

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE NO. 10 OF 2002**

BETWEEN:

HELLEN JANE ROYLE.....PETITIONER

AND

MICHAEL BEECH ROYLE.....RESPONDENT

CORAM: TWEA, J.

Dzonzi, of Counsel for the Petitioner

Absent, of Counsel for the Respondent

Ngwale, Court Clerk

JUDGMENT

This is a petition for divorce brought by the petitioner, on grounds of cruelty and desertion. The respondent although he acknowledged service, indicated that he would not defend the petition.

When the matter was called for hearing only the petitioner gave evidence.

It was her evidence that she came to Malawi in 1994 and she met the respondent and they started living together. She then lived at a plot No. 9105 in Lilongwe. She married the Respondent in January, 1996. I must mention at the outset that both the petition and in her evidence, she did not exhibit the certificate of marriage. However, she deponed in her affidavit that the marriage was solomonied before the District Commissioner at Lilongwe. It was in her evidence that she mainly paid the rent for her house although the Respondent initially paid for it.

The Petitioner, further said that their marriage deteriorated from 1998. She told this Court that the Respondent was irresponsible and run up in debts as a result of which their landrover motor vehicle was repossessed and the sheriff executed on some of their property. She had to defend property as her own and made arrangements to pay the Respondent debts which run above K400,000.00

It was her evidence that the Respondent had financial problems. She took away his

cheque books and got him on counselling to help him. However the Respondent opened up new bank accounts and withdraw from the counselling sessions, alleging they were a waste of time and money.

It was further her evidence that although the Respondent has two jobs, he did not provide for the house. Further, he neglected to pick her from the Airport, he would go away on trips for days and not tell her, and that they basically lived apart. She told this court that this caused her depression and she had medical treatment for this. I must mention on the outset that no medical evidence was submitted on this issue. It was further her evidence that the Respondent has denied her conjugal rights and from early 2001 they lived in separate bedroom and she left the matrimonial home in about January, 2002 after she failed to get the Respondent to respond to her request to sort things out. It was her evidence that the reasons she wants a divorce is because the respondent said he does not want her for a wife.

This basically is the evidence that the Petitioner gave in this Court. I must say that what she told this Court does not necessarily agree with what she pleaded in her Petition. I will look at her petition in the light of the evidence given in Court.

As is submitted for this Petitioner, any spouse can file a petition for divorce under S.5 of the Divorce Act on four grounds of adultery, desertion for a period of three years, cruelty and that the Respondent is incurably of unsound mind. The Petitioner herein pleads cruelty and desertion on the part of the Respondent.

I note that in her grounds she pleaded the Respondent's conduct of not providing for the house and her as having caused her psychological anguish and causing her to move out of the matrimonial home. The evidence of the Petitioner was that Respondent stopped talking to her after she withdraw his cheques to prevent him from spending money, according to her, irresponsibly. It is abundantly clear to this Court that the union of the parties took the strain after she withdrew his cheque books, and did letters to people that would be creditors of the Respondent. It is worth noting that the letters she did to people were not exhibited in this Court.

From the evidence adduced by the Petitioner, the marriage started deteriorating in 1998 when the Respondent run up debts. The Petitioner told this Court that the debt was due to his responsibility. She consequently had to bail him out. What actually happened was not told in this Court. The Respondent is a businessman and according to the Petitioner he runs two jobs to keep up. Whether the debts were business or personal debts is not clear. I am of the view that this Court could not find the Respondent irresponsible in the absence of any evidence as to how the debts were incurred.

The Petitioner however, was clear that she had to bail him out and that he was not providing for household or her. One wonders how a man who fails to own up to his debts and has been bailed out by his wife would provide for the home. The Petitioner was honest enough to admit in her evidence that the Respondent did provide for her initially, and then later they split the bills. Clearly, this could only be so where the parties are able to afford that. The evidence has it that at the time she left the matrimonial home she earned more than the Respondent. There is no evidence to show that she could not provide or maintain the Respondent even if all his businesses went under. There is no evidence that his financial problems were under control to enable him to contribute or

relieve the Petitioner of the burden of her bailing him out of the financial problems. I am not therefore, on the facts prepared to find that the Respondent's failure to provide for the house amounted to cruelty.

I have examined the evidence of the Petitioner for verbal mental or psychological abuse and I find none other than mental and psychological anguish that may be associated with the withdrawal of conjugal rights.

The Petitioner informed this Court that the Respondent withdrew from having sexual intercourse with her after the money issues came to the fore, that he had had his cheques withdrawn and letters to people done against his conduct. The Petitioner cited the case of Malila vs Malila 10 MLR 227 in support of her case. From what happened in this case one wonders who would feel rejected and unwanted? the Petitioner or the Respondent? I bear in mind that the intention of a party is generally not material. But this Court would be failing its duty if it over looks the reaction of the Petitioner to the financial problems of the Respondent: it was in my view grossly out of proportion and stripped the Respondent of all his dignity and worth. No matter she wished him well, it was totally undignified. It makes matters worse that she got a job that paid better and still insisted that he should pay up. Marital sex requires some degree of respect between the parties. I find that the withdrawal of conjugal right had a cause which the Petitioner was well aware of.

With the last proceeding paragraph I find that the parties became incompatible and slept in different rooms. There is no evidence that the Petitioner restored the cheque books to the Respondent or withdraw the letters she did. There is evidence of the Respondent starting up on counselling sessions and giving up, but this alone would not be indicative of will not change. In my view, how he was treated at home is a relevant factor.

In the present case, the Respondent may have been financially irresponsible, but in the absence of any evidence to show that he was irresponsible in his personal financial dealing so as to run a debt of not K400,000.00, I am not able to side with the Petitioner. I bear in mind that he look after her for they looked after each other from 1994 when they lived together, up to 1996 when they got married and to 1998 when the Respondent fell into debt. There is no evidence of carelessness at all. The Court would be slow to allow financial woes to be the basis for divorce.

I have looked at the evidence in the present case. In my view, this is a proper case for judicial separation. The parties incompatibility may be permanent or not and much would depend on the capacity of the Respondent to control his financial affairs, without being an unnecessary burden to the Petitioner, and the Petitioner's reasonable reaction to her spouses financial failures. It is my view that both parties here are guilty and I cannot exercise my discretion in favour of one. I therefore grant the Petitioner judicial separation from the Respondent with discretion to file for divorce if they are unable to reconcile.

Pronounced in Open Court this 4th day of December, 2002 at Blantyre.

E.B. Twa
JUDGE