IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NO. 1 OF 1989

BETWEEN

JUBEDA JAMAL.....PETITIONER

AND

IBRAHIM JAMAL .....RESPONDENT

CORAM: D F MWAUNGULU(JUDGE)

Tembo, legal aid advocate, for the Petitioner

Respondent, absent, unrepresented

Chingota, a court reporter

Chaika, an official interpreter

Mwaungulu, J

JUDGEMENT

Mrs. Jubeda Jamal, the petitioner, prays this Court dissolve her marriage to Ibrahim Jamal, the respondent, on the ground of cruelty. Unfortunately, this petition remained in our Court from 1989. This Court gave a registrar's certificate on 19th of August 1991. Nothing happened until 17th September, 2001. The respondent, according to Mr. Tembo, a legal practitioner for the petitioner, appeared this morning and discussed with the petitioner's legal practitioner. The respondent told Mr. Tembo that he may or may not be present later in the afternoon. Otherwise, he told Mr. Tembo, he did not want to oppose

the petition.

Obviously procrastination in processing this petition raises concern about the justice delivery in domestic family law. More importantly, however, the time this Court took to finally dispose the matter indicates, contrary to what one expects from such a division, weakness in the family law division of this Court. The weakness is responsible for problems in the development of the law in this area. The problems also surface seriously in our customary law jurisdiction and customary family law. Over 95% marriages are contracted under customary law. A review of the jurisdiction, procedures and laws affecting spouses and children on death or dissolution of marriage needs close and immediate attention.

The petitioner and respondent married on 8th October 1977 at the Blantyre offices of the Registrar General. They are Malawian citizens and domiciled in Malawi. The petitioner married before under Islamic law. That marriage ended under Islamic law. On 8th October 1977 the petitioner married a second time to the respondent. The petitioner and respondent lived in Blantyre and Lilongwe. They have four children: Zahil born on 23rd September 1973, Nanshad born on 9th March 1979, Azad born on 5th September 1980 and Akba born on 7th of July 1985.

The petitioner and respondent come to court for the first time. The petitioner, the only spouse, who gave evidence in this Court, denies conniving or colluding with the respondent over the petition she makes to this Court. In fact, as we see shortly, the petitioner and respondent lived separately since 1990. The marriage probably would have ended long ago but for the delay in processing the petition.

The respondent, it seems to the Court, is employed. From where they lived, the respondent has had good jobs. The petitioner has not worked. The petitioner and her husband however ran businesses, including a bottle store where she worked. Cruelty is the reason the petitioner dissolves the marriage. Life at the bottle store is significant to the ground she poses for the dissolution of her marriage.

The petitioner alleges that throughout their marriage the respondent treated her with cruelty from which she suffered injuries to her head. She told the court that the respondent has violent and ungovernable temper. Taking alcohol exacerbates the temper. The respondent, when in that state, has struck her at times and threatened and abused her. The petitioner recalls in 1987 when the respondent set on her, three months pregnant at the time, and pounced her with violent blows. She miscarried. She told the court that her husband, who is habitually drunk, particularly after 1989, intensified in threatening and abusing her. Her husband beat, humiliated and abused her in front of people at the bar, where she worked, and around the family and the house. Consequently, she left

respondent by 1990. She lives separate from her husband since.

On this evidence, the petitioner discharged the burden on her to prove cruelty, the ground she bases her petition. Cruelty occurs when a spouse's conduct or words cause or could cause injury to another's health, mental or physical. The respondent, who the petitioner proved to be intemperate and prone to violence, is a person whose conduct actually affected the petitioner's health and a foetus' life and whose conduct, if allowed, could cause more actual physical injury to the petitioner. The respondent, it appears to this Court, never sought counseling on the violent character itself and drinking which aggravated that character. The respondent's conduct, no doubt, the petitioner found intolerable and substantial. She found it impossible to continue the marriage. On the law as is now, a law that, for minor amendments, has not been reformed since 1903 and 1905, respectively, when the Marriage Act and Divorce Act were passed, this Court grants divorce on proof that a matrimonial offence is committed.

The petitioner's legal practitioner however cited Ash v Ash [1972] 2 WLR 347, the only case cited on the matter. It is difficult to understand why Mr. Tembo cited the case. Ash v Ash was decided on the reforms in England and Wales under section 2 (1) of the Divorce Reform Act 1969. No doubt, in England and Wales, the Divorce Reform Act introduced fundamental reforms to divorce law. It is only in respect of these reforms and how they affect our divorce law that I comment on the case counsel cited.

Ash v Ash, but for that section 2 of the Divorce Reform Act is not our law, slightly assists the petitioner. There, a decision of the family division of the High Court for England and Wales, Bagnall, J., accepted that, as the husband actually admitted, the respondent, the husband, committed acts of violence, particularly if drunk, that resulted or could result into future injury to the petitioner's health. These in Bagnall, J's view however were insufficient to prove the marriage between the respondent and the petitioner had irretrievably broken down. That decision, as I repeatedly mention, bases on section 2 of the Divorce Reform Act 1969:

"The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court on one or more of following facts that is to say ... that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to leave with the respondent ... If the court is satisfied on the evidence of any such fact is mentioned subsection 1 of this section, then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, ... grant decree of nisi of divorce."

One consequence of the reform is put succinctly in the respondent's submission in defence to the petition summarised by Bagnall, J., as follows:

"The respondent put his defence to the petition in two ways. First, he says that notwithstanding the fact that he has admitted and that I have found, nevertheless it should not be held that he has behaved in such way that the petitioner cannot reasonably be expected to live with him. Secondly, if that be wrong, he says that under section 2 (3) of the Divorce Reform Act 1969 I should conclude that I am satisfied on all the evidence that the marriage has not been broken down irretrievably. If he satisfies me upon either of those two submissions, the prayer for dissolution in the petition must be rejected."

Bagnall, J., then considered the true construction of paragraph b of section 2 (1) of the Divorce Reform Act of 1969 meant. He said the phrase 'cannot reasonably be expected live with the respondent' necessary poses an objective test. He thought that answering the question whether a spouse can or cannot be reasonably expected to live with another involves considering the behaviour of a spouse as alleged and established by the evidence and the character, personality, disposition and behaviour of the petitioner:

"The general question may be expanded thus: can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent? It follows that if the respondent is seeking to resist a petition on the first ground upon which Mr. Ash relies, he must in his answer plead and in his evidence establish the characteristics, faults, attributes, personality and behaviour on the part of the practitioner upon which he relies. Then, if I may give a few examples, it seems to me that a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can be reasonably be expected to live with the respondent similarly addicted; a taciturn and morose spouses can reasonably be expected to live with a taciturn and morose partner; a friltatious husband can reasonablely be expected to leave with a wife who is equally susceptible to the attractions of the other sex; and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other."

Bagnall, J., concerning the particular petitioner in Ash v Ash, was satisfied the petitioner was one who prepared to take the advantage of the good and enjoy the prosperity but incapable to tolerate the disadvantages of the bad and adversity. Bagnall J then said this about the petitioner:

"However, a part from my clear impression that the petitioner showed lack of understanding of the problems of the respondent I have reached the conclusion that she has not shown herself to be of such a character and personality and her behaviour has not been such that I can conclude that she can reasonably be expected to live with the respondent. I therefore hold that the petitioner has satisfied Court of the facts in relation to this marriage set out in paragraph (b) section 2 (1) of the Act."

The Divorce Reform Act of 1969 introduced the notion of the marriage having had to be irretrievably broken down. The notion overshadowed and overarched the law before the reforms, albeit obliquely, in concepts like condonation and forgiveness. The previous law recognised that, however grave the matrimonial offence, spouses, depending on temperament and attitude to matrimonial offences, could and did continue with the marriage relationship. More importantly, in confining the dissolution to stipulated matrimonial offence the law excluded possible behaviour which spouses in a marriage relationship could tolerate without ending the marriage relationship. The latter was limited in scope. It was difficulty to delineate behaviour close to behaviour justifying the dissolution of marriage. While stipulating offence brought a measure of certainty, certain behaviour, cumulatively or singly, made continuing the relationship difficult. The fear, genuine in all respects, was that relaxation would lead to licence and a threat to marriage, a very important social institutions. There was however also the painful reminder that continuing a relationship that had a irretrievably broken down had adverse social consequences on the spouses, the children and society. That necessitates an appropriate balance. The Law Commission's Reform of the Grounds of Divorce, [Law Commission, Grounds of Divorce (CMMD. No. 3123) November 1966, page 10, paragraph 15], the precursor to the Divorce Reform Act 1969 comments the rationale of the Act to be:

"... (I) To buttress, rather than to undermine, the stability of marriage; and (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and minimum bitterness distress and humiliation."

Our customary family law recognises, of course with fewer safeguards, as introduces in the Divorce Reform Act 1969, the notion of the marriage having had to irretrievably break down. This Court now has a more pronounced jurisdiction over appeals on customary family law and can provide and develop necessary and appropriate direction and guidance in our customary family law. For marriages under the Marriage Act, reforms like those in the Divorce Reform Act 1969 for England and Wales have to be made to our Divorce Act.

Under our law, this Court will grant divorce on proof of a matrimonial offence. Mrs. Jamal, as I said earlier, discharged the burden. I grant a decree nisi for the dissolution of the marriage. I grant custody, if the issues are still children, to the petitioner. The respondent bears the costs of this petition.

Made in open Court this St. Day of October, 2001 at Blantyre.

D F MWAUNGULU

JUDGE