

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE NO. 3 OF 2001

BETWEEN:

PRISCA KULISEWA.....PETITIONER

-and-

JOEXLS KULISEWA.....RESPONDENT

-and-

SELLINA MPHAMBA.....CO-RESPONDENT

CORAM: THE HON. MR JUSTICE F.E. KAPANDA

Mr Mzumara, of Counsel for the Petitioner

Mr Tsingano, of Counsel for the Respondent

Mrs Moyo, Official Interpreter/Recording Officer

Date of hearing : 10th August 2001

Date of judgment : 10th December 2001

Kapanda, J

JUDGMENT

Introduction

The Petitioner, Prisca Kulisewa, is asking for the dissolution of her marriage to the Respondent on the grounds of the Respondent's adultery with the Co-Respondent. It is

also the prayer of the Petitioner that her said marriage to the Respondent be dissolved on the grounds of cruelty and desertion.

Moreover, the Petitioner has made the following additional prayers:-

- (a) That she be granted custody of the children of the marriage.
- (b) That she be given a share of the matrimonial property.
- (c) That the Respondent should be ordered to pay to the children maintenance expenses.
- (d) That the Respondent and Co-Respondent be condemned to pay the costs of this petition, and
- (e) That the court should give her such further and other relief as may be just.

The Respondent acknowledged service of the Petition. But it is noted that both the Respondent and the Co-Respondent did not file answers to the Petition in these divorce proceedings. Actually, the Respondent, though represented by Counsel, neither cross examined the Petitioner on her evidence in support of her petition nor did he offer any evidence of his own regarding this Petition. I will comment upon these observations later in this judgment when dealing with the question of whether or not there has been collusion between the Petitioner and the Respondent.

The Petition

As already indicated there are three grounds upon which this petition for divorce is premised viz adultery, cruelty and desertion. The relevant parts of this petition, including the prayers being sought, are as follows:-

“1. That on 20th October 1994 the Petitioner Prisca Kulisewa then Prisca Chirombo Mbewe (Spinister) was lawfully married to Joexls Kulisewa (hereinafter called the respondent) at Mwanza.

2. That after the said marriage the Respondent and the Petitioner lived and co-habited together at Mwanza.

3. That both Petitioner and Respondent reside and are domiciled in Malawi.

4. That there are children of the family P. K. born on [day/month] 1995 and O. K. born on [day/month] 1997.

5. That there have been no previous proceedings in the High Court or Subordinate Court with reference to the said marriage either by or on behalf of the Petitioner or the Respondent.

6. That ever since the celebration of the marriage the Respondent who is a man of ungovernable temper has treated the Petitioner with cruelty and that the Petitioner has suffered injury to her health.

(a) that the Respondent has constantly been sleeping out with other women.

(b) that the Respondent refuses the Petitioner to live in the matrimonial home.

(c) that the Respondent through his sister and brother harassed the Petitioner up to the extent of entering the matrimonial bedroom and snatched money from the Petitioner's handbag and the key for the bedroom.

(d) that the Respondent told both the Police and the Church that he does not need the Petitioner in his home.

(e) that on 1st April 2000 the Petitioner found the Respondent with a certain Police Woman of Mwanza Station (who the Respondent intends to marry.)

(f) that the Respondent has constantly abstained from the Petitioner thereby denying her conjugal rights.

7. That the Respondent chased away the Petitioner on 27th April, 2000 from the matrimonial house telling her that he does not want her anymore. That since the celebration of the marriage the Respondent has without justifiable cause repeatedly beaten up the Petitioner on numerous occasions.

8. That the Respondent is generally of ungovernable temper.

9. That the Petitioner started seeing changes in her husband in the way that he was seen in the company of unmarried women.

10. That on 1st April 2000 the Petitioner found the Respondent with a woman Constable of Mwanza Police Station. The matter was taken to the then Officer-in-Charge of Mwanza Police Station who summoned the Respondent to a meeting. It was at the very same meeting that the Respondent announced that he does not need the Petitioner and that he will take the Co-Respondent.

11. That the Respondent has committed adultery with the Co-respondent and various other women not known to the Petitioner.

Particulars of Adultery

(a) immediately after chasing the Petitioner from the matrimonial home in Mwanza the Respondent has been cohabiting with the Co-respondent as a husband and wife todate.

(b) the Respondent has categorically challenged and told many people including the Petitioner's sister Mrs Gomani at Sobo, Mwanza Police in the presence of the Officer-in-Charge and Church elders that the Respondent is now legally married to the Co-respondent.

(c) the Respondent has been seen in the company of the Co-respondent at the Office and at the matrimonial home.

(d) the Co-respondent has now a baby boy with the Respondent as the responsible putative father.

(e) that the Petitioner has not in any way been accessory to connived or condoned the Respondent's cruelty or desertion.

12. The Petitioner therefore humbly prays to this honourable:-

(a) that the marriage between the Petitioner and the Respondent be dissolved.

(b) that the Petitioner be granted custody of the said children of the marriage.

(c) that the Petitioner be given the share of all the matrimonial property.

(d) that the Respondent be ordered to pay to the children maintenance expenses.

(e) that the Respondent and Co-respondent be condemned in costs of this action.

(f) that the Petitioner may have such further and other relief as may be just.”

I wish to point out that I have not corrected any grammatical errors, if there are any, in the petition herein. The Respondent, despite acknowledging service of the Petition has not filed any answer to this Petition. Thus the petition is for all intents undefended.

Evidence

The Petitioner was the only person who testified in these proceedings. It was her testimony that she is a teacher by profession and that she is currently teaching at Ndirande Community Day Secondary School.

It was her further testimony that the Respondent is her husband and to this end she produced a Certificate of Marriage to prove her marriage to the Respondent. The said marriage certificate, marked as exhibit P1B, shows that the Petitioner and the Respondent got married on 20th October 1994 at the District Commission’s office at Mwanza Boma.

The Petitioner further testified that she, and the Respondent, are blessed with two children. It was further given in evidence that the two children are living with her. The Petitioner further told this court that she wants her marriage dissolved on the ground of adultery because the Respondent has married another woman, i.e. the Co-Respondent Sellina Mphamba, and that the Respondent and the Co-respondent are living together as husband and wife. It was also her testimony that the Respondent has a male child with the Co-Respondent.

The Petitioner further testified that she was chased from the matrimonial home in April 2000 and since then she has been living in a rented house at Ndirande. It was further given in evidence, by the Petitioner, that she was beaten and chased from the matrimonial home, in Mwanza, after she found the Respondent in the company of the Co-Respondent. The Petitioner further told this court that the husband made her travel to Blantyre from Mwanza, at night, during the time she was chased from the said matrimonial home.

The Petitioner was not cross examined. It therefore follows that her testimony is uncontradicted and unchallenged. Consequently the evidence herein will be treated as correct for the purposes of this judgment.

Issue for Determination

There is only one issue for determination in these proceedings and the question that arises, and falls to be decided is whether or not, the marriage between the Petitioner and the Respondent should be dissolved on the grounds indicated in the petition herein. I must note that the foregoing question will have to be determined on the basis of the evidence on record and of course the relevant law.

Law and Findings

Collusion

As already indicated the Respondent did not file an answer to the petition herein. It therefore follows that, notwithstanding the appearance of Counsel on behalf of the Respondent, this case is undefended. In the circumstances, as required by law, I have warned myself about the danger of collusion in petitions that are not defended but I am satisfied, on the evidence on record, that there is no collusion in the presentation or prosecution of this petition.

Domicile and/or Jurisdiction

It is trite law that a court will only assume jurisdiction in matrimonial proceedings if it is satisfied that the parties are domiciled within the jurisdiction. I am convinced, in the light of the evidence on record, that both the Petitioner and the Respondent are domiciled in Malawi. This court, therefore, has jurisdiction to entertain these divorce proceedings.

Adultery

The position of the law, with regard to proof of the matrimonial offence, is that the standard of proof is like that in all civil matters actions i.e. its proof on preponderance of

probabilities - see the case of Maclune -vs- Maclune 9 MLR 409. In this regard I am also mindful of the often repeated pronouncement of the court that adultery is committed in private thus it is not always proved by direct evidence. Indeed, it is very rare that people will be found committing adultery in flagiranto delicto. I will, therefore, in making my findings on the question of adultery, be mindful of the observations made above.

Further, I have reminded myself that where adultery is a ground upon which a party is seeking divorce it is incumbent upon a court to enquire whether the Petitioner has not in any manner been accessory to, or connived at, or condoned the adultery. This court is satisfied that the Petitioner has not in any manner been accessory to, or connived at, or indeed condoned the Respondent's adultery with the Co-Respondent. Finally, it is the considered judgment of this court that the petition has not been presented or prosecuted in collusion with the Respondent.

In the instant case I find that the Petitioner has proved that the Respondent has committed adultery with Sellina Mphamba. I am of this view because where a man and a woman are living together, like the Respondent has been doing with the Co-Respondent, it would be fair and reasonable to infer, in the absence of direct evidence, that the Respondent has committed adultery. Moreover, it must be observed that there is evidence that the Respondent has a child with the Co-Respondent. As a matter of fact this has not been disputed by the Respondent. Is there any better evidence of adultery a court would be looking for than what there is in the instant case? This court is satisfied that on the unchallenged evidence of the Petitioner, to the effect that the Respondent has a child with the Co-Respondent, the Petitioner has proved to the requisite standard that the Respondent has committed adultery with, Sellina Mphamba, the Co-Respondent. Further, the failure by the Respondent to defend this petition is enough corroboration of the evidence of the Petitioner that the Respondent has committed adultery with the Co-Respondent (Njikhoh -vs- Njikhoh Matrimonial Cause No. 828 of 1996 [unreported] per Unyolo, J. as he then was).

Consequently, I find that the Respondent is guilty of the matrimonial offence of adultery. This court finds no reason why it should not grant the Petitioner the relief she is seeking

of the dissolution of her marriage on the ground of, inter alia, the Respondent's adultery.

Cruelty

Regarding the issue of cruelty, raised in the petition, it must be pointed out that same is established by showing conduct, actual or probable, threatening the other spouse's mental or bodily health and the court never looks at mere abuses and altercations normal in any marriage but a threat to health, mental or bodily, actual or perceived. The case of Malinki -vs- Malinki (1975-77)8 MLR 141 is very instructive on the observations made above. Further, I wish to note that the case of Kamlangira -vs- Kamlangira 6 ALR (M) 349 is for the proposition that one act of cruelty may be sufficient to prove cruelty and therefore such act of cruelty can move a court to grant a divorce.

Turning to the case before me I am satisfied that, on the undisputed evidence on record, the Petitioner has proved the allegation of cruelty against the Respondent. The Petitioner was physically assaulted. This one act of violence definitely affected her physical well being. In the premises cruelty has been established and I would, therefore, not hesitate to grant the Petitioner the relief

she is seeking of the dissolution of her marriage on the ground of, among other grounds, cruelty.

Desertion

Finally, it is observed that the Petitioner is further seeking the dissolution of her marriage on the ground of desertion. It is an undeniable fact, shown by the unchallenged evidence on record, that the Petitioner was chased from the matrimonial house. This, at law, amounted to constructive desertion by the Respondent thus this court would perfectly be entitled to, and I hereby, grant the Petitioner the relief of dissolution of her marriage on the ground of desertion.

Order

Following from the observations, and findings, made above a decree nisi for divorce is

therefore granted to the Petitioner and the Respondent is condemned to pay the costs of, and occasioned by, these proceedings.

Custody and maintenance of children;

distribution of matrimonial property

The Petitioner has prayed, as shown in the petition, that she should be given custody of the two children of the marriage. It is also her prayer that the Respondent should be ordered, by this court, to pay to the said children maintenance expenses. Moreover, the Petitioner is asking this court to order that she be given a share of all the matrimonial property. I notice that the Petitioner did not offer any evidence on these two prayers. Whether it was deliberate I do not know but it can safely be assumed that these prayers have not been abandoned. Indeed, in any event the court must adjudicate upon these matters following the dissolution of the marriage between the Petitioner and the Respondent but the court can not do so without receiving evidence.

Thus the question concerning the custody and maintenance of the two children; and the distribution of matrimonial property, should be dealt with in chambers and in a separate application. It is so ordered.

Pronounced in open Court this 10th day of December 2001 at the Principal Registry of the High Court, Blantyre.

F.E. Kapanda

JUDGE