



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRARY

CIVIL DIVISION

MATRIMONIAL CASE NO. 6586 OF 2017

BETWEEN

TAMALA BLESSINGS NGOMWA.....PLAINTIFF

-And-

ANDREW MADALITSO NGOMWA.....DEFENDANT

CORAM: THE HON. MR. JUSTICE D. MADISE

Mrs Katopola, Mrs Kanyuka, Counsel for the Petitioner

Mr. Mzembe, Counsel for the Respondent

M. Manda, Official Interpreter

Madise, J

JUDGEMENT

1.0 Introduction

- 1.1** On 20th July, 2017 the Petitioner in this matter filed a petition for the dissolution of her marriage with the Respondent on the grounds of adultery and cruelty. An affidavit of the Petitioner has been filed in support of the petition. The Respondent has opposed the petition and had filed an affidavit in which he has counter claimed on the basis of desertion and cruelty.
- 1.2** Hearing of the petition took place at Blantyre on 11th January, 2018 and was concluded on 21st May, 2018. I now proceed to give my view on the claim and counter claim.

2.0 The Facts

- 2.1** In her affidavit the Petitioner stated that her marriage with the Respondent was rocky because of the Respondent's child from another woman and his nieces. The daughter would at time stay with her mother and would return to her father's house. The Petitioner denied that she was mistreating the daughter and the two nieces.
- 2.2** Later the daughter mother informed the Respondent that her daughter would not be returning to the Respondent's house. No reasons were given. Apparently, the Respondent construed this sudden turn of the events that the Petitioner was mistreating the girl. Eventually the Petitioner's niece also left for her father and there upon the Respondent started claiming that the children were leaving because the Petitioner was cruel.
- 2.3** When tensions were too high the petitioner was ordered to leave the bedroom. She then moved to a spare bedroom where Tawonga the daughter used to stay. The Respondent then informed the Petitioner that his daughter Tawonga was returning home and she was ordered to move to the guest wing.

- 2.4 Later the Respondent started bringing his girlfriend Blandina into the house. On one occasion the Respondent's daughter had a birthday party and it was Blandina who organized the function. The girlfriend was actually given the Petitioner's car to be using, while the Petitioner walked on foot.
- 2.5 The Petitioner alleged that on 10th June, 2017, she returned home only to find Alice the Respondent's niece, Blandina and the maid dancing to some music in the house. She just ignored them. On 15th June, 2017 she returned home and found the garage door leading to the guest wing locked. Her personal items had been thrown into the boy's quarters she was informed that Blandina had removed her items.
- 2.6 On 18th June, 2017 she returned home and found that the main gate had been locked and she could not access the boy's quarters. She then sought a protection order from the court which was granted on 20th June, 2017.
- 2.7 The petitioner tendered in evidence screen shots of Blandina obtained from her facebook page showing Blandina in the Respondent's bedroom. The other screen shot shows Blandina displaying a birthday card from the Respondent. This was actually posted on Blandina's face book page. In response Blandina wrote on her face book page the following;

Thanx my sweetie Bae Andrew for the gifts. I don't take these for granted u made my day. God bless u Hunnie!!

- 2.10 Lastly the Petitioner has presented before this court a screen shot obtained from Blandina's face book page showing her driving the Petitioner's vehicle. The Petitioner has presented a copy of an email the Respondent wrote her

advising her that he had bought a car for her. The email had a link the Petitioner was supposed to open and follow to see the progress of the purchase. In reply the Petitioner thanked the Respondent dearly for the gift.

*Thanks so much Amuna anga.. I don't know kuti ndi ngathokoze
bwanji*

- 2.11** Apart from the petitioner two more witnesses testified in support of the petition. Rhoda Bisani a former maid for the Petitioner and the Respondent stated that she started work on 12th August, 2016. She was staying in the Matrimonial home. She stated that the Respondent had a girl friend called Blandina who use to visit the house.
- 2.12** At time Blandina would also sleep in the Respondent's bedroom. She stated further that Blandina's personal items were being kept in the Respondent's bedroom. At that time the Petitioner had left the Matrimonial home. When the Respondent ordered her to removed the Petitioner's items to the boy's quarters, she refused and Blandina fired her 5 days later. The matter was referred to the labour office.
- 2.13** The second witness was Eliza Bamusi whose husband worked for the Respondent. She stated that at times she could visit her husband at his work place. One day when she wanted to visit her husband Blandina chased her away. According to her, Blandina was the Respondent's wife. That marked the end of the Petitioner's case.
- 2.14** In opposition the Respondent stated that after the celebration of their marriage on June 8th, 2013, the petitioner started demonstrating elements of cruelty towards, the Respondent, his daughter and niece. The Petitioner then

demanded that the daughter and niece be removed from the house since she was not a mother to the two girls. Thereafter the Respondent alleged that the Petitioner started threatening him with grievous bodily harm. In January, 2016 he decided to evict the petitioner from the bedroom for fear of his life.

2.15 The Petitioner then moved to the daughter's bedroom. When the daughter returned, the Petitioner was moved to the guest wing. Since the threats and cruelty continued the Respondent's relatives moved her personal items to the servant quarters. After this incident, the Petitioner then left the matrimonial home. Since then there has been peace at the house.

2.16 In cross examination the Respondent admitted knowing Blandina as his daughter's friend who was assisting her with school work. He further admitted that Blandina was driving the petitioner's car as she was dropping off and picking his daughter to and from school. He further admitted that Blandina took a photo of herself (selfie) in his bedroom. The Respondent further failed to explain about the birthday card and the message thereon which was sent to Blandina on her birthday.

2.17 There is a response to the cross petition where the petitioner is denying all forms of cruelty as alleged in the cross petition. She called on the Respondent to substantiate this allegation.

3.0 The Issues

3.1 There are five main issues for determination before me.

- 1) Whether the Respondent committed adultery.
- 2) Whether the Respondent was cruel to the petitioner.
- 3) Whether the Petitioner was cruel to the Respondent, his daughter and or niece (cross petition)

- 4) Whether an order for divorce should be granted.
- 5) Whether damages are payable.

4.0 The Law

- 4.1** The burden and standard of proof. **7.1.1** In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove.
- 4.1.2** The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty, whichever story is more probable that the other must carry the day.

Section 22(1) Constitution

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Section 22(2) Constitution

Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.

Section 22(3) Constitution

All men and women have the right to marry and found a family.

Section 22(4) Constitution

No person shall be forced to enter into marriage.

Section 22(5) Constitution

Sub-section (3) and (4) shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation.

4.2 What is adultery?

Black Law Dictionary 6th Ed 1991 describes adultery as the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife or by a person with a person who is married to another.

4.3 The vice about adultery is historical. Once two people (male and female) are married they are supposed to enjoy conjugal rights amongst themselves to the exclusion of all others. Throughout the establishment of the modern legal system based on common law, courts worldwide have come to accept that adultery as a social evil is difficult to prove in a civil court.

4.4 The reason is that ordinary and reasonable people do not engage in sexual intercourse in the open. Even married people who are perfectly entitled to sexual intercourse give the pleasure of such intimacy the dignity it deserves by concealing its performance. However like any matter before any court adultery can be proved without direct evidence

4.5 For adultery to stand there must be proof that the other party to the act was married at the time the act was committed. The law demands that there should be more than mere opportunity. When two people are found in the same it cannot be said that adultery took place. There must be more than that. The two must be found in the same house but in a compromising position.

- 4.6 In Chilakolako vs. Chilakolako [1978 – 80] 9 MLR 355, Villiera J quoting a paragraph in Latey on Divorce 15th Ed at 103, 1973 stated as follows

Although inclination coupled with opportunity is often accepted by the court as proof of adultery, it is a refutable description. Indeed behavior or familiarities short of sexual intercourse raises a very strong prescription of adultery but the court must be convinced that the wife has transgressed not only the bounds of delicacy but also of duty and that there has been a surrender not only of the mind but also of the person

- 4.7 Similarly in Ross vs. Rose (4) A.C [1930] it was stated as follows

Adultery is essentially an act which can barely be proved by direct evidence. It is a matter of inference and circumstances, it is easy to suggest conditions which can leave no doubt that adultery has been committed but the mere fact that people have been thrown together in an environment which lends itself to the conclusion of the offence is not enough unless it can be shown by documents e.g. letters and diaries or any conduct that the association of the parties was so intimate and their mutual passion so clear that adultery may reasonably be assured as a result of an opportunity for its occurrence.

- 4.8 What is cruelty?

The simplest definition of cruelty has been described in many judicial pronouncements within and beyond as conduct out of the ordinary. It is conduct which departs from the normal and which causes injury to health or apprehension of such fear of injury. See Collins vs Collins [1964] A.C 644

- 4.9 It is conduct of such character as to have causes danger to life, limb or health, bodily or mentally or as to give rise to a reasonable apprehension of such

danger. See Sobnack vs. Sobnack Matrimonial cause no 10 of 2008 (unreported)

5.0 The findings

- 5.1** There is no dispute that the parties got married on June 8th, 2013 at Word Alive Ministries in Blantyre in the Republic of Malawi. There are no issues of the marriage.
- 5.2** The Petitioner has alleged that the Respondent had committed adultery on several occasions with one Blandina Dedza. Her evidence is that Blandina was staying with Respondent at the matrimonial home and she was sleeping with the Respondent in the main Bedroom.
- 5.3** There is evidence that Blandina took a *selfie* in the Respondent room. Apparently this confirmed according to the petitioner that Blandina was using and staying in the main bedroom. The Respondent had not disputed the fact that Blandina took that *selfie*.
- 5.4** The Petitioner has shown to the court the birthday card the Respondent sent to Blandina. The Petitioner has shown to the court the love message Blandina was writing about the Respondent on her facebook page. The Respondent has not disputed the fact that the Petitioner's car was given to Blandina.
- 5.5** The Respondent has not disputed moving the Petitioner from the main bedroom, to another bedroom, then the guest wing and finally to the servant quarter. The Petitioner then left the matrimonial home. The maid who used to work for the parties told the Court that Blandina was sleeping in the Respondent's bedroom.

- 5.6 The question before me is whether the Petitioner has proven adultery. It is very unlikely that two people, a man and woman can be caught red handed committing adultery. Evidence of adultery in most cases is circumstantial. There must be more than opportunity to infer the act of adultery. Association, coupled with opportunity and the evidence of illicit association, affection or familiarity creates a reference upon which a court can find adultery. See Kaunda vs. Kaunda matrimonial cause No 4 of 1991.
- 5.7 The petitioner need not prove adultery. It automatically follows in my view that sexual intercourse did take place between the two cheaters as evidenced by the constant presence of Blandina at the family home. Adultery is rarely proved by direct evidence. The claimant must only prove acts which leave no doubt in the eyes of right thinking members of society that adultery did take place. There must be established instances, inferences and circumstances which point to one logical conclusion that adultery did take place (See Ross vs Ross [1930] AC7)
- 5.8 In this matter I find that there was association as Blandina was always found at the house. I find opportunity as Blandina was allowed to enter the main bedroom. I find affection as the Respondent had send a love message to Blandina on her birthday to which Blandina also replied in a similar fashion. I find affection and familiarity as the Respondent had given the petitioner's car to Blandina.
- 5.9 Looking at the whole evidence I find without hesitation and on a balance of probabilities that the Respondent did commit an act of adultery with Blandina. He must pay damages to compensate the petitioner for the embarrassment and mental suffering she endured due to the Respondent's actions.

- 5.10 As for the cruelty, I find that by committing an act of adultery and removing the Petitioners personal items from the main bedroom, to the other room, then to the guest wing and finally to the servant quarters, the Respondent was cruel to the Petitioner. If he had stopped loving the Petitioner and wanted the marriage to end, he could have informed the Petitioner without degrading and dehumanizing her.
- 5.11 The Respondent was not a man enough to handle his family affairs and decided to call his relatives, nieces and servants to inflict emotional suffering on the Petitioner. In my considered view, I find cruelty and the Respondent must pay damages for his actions.
- 5.12 The Respondent filed a cross petition on cruelty. He has however led no evidence to substantiate his claim. He did not call the daughter or niece to testify how the petition mistreated them. That prayer must fall.
- 5.13 I therefore find in favour of the Petitioner and I grant an order of divorce *nisi* plus cost of this action. I further order the Respondent to replace the car he had snatched from the Petitioner. It must be a car of a similar value to be determined by the Registrar.

The petitioner must take out summons for assurance of damages within 14 days

Pronounced in Open Court at Blantyre in the Republic on 23rd July 2018.

Dingiswayo Madise
Judge