



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
MATRIMONIAL CAUSE NO. 11 OF 2018

**BETWEEN:**

**JULIET SIBALE.....PETITIONER**

**-AND-**

**MICHEAL SIBALE.....RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE J. N'RIVA**

**Petitioner present**

**Respondent not present**

**Mr Ndeketa counsel for the petitioner**

**Ms Mtegha court clerk**

**JUDGMENT**

**INTRODUCTION**

The petitioner, Juliet Sibale, prays for the dissolution of her marriage with the respondent, Micheal Sibale, on the ground that the respondent had caused irretrievable breaking down of the marriage due to adultery, desertion and cruelty.

Further, the petitioner prays for custody and maintenance of the two issues of the marriage, construction of a matrimonial house and compensation for the breakdown of the marriage.

Despite being served with the petition and Notice of Hearing, the respondent did not attend the trial and the case proceeded in his absence. I have warned myself of the dangers of collusion. I find nothing before me to suggest that there is collusion between the parties. I will thus proceed to determine the petition.

### EVIDENCE

The petitioner was the only witness who testified, and she adopted her witness statement. The petitioner and the respondent got married in Zomba on 28<sup>th</sup> May, 2011. They later registered their marriage at the Registrar General's Office on 21<sup>st</sup> of December, 2013. The marriage has two children.

The petitioner asserted that the respondent started having extra-marital affairs in 2012 and when he was questioned about it, he did not deny it or show any signs of regrets.

The respondent beat and asked the petitioner for divorce in 2016 after she confronted him on an extra-marital affair. The respondent continued to ask the petitioner for divorce in 2017 despite the intervention of marriage advocates and a pastor.

The parties have been on separation ever since and in July 2018, the petitioner attempted to reconcile with the respondent but the latter deserted the family up to the date of hearing.

### ISSUES FOR DETERMINATION

The main issues for determination are whether the marriage between the petitioner and the respondent should be dissolved; whether custody of the issue of the marriage be awarded to the petitioner; and whether provision be made for the maintenance and upkeep of the petitioner and the issue of the marriage.

### Applicable 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. Kamlangila* [1966-68] ALR Mal 301.

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: 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 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 *Sadala v. Sadala* Matrimonial Cause No. 8 of 2016.

The marriage between the petitioner and the respondent was entered into on 28<sup>th</sup> of May, 2011. This is well before the commencement date. In the premises, by reason of section 3 of the Marriage, Divorce and Family Relations Act, the marriage in this case 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

Section 2 of the Divorce Act (Cap 25:04) of the Laws of Malawi provides as follows:

"Nothing hereinafter contained shall authorise—

(a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented:

Provided that where a wife has been deserted without cause by her husband, or where her husband has been deported from Malawi under any law for the time being in force relating to the deportation of aliens, and the

husband was immediately before the desertion without cause or deportation domiciled in Malawi, the Court shall have jurisdiction for the purpose of any proceedings for dissolution of marriage or judicial separation, notwithstanding that the husband has changed his domicile since the desertion without cause or deportation; or

(b) the making of any decree of nullity of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented or unless the marriage was solemnized in Malawi.”

In the matter at hand both the petitioner and respondent are resident and domiciled in Malawi. The petitioner resides in the City of Blantyre and the respondent resides in Mzuzu. At the time of presenting her petition the parties were and are still domiciled in Malawi. Thus, the requirements under section 2 of the Divorce Act have been satisfied. This Court has jurisdiction to hear this petition for divorce.

#### Grounds for divorce

Section 5 of the Divorce Act provides that

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

- (a) has since the celebration of the marriage committed adultery; or
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
- (c) has since the celebration of the marriage treated the petitioner with cruelty;

Section 7 provides that

(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 where 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) of cruelty towards the other party to the marriage: or
- (iii) where the ground of the petition is adultery or cruelty, or 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
- (iv) where the ground of the petition is adultery or unsoundness of mind or desertion without cause, of such willful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion. "

### Analysis

### **ON DIVORCE**

#### Adultery

The petitioner asserted that the respondent was indulged in extra-marital affairs even with her own sister. The respondent had not shown any remorse when confronted about these extra-marital affairs. The petitioner asserted that she has been finding used condoms in the parties' bedroom. Further, that she found intimate messages between the respondent and her sister. The Court finds this as enough evidence of adultery. However, I would be inclined to say 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".

In the present case, the petitioner in her own words asserted that even though she found out about the respondent's adultery, she forgave him and was ready to work out their marriage. She continued to stay with the respondent as husband and wife until the respondent deserted the family in July 2018. All in all, this according to this Court amounted to condonation. The petitioner has thus failed to succeed on this ground.

### Cruelty

The petitioner has further claimed that she has been treated with cruelty by the respondent. The petitioner has therefore prayed for divorce on the ground of cruelty. Regarding this issue of cruelty, raised in the petition, it must be pointed out that cruelty 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 v. Malinki* [1975-77] 8 MLR 141 is very instructive on the observations made above. Further, I wish to note that the case of *Kamlangira v. Kamlangira* 6 ALR (M) 349 is for the proposition that one act of cruelty may be sufficient to prove cruelty and can move a Court to dissolve a marriage. In *MN Fainess Tanil Majamanda v. Patrick M Majamanda* [2006] MLR 128 Nyirenda J, as he then was, said 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?"

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 in front of their children. This one act of violence definitely affected her physical well-being. Further, the conduct of the respondent *i.e.* leaving used condoms in their matrimonial bedroom knowing for a fact that the petitioner will find them, pushing for divorce when the petitioner was ready to forgive him and eventually leaving the matrimonial house would definitely cause one to suffer from mental anguish. The actions of the respondent would definitely make a right-thinking person to conclude that the petitioner cannot reasonably be expected to live with him. In the premises, cruelty has been established.

Having found that the claimant has proved cruelty, and that being a ground for divorce, I find it unnecessary to consider the issue of desertion.

All in all I am satisfied that the petitioner has established and proved cruelty on the part of the respondent. It would therefore be right in the circumstances to grant the petitioner's petition and dissolve her marriage to the respondent. Consequently, I dissolve her marriage to the respondent and grant her a *decree nisi*.

### **ON CUSTODY**

In custody proceedings, the best interest and the welfare of the child is the paramount or primary consideration and not the interests of the disputing parties to a divorce. See Section 23 of the Constitution and section 8 Child Care, Protection and Justice Act. See also *EA v IC AR* (Matrimonial Cause No. 1 of 2016) [2018].

As regards the issue of custody, the position of the Court has mostly been that unless in exceptional circumstances, custody of young children is granted to the mother. When a question relating to the custody of a child arises, the primary consideration is the welfare, happiness and interest of the child and in considering this the Court must consider all the practical aspects or circumstances of the cases.

In the instant case the children are aged about 7 years old and 5 years old. The respondent left the matrimonial home and left the children with the petitioner. They have been living with their mother and they go to school. There is no doubt, in my view that they are both of a young age and as it has been stated in *Katimba v Gertrude Katimba* [2008] MLR 123 (HC) custody of a child of tender years should remain with its natural mother. What matters is the welfare, interest and happiness of the

child. Consequently I order that custody of the child be granted to the petitioner, and that the respondent should have reasonable access to the children for example, during weekends and school holidays. See also section 8 (3) of the Child Care, Protection and Justice Act.

### **ON MAINTENANCE**

On the issue of maintenance, the petitioner stated that the respondent has failed to provide maintenance for the children even though he earns around MK 500, 000.00.

Section 23(4) of the Constitution of the Republic of Malawi provides as follows;

“(4) All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate to State assistance”.

The law requires both parents to maintain their children. The petitioner prays that the respondent pays MK200, 000.00 as maintenance for the children. It is obvious that by staying with the children, the petitioner is already maintaining them. The Court has to make a maintenance order against the respondent. The Court therefore orders that the respondent should be paying MK150, 000.00 every month as maintenance for the children considering his earnings. Any of the parties is free to apply to the Court for the revision of the amount, after six months of this order.

### **ON CONSTRUCTION OF MATRIMONIAL HOUSE**

In *Matimati v Chimwala* [1964-66] ALR Mal 34 at 36 the principal was laid down that

“under customary law a man has an obligation to provide his wife with a house when he marries, and if he divorces his wife before doing so, this will not relieve him of the obligation”.

It is indeed the position at customary law in Malawi that where a marriage is contracted under customary law of the matrilineal system, a husband is required to build a house for his wife at her village during the subsistence of the marriage.

However, this issue of construction of matrimonial house seems to apply to customary marriages. In the premises, it is on record that the parties married in church and later registered their marriage at the Registrar's Office. The marriage between the parties was a civil marriage and not customary marriage. Therefore, the construction of a matrimonial house does not apply.

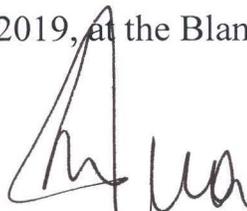
**ON COMPENSATION**

The petitioner also claimed compensation for the breakdown of the marriage. The evidence before the Court is evident that the respondent was indifferent to the breakdown of the marriage. In my discretion I order the respondent to pay the petitioner a sum of MK2, 000, 000.00 as compensation for the breakdown of the marriage.

**COSTS**

I have to consider the issue of costs. Costs follow the event and are in the discretion of the Court. The claimant having, to a great deal succeeded, I award her costs of this litigation. I also award her costs for the application, to stay the proceedings, which I dismissed yesterday.

PRONOUNCED this 9th of April, 2019, at the Blantyre.



J N'RIVA

JUDGE