



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**



MATRIMONIAL CAUSE NO. 8 OF 2016

BETWEEN:

ELUPHY SADALA PETITIONER

-AND-

KAYISI SADALA RESPONDENT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Mwangomba, of Counsel, for the Petitioner

Messrs. Chidothe and Master, of Counsel, for the Respondent

Mr. O. Chitatu, the Official Court Interpreter

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

This is a petition by the Petitioner, Eluphy Sadala, who seeks dissolution of her marriage to the Respondent, Kayisi Sadala, on grounds of adultery and cruelty. The Respondent filed a memorandum of appearance in which he indicated his intention to defend the case.

Applicable Law

There is one very important question that has to be determined at the outset, namely, whether or not the applicable law in this case is the Marriage, Divorce and Family Relations Act or the law existing prior to the enactment of the Act.



Section 3 of the Marriage, Divorce and Family Relations Act is relevant and it is in the following terms:

- ☛ *“This Act shall apply to marriages entered into on or after the day it comes into operation, but Part IX shall apply to all marriages regardless of the date they were celebrated.”*

The Marriage, Divorce and Family Relations Act came into operation on 3rd July 2015 [hereinafter referred to as the “commencement date”]: see Government Notice No. 20 of 2015, published in Government Gazette dated 31st July 2016.

Section 3 of the Marriage, Divorce and Family Relations Act is in my view clear and unambiguous. It states in plain language that the Act applies to marriages entered into on or after the commencement date, save for Part IX which applies to all marriages regardless of the date they were celebrated: see **Hilliard James Cathcart Kay v. Norah Nikkie Cathcart Kay and Murray Henderson, HC/PR Matrimonial Cause No 11 of 2015, unreported.**

The marriage between the Petitioner and the Respondent was entered into on 21st March 1997. This is well before the commencement date. In the premises, by reason of s. 3 of the Marriage, Divorce and Family Relations Act, the marriage herein will still be governed by the law existing prior to the enactment of the Marriage, Divorce and Family Relations Act, save for, of course, matters falling within Part IX.

Jurisdiction

Before delving into the discussion of the circumstances of the petition, I have to satisfy myself that this Court has jurisdiction to attend to this matter. Section 2 of the Divorce Act (Act) requires that, for purposes of dissolution of a marriage, the petitioner has to be domiciled in Malawi at the time when the petition is presented to court.

Further, s. 7 of the Act provides as follows:

“(1) On a petition for divorce it shall be the duty of the Court to inquire, so far as it can reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter-charge which is made against the petitioner.

(2) If the Court is satisfied on the evidence that-

(a) the case for the Petitioner has been proved; and

- (b) *where the ground for the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and*
- (c) *the petition is not presented or prosecuted in collusion with the Respondent or either of the Respondents,*

the court shall pronounce a decree nisi of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition:

Provided that the Court shall not be bound to pronounce a decree nisi of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or, if, in the opinion of the Court, the petitioner has been guilty-

- (i) *of unreasonable delay in presenting or prosecuting the petition; or*
- (ii) *where the ground of the petition is adultery or cruelty, of having without cause deserted, or having without cause wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or*
- (iii) *where the ground of the petition is adultery or unsoundness of mind or desertion without cause, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion”*

In the present case, the parties contracted their marriage on 21st March 1997 at the office of the Registrar of Marriages in Blantyre. The parties have at all material times been domiciled in Malawi. Based on the palpable acrimony between the Petitioner and Respondent as they gave their evidence, I can safely conclude that the petition was not brought in collusion. The Court has also been told that there has not been any proceedings before any court with regard to this marriage. In the premises, this Court is satisfied as to its jurisdiction and will now determine the matter on its merits.

The Petition

Paragraphs 6 and 7 of the petition deal with grounds for divorce and they read as follows:

- “6. ***THAT*** *the Respondent has since celebration of the marriage treated the petitioner in a manner that has culminated in irretrievable breakdown of their marriage. The issues mainly hinge on infidelity and cruelty.*

Particulars of infidelity

- (i) *The marriage has been rocked with instances of infidelity on the part of the respondent. This got worse when he became Acting Chief Executive Officer of Malawi Savings Bank.*
- (ii) *The petitioner recently discovered that the Respondent has a 7 years child with one Jacqueline Jumbe who was previously his secretary at Indefund. The Respondent (sic) only got to know about it on 8th March, 2016.*
- (iii) *The petitioner also recently discovered that the Respondent is also going out with one Kekha Njobvu who resides in the United Kingdom. He has a 9 years old child with this woman.*
- (iv) *The petitioner also discovered that the Respondent has been going out with one Habiba Maganga. This discovery was made on 14th February, 2016. She later discovered that the Respondent wrote an e-mail to this lady informing her that there was no existing marriage between the Respondent and the Petitioner.*
- (v) *The petitioner discovered that the Respondent has many other girl friends such as Getrude Chibweya, Mwiza Luhanga, Chrissy Ajawa and Hupekire Manguluti just to mention a few.*
- (vi) *The Respondent has blatantly told the Respondent (sic) that the issue of infidelity is irreconcilable and that he no longer wants the marriage with her to continue.*

Particulars of Cruelty

- (i) *The Respondent intensified his womanizing when the petitioner was incapacitated following a fatal accident that she was involved in at Chirimba on 13th May, 2015.*
- (ii) *After mediation talks held on 14th May, 2016 the Respondent demanded that she move out of the matrimonial bedroom.*
- (iii) *The petitioner refused to move out of the matrimonial bedroom but the Respondent has not been talking to her since then.*
- (iv) *The respondent stopped eating food prepared by the petitioner.*
- (v) *The respondent told his children (from different women) with whom the parties were staying with that the marriage between him and her was over.*

- (vi) *The respondent ordered that the petitioner should be cooking her own food and the respondent and her children will also be cooking their own food.*
 - (vii) *The respondent has on several occasions pushed the petitioner to sign an agreement for divorce.*
 - (viii) *The Respondent severely beat up the Petitioner on 15th August 2016.*
7. *The petitioner pleads that the marriage between the parties has irretrievably broken down.*

The petition ends with a prayer for four reliefs, namely, that (a) the marriage be dissolved, (b) the matrimonial property be equally shared between the parties, (c) the Petitioner be granted such other reliefs as the Court may deem fit and (d) the Respondent be condemned in costs.

Affidavits

Three affidavits were sworn in support of the Petition for Divorce, namely, an affidavit sworn by the Petitioner on 16th August 2016, an affidavit sworn by the Petitioner on 18th November 2016 and an affidavit by Mr. Frank Patani Mwase. On the other hand, two affidavits were filed on behalf of the Respondent, that is, an affidavit in response to the petition and an affidavit by Mr. Richard Ussi Mcheпа.

I have read the affidavits and I wish to observe that a number of matters covered therein have a peripheral relevance to the main issues for determination in this case, namely, adultery and cruelty. At the expense of stating the obvious, the Court will as much as possible stick to relevant matters only.

Evidence

The Petitioner (PW1) adopted her two affidavits as her evidence in chief. The relevant part of her evidence is similar in material respects to the averments in the Petition for Divorce. I will, therefore, now only dwell on critical matters not covered in the Petition for Divorce.

At the time of marriage in 1997, the Respondent requested that his children from his previous relationships should be brought up within the matrimonial home. He brought two children named Suwira and Aisha. He bore these two children with one Suzgo Nyirenda. In 2007, the Respondent requested the Petitioner to bring another child that he bore with one Gloria Likupe and the Petitioner agree to the request.

As regards the Respondent's relationship with one Habiba Maganga, the Petitioner testified that she came to know of it on 14th February, 2016 when she found out that he had bought valentine flowers for both of them and the Petitioner had actually written this fact on his facebook.

The Petitioner further testified that at a meeting held on 9th April 2016, the Respondent confessed that he has a child named Tiara with Jacqueline Jumbe. She denied ever discussing the issue of Tiara with the Respondent prior to 8th March, 2016. She came to know about Tiara when she discovered remittances of airtime units by the Respondent to Jacqueline Jumbe. The Petitioner openly challenged her to find out where the airtime units were going and that he did not care about her. That gave her a clue that something was going on as far as infidelity is concerned. She was angered by this development and immediately reported this matter to his relatives.

As regards the allegation of cruelty, the Petitioner gave the following additional testimony:

- (a) the Respondent stopped talking to the Petitioner although they were staying in the same house and sleeping in the same bedroom and on the same bed;
- (b) after the second mediation session, the Respondent only communicates with the Petitioner using social media, text messaging and e-mails;
- (c) the Respondent even divided the house into two and ordered his children to stop communicating with the Petitioner or to use anything bought by her;
- (d) as regards the beating that she suffered at the hands of the Respondent, she gave the following narration in her affidavit of 18th November 2016:

"11. It is not true that the incident on 15th August 2016 was triggered by me. It originated from a phone conversation which I had with my friends. He alleged that I was talking to my fellow whores and gossipers who are not mannered. I responded to him back to say I didn't disturb him when he was talking to his girlfriends. That is when he was enraged and beat me several times and I fell down unconscious towards the door. Blood was coming out of my nose and my right cheek was swollen because of his blows on me. After 2 or 3 minutes I managed to reach for my phone and

called my relatives and my friends to tell them what was going on. I took a self picture which can be verified as it shows date and time it was taken. By that time blood was coming from my nose and I was defenceless. He took a mop and tried to clean the pool of blood on the floor but never made any attempt to help me. He now was busy calling friends and told them that they were fighting because of family properties and he told his brother Shasha that he beat her because she was chasing him out of the matrimonial home. I was injured but he could not even take me to the hospital. I exhibit a record of the treatment I got at hospital and mark it "P10".

12. *When Mr. Frank Mwase came to take me to hospital he told him that I was injured because I fell down and not that we were fighting as he told his friends (contradicting his earlier statements). When he was quizzed by Mr. Frank Mwase as to why he could not take me to hospital (his response was paja inu mumapanga zamadrama eti referring to the job of Mr. Frank Mwase). He further told some friends that I locked myself in the bedroom and I wanted to commit suicide. At the Police Station he gave a false statement to the effect that he beat me up because I said that he was sleeping with his daughter and that enraged him so much. There are so many varying and contradicting explanations which he has told his friends. I did not exaggerate anything at all."*

The Petitioner tendered the Marriage Certificate as Exhibit P1, a letter written to the Board of Malawi Savings Bank wherein the author complains that the Respondent was going out with his wife as Exhibit P2, documents written by the Respondent listing women to whom the Respondent had been sending money as Exhibit P3 and a record of the treatment she got at hospital as Exhibit P4.

In cross-examination, the Petitioner was pressed on the exhibits that she had tendered. She admitted that (a) Exhibit P2 neither states the author thereof nor does it show that it was addressed to the Board Chairperson of Malawi Savings Bank, (b) she did not see the Respondent sending money to the ladies as alleged. She also conceded that she never saw the Respondent with Chrissy Ajawa at his home village. Finally, she stated that they were no longer sleeping together.

In re-examination, the Petitioner stated that she last slept with the Respondent as a husband and wife on 6th or 7th March 2016.

The Petitioner called one witness, Mr. Frank Potani Mwase (PW2). PW2 adopted his affidavit as his evidence in chief. In a nutshell, his testimony is that on 15th August, 2016, the Petitioner called him and requested him to take her to hospital. When he got to the home of the Sadalas, he found the Respondent sitting on the khonde and the following transpired:

- “7. *I told him why I had come to the house and he told me that there was no problem and everything was fine.*
8. *I insisted that I wanted to see the petitioner. He went in and told her that I wanted to see her.*
9. *The Respondent came back to the Khonde and told me that the Petitioner had slipped and in process injured herself.*
10. *The petitioner did not come out and the Respondent went into the house again. I presumed to remind her that I wanted to meet her.*
11. *The respondent came out again and this time told me that the petitioner had said some things to him which he could not take and he reacted. I took this to be an indirect admission that he had beaten up the petitioner.*
12. *The respondent told me that I could go in and meet the petitioner who was sitting in the living room. I met her and found that her face was bloody and swollen.*
13. *I told the Respondent that I was taking her to the hospital for medical attention.*
14. *I picked the petitioner and first went to Chileka Police Station to get a referral letter.*
15. *The police gave her the letter and from there we went to Mwaiwathu Private Hospital where the petitioner was treated.”*

In cross examination, PW2 stated that the Petitioner was swollen around the face and she had blood around the mouth, nose and eyes.

The Respondent (DW1) adopted his affidavit and this constituted his evidence in chief. He disputed that the Petitioner came to know of Tiara on 8th March 2016 because the truth is that he informed the Petitioner of the same in December 2009 which was immediately after the birth of the child. He insisted that the issue of Tiara was discussed between the Petitioner and the Respondent whereat it was agreed that the relationship between the Respondent and the mother of Tiara should end immediately and that the Tiara should not be using his name as her surname.

DW1 questioned the authenticity of Exhibits IP 2 and IP 3. DW1 also maintained that it is not true that he does not talk to or communicate with the Petitioner. He also denied that he stopped eating food prepared by the Petitioner.

Regarding the incident of 15th August 2016, DW1 testified that the incident was triggered by the Petitioner. He stated that, on the material day, the Petitioner was

pestering the Respondent to obtain divorce papers. She got angry and became violent and in the process of defending himself she fell down and slightly hurt herself. According to DW2, this was deliberate plan to find an excuse to leave the house and find a ground for her to institute divorce proceedings.

In cross examination, DW1 admitted that he has sired one child outside the marriage with Jacquelin Jumbe. The child was born on 26th November, 2009 and his name is Dialo. He, however, insisted that the Petitioner, his relations and marriage advocates were aware of this at all material times.

In re-examination, DW1 stated that he had never beaten the Petitioner in the twenty years of their marriage except for the one incident on 15th August 2016. He believes the Petitioner had planned to provoke him so that he should beat her and this would enable her to get a divorce. To substantiate his belief, he pointed to the fact that (a) prior to this incident, she had already started removing her belongings from the matrimonial home in preparation to leave, (b) on this day, she had started very early in the morning pestering him to divorce her, and (c) immediately after the incident, she called her relatives and the police.

DW1 reiterated that he had sired a child with Jacquelin Jumbe in 2009. He notified his wife of this and they agreed to keep it out of public domain because she did not have children. He further stated that after the reconciliation meeting on 9th April, 2016 they continued to live as husband and wife, doing everything that married people do.

DW2 was Richard Ussi Mchepa. He adopted his affidavit as his evidence in chief. He stated that he is one of the Respondent's advocates in his marriage to the Petitioner and he has been so since the start of their marriage in 1997. To his knowledge, the Petitioner and the Respondent had been peacefully staying together until 2003 when marital problems between the two started:

- “13. ***THAT*** I had never been called for family issues therefrom until 2016 when I received a call from my other brother, Muhammad Sadala, who is also my co-advocate for the Respondent. He told me that he was called by the Petitioner herein who said that she was leaving the Respondent as she was tired with his behavior of infidelity.
14. ***THAT*** I then called the Respondent to enquire about the petitioner's allegations and as to how they were staying in their family. He told me that, since he stopped working, the Petitioner had been misbehaving and acting up and that things, in their family, were not as before as there was now no peace at all.

15. ***THAT** together with Abdul Banda and Muhammad Sadala, my uncle and brother respectively, went to Blantyre where we met 4 people from the Petitioners family namely; Chematindiri, Mable Nyirenda, Alfred Golosi and Jane Maunda. The two sides sat down on 9th April, 2016 to hear from both the Petitioner and the Respondent.*
16. ***THAT** it was the petitioner's story that she wanted to separate with the respondent because of infidelity.*
17. ***THAT** the Respondent denied the allegations of infidelity. He stated that since he stopped work in July, 2015, the Petitioner's behavior changed. He said that the Petitioner started being rude to him, denying him conjugal rights and even accusing him and his children of bewitching her. She even stopped cooking for him and was constantly threatening to kill him with a knife. He even brought the said knife to the meeting as evidence.*
18. ***THAT** the petitioner did not deny all what the Respondent alleged. Consequently, her relatives apologized on her behalf again and we left the two to reconcile between themselves. During the meeting, no evidence was found that the Petitioner was engaged in extra marital relationships.*
19. ***THAT** a month after the said meeting, I again got a call from Muhammad Sadala concerning the same issues in the Respondent's marriage.*
20. ***THAT** I therefore went, together with the said Muhammad Sadala Abdul Banda, to Blantyre where we also met some people from the Petitioner's family.*
21. ***THAT** We had⁴a meeting with the parties herein on 14th May, 2016 where the Petitioner accused the Respondent of stealing her money. On the other hand, the Respondent alleged that the Petitioner continued threatening to kill him.*
22. ***THAT** Upon discussing the issues, we, the respondents Advocates, proposed that the two should be sleeping in different rooms as the same would mean that the Petitioner would no longer be threatening the Respondent and also that the Respondent would not be having access to the Petitioner's alleged money.*
23. ***THAT** I repeat paragraph 22 hereof and state that the Petitioner's relatives denied our proposal thus, we left without agreeing on one thing."*

In cross-examination, DW2 stated that is not aware that the Respondent has children outside marriage except for one child whom he came to know about during a mediation session in 2016. The child is called Dialo but he does not remember the name of the mother. He clarified that two meetings took place and the issue of the child was said during the second meeting held on 14th May 2016 and not at the first meeting of 9th April 2016.

It was also his testimony that it is the Petitioner who raised the issue of infidelity of the Respondent during the meeting of 9th April, 2016. Her complaint was that the Respondent was a womanizer.

The Law

I now wish to remind myself about the nature of these proceedings. It is trite that the burden of proof in divorce cases is on the party that alleges misconduct on the part of the other party, there being a presumption of innocence: see **Redpath v. Redpath and Milligan [1950] 1 ALL E.R. 600**. Though divorce cases are civil in nature, the standard of proof in such cases is slightly higher than in other ordinary civil cases in which it is only on the preponderance of probability, although not as high as in criminal cases in which it has to be beyond reasonable doubt: See **Yotamu v. Yotamu [1995] 2 MLR 702**, **Maclune v. Maclune 9 MLR 409** and **Kamlangira v. Kamlangira [1966-68] ALR Mal 301**.

Section 5 of the Act outlines five grounds of divorce; namely, adultery, desertion, cruelty, insanity or that the husband has since the celebration of the marriage been guilty of rape, sodomy or bestiality. It may not be out of place to quote the relevant part of s. 5 of the Act:

“A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent –

- (a) *has since the celebration of the marriage committed adultery; or*
- (c) *has since the celebration of the marriage treated the petitioner with cruelty; ...” - Emphasis by underlining supplied*

Adultery

Adultery is defined a voluntary act of sexual intercourse between one of the spouses and another person: see **Hayter v. Hayter (1991) 14 MLR 94**.

Counsel Mwangomba submitted that there is sufficient evidence in the present case to prove that the Respondent committed adultery with Jacqueline Jumbe:

“Coming to the present case, the petitioner discovered on 8th March, 2016 that the respondent has a 7 years old child with one Jacqueline Jumbe who was previously his secretary at Indefund. The petitioner also recently discovered that the respondent is also going out with one Ketha Njobvu who resides in the United Kingdom and has a 9 years old child with her.

My Lord, the respondent has admitted that he indeed has a child with Jacqueline Jumbe. This fact was only discovered by the petitioner on 8th March, 2016 and the discovery was the beginning of problems in the family.

We submit that the petitioner has proven the adultery beyond reasonable doubt and the standard prescribed by Section 7(2) of the Divorce Act (Cap. 25:04, which is the applicable law in this matter) has been met (see also Muthali v Muthali 8 MLR 101).

Counsel Mwangomba also contended that there was no condonation on the part of the Petitioner with respect to the adultery committed by the Respondent with Jacqueline Jumbe. He invited the Court to note that the parties last had sex on 7th March, 2016 and this was before the Petitioner discovered on 8th March, 2016 that the Respondent had fathered a child with Jacqueline Jumbe.

Counsel Mwangomba also advanced an alternative view regarding condonation:

“The respondent did not plead any defence of condonation in this matter. Therefore, any attempt to bring this defence through oral evidence has no basis. It must have been raised in the written response. This could have given the Petitioner an opportunity to respond on the same.”

Counsel Mwangomba cited the case of **Malawi Railways Ltd v P.T.K. Nyasulu MSCA Civil Appeal No. 13 of 1992** as authority for the proposition that there is a duty on every party to the proceedings to plead all material facts which the party will rely upon at the trial otherwise the party is not entitled to give any evidence of them at the trial.

Counsel Mwangomba further submitted that the Petitioner had also discovered that the Respondent has many other girlfriends and the Respondent has blatantly told the Petitioner that the issue of infidelity is irreconcilable.

Counsel Mwangomba concluded on this ground by submitting that the fact that the Respondent has children with other women and that the children were born when the marriage between himself and the Petitioner was subsisting is conclusive evidence that the Respondent committed adultery and is in fact an adulterous man.

Counsel Chidothe, on the other hand, holds the view that the Petitioner has failed to discharge the burden placed on her to prove the alleged acts of adultery set out in the Petition for Divorce. This is covered in the Respondent’s Final Written Submissions from page 34 to 37 as follows:

“The Petitioner alleges that the Respondent engaged in adultery with various women. As the authorities clearly demonstrate to establish adultery one must prove undue familiarity and opportunity for sexual intercourse to take place. With regard to all the women

mentioned save for Jacqueline Jumbe the Petitioner has failed to prove these elements. The allegation that on 14th February, 2016 the Respondent wrote an e-mail to Habiba Maganga informing her that there was no existing marriage between her and the Respondent was devoid of any evidence. The allegation of airtime being sent to the alleged women was not proved in Court to the requisite standard. That notwithstanding the same did not establish the elements of undue familiarity an opportunity to have sexual intercourse. In terms of the evidence the Petitioner has never seen the Respondent with the alleged women. Neither was there evidence to show that the Respondent was seen with these women at all or in situations affording opportunity for sexual intercourse to take place. The allegation that a certain person complained that the Respondent was going out with his wife was not proved as exhibit "P2" which was relied on was far from proving the same. Besides the document was clearly not authentic and not reliable as it, inter alia, had no author and did not show or indicate that it was addressed to the Board Chairperson of Malawi Savings Bank or any destination. Besides its a mere typed unsigned document which any person including the Petitioner could just prepare. Even with regard to Chrissy Ajawa there was no evidence proving undue familiarity and opportunity to commit sexual intercourse elements. In cross-examination the Petitioner testified that she never saw the Respondent with Chrissy Ajawa. In re-examination she gave a contradictory statement by stating that she at some point saw the Respondent with Chrissy Ajawa. These contradictory statements clearly demonstrates lack of honesty on the part of the Petitioner and renders her evidence unreliable. Without prejudice to this position she was not able to demonstrate undue familiarity on the part of the Respondent and Chrissy Ajawa. And even when she testified in re-examination that she at some point saw the Respondent with Chrissy Ajawa she did not testify that she saw them at a place or in circumstances affording an opportunity for sexual intercourse to take place. The Petitioner thus failed to prove adultery between the Respondent and Chrissy Ajawa.

The Respondent failed to adduce evidence to prove her allegation that the Respondent has a 9 year old child with Kekha Njobvu let alone that the Respondent committed adultery with this woman.

Counsel Chidothe also put forward an alternative position. This relates to condonation and is to be found on pages 36 and 37 of the Respondent's Final Written Submissions:

"Even if it was to be taken that adultery was proven with regard to these women, which is not the case, the evidence demonstrates that after these discoveries the parties continued their normal married life including engaging in sexual intercourse. This is clear if one just takes the evidence of the Petitioner alone who testified that she last engaged in sex with the Respondent around 6th or 7th March, 2016 in re-examination while in cross-examination she stated that it was after 18th March, 2016. Her testimony was to the effect that she stopped engaging in sex with the Respondent after discovery that the Respondent had a child with Jacqueline Jumbe a discovery which in terms of her evidence was done on 8th March, 2016. She never testified that after purportedly discovering that the Respondent was going out with the said ladies she stopped engaging in sex with the Respondent or treating him as her husband. All this demonstrates that

even if the Petitioner had succeeded in proving adultery with regard to these ladies the same cannot constitute a ground for divorce on the ground that there was condonation. With regard to the issue of Jacqueline Jumbe there is no dispute that the Respondent has a child with him who was born in 2009. The bone of contention is when the Petitioner became aware of this and whether there was condonation in respect of this adultery. The Petitioner testified in cross-examination that she discovered that the Respondent had a child with Jacqueline Jumbe on 8th March, 2016. Her evidence in chief on this aspect makes no sense at all. The relevant part of her testimony is as follows:

In the first part of this testimony the Petitioner testifies that the Respondent confessed to have fathered this child on 8th March, 2016 and she quotes the alleged Chichewa confession. Just after that quote she says "This stunning confession of his infidelity was made at the first mediation talks held on 9th April, 2016. Reading these two statements shows that they make no sense on when the confession was made as on the one hand the Petitioner says it was made on 8th March, 2016 and on the other on 9th April, 2016. More confusing is the fact that she later says that she was angered by this development and immediately reported the matter to her relatives. One wonders how she would report to her relatives when the confession was made at a mediation meeting where her relatives were in attendance. All this demonstrates that the Petitioner's version of facts lacks honesty, credibility and reliability. The Respondent on the other hand testified that he informed the Petitioner of his fathering of a child with Jacqueline Jumbe in December, 2009. He actually stated that considering that the Petitioner was not bearing children they had agreed not to make this known to other people including their relatives for respect purposes."

I am most grateful to both Counsel for their respective submissions.

It is trite that mere opportunity is not proof of adultery and that adultery cannot be established merely on suspicion. Suspicion must be accompanied by evidence of undue familiarity and opportunity. There must be evidence to show that there was opportunity for adultery to have been committed: see **Ross v. Ross [1930] AC 7** and **Chirwa v. Chirwa [1996] MLR 452**.

It is also the case that it is not always possible to prove adultery by direct evidence. In the words of Mzikamanda, J, as he then was, in **Captain Kingstone Mbewe v. Donata Chakanza [2007] MLR 72** at 76:

"Very rarely will people committing adultery be caught in the act of adultery. Often times adultery will be inferred from circumstance surrounding a particular case (see Chafukira v Chafukira and Another [1997] 1 MLR 446; Panjwani v. Panjwani and others [1997] 1 MLR 142; Mhango v. Mhango (1) [1993] 16(2) MLR 613. This is not to suggest that adultery may be inferred easily in any given case. ...In Mhango v Mhango [1993] 16(2) MLR 613 Mtambo J as he then was having noted that adultery is rarely proved by direct evidence, conditions must be proved which leave no doubt that adultery was committed.

The mere fact that people are together in an environment leading to commission of the offence is insufficient, unless documents, letters, diaries or antecedent conduct show the association of the parties was so intimate and their mutual passion so great and clear that adultery may reasonably be assumed as a result of an opportunity for its occurrence. ... There must be evidence of strong inclination with opportunity and the circumstances must lead guarded discretion of reasonable and just man to probability of adultery having been committed. ... Having noted the need for ample evidence from which to infer adultery, the case of Tembo v Tembo and Another [1995] 1 MLR 331 further observed that mere cohabitation amounts to adultery where the parties are not married.”

Having given the matter at hand a careful and exhaustive consideration, I have to decide which story is more probable than the other. In so far as the charge of adultery is concerned, I was least impressed by the Petitioner’s version: it lacks consistency, honesty, credibility and reliability. In these circumstances I come to the inevitable firm conclusion that the Petitioner has failed to discharge the legal burden placed on her to prove the alleged acts of adultery.

I wish to observe that I am not surprised that the Petitioner has failed to prove adultery on the part of the Respondent to the requisite standard. A perusal of the Petition of Divorce shows that the Petitioner had set out to prove infidelity. Unfortunately, infidelity per se (without more) is not a ground for divorce under section 7 of the Divorce Act. The provision requires a petitioner to prove that a respondent “has since the celebration of the marriage committed adultery”.

In any case, even if the Court were to hold that there was sufficient evidence to prove that the Respondent had committed an act of adultery with Jacqueline Jumbe, I would be inclined to agree with Counsel Chidothe that the same was condoned by the Petitioner.

“Condonation” is defined as the reinstatement in his or her former marital position of a spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse, with the intention of forgiving and remitting the wrong: see **Hearn v. Hearn [1969] 3 All ER 417**. Condonation can take place without a resumption of sexual intercourse. The principle was explained by Lord Simon in **Henderson v. Henderson [1944] 1 All ER 45** in the following terms:

“The essence of the matter is (taking the case where it is the wife who has been guilty of matrimonial offence) that the husband with knowledge of the wife’s offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place”.

Further, where the parties remain, without having sexual intercourse, in the same matrimonial home after one spouse has gained knowledge of the other spouse's guilt, the question whether condonation is to be inferred from continuance under the same roof is in essence a question of fact: see **Burch v. Burch** ([1958] 1 All ER 848 at pages 855 and 856.

In the present case, the testimony of the Petitioner is that she stopped having sexual intercourse with the Respondent upon discovering on 8th March, 2016 that the Respondent had sired child with Jacqueline Jumbe. The Petitioner desperately sought to convince the Court that the cessation of sexual intercourse was an expression of revulsion. I am not persuaded. It will be recalled that despite the alleged discovery having taken place on 8th March 2016, the unchallenged evidence is that the Petitioner and the Respondent continued sharing the matrimonial bed until 15th August 2016. It is my finding that the Petitioner and the Respondent continued or resumed conjugal cohabitation during the period of at least five months from 8th March 2016 and 15th August, 2016. In the premises, if the Respondent at all committed adultery with Jacqueline Jumbe, the same was fully condoned and, consequently, the same cannot constitute a ground for divorce in the present proceedings.

Before resting, a comment on the suggestion by Counsel Mwangomba that the Respondent cannot lead any evidence pertaining to condonation in this matter because he did not plead the same may not be out of order. Section 7(2) of the Divorce Act enjoins the Court to be satisfied that, among other matters, the petitioner has not condoned the adultery. To my mind, the issue of condonation does not have to be specifically raised by a party for the Court to consider it: the Court is duty bound to do so per the requirements of section 7(2) of the Divorce Act. Of course, different considerations apply where the respondent does not merely contest the petition but also opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion without cause: see section 10 of the Divorce Act. In such a case, the ground being relied on would have to be raised by way of cross-petition and evidence would have to be led to prove the same.

Cruelty

“Cruelty” was defined in **Chirwa v. Chirwa** [1996] MLR 452 as “*conduct of such character as to have caused danger to life, limb, or health bodily or mental or as to give rise to a reasonable apprehension of such danger.*”

In the present case, there is uncontroverted evidence that the Respondent (a) stopped eating food prepared by the Petitioner (b) would not talk to the Petitioner for many weeks although they were staying in the same house and

sleeping in the same bedroom, (c) told his children (from different women) whom the parties were staying with that the marriage between the Petitioner and him was over, (d) ordered that the Petitioner should be cooking her own food and the Respondent and his children will also be cooking their own food; and (e) severely beat up the Petitioner on 15th August 2016.

As was aptly observed in **Fainess Tanil Majamanda v. Patrick M Majamanda [2006] MLR 128** by Nyirenda J, as he then was, in determining cruelty, the question should be:

“Would any right thinking person come to the conclusion that this husband has behaved in such a way that the wife cannot reasonably be expected to live with him taking the whole of the circumstances and the characters and personalities of the parties?”

Applying the test laid down in **Fainess Tanil Majamanda v. Patrick M Majamanda**, supra, to the present case, I am satisfied that the Petitioner has established cruelty on the part of the Respondent. I am also satisfied that the Petitioner did not condone the acts of cruelty on the part of the Petitioner.

Conclusion

All in all, cruelty is a ground for divorce. The Petitioner has proved cruelty to the requisite standard. I, accordingly, grant the Petitioner decree nisi of divorce on the ground of cruelty. For avoidance of doubt, issues pertaining to custody of the child and visitation rights will be dealt with once, if at all, the Petitioner obtains decree absolute. As the Petitioner has succeeded on one ground and failed on the other ground, each party will bear its own costs. It is so ordered.

Pronounced in Court this 31st day of May 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE