

IN THE TRADITIONAL CIVIL APPEAL COURT SITTING AT MZUZU
CIVIL APPEAL CASE NO. 21 OF 1979

LYNESS GONDWEAPPELLANT
-VS-

HUSTON MOYORESPONDENT

JUDGEMENT

This is an appeal from the judgement of the Mzimba Traditional Court which court dismissed with costs the appellant's petition for divorce

It is not known when the parties married but the appellant's sole ground for her petition is what may in English Family Law be referred to as *wilful refusal to consummate a marriage*. Her ground reads "**you are my husband but you do not come and enter my house**" meaning not only that the respondent literally failed to go into the appellant's matrimonial home but also omitted to discharge other obligations such as sexual relations with the appellant. According to the appellant she had complained to the village headman about the respondent's conduct. The village headman dealt with complaint urging, specifically, the respondent to *consummate* his marriage. The respondent ignored the advice. It is said that the matter then went to court on three occasions, the court too urged the respondent to *consummate* his marriage but the advice was again ignored. Thereafter these proceedings were initiated and the respondent put no question to the appellant after she had stated her grounds.

The respondent concedes that he omitted to *consummate* his marriage alleging, however, that he was prevented from so doing because a certain funeral ritual had not taken place. Such forbade a participant from enjoying sexual life before its fulfilment. Whatever is the efficacy of the ritual there is evidence, however, that the ritual was observed for two weeks only. But the period which the respondent is alleged to have wilfully refused to consummate his marriage covers a total period of more than two weeks. It is said to be five years.

In our view there is evidence on which the court below could have granted the order prayed for, the petitioner's testimony discloses a real ground for the order sought. The respondent did not quite challenge the testimony. For these reasons we grant the order prayed for. As the law in Mzimba is that whoever is guilty of the matrimonial offence forming the basis of the divorce "loses" both lobola and children in the sense that if, as in this case, it is the male spouse that is at fault, his lobola is non-refundable and custody of the children goes to the female spouse, it is here and now ordered that custody of the children of the parties' marriage is placed in the hands of the appellant and the lobola is to be retained by the said appellant. The respondent is further condemned in costs.

HON. JUDGE INKOSI MZUKUZUKU (ACTING CHAIRMAN)

HON. JUDGE CHIEF KABUNDULI (MEMBER)

HON. JUDGE MTEMI KILIPULA (MEMBER)

HON. JUDGE ME. S. Z. F. GONDWE (MEMBER)

HON. JUDGE MR. S. G. PHOMBEYA (MEMBER)

DELIVERED IN OPEN COURT THIS IS 19TH DAY OF JANUARY, 1980 AT MZUZU.