

IN THE HIGH COURT OF MALAWI, BLANTYRE

PRINCIPAL REGISTRY

CIVIL CAUSE NO.57 OF 1986

BETWEEN:

YVONNE BOTHA PETITIONER

AND

DARREL ALWYN BOTHA RESPONDENT

AND

DEBORAH JAYNE PENMAN CO-RESPONDENT

Coram: MTEGHA, J.

Msaka of Counsel for the Petitioner
Respondent absent, unrepresented
Kadyakale, Law Clerk
Longwe, Court Reporter

JUDGMENT

The petitioner in this case, Yvonne Botha, is praying to this Court for the dissolution of her marriage to the respondent, Darrel Alwyn Botha, on the ground of adultery with the co-respondent, Deborah Jayne Penman.

The parties were married on 1st July, 1972 at the Anglican Church, Fort Victoria, Rhodesia, now Zimbabwe. A certificate to this effect was issued and tendered in court as Exhibit P1. An affidavit sworn by J.A. Martin, Rector of the Church at which the marriage took place was also tendered in court as Exhibit P2. The affidavit states that the marriage so contracted is a valid one. There are two issues of the marriage, namely Ashley Anne, born on 20th July, 1974 and Brett Darrel, born on 12th December, 1977.

It was the evidence of the petitioner that after the celebration of their marriage they cohabited and lived at Fort Victoria, until 1975, when they moved to Blantyre, here in Malawi. It was her evidence that they have lived here since, and the respondent's parents are here, staying in New Lands and that the respondent himself has bought a plot on BCA Hill on which he plans to build a house. He has also a cottage at the Lake.

In May, 1985, the petitioner told the court, the respondent told her to leave the matrimonial home and asked her for a divorce. She went to her parents in Johannesburg,

South Africa, but she refused to give him a divorce. In her absence the respondent took the co-respondent into the matrimonial home as a wife. When she got this information, she sought her divorce in South Africa, but she could not get it because both she and the respondent are living here in Malawi, so she came back. She found that the respondent and co-respondent are living together. She left the matrimonial home and has never lived with the respondent under one roof since then. She has, instead, got her own house in Kirk Range Drive where she resides with her two children, whom she intends to keep if I grant her the prayer.

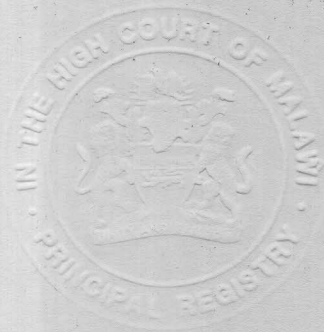
The second witness for the petitioner was Salafina Nkhoma, a housemaid. She told the court that she was employed by the petitioner to look after the children and to look after the bedrooms of the matrimonial house. When the petitioner left for South Africa, and when they were living in New Lands, a woman by the name of Penman moved into the matrimonial home and lived with the respondent as husband and wife. She used to find them on the same bed in the mornings when she was bringing them morning tea; she used to wash clothes for both of them. She and the petitioner and the children left for another house when the petitioner came back from South Africa.

This petition is undefended and in such case I must guard against the dangers of collusion. It appears to me that there was no collusion. I have also got to consider the question of domicile of both parties. Mr. Msaka for the petitioner has submitted that a married woman takes the domicile of her husband; he cited to me the cases of *De Reneville vs. De Reneville* (1948) 1 AER 56 and *Attorney General for Alberta vs. Reata E. Cook* (1926) AC 444. I have looked at these cases, and although the facts are not similar to the case at hand, the decisions in those cases appear to be supporting Mr. Msaka's submission. The jurisdiction of this Court to entertain petitions of divorce certainly depends upon the domicile of the parties. The respondent in this case came to Malawi in 1975; he has lived here ever since; he has acquired property; and these points are indicative to the fact that he has turned Malawi into his home. The wife, in this case, the petitioner, is therefore, domiciled here as her husband. This Court has, therefore, jurisdiction to hear the petition.

The ground for seeking this divorce is adultery. As has been pointed out several times by this Court, there is no need to prove adultery by direct evidence since it is done in secrecy. Proof of adultery can be inferred from the surrounding circumstances. In the case at hand, evidence of PW2, Nkhoma, is sufficient; she found the respondent and co-respondent in bed every morning when she was giving them their morning tea; she washed their clothes. No stronger evidence than this is necessary. In my considered view the

matrimonial offence has been made out and I see no bar to my granting the petitioner the prayer. I grant her decree nisi that the marriage be dissolved. I also award the custody of the children to the petitioner. I also condemn the respondent to pay the costs for this petition.

PRONOUNCED in open Court this 20th day of November, 1987 at Blantyre.



H.M. Mtegha
H.M. Mtegha
JUDGE