

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MATRIMONIAL CAUSE NO. 8 OF 2002**

**BETWEEN:**

SYLVIA BIANCA SEKEYANI.....  
.....PETITIONER

and

CLEMENT SEKEYANI.....  
.....RESPONDENT

**CORAM: THE HON. MR JUSTICE F.E. KAPANDA**  
Counsel of the Applicant, Absent  
Mr C. Mhango, of Counsel for the Respondent  
Mr A. Rhodani, Official Interpreter

Place and Date of hearing: Blantyre 11<sup>th</sup> February  
2005

Date of judgment: ..... May  
2005

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JUDGMENT

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**Kapanda, J.**

**Introduction:**

The Petitioner, Sylvia Bianca Sekeyani, wants her marriage dissolved on the ground of Respondent's alleged cruelty. Further, the Petitioner prays for this Court to make the following decrees:

- (a) That she be granted custody of the child of the marriage.
- (b) That the Respondent be granted visitation rights of the child.

Furthermore, the Petitioner prays that she should be awarded the costs of, and occasioned by, these proceeds.

The petition is defended. Indeed, the Respondent has filed answers fro divorce to the petition and wants it to be dismissed with costs. Further, the Respondent states that, in the event that the marriage is dissolved, he has no objection to the Petitioner having custody of the child but he should be granted full visitation rights.

## **The Petition and the Response thereto**

### **The Petition**

The Petitioner has filed a Petition for Divorce dated 29<sup>th</sup> April 2003 where she has set out the grounds on which she is seeking the dissolution of her marriage. As mentioned earlier, the Petitioner wants her marriage dissolved on grounds of cruelty. It is alleged by the Petitioner that since the inception of her marriage the Respondent has treated her with cruelty and that the Respondent is a man of violent and ungovernable temper. The Petitioner further alleges that due to

the Respondent's actions and behaviour she has been psychologically greatly affected and mentally tortured. Further, she has given the particulars of cruelty. They are quite lengthy and the Court, for lack of brevity, will set out the said particulars which are enumerated as follows:

**"PARTICULARS OF CRUELTY**

- (a) The Respondent hit the Petitioner just weeks into the marriage because she had opened the door for him late as it was deep in the night. The Respondent was coming home from a drinking spree.
- (b) That almost on daily basis, the Respondent would get abusive towards the Petitioner by hitting her in front of friends and/or servants.
- (c) That the Respondent within the same first year of marriage poured hot cooking oil and scalded the Petitioner's chest on flimsy grounds suspecting her of infidelity until she had to be treated at a hospital.
- (d) That just when the Petitioner's baby was about 2 years old, the Petitioner and the Respondent agreed to hold a birthday party for the child but the Respondent did not deliberately attend the birthday party. Upon his return, the Respondent hit the Petitioner accusing her of holding a party in his absence. This happened in front of friends and visitors who had come for the party and the said friends and visitors had to depart prematurely because of this act.

- (e) That the Respondent continued his ungovernable behaviour of bullying the Petitioner on very flimsy excuses. The Respondent would become abusive and hit the Petitioner once every week or fortnight.
- (f) That again when the child was 4 years of age, the Respondent hit the Petitioner stating that she could not be holding birthday parties for the child. This occurred in the presence of the visitors and friends who had to intervene and stop the Respondent from hitting the Petitioner further and harming her.
- (g) That the Respondent had continued to hit the Petitioner until the 21<sup>st</sup> day of April 1001 when the Petitioner ran away from the matrimonial home to collect the marriage advocates only to find on her return that the Respondent had left and taken his belongings.
- (h) That the Respondent had on several occasions treated the Petitioner with cruelty by abusing the Petitioner's father and insulting the Petitioner's father as a pauper.
- (i) That sometime in early November or October 2001, the Respondent hit the Petitioner on grounds that the Petitioner had brought a male workmate to the matrimonial home and since the Respondent did not know him, the Respondent unceremoniously requested that the visitor depart immediately. The Respondent hit the Petitioner soon after coming back from his errands in the evening on the said grounds.

- (j) That on or about on 28<sup>th</sup> April 2002 after the Respondent had moved out of the matrimonial home he came back and forced the Petitioner to have sex with him and when the Petitioner resisted, the Respondent lost his temper and smashed and destroyed everything that he could lay his hands on. I hereby exhibit a list of all the items that were destroyed by the Respondent, and mark the "B."

The Petitioner continues to state in her petition that the petition for divorce has not been presented or prosecuted in collusion with the Respondent. It is her further contention she has not been an accessory to or connived at or condoned the cruelty she has set forth in her petition.

## **Response**

The Respondent has denied treating the Petitioner with cruelty and further denies that he is a man of violent or ungovernable temper. In further reply to the allegation of cruelty the Respondent has responded as follows:

- "(a) That it is not true that the Respondent hit the Petitioner just weeks into the marriage as alleged or at all. That were the Respondent a man of violent and ungovernable temper as alleged, the Petitioner would not have stayed in marriage with the Respondent for over ten(10) years.
- (c) In response to paragraph 6(a) to (c) it is not true that the Respondent hit the Petitioner or abused the Petitioner as alleged or at all. The Respondent states that during the first year of their marriage the

Petitioner and the Respondent lived at the Petitioners' mother's residence and the Respondent would have been evicted from the house had the Respondent hit or abused the Petitioner.

- (d) In response to paragraph 6(d) it is true that the Petitioner and the Respondent had an argument over a birthday cake made by the Petitioner for a man called Victor Thomas without the knowledge of the Respondent. It is also true that there ensued a fight where each party hit the other and the Respondent sustained a deep bite on the hand which left a scar appearing eve to date.
- (e) That there were other arguments relating to the manner of dressing as the Respondent disapproved of a married woman wearing mini skirts but these arguments did not lead to any fight at all.
- (f) That the Petitioner and the Respondent have one child, a boy, and the Respondent loves the child and the Respondent could not disapprove birthday parties for his only child.
- (g) That the Respondent firmly states that the Petitioner resolved to dissolve the marriage on or after 28<sup>th</sup> November 2001 when the Respondent lost his job.
- (h) That on or about 21<sup>st</sup> April 2002 the Petitioner resolved that she would separate from the Respondent and the Respondent was disturbed and approached the Petitioners' mother to mediate but the Petitioner could not accept to stay with the Respondent. Once the mother-in-law had

left the house the Petitioner left the matrimonial home and slept out without the knowledge or approval of the Respondent. The Respondent was left with no option but to leave the Petitioners' home and sought refuge elsewhere.

- (i) Finally the Respondent was advised by his father-in-law that he should expect a law suit for divorce anytime.
- (j) It is not true that the Respondent treated the Petitioner with cruelty but that once the Respondent lost his job the economic condition became tough as the Petitioner remained the sole breadwinner in the house and the only reason for alleging cruelty is to justify her action for divorce.
- (k) While it is true that out of anger the Respondent broke some items which the Respondent bought together with the Petitioner as a family it is not true that the Respondent damaged all the items listed in exhibit "B" and the Petitioner is put to strict proof of her allegation herein."

The Respondent therefore prays that the petition be dismissed with costs.

As mentioned earlier, the Respondent states that in the event the marriage is dissolved he has no problem with the Petitioner having custody of the child of the marriage but that he should be allowed full visitation rights.

## **Evidence**

Both the Petitioner and the Respondent have given evidence in this matter. They gave viva voce evidence. It is from this evidence that the facts of this case are obtained.

### **Facts of the case**

As mentioned above, the facts obtaining in this matter are to be gathered from the testimony of both Petitioner and the Respondent. These are:

The Respondent and the Petitioner are Malawians and have lived in Malawi since their respective births. They got married on 28<sup>th</sup> December 1991 at the Holy Innocent Church at Limber in the Republic of Malawi. Their marriage was contracted under the marriage Act<sup>1</sup>.

It is common cause that after the celebration of their marriage the two parties stayed together for a period 10 years at Impinge in the City of Blantyre of the Republic of Malawi. The Petitioner and the Respondent are no longer staying together having separated three(3) years ago. The Petitioner is now staying in Melanie while the husband stays in Blantyre. Further, it is not in issue that there is one male child borne out of this marriage. The child is staying with the Petitioner in Melanie.

The marriage between the two is on the rocks hence the Petition for Divorce before this Court. The Petitioner has accused the Respondent of being cruel to her a charge denied by the Respondent. But it is trite fact that there were fights between the Petitioner and the Respondent. These fights were witnessed by third parties. Both parties claim that they got injured during the fights. Further, it is an undisputed fact that at one time the Respondent broke a number of household items in the matrimonial home. Indeed, the Respondent admits that he lost his temper when the wife refused to talk to her and

<sup>1</sup> Cap. 25:01 of the Laws of Malawi.



said she did not want him anymore whereupon he started breaking household items. I must add that the Respondent was actually gloating about his temper. Actually, he informed this Court that if tampered with his temper rises.

The above are the facts in this matter. I should now proceed to consider the issue for consideration under this petition.

### **Issue for Determination**

As I see it, there is only one issue that requires to be determined in these proceedings. The said question is whether or not there is proof of cruelty necessitating that the marriage between the Petitioner and the Respondent be dissolved.

### **Law and consideration of the issue**

#### **Collusion**

These proceedings are defended. Actually, the Respondent is praying that these divorce proceedings should be dismissed with costs. As it were the Respondent appears to be saying that he does not want the marriage to be dissolved on the said ground of cruelty and has not offered any other ground upon which the said marriage could be dissolved. Accordingly, this Court is satisfied that this petition for divorce is not presented or prosecuted in collusion with the Respondent.

#### **Domicile and jurisdiction**

The position at law is settled, and I need not cite an authority for it, that a Court only assume, jurisdiction in matrimonial proceedings unless it is satisfied that the Petitioner and the Respondent are domiciled within the jurisdiction of the Court. There is evidence on record to show that both the Petitioner and the Respondent are resident and domiciled in Malawi. Further, both parties are Malawians who come from Mango chi and Blantyre respectively. This Court, therefore, has jurisdiction to entertain the divorce proceedings herein.

## **Proof of cruelty**

It is settled law that the standard of proof in matrimonial proceedings is the one generally obtaining all civil matter. The standard is that of proof on a preponderance of probabilities<sup>2</sup>. In particular, this Court is mindful of the following dictum of Smith, Ag. J. in **Kamlangira -vs- Kamlangira**<sup>3</sup> with registered to cruelty:

“The Malawi Legislation states that cruelty must be “proved.” Beyond reasonable doubt was laid some while ago; clearly proof must reach a high degree of probability - the exact degree must depend on the consequences to the parties and the state of the decision to be made generally on the circumstances. Divorce is a serious matter because it affects the status of the parties, a status brought about by a contract solemnized in a form laid doubt by the State...”<sup>4</sup>

I can do no better than adopting and applying this dictum to the present case. Indeed, this Court will be guided by the observation that whether or not cruelty has been proved will depend on the consequences to the parties if divorce is not granted where the ground upon which it is based is cruelty.

Further, it is trite law that cruelty as a ground of divorce is

<sup>2</sup> *MacLune -vs- MacLune* 9 MLR 409.

<sup>3</sup> [1966-68]ALR Mal 301.

<sup>4</sup> *Ibid* p. 309.

defined as conduct of such a character as causes danger to life, limb or health or such as gives rise to reasonable apprehension of such danger<sup>5</sup>. The Court does not require that there be so many incidences of cruelty for one incident would still qualify to be cruelty at law and be sufficient ground for ordering the dissolution of a marriage<sup>6</sup>.

### **Has cruelty been proved?**

As mentioned earlier, this Court must determine whether or not there is proof of cruelty requiring that the Court should grant the relief being sought by the Petitioner viz dissolution of her marriage with the Respondent. This Court finds and concludes that the answer to this question is in the affirmative. The record of these proceedings will show that the Petitioner has been fearing for her life because of the Respondent's temper. To make matters worse the Respondent was even gloating about it in Court. He did not say that he lost his temper momentarily and started breaking household items but that he does lose his temper if tampered with. The Respondent has a character that would give rise to an apprehension of danger to life, limb or health of the partner. Indeed, this Court has earlier on noted that there were a lot of fights between the Petitioner and the Respondent that had actually been witnessed by third parties. I would therefore agree with

<sup>5</sup> Russell -vs- Russell [1897]P 315.

<sup>6</sup> Kamzingeni -vs- Kamzingeni Cicil Cause No. 362 of 1977 [unreported][High Court decision].

the Petitioner that the Respondent is a man of ungovernable temper so much so that his top would blow and he would beat the Petitioner. As a matter of fact, it would be foolhardy not to accept the evidence of the Petitioner that she has been treated with cruelty by the Respondent where the Respondent gloats about his temper is a Court.

In sum, this Court finds that there is ample evidence of cruelty on the part of the Respondent. Accordingly, 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 cruelty. Following from the observation made above this Court orders that a decree nisi for the dissolution of this marriage be granted.

### **Custody of the child**

The Respondent does not object to the Petitioner having custody of the child of the marriage. Further, the Court has taken notice of the fact that the Petitioner is not against this Court granting the Respondent visitation rights. In the circumstances, it is ordered that the Petitioner shall have custody of the only child of the marriage with full visitation rights to the Respondent. The parties shall make arrangements on how these visitation rights shall be exercised. If there is no agreement either party will be at liberty to apply to the Court for an order as regards how the Respondent shall exercise the visitation rights granted to him by this by this Court.

### **Costs**

It is well to remember that although costs of proceedings follow the event the Court still exercises as to the issue of costs. The Court will exercise this discretion by ordering that either party shall bear own costs. I have ordered this considering that the dissolution of this marriage has been based on the Respondent's admission that is a man of bad temper.

**Pronounced** in open Court this                      day of June 2005 at the

Principal Registry, Blantyre.

A handwritten signature in blue ink, appearing to be 'F.E. Kapanda', written in a cursive style.

F.E. Kapanda

**JUDGE**