayter v Hayter and another* [1991] 14 MLR 94 (HC) at 96.

150. He asserted that in the present case his act being a one-time occurrence where he generally conducted himself peacefully towards the respondent and further that the fight having been inspired by provocation, it would be absurd to conclude that the act raised a reasonable apprehension of further acts of the same kind. And that as such, the act was neither gross nor capable of raising apprehension of similar future acts.

151. He then submitted that in *Majamanda v Majamanda* matrimonial cause number 10 of 2004 (High Court) (unreported) it was held that the test of cruelty was whether a right-thinking person would conclude that the guilty party behaved in a way that the innocent spouse cannot reasonably be expected to live with the said guilty spouse taking into account all the circumstances. And further, that the causes of alleged cruelty must be grave

and weighty and such as to lead to an absolute impossibility that the duties of married life can be discharged.

152. He then pointed out that in the present matter the cause of the alleged cruelty which led into a fight as opposed to a beating was not weighty or so grave that it could reasonably lead to the respondent's failure to discharge her marital duties.

153. He asserted that, in any case, having reacted to acts of provocation from the respondent which led to a fight, no right-thinking person would conclude that he behaved in such a way that the respondent could not reasonably be expected to live with him taking into account the circumstance that she had provoked him and she had known his personality as not a cruel man to her.

154. He then asserted that the respondent would have brought a petition of divorce on her ground of cruelty but she waited for his petition which shows that the said ground is not being raised in good faith.

155. He submitted that the respondent has failed to prove cruelty.

156. This Court wishes to agree with the respondent's position that the days when the Courts would expect more than one act of cruelty to occur before the ground of cruelty could be accepted to dissolve a marriage are long gone. The mentality that more than one act of cruelty is required or that there must then be fear of future similar acts to ground cruelty as a reason for divorce is not compatible with the human rights provisions alluded to by the respondent that enjoin this Court to safeguard the dignity of all citizens and to protect them for inhuman and degrading treatment in the course of proceedings. For that reason, and the reasons properly recited by the respondent, this Court fully agrees that a single act of cruelty is sufficient to ground a petition for divorce. To that end the case law as represented by decisions such as *Makunje, Kamlanjira and Hayter* on the aspect under discussion are not good law. This Court is not bound by them having been made by a contemporary court and therefore for the reasons given departs from them. In any event *Hayter* was decided *per incariam* having not alluded to relevant prior contrary decisions on the same point. A single act of cruelty is therefore sufficient to ground a petition for divorce as correctly decided in *Chokani*.

157. This Court therefore is not persuaded by the petitioner's contention that there should have been more than one single act of cruelty and that there should be fear of similar future acts for the respondent to succeed. That sort of mentality is not compatible with the human rights regime that is guaranteed under the Constitution.

158. This Court finds on the evidence that, contrary to the assertions by the petitioner, the respondent denied that she was provocative and she insisted that she ended any argument with crying. Further, this Court does not find to be correct the assertion that the respondent's counsel's questions

during the cross-examination of the petitioner, premised on the assumption that there was provocation, to constitute an admission of provocation by the respondent. That line of questions does not amount to evidence of provocation. It was simply following the line of thought of the petitioner on the events as indicated by him.

159. This Court has considered the petitioner's contention that he was simply pushed the respondent out of the house after provocation but observes that, as submitted by the respondent, the petitioner does not clearly indicate what sort of actions on the respondent's part provoked and insulted him. The petitioner admitted that the respondent pointed fingers at him. This Court is not persuaded that even if it was assumed that he was provoked by the finger pointing a reasonable person in the position of the petitioner would have reacted the way he did. Beating up the respondent inside the house and thereafter following her to beat her again after she run to the servant's quarters.

160. Given what transpired in the run up to his assault on the respondent this Court does not believe the petitioner that he got provoked. This Court observed that indeed during cross-examination the petitioner admitted that he beat up the respondent. That does not go well with his allegation that he was provoked and fought with the petitioner. It must be borne in mind that prior to this incident of the assault the petitioner and the respondent were not on speaking terms and each regrettably kept to a separate bed.

161. Assuming it to be true, the narrative by the petitioner that on the fateful day he made a decision not to leave the house after the alleged provocation appears to suggest that he was in control of himself and had not lost control so as to fall within the category of those acting under provocation as explained in *R v Thornton.*

162. It is the considered view of this Court that the beating of the respondent by the petitioner was serious in the view of the fact that the petitioner was actually arrested by the police in the aftermath of his assault of the respondent. He has not denied that he got arrested and was locked up for a night. The medical report from the hospital which has also not been disputed shows that the respondent was attended to at the hospital in the aftermath of the assault herein. The assault on the respondent was therefore grave and weighty as described by her in her testimony and contrary to the assertion by the petitioner that it was not grave and weighty.

163. The beating of the respondent at the hands of the petitioner therefore constituted an act of cruelty coming after a series of incidents in which the petitioner asked the respondent to leave the matrimonial home. In view of this prior expression by the petitioner that the respondent leave the matrimonial home, this Court finds it doubtful that he was provoked and agrees with the submissions by the respondent on that aspect.

164. The petitioner argued that the cross-petition is in bad faith as it was not presented independently before his petition. This Court is not persuaded that such is the case considering that there was no condonation which is the only bar to raising such an issue and the delay does not appear inordinate to prejudice the petitioner.

165. In the foregoing premises, this Court finds that the respondent has proved that she suffered cruelty at the hands of the petitioner as provided in section 5 (c) of the Divorce Act and as explained in the case of *Chokani*. She never condoned the same. And this Court grants a decree of divorce nisi to the respondent as sought.

166. The parties shall agree on the ancillary issues of custody of their child and distribution of matrimonial property if any within 21 days failing which the matter may be taken up with this Court.

167. The costs of these proceedings are for the respondent who has succeeded.

Made in open court at Blantyre this 27th August 2020.

M.A. Tembo

JUDGE