

IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.4 OF 1987

BETWEEN:

PHILLIP KONDOWOLE APPELLANT

- and -

LINDIWE EUNICE KONDOWOLE RESPONDENT

- and -

E.A. SANKHULANI 1ST CO-RESPONDENT

- and -

W.L. MACHAISA NGULUBE 2ND CO-RESPONDENT

Before: The Honourable Mr. Justice Unyolo, J.A.
The Honourable Mr. Justice Mtegha, J.A.
The Honourable Mr. Justice Mbalame, J.A.
Kumange, Counsel for the Appellant
Respondent, not present, unrepresented
1st Co-respondent, not present, unrepresented
2nd Co-respondent, not present, unrepresented
Phiri/Longwe, Court Reporters
Kadyakale, Official Interpreter

JUDGMENT

Mtegha, J.

The appellant in this case Phillip Kondowole appeals to this Court against the decision of Banda, J. in which he dismissed the appellant's petition for divorce on the grounds of adultery and cruelty. The learned Judge held that neither adultery nor cruelty had been proved to the requisite standard. The grounds of appeal are as follows:

- (1) That the Hon. Judge erred in law and fact in finding that adultery and cruelty were not proved.
- (2) The Hon. Judge misdirected himself in holding that there was no evidence of illicit association and
- (3) The decision is against the weight of the evidence.

It would be prudent, in our view, that we should mention that the respondent, first and second co-respondents were not present at the hearing of the petition despite the fact that they were served, and therefore this petition was

undefended and the learned Judge rightly warned himself against the dangers of collusion.

Briefly, the facts of the case are that the parties were married on 7th October, 1969 at the Resident Magistrate's Court in Hermanus District of Cape Province in South Africa. They returned to Malawi in 1976, and settled at Nkhotakota where they were running a business. There are four children from this marriage.

It was the appellant's evidence that he was hearing rumours that the respondent was sleeping in hotels in Lilongwe, but he did not see her with anybody. These rumours, as the trial Judge rightly pointed out, were hearsay and therefore inadmissible to prove adultery. The petitioner, however, stated that the respondent frequently left the matrimonial home and went to Lilongwe to see her friends.

In order to prove adultery the petitioner tendered letters addressed to the respondent by the two co-respondents. The first one, Exh. 2 dated 10th February, 1984, came from the second co-respondent. In part that letter stated,

"My dear, you really caught my eyes with that beautiful glittering eyes and nice thighs of yours. I wish I had a lot of days to spend in Lilongwe, I would have accompanied you to Nkhotakota and see your PICK IN PAY Restaurant and spent some nights with you my dear, you were so nice Eunice, that is why I got your photograph for me to keep as a remembrance."

Another letter, written by the first co-respondent dated 27th November, 1984 had this to say,

"Dear Eunice,

There could be nothing good than those sleepless/nights we had in that hot weather - At the end of the game, I was exhausted. I didn't want to leave you alone for someone but I was forced to because of time. All the same, I was leaving you with high hopes of the future - months to come.

Eunice, I must thank you for the warm and tender welcome you showed - more than I can say - please keep it up. Now, how are you, after having that bad cough? I left some tablet for you, I don't know if at all they helped you, but I am sure they did.

I will be going to Dedza on 18th December, 1983 to 20th December and I will make sure that I should drive down to see the boy. Then I will carry a few things for him - what is his favourite item that I should carry for him - money will not do him good tell me what I should do for him.

As you said last time, when will you come for your Xmas shopping? Tell me when you will be in Lilongwe so that I should make possible arrangements and we should meet somewhere. I want to meet you somewhere - You know what I mean and what we should do. Eunice, answer and tell me what I should do on both subjects.

For a general information, I will be free from 13th December to 18th December if you could come during this time, that will be good and we can arrange how to go about it. Any time you come it, come over to City Centre and ask for me. I will be too good to see you Darling Eunice. Don't forget to bring my photo - the one you showed me on that day. I will be happy to see you again, coming here anytime. Please answer and see what we can do. This will not be the end, but the start of the long road. Waiting to hear something from you soon Darling."

The third letter also came from the first co-respondent. In that letter he informed the respondent how he travelled after their meeting in Nkhotakota and went on to say,

"So how are things? I know you wanted to made a broken heart but things were beyond your control. I must thank you for the work done, by keeping me busy and all for the three days I stayed there. Meals and the most important menu we were preparing - more thanks to the two boys and a woman for keeping the affair in that way."

It was the learned Judge's view that these letters did not suggest that sexual intercourse took place between the respondent and the two co-respondents, and therefore dismissed the petition.

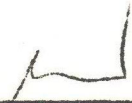
It has been argued before us by Mr. Kumange that the learned Judge was wrong not to infer that sexual intercourse took place between the respondent and the co-respondents, because these letters clearly indicate that there was illicit association between the respondent and the two co-respondents, from which the Judge should have inferred that adultery was committed.

As it has been pointed out on several occasions that it is not necessary to adduce direct evidence in order to prove adultery. Adultery can be established by looking at all the circumstances of the case, such as undue familiarity, suspicious circumstances, improper conduct such as the one in Roast v. Roast 1894 Probate 248 where filthy correspondence was found in the respondent's possession. The facts in the present case are that the respondent frequently left her matrimonial home and went to Lilongwe. The letters show that she was on intimate relationships with both co-respondents, one of whom was residing in Lilongwe and the other one had visited Lilongwe from Zambia. Moreover, the co-respondents were served with the petition, but they never bothered to appear, and although this is not per se a sufficient admission by the co-respondents, it is a circumstance which the Court ought to have taken into account. Above all the respondent has disappeared to an unknown destination presumably to South Africa.

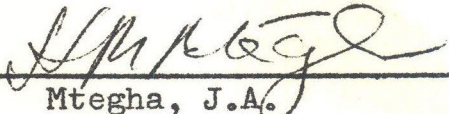
We are therefore of the view that taking into account all these circumstances, the Court below should have inferred that adultery had taken place. We therefore allow this appeal and grant the petitioner a decree nisi that his marriage to the respondent be dissolved. We further grant him custody of the children. The respondent and the two co-respondents be condemned in costs.

DELIVERED at Blantyre this 19th day of August, 1988.


(Signed):


Unyolo, J.A.

(Signed):


Mtegha, J.A.

(Signed):


Mbalame, J.A.