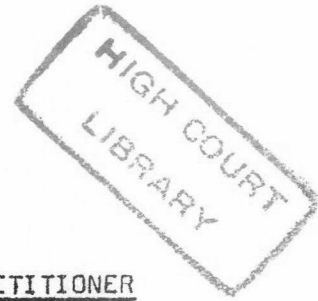


CIVIL CAUSE NO. 439 OF 1979



BETWEEN:

REGINALD BAISON MKONKHA.....PETITIONER

- and -

MARGRET MKONKHA.....RESPONDENT

Coram: Jere, J.

For the Petitioner: Chiudza Banda of Counsel
For the Respondent: Mtambo of Counsel
Official Interpreter: Sonani
Court Reporter: Caffyn

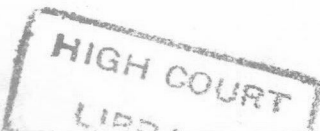
J U D G M E N T

This is a petition by Reginald Baison Mkonkha praying for the dissolution of his marriage with his wife, Margret Mkonkha, on the grounds of cruelty and adultery. Mrs. Mkonkha in her answer to the petition denies both allegations. She has filed a cross-prayer seeking for the dissolution of the marriage on the grounds of adultery.

The parties were married in Salisbury, Rhodesia, around April, 1965. The husband was at that time working for the Malawi Government as a clerical officer in Salisbury. The marriage was contracted under Shona customary law. The husband is a Malawi citizen from Dowa District. The wife is a Shona woman. The couple came to Malawi in 1966 and the husband continued to work for the Malawi Government in the Ministry of Labour as a clerical officer. They have lived and cohabited at Chitawila location in the City of Blantyre, Zomba, and finally in Lilongwe. There are six children of the marriage, namely:-

- (1) Vutikani Mkonkha, born on 9th day of June, 1966.
- (2) Raphael Mkonkha, born on 20th day of May, 1968.
- (3) Judith Mkonkha, born on 11th day of November, 1970.
- (4) Edith Mkonkha, born on 18th day of February, 1972.
- (5) Jessie Mkonkha, born on 14th day of January, 1974.
- (6) Ethel Mkonkha, born on 1st day of July, 1977.

Since the marriage was contracted in Rhodesia, the Court was interested to know whether it was a valid marriage under Shona customary law. There was evidence on Shona customary law: Mr. Ernest Abssaiah Dauyo gave evidence on the customary law in question. I am satisfied that he was competent to give such



evidence. He was educated at Waterfalls, Salisbury, and his mother is a Shona. He studied Shona customary law of marriage. He told the Court what, in Shona, constitutes a valid marriage. One of the essentials of customary law marriage, Lobola (bride price), must be paid either in whole or in part. It was his view that if no Lobola is paid there cannot be a marriage and it cannot be officiated.

The husband's evidence is that he paid Lobola but he does not state how much he paid. His wife gave evidence on the matter and said that nothing was paid. She said the husband paid K20 which was not counted as Lobola. She went on to say that since the husband was a government official, it was agreed that he would pay Lobola at some future date. They now have six children and according to her she is validly married to him because of the long period they have lived together. I have seriously considered the matter and am inclined to accept the husband's evidence and I find that there is a valid marriage subsisting between the parties according to Shona custom.

From the date the marriage was contracted, the parties intended to make Malawi their home. I find that Malawi is their home and hence their domicile. This Court therefore has jurisdiction in this matter.

The husband's evidence is that prior to 1972 the parties lived happily together, but when in that year he was transferred to Zomba Labour Office, troubles started. The main problem was that each time he left his home she also left and was uncooperative. The matter was reported to the elders but she would not change her behaviour. The matter came to a head in May, 1977, when she hit him with a piece of wood. He went to the Traditional Court in Zomba seeking for the dissolution of the marriage. The Court declined on the basis of lack of jurisdiction. It was his evidence that she became uncontrollable after the abortive divorce proceedings. She slept out for days and did not take any notice of him. She never revealed where she went to sleep. He alleged that she went out with other men whom he did not know. He saw one gentleman pick her up in a car but he did not know the owner of the car. He did not, however, follow her to find out who the man was. He said that he had not forgiven her sins of cruelty and adultery and therefore left the matrimonial home in January last year. In cross-examination he admitted that while in Zomba he was going about with a woman from Zomba District. He also said his wife hit him with a stick before he knew the other woman. He is now living with this unnamed woman in Lilongwe, and is seeking the discretion of the Court to grant him a divorce, despite the fact that he is himself committing adultery.

It is clear from the evidence that at some time in May he was going on transfer from Zomba to Lilongwe. They loaded the vehicle with their belongings and his wife and children were in the vehicle. They reached the Labour Office in Zomba and he then disappeared, leaving his wife and children for one week. He was away in Salima and no satisfactory reason was given for this kind of behaviour.

The wife's story is that she lived happily with him up to 1972. She said he had made a woman pregnant but she did not

mind because he was looking after her and the children. In 1972 he started staying out claiming that he was a football official. He abandoned her and members of the Youth League used to help her. He was called to explain his conduct and he denied that he had another woman. He gave beer-drinking as the reason for neglecting his family. The wife admitted that she assaulted him on the 2nd May because he had provoked her. The provocation was that he came home with a woman and he told this woman, in her presence, that she (the woman) should not fear anything and introduced her as his wife. He then went on to say that his wife had died. Mrs. Mkonkha then took a chair and hit him but was however stopped from beating him. He then disappeared for one week.

In the same month of May she was told that they would be going to Lilongwe. She packed her luggage in the lorry and was then told they were going to Salima. They went to the office the following morning for the petitioner to do the handing over. Mr. Mkonkha thereupon said that he was going to collect his other woman and brought her. The respondent started fighting with the woman and the Member of Parliament for Zomba, Mr. Mataka, blamed Mr. Mkonkha, who promptly disappeared with the woman. He was away for five days.

He told his wife that all was now over and they proceeded to Lilongwe. She gave birth to their last born child on 1st July, 1977. The petitioner then summoned her to Lilongwe Traditional Court. Afterwards he left the matrimonial home and went to Kawala location where he has since been living with the other woman.

The respondent is seeking for the dissolution of the marriage on the grounds of adultery.

There is no doubt that the petitioner is committing adultery with the woman with whom he is now cohabiting. It is my view that the respondent has not condoned this continuous adultery. In the circumstances she has established her case on the balance of probabilities. I therefore grant her the divorce as prayed in her cross-petition.

I now come to the husband's petition. I agree that the respondent hit the petitioner with a chair, and in my view it was only once, and because she was provoked. I am also of the view that he forgave her so this is not a ground for divorce. I am not impressed with the petitioner's evidence. It did not have the ring of truth. It is such evidence that no reasonable tribunal of fact would believe. I dismiss his petition with costs.

In conclusion, on the respondent's cross-petition I dissolve the marriage between the petitioner and the respondent. I grant a decree nisi.

The petitioner has no objection to the respondent being granted custody of the children of the marriage provided he has reasonable access and that they are not taken out of jurisdiction. In these circumstances I grant custody of the children to the respondent and that the petitioner should have reasonable access. They should only be taken out of jurisdiction with the permission of the Court.

Pronounced in Open Court this 29th day of February 1980, at Blantyre.

N. J. J. J.
JUDGE