



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
FAMILY AND PROBATE DIVISION

MATRIMONIAL CASE NUMBER 16 OF 2020

(Being Civil Cause Number 355 of 2021)

(BEFORE JUSTICE J.R. KAYIRA]

BETWEEN:

NICOLE ANTOINE PRICE.....PETITIONER

AND

GEORGE GARVIN PRICE.....RESPONDENT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA
Counsel Mr. Chisomo Nyemba of Counsel for the Petitioner
Counsel Mr. Jones Gulumba of Counsel for the Respondent
Nicole Price Petitioner (Represented)
George Price Respondent (Represented) (absent)
Patricia Chipwanya Court Clerk and Official Interpreter

JUDGMENT ON PETITION FOR DIVORCE

Kayira J

BACKGROUND

The Petitioner filed a petition for divorce against the Respondent on 16th October, 2020. In the petition, she seeks a decree of divorce *nisi* on the ground that the Respondent is cruel to her which has resulted into the marriage irretrievably breaking down. The petition was amended by consent of the parties on 8th March, 2022 and in this amended petition, in addition to a decree of divorce, the Petitioner seeks custody of their only child and that accessibility should be during weekends whenever the Respondent is in Malawi. Further, that the child should be able to visit the Respondent in the United Kingdom whenever

possible to do so and any other conditions which the Court deems to be fit. The Petitioner also seeks an order for child maintenance so that the Respondent should provide accommodation, basic household items, utilities, tuition fees and all educational and medical needs of the child. She further claims any alimony to be granted as a lumpsum or in a manner deemed fit by the Court and costs of the action. She also prays for share of the matrimonial properties. The said properties include a house in Chilobwe and two trucks which were jointly purchased by the couple.

The Respondent filed a response to the petition on 30th October, 2020 and did not make any amendments to the defence. In the response, he denied the allegations raised by the Petitioner. The matter went for trial and three witnesses namely: Nicole Price, Mike Anthony and George Price testified. The matter was adjourned for judgment and this is the judgment on the application for divorce.

EVIDENCE ADDUCED IN COURT

During the hearing, the Petitioner adopted her witness statement which was marked as **EXP1**. She also tendered a Bluebook which was marked as **EXP2** whilst a Marriage Certificate was marked as **EXP3**. The pictures for the house were marked as **EXP4**. During cross examination, **PW1** conceded that she did not meet the Respondent in 2022 but she gave birth to a daughter in 2022 and the father is not the Respondent. During the subsistence of their marriage, they had an issue relating to maintenance of the household especially the Petitioner's contribution towards utilities, foodstuffs and rentals. This issue was resolved and they reconciled such that the Petitioner was paying her rental contribution to the Respondent once she is paid. It was the firm evidence of **PW1** under oath that the Respondent demanded use of condoms when he returned from Malawi. In response, **PW1** reluctantly accepted but was suspicious as to what he did when he was in Malawi. On re-examination, **PW1** conceded that she has a child with another man because she was tired staying alone. In terms of her contributions, she was paying a monthly sum of 400 pounds. Out of this, 250 was for foodstuffs; 100 was for savings and 50 pounds was for rentals.

PW2 was Mr. Mike Anthony who tendered his witness statement which was marked as **EXP5**. As a brother and Marriage Advocate for the Petitioner, **PW2** confirmed receiving complaints from the couple whilst they were staying in the UK. The major complaint was that the Petitioner was refusing to have sexual intercourse with the husband for fear of sexually transmitted infections since he was coming home late and she was suspicious of him. It was his evidence that the Respondent refused to assist the Petitioner to renew her UK visa such that she returned to Malawi. Later, the Respondent also came to Malawi and they had discussion on the marital issues. It was at this meeting that the Respondent informed

them that he is no longer interested to continue living with the Petitioner as his wife. **PW2** confirmed that the Petitioner has moved on by having a child with another man.

It was the evidence of **DW1** that he after disagreements on how to provide for the family, their marriage was adversely affected. Actually, due to the tension, he was the only one who was initiating sex since the Petitioner did not show any interest in the same. In his further testimony, **DW1** confirmed that he had lost his affection to the Petitioner who refused to have sexual intercourse with him several times when the Respondent asked for the same. The tension was so bad that they would sometimes not talk to each other. He firmly stated that he did not consider having normal sexual intercourse without a condom as safe for him because he was suspicious of the Petitioner. Since the Petitioner accused him of infidelity, **DW1** decided to use condoms so that if the Petitioner is infected, she should not point at him as the source of the sexually transmitted infection. **DW1** confirmed that he lost his affection towards the Petitioner because for the past 2 years they were having disagreements and when he asks for sex, the Petitioner was refusing.

Below are the facts as found by this Court.

FACTS

It is a fact that the Petitioner and the Respondent come from Chipanda village Traditional Authority Machinjiri in Blantyre District. Currently, the Petitioner resides in Chigumula Township within the City of Blantyre whilst the Respondent is resident of 29 Adellade Road, Southampton Hampshire area in the United Kingdom-UK. In the course of their courtship, the two were privileged and blessed with one child whose name is Bruno Eli Price on 18th January, 2015. Subsequently, they formalised their union before the Registrar General's office in Blantyre on 27th February, 2015. They are Malawians who moved to the United Kingdom upon their marriage where they were staying and working.

During the subsistence of their marriage, the Petitioner and the son went to the UK where they stayed for 6 months only. She returned to Malawi but travelled back to the UK following the Respondent together with the child in 2017. At the time that the Petitioner went to the UK, she was employed by a train cleaning company called ISS Cleaning and Transport Company. The Respondent also works for the same company. In short, the two had a common employer. As they lived in the UK, the couple had issues in terms of maintenance of the household especially the Petitioner's contribution towards utilities, foodstuffs and rentals. The Petitioner refused to contribute towards the same until their Marriage Advocate-PW2 intervened. This issue was resolved and they reconciled. In terms of the Petitioner's contributions, she was paying a monthly sum of 400 pounds. Out of this, 250 was for foodstuffs; 100 was for savings and 50 pounds was for rentals.

In 2018, the Respondent visited Malawi whilst the Petitioner and the child remained in the UK. On return to the UK, the Petitioner suspected him of infidelity. Considering the persistent and continuous disagreement which he was having with the Petitioner, the Respondent unilaterally decided to be returning home from work very late. Eventually, the couple suspected each other of infidelity. As a way of reassuring the Petitioner of her health but without any communication, the Respondent started using condoms when having sex with the Petitioner. In order to save her marriage, the Petitioner accepted the practice. However, this practice of using condoms did not last for long because the Petitioner was unwilling to have sex with the Respondent. This was for fear of being infected with sexually transmitted infections by the Respondent. The suspicions between the couple heightened and eventually the two lacked trust in each other as well as withdrew their interest in sexual activities. This withdrawal was especially on the part of the Petitioner who unilaterally resolved to non-performance of conjugal rights. Efforts were made to resolve the issues through Advocates in Malawi but the same yielded no positive results.

On 15th January, 2020, the Petitioner and the child travelled to Malawi for a holiday. However, the Petitioner and the child never went back to the UK because their visa was not supported by the Respondent. In turn, the Respondent travelled to Malawi in September, 2020 and they had a family discussion of the issues. It is at this meeting that the Respondent informed them that he is no longer interested to continue marriage with the Petitioner. It is a fact that the Petitioner has a daughter with another man who was born in 2022.

APPLICABLE LAW

It is a fact that the two celebrated their union before the Registrar General's office in Blantyre on 27th February, 2015. This is before the Marriage, Divorce and Family Relations Act of 2015-MDFRA came into force. Section 3 of the MDFRA provides for its applicability. The said provision is explicit that the Act shall apply to marriages entered into on or after the day it comes into operation. The MDFRA was enacted in 2015 and assented on 10th April, 2015. It was published/gazetted on 31st July, 2016. This is the date on which the Act started its application. Therefore, the MDFRA is not applicable to this marriage except Part IX which applies to all marriages regardless of the date they were celebrated. In short therefore, the validity of this marriage must be under the Marriage Act whilst the issues of the rights accruing to the couple are under the MDFRA and the grounds for divorce are under the Divorce Act.

JURISDICTION

Section 4 of the Divorce Act mandates the High Court to deal with divorces of civil marriages in this manner jurisdiction under this Act shall only be exercised by the High Court (hereinafter called the Court),

and such jurisdiction shall, subject to this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. Actually, Section 55 of the Marriage Act states that jurisdiction of marriages contracted under this Act shall be reserved to the High Court. These two provisions in my view are supported by Section 39 (2) (e) of the Courts Act which states that notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of any marriage celebrated under the Marriage Act or any other law, other than customary law is in question. In other words, civil marriages are within the ambit of the High Court when it comes to seeking divorce orders.

STANDARD OF PROOF

This is a civil matter and the settled law that the standard of proof in civil matters is on a balance of probabilities. See the case of *Miller vs. Minister of Pensions* [1974] 2 ALL ER 372 and *BP Malawi Limited vs. NBS Bank Ltd* [2009] MLR 39 at 43.

"The burden is on the one who alleges to adduce satisfactory evidence to me on the balance of probabilities of the existence of the alleged fact. The principle that the one who asserts must prove and the standard of proof in civil cases has been discussed by Denning LJ in *Miller vs. Minister of Pension*. This means that the case must be decided in favor of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say. We think it is more probable than not that the burden is discharged but if the probabilities are equal it is not.

On page 66 of the said **Phipson on Evidence**, the learned authors thereof state that-

The standard of proof required in civil cases is generally expressed as proof on the balance of probabilities. **"If the evidence is such that the tribunal can say 'we think it more probable that not' the burden is discharged, but if the probabilities are equal it is not."**

As noted in the above cases, it is trite law that he who alleges must prove. In this case, the Petitioner must prove the allegations that she has made towards the Respondent on a balance of probabilities. It is only the issue of adultery that has to be proven on a slightly higher standard but not beyond reasonable doubt.

I have read the thorough and detailed submissions from both parties. I fully appreciate the prayer by the Respondent that the Court exercises its discretion and dismiss the petition on the ground of adultery in accordance with the proviso in Section 7 (2) of the Divorce Act. Whilst fully appreciating the proviso, I consider it proper to determine all issues in detail. I will therefore proceed with the analysis of the prayers from both sides.

REASONED ANALYSIS OF THE COURT

The ground for divorce is cruelty and it falls under Section 5 (c) of the Divorce Act. On the other hand, the Respondent asserts that the Petitioner is the one in the wrong because she committed adultery during the subsistence of their marriage. This ground is provided under Section 5 (a) of the Divorce Act. In the petition, the Petitioner states that the Respondent treated her with cruelty. The particulars of the cruelty are that he had total lack of affection or consideration and stopped performing conjugal duties and denied the Petitioner sexual intercourse for a year. The Petitioner further states that the Respondent behaved in such a manner that the Petitioner cannot reasonably be expected to live with him more so considering that the Respondent is unwilling to facilitate the Petitioner's application for renewal of the visa and does not want her as his wife.

It is imperative to reproduce the Section 22 of the Constitution which recognizes different types of marriages as follows:

“(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2) 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. (3) All men and women have the right to marry and found a family. (4) No person shall be forced to enter into marriage. (5) Subsections (3) and (4) **shall apply to all marriages at law**, custom and marriages by repute or by permanent cohabitation.”

It is important to note that in addition to categorizing marriages recognized in Malawi, this provision is emphasising the rights and obligations of parties in a marriage. These are rights to equal protection before the law from neglect, exploitation and cruelty. In terms of duties, parties in a marriage are not supposed to treat each other in a manner that results in the other being neglected, exploited and/or enduring cruelty. Premised on the provision, such rights and obligations also apply to the parties in this case because this is a civil marriage or marriage at law.

The rights and obligations for a couple have been unified under Chapter IX of the MDFRA. It is striking to note that one of the legal obligations of a couple is consortium. This right entails association where a

wife and husband are able to share human and material aspects of their lives. It in simple terms depicts the intimate relationship between a wife and a husband. In other words, a marriage must be of comprehensive and satisfactory benefit between the two physically, emotionally, spiritually, materially, educationally, financially and sexually. This means that any deprivation of such benefits must be properly and mutually discussed, understood, justified and consented to by both parties before implementation.

This Court is duty bound to determine if the Respondent treated the Petitioner with cruelty. Cruelty is any intentional conduct towards a spouse which conduct has potential to cause actual harm or injury to health, life or limb of the spouse or cause reasonable apprehension of such injury or harm. In the present case, the genesis of the disagreement is the Petitioner's unwillingness to contribute towards the household. During the subsistence of marriage, the legal obligation to provide for a household, rests on both the wife and husband. This joint and several duty, demands that there should be meaningful contributions from spouses towards the needs of the house. Any non-performance without tangible reasons furnished to the spouse is wrong. Therefore, the refusal to contribute by the Respondent was and is a breach of this fundamental marital duty.

This Court finds that this non-performance in terms of providing for the family resulted in serious tensions between the couple. The Court notes that despite the Petitioner contributing 400 pounds after the discussions, this did not yield positive results from the Respondent because the tension had consistently been there for a long period of time. This is why the Respondent unilaterally decided to be returning home from work very late. The Court holds that the unilateral decision to be spending more time with friends than the Petitioner was wrong, inconsiderate and a confirmation that he has no affection for the Petitioner. It is abundantly clear that such a conduct created unnecessary anxiety and emotional disturbance on the part of the Petitioner. This Court further finds that this voluntary and intentional conduct of the Respondent was potentially threatening the health of the Petitioner who lost companionship. Therefore, this was a blatant disregard of a spouse and a breach of the right to consortium and it is cruelty.

The other issue which has to be considered in terms of cruelty is the withdrawal of sexual services by the Petitioner. It is undisputed that because of the failure to resolve the financial issues between the couple, the Petitioner suspected that the Respondent was unfaithful. Eventually, she lost her interest for sexual intercourse for fear of being infected. Actually, it is only the Respondent who was initiating sexual intercourse whilst the Petitioner was not interested at all. This lack of interest made the Respondent to also suspect that his wife is unfaithful. Due to the allegations of infidelity, the Respondent unilaterally introduced use of condoms during sexual intercourse as an assurance of safety from sexually transmitted infections from each other. However, this escalated the situation.

A critical examination of the sequence of events does not indicate any female friend for the Respondent. There is no other piece of evidence which suggests that the Respondent had an affair somewhere. Likewise, there is no piece of evidence supporting the suspicions that the Respondent had towards the Petitioner. It is to that extent that this Court holds that the allegations of infidelity on either party have not been proven and are baseless. The question is whether the failure to perform conjugal responsibilities amounts to cruelty?

It is not disputed that sexual intercourse is an integral and fundamental component of a couple. This is why one of the duties of a couple is to fully and sufficiently satisfy each other sexually. The performance of sexual duties towards one's spouse serves many purposes hence any decision relating to one's willingness or availability for sexual intercourse must be communicated with sufficient particulars to the other. Similarly, any alterations and introduction of new things in a couple's sexual life must be done properly. I have critically analysed the evidence and find no reasonable ground for withdrawing sexual services to the Respondent. Although unilaterally done, the Respondent had taken measures to address the concerns raised by the Petitioner. The Respondent introduced the condoms as a response to the conduct of the Petitioner. Although he did not discuss the issue of condom usage prior to introducing them, I do not consider his conduct as posing a threat to the life of the Petitioner who had complained about STIs. Despite this effort, it is striking to note that on the contrary, the Petitioner resolved to maintained her decision to unilaterally withdraw her sexual services to the Respondent for more than a year. It is the considered view of this Court that the Petitioner should have made efforts to resolve their issues within a reasonable period of time such as 6 months whilst they continued to use condoms as a way of preventing STIs. To completely withdraw sexual services to a spouse for one year without any medical condition justifying the same is inhumane, unwarranted and unjustifiable. Her conduct therefore is cruel because it poses a threat to life, health and limb of the Respondent. To that extent, her argument that the Respondent was inconsiderate, lacked affection and cruel fails.

The Respondent has argued that the Petitioner committed adultery during the subsistence of this marriage. The undisputed evidence is that on 15th January, 2020, the Petitioner and the child travelled to Malawi for a holiday. However, the Petitioner and the child never went back to the UK because their visa was not supported by the Respondent. In turn, the Respondent travelled to Malawi in September, 2020 and he has never met the Petitioner. It is a fact that the Petitioner has a daughter with another man who was born in 2022. Adultery is established where there is evidence of undue familiarity with an adult of the opposite sex coupled with an opportunity to have sexual intercourse. The birth of a child to the Petitioner whose father is not the Respondent is *prima facie* evidence that she had sexual intercourse with a man.

Since this is during the subsistence of the current marriage, then adultery has been established against the Petitioner.

DETERMINATION

I have considered the evidence adduced in this Court more especially bearing in mind Section 7 of the Divorce Act. This Court holds that cruelty has been proven against the Petitioner and the Respondent. In other words, they treated each other with cruelty. Further, this Court holds that the Petitioner committed adultery since she has had sexual relations with another man to an extent of having a child with him during the subsistence of the present marriage. I therefore proceed to dissolve the marriage and grant the prayer for a decree of divorce *nisi* on the grounds of cruelty and adultery.

Since the parties have both contributed towards the irretrievable breakdown of this marriage, each party will bear his and her own costs of this cause of action.

The Court sets 2nd May, 2023 @2pm for hearing on issues of alimony, child custody, maintenance and distribution of matrimonial properties.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 19th APRIL, 2023 @ 29AM

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE