



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

MATRIMONIAL APPEAL CAUSE NUMBER 03 OF 2022  
(BEFORE JUSTICE J.R. KAYIRA)

**BETWEEN:**

**EZEKIEL PETROS MANGANI.....PETITIONER**

**AND**

**SUNGENI TWAYA KHEMBO MANGANI.....RESPONDENT**

**CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA**

Counsel Mr. Carnisius Tamandani Kadyampakeni of Counsel for the Petitioner

Counsel Mr. Kondwani Kunitengo of Counsel for the Respondent

Mr. Ezekiel Petros Mangani Petitioner (Represented)

Sungeni Twaya Khembo Mangani Respondent (Represented)

Ms. Christina Kazembe Court Clerk and Official Interpreter

---

**JUDGMENT ON PETITION FOR DIVORCE**

**Kayira J**

---

**BACKGROUND**

The genesis of this matter is a petition for divorce on the ground of cruelty which was filed on 20<sup>th</sup> January, 2022. The Petitioner asserts that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. Since the celebration of their marriage, the Respondent has habitually accused the Petitioner of marital unfaithfulness and in general has been cruel to the Petitioner. Therefore, the Petitioner considers that the marriage has irretrievably broken down. The Petitioner asserts that the Respondent has been accusing him of infidelity such that on several occasions they have had counselling sessions at Church but these did not yield any positive result. Further, the Respondent on several occasions woke him up during the night to ask about his infidelity which caused the Petitioner stress and headaches. Actually, in 2010 the Respondent aborted their unborn child on the

premise that the Petitioner was mistreating her. The Petitioner further asserts that on 15<sup>th</sup> September, 2020 the Respondent started beating him to an extent of striking with force his genitals and tried grabbing and pulling them. It was only when the Petitioner ran from the bedroom to the bathroom that he saved his life. The Petitioner seeks a decree of divorce nisi from the Respondent. Additionally, the Petitioner seeks primary and physical custody of their children as well as costs of this action.

In response, the Respondent filed a statement of defence on 2<sup>nd</sup> June, 2022. The Respondent admits that the marriage has irretrievably broken done because of the conduct of the Petitioner. It is her assertion that she miscarried due to the various cruel treatments that the Petitioner was subjecting her to such as denying her sex. Further, the Petitioner claimed that the Respondent has a communicable venereal or sexually transmitted disease yet medical tests and results did not confirm this. The Respondent denies beating or injuring the Petitioner on his genitals. She went further to state that the Petitioner was guilty of adultery with one of their maids whom he took for a pregnancy test and another lady whom he was usually giving a lift. That during the subsistence of their marriage, she often found text messages in the Petitioner's phone showing that he was in a sexual relationship with some ladies. The Respondent prays that the Court proceeds to dissolve the marriage and grant an order of divorce, child custody and maintenance, compensation due to what she has gone through with the Petitioner as well as distribution of matrimonial property which was held jointly by the couple.

After closure of pleadings, the matter came for hearing. During the hearing the parties adopted their witness statements, gave their oral testimonies in addition to the witness statements and called no witness. They have now closed their respective cases and it is the duty of this Honorable Court to determine the petition. I have had time to read the final written submissions of the parties. Counsel for the Petitioner was thorough in terms of the evidence and analysis such that the Court appreciated the sequence with ease. However, the analysis by Counsel for the Respondent was too brief such that the Court had challenges to appreciate the basis of some of his conclusions. This is the document which was submitted before 2:30PM today. The one submitted at 2:30pm today was never considered by this Court. Below are facts as found by this Court.

## **FACTS**

The Petitioner comes from Kumwamba village Traditional Authority Mabuka in Mulanje District whilst the Respondent comes from Chapita Village Traditional Authority Nsamala in Balaka District. The two celebrated their union at the Registrar General's office in Blantyre on 27<sup>th</sup> February, 2004 and a Marriage Certificate was issued-EXP2. During the subsistence of the marriage, the couple was privileged and

blessed with two children namely; Victoria Mangani who was born on 10<sup>th</sup> March, 2005 and Adrian Mangani who was born on 1<sup>st</sup> April, 2007. It is a fact that the Respondent was treated at Queen Elizabeth Central Hospital and Bakhita Private hospital for illness due to assaults by the Petitioner on 7<sup>th</sup> January, 2020 and 22<sup>nd</sup> September, 2020, 25<sup>th</sup> May, 2021. On 22<sup>nd</sup> September, 2020 she underwent an x-ray procedure to check the kind of injuries she sustained based on her complaint that the Petitioner hit her on the chest.

It is a fact that the couple had trust issues from the same year that they officially celebrated their marriage such that each one was suspicious of the other. As a result of the mistrust, there are several incidences which are a result of this mistrust. The first instance relates to the loss of their third child as a couple. On the one hand, the Petitioner believes that the Respondent aborted their third child in 2010 whilst on the other hand the Respondent believes that she miscarried because of the mistreatment received from the Petitioner. All these beliefs have no medical back-up. The second instance is where the Petitioner accused the Respondent of having a sexually transmitted infection without any medical basis. The third instance relates to allegations of infidelity on the part of the Petitioner by the Respondent. It is a fact that during the subsistence of their marriage, there were several occasions that the Respondent asked the Petitioner of sexual relations with a number of ladies inclusive their housemaid. This issue was also discussed at Church several times but there was no positive result.

The last and final incidence happened on 15<sup>th</sup> September, 2020. During the night of that day, the Petitioner went to sleep in their bedroom. Whilst there, the Respondent came to ask about his unfaithfulness with other ladies. It was in the course of such an inquiry that she started beating him and she actually pulled his genitals to demonstrate her anger. Seeing that his life was in danger, the Petitioner held the Respondent by his elbow and this compelled the Respondent to release the genitals thereby allowing the Petitioner a chance to escape. He ran from the matrimonial bedroom to the bathroom to save his life. It is because of this incident that he chased the Respondent out of the matrimonial house. Currently, the Petitioner resides in their matrimonial home at Ngumbe GDC Township whilst the Respondent is staying in their house at Chilobwe Township within the City of Blantyre.

I will now proceed with analysis of the applicable law.

### **APPLICABLE LAW**

It is a fact that the Petitioner and the Respondent celebrated their union at the Registrar General's office

in Blantyre on 27<sup>th</sup> February, 2004 and a Marriage Certificate was issued-**EXP2** 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 10<sup>th</sup> April, 2015. It was published/gazetted on 31<sup>st</sup> 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. Only the issue of adultery has to be proven on a slightly higher standard but not beyond any reasonable doubt.

### **REASONED ANALYSIS OF THE COURT**

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.

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 he committed adultery during the subsistence of their marriage. This ground is provided under Section 5 (a) of the Divorce Act. In the petition for divorce, the Petitioner asserts that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. Since the celebration of their marriage, the Respondent has habitually accused the Petitioner of marital unfaithfulness and in general has been cruel to the Petitioner.

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 Petitioner asserts that the Respondent has been accusing him of infidelity such that on several occasions they have counselling sessions at Church but these did not yield any positive result. Further, the Respondent on several occasions woke him up during the night to ask about his infidelity which caused the Petitioner stress and headaches. An inquiry about unfaithfulness from a spouse is not wrong. It allows the couple to account to each other and where necessary make changes in the manner that they relate to persons of the opposite sex. However, frequent inquiries of this nature without tangible evidence which support the allegation has the potential of becoming a nuisance and health hazard to the spouse.

The Petitioner further asserts that on 15<sup>th</sup> September, 2020 the Respondent started beating him to an extent of striking with force his genitals and tried grabbing and pulling them. In cross examination, the Petitioner confirmed that the Respondent wanted to kill him by crushing his testicles. In retaliation, the Petitioner held the Respondent's neck and this compelled her to release him. It was only then that the Petitioner ran from the bedroom to the bathroom that he saved his life. Pausing there, it is abundantly clear that the Respondent was angry with the Petitioner. She had issues about his infidelity and wanted to deal with such issues. Since these were recurring issues, her levels of anger were not ordinary and she eventually failed to control them. Eventually she decided to deal with the Petitioner in this manner. This Court finds such an approach to dealing with marital unfaithfulness as illegal more especially because there were other avenues such as judicial separation and reconciliation discussions premised on reasonably tangible information. The assault of the Petitioner was cruelty by the Respondent because it posed a threat to his life and limb thereby compelling him to run away for his safety. In short, the conduct of the Respondent was cruel to the Petitioner.

It is a fact that the couple had trust issues such that each one was suspicious of the other. As a result of the mistrust, there have been several situations in this marriage. On the one hand, the Petitioner believes that the Respondent aborted their third child in 2010 whilst on the other hand the Respondent believes that she miscarried because of the mistreatment that she was receiving from the Petitioner. All these believes have no medical back-up. On this issue, the Court listened attentively to the witnesses and took its time critically analysing their written evidence and submissions. There is no evidence that explains this incident properly. There is no medical report to confirm or rebut such believes. Actually, none of the parties called a witness from the Church to support this incident. Therefore, it will be wrong for this Court to conclude either of the beliefs. However, it is safe to conclude that there is suppression of material facts from both parties because medical processes always confirm the cause of an abortion and if both of them were available at the hospital, they should have had such information from the medical officers who were attending to them. Therefore, a claim of cruelty fails under this incident.

The Respondent admits that the marriage has irretrievably broken done because the Petitioner was subjecting her cruel conduct such as denying her sex. In her witness statement, she submitted that the Petitioner claimed that the Respondent has a communicable venereal or sexually transmitted disease yet medical tests and results did not confirm this. This court takes note that the witness statement of the Respondent which was tendered and marked in this Court as **EXD1** and her *viva voce* evidence have not expounded on the two interrelated and interlinked issues above. During cross examination, there was no question relating to the piece of evidence on non-performance of conjugal duties by the Petitioner. Further, there was no question as to whether the Petitioner accused the Respondent of a venereal disease. This being the case, the responses by the Respondent in re-examination are inadmissible because they raised new issues which never arose in cross examination. Therefore, this Court holds that this part of the evidence has not been discredited by the Petitioner.

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 during the subsistence of the marriage, must be communicated with sufficient particulars to the other. I have stated that the issue of denying sexual intercourse and the allegation of having an STI are interrelated and interlinked. The interlinkage comes on the basis that where a spouse suspects that the partner has an STI, there is an inherent fear of transmission if he or she has sexual intercourse with the infected spouse. Actually, that would be a reasonable ground for withdrawing sexual services to a spouse until he or she recovers. If the STI is

incurable, then the spouse would be justified to introduce meaningful and reasonable precautions so as to still perform conjugal duties without exposing oneself to the infection.

It is striking to note that in this case, there is no medical report confirming that the Respondent had an STI. Further, there is no evidence that there were some cultural ceremonies which could have justified the unilateral decision to withdraw sexual services by the Petitioner. This meant that it was safe to have sexual intercourse as a couple. However, the Petitioner refused to have sexual intercourse with the spouse. Bearing in mind the circumstances in this case, this Court finds this conduct as inhumane, degrading, unjustifiable, unreasonable and wrong. The failure to perform such a noble task has now resulted in emotional disturbance, mistrust and unnecessary suspicion on the part of the Respondent against the Petitioner. For a married person, this condition is unhealthy and has a potential to cause a harm or injury to the health of the Respondent. Therefore, this Court finds that the intentional withdrawal of sexual intercourse to the wife was cruelty on the part of the Petitioner.

The Respondent alleges adultery on the part of the Petitioner. She firmly submitted that the Petitioner has several ladies who are unduly familiar with him to an extent that he has sexual relations with them. One of such ladies is one of their maids. 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 issue that arose during cross examination related to phone text messages and alleged gifts given by the Petitioner to ladies such as Nyembezi. The Respondent did not tender anything supporting the fact that the Petitioner was exchanging messages with a female which depicted sexual relations between the two. Further, the evidence relating to the manner the Petitioner gave a lift to a lady and put her in the front seat whilst the Respondent was put in the back seat does not on its own suffice. It may be classified as prioritising that lady against the wife. The report from the son as to the lady having a discussion to get married to the Petitioner is inadmissible because it is hearsay. This being the case, this Court does not find any evidence which shows that the Petitioner went further and interacted with this particular lady in a such a manner that would reasonably compel an ordinary person on the streets of Ngumbe township to conclude that he was unduly familiar with her.

The Court further notes that there was no other piece of evidence to show that apart from meeting in the car in the presence of the Respondent, the two had another meeting where they had or could have sexual intercourse. Similarly, this Court has no evidence which shows that the said Nyembezi interacted with the Petitioner in such a manner that one would safely infer a sexual relationship between the two. The evidence falls short of any opportunity between the two meeting and having sexual intercourse or



possibility of that. It is to this extent that this Court holds that adultery has not been proven against the Petitioner. The cross petition is hereby dismissed.

#### **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. Premised on this analysis, this Court proceeds to dissolve the marriage and grant the prayer for a decree of divorce *nisi* on the grounds of cruelty from both sides.

The Court sets 8<sup>th</sup> May, 2023 @2pm for hearing on issues of alimony, child custody, maintenance and distribution of matrimonial properties. In terms of the children, I would like to examine them since they are of understanding age. Therefore, they must be present at the next hearing.

It is so ordered.

**PRONOUNCED IN CHAMBERS ON 18<sup>th</sup> APRIL, 2023@3PM**

**HONORABLE (MRS.) JEAN ROSEMARY KAYIRA**  
**JUDGE**