



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NUMBER 62 OF 2009

BETWEEN:

LUCY CHINGOLO

PETITIONER

AND

ESCKIM CHINGOLO

RESPONDENT

Coram: Justice M.A. Tembo,

Petitioner, present and unrepresented

Respondent, present and unrepresented

Chitatu, Official interpreter

JUDGMENT SUMMARY

This is the judgment of this Court on the petition for the dissolution of the marriage between the petitioner and the respondent. The petitioner filed the petition seeking dissolution of the marriage on the grounds of cruelty, desertion and adultery on the part of the respondent.

This Court heard the evidence of the petitioner, the respondent, the witness to the petitioner's marriage and another witness for the respondent. This Court wishes to point out that almost all the evidence given by the witness of the respondent was hearsay and not much weight has been attached to the same. This Court has also

attached weight to only a smaller part of the evidence of the petitioner's witness for the same reason. The petitioner's evidence was very consistent and struck this Court as bearing the truth in this matter. The respondent in his testimony dwelt much in his testimony on matters that did not directly address the complaints in this matter very much despite the many directions given by this Court as both parties are unrepresented.

The petitioner and the respondent registered their marriage at the Registrar General's office at Blantyre on 4th April 2003. They initially lived together happily in their marriage until a few years later when the respondent and the petitioner started having problems in their marital relationship. The petitioner and the respondent have a single child in their marriage.

Both parties are domiciled in Malawi.

Cruelty

On the ground of cruelty, the petitioner informed this Court that the respondent started beating her up whenever she did what the respondent considered to be wrong. For instance, one time around 2007/2008 whilst the two were living in Machinjiri, the respondent missed a call on her cell phone late in the night from a certain Mabvuto Zamadunga. The respondent asked the petitioner who had called and the petitioner explained the same. The petitioner indicated that the respondent knew this Mabvuto Zamadunga. The respondent then started calling the petitioner a prostitute and beat her up through the night and at some point the respondent used a piece of wire to beat the petitioner.

On a different occasion the respondent beat up the petitioner and a neighbor had to intervene and on that occasion the respondent removed some dreadlocks from the petitioner's head in the course of the scuffles.

Although the respondent denied beating up his wife, it appears to this Court from his evidence that the respondent's wrath flared up on occasions when the petitioner would come home late from work. The petitioner explained that after her usual hours at work she would go and sell stationery privately and would be delayed going home on some occasions. The petitioner insisted that the respondent knew

all this although he would get infuriated with the petitioner's late arrival at home from work.

Marriage witnesses tried to reconcile the petitioner and the respondent after all their problems but in the end the petitioner decided to leave the matrimonial home. The respondent is said to have cried in regret at one reconciliation meeting but the petitioner's marriage witness told him that the marriage was no longer viable and this was agreed to by the marriage advocate for the respondent. This is according to the witness for the petitioner who was a witness to the marriage herein.

For cruelty to be established there must be serious conduct by the guilty party of intolerable nature so as to cause danger of bodily or mental hurt or a reasonable apprehension thereof . In the circumstances of this case, the conduct complained of, namely, repeated beatings on some occasion resulting in removal of dreadlocks and use of a wire is in the view of this Court, appears to satisfy the legal definition of cruelty as a ground for dissolution of marriage. The repeated beatings actually resulted in bodily harm to the petitioner and she must have lived in mental distress for fear of further beatings.

In these circumstances this Court finds that the petitioner has proved that the respondent was indeed cruel to her despite the attempts by the respondent to deny the same. The petitioner has therefore proved cruelty as a ground for dissolving the marriage herein.

Disertion

On the ground of desertion, the petitioner informed this Court that she was forced to leave the matrimonial home in 2008 due to the beatings that she suffered at the hands of the respondent. The petitioner went to live with her parents at the same Machinjiri location after she left the matrimonial home. The respondent tried to plead with the petitioner saying that he had changed his ways but the petitioner informed him that he always went back to beating the petitioner within a couple of weeks of promising that he had changed.

There is an allegation of desertion whereby the petitioner was forced to leave the matrimonial home due to the conduct of the respondent. In view of the cruelty

inflicted by the respondent on the petitioner, the petitioner states that she was justified in the circumstances to leave the matrimonial home.

It has been held by the courts that where a husband's conduct towards his wife was such that a reasonable man would know, and that the husband must have known, that in all probability it would result in the departure of the wife from the matrimonial home, that, in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home, and the fact that he nevertheless desired or requested her to stay did not rebut the intention to be inferred from his acts-that he intended to drive her out-and he was guilty of constructive desertion. See *Lang v Lang* [1954] A.C. 402.

It appears to this Court that the conduct of the respondent was such that a reasonable man would have known that it would result in the petitioner eventually leaving the home. The respondent is guilty of constructive desertion for conducting himself in such a manner as to force the petitioner to leave their matrimonial home.

Adultery

On the ground of adultery, the evidence that the petitioner has of the respondent committing adultery is that she had heard that the respondent had impregnated a girlfriend three months after the petitioner had left the matrimonial home. The name of this girlfriend of the respondent is said to be Sungeni but the petitioner forgot her surname. The petitioner indicated that she confirmed this by sending a congratulatory text message on a mobile phone to the respondent and the respondent texted her back thanking the petitioner for the congratulatory message.

Further, the petitioner testified that the respondent actually sent her a text message on mobile phone indicating that the child of the petitioner and the respondent now had a sibling. The respondent did not dispute all of this.

On proof of adultery as a ground for dissolution of marriage it has been held by the courts that it is not usual that adultery is proved by direct evidence. The fact that adultery has been committed is always inferred from circumstances which lead to it by a fair inference as a necessary conclusion. The court must be satisfied that there must be more than opportunity before it will find adultery had been committed. Association coupled with opportunity and the evidence of illicit

association, affection or familiarity creates on inference upon which the court can find adultery. See *Kaunda v Kaunda* [1994] MLR 163 (HC).

From the evidence presented in this Court whereby the respondent confirmed to the petitioner that their child now had a sibling clearly leads to the inference that the respondent bore the second child in an adulterous relationship. The petitioner has established adultery.

In the final analysis the petitioner succeeds in this matter and this Court finds for her on all grounds sought for dissolving the marriage herein. A decree order nisi of divorce is granted and as usual a decree order absolute will be made in six weeks time if no one shows cause why the marriage at hand should not be dissolved.

I will hear the parties on the issue of custody and maintenance of their child if they have not already agreed on the same.

Made in open court at Blantyre this 24th March 2014.

M.A. Tembo

JUDGE