NOSISI CHIMBWERO (nee MOYA)

versus

ZACHARIA CHIMBWERO

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, 30 July and 1 August, 2012

**Matrimonial Action**

*F Nyamayaro*, for plaintiff

The defendant in person

CHITAKUNYE J: The plaintiff and defendant were married to each other in terms of the Marriages Act, [*Cap 5*:*11*] at Harare on 19 August 2002. Their marriage still subsists. Prior to that date they had been living together as husband and wife in terms of customary law since 1995.

The defendant was born and bred in Zimbabwe he thus considers Zimbabwe as his place of domicile.

Their marriage was blessed with two minor children namely Yolanda Chimbwero, born 27 November 1995, and Marcia Chimbwero, born 26 May 2001. Both children are girls.

Some unhappy differences arose in the marriage leading to the plaintiff suing the defendant for a decree of divorce out of this court on the 24 February 2011.

The plaintiff alleged that the marriage relationship has irretrievably broken down with no prospects of restoring a normal marriage relationship between the parties. The reasons for the breakdown included that:

1. The defendant is a violent person and always assaults , abuses and treats the plaintiff with cruelty;
2. The defendant engages in many extramarital relationships;
3. The parties separated in August 2008 and have not stayed as husband and wife since then; and
4. The plaintiff has lost love and affection for the defendant.

Due to the foregoing the plaintiff sought a decree of divorce.

During the subsistence of the marriage the parties acquired household property which she said was now worn out and of no value at all. She therefore suggested that no order be made on the division; apportionment and distribution of assets of the spouses should be made.

The plaintiff claimed custody of the minor children and that issues of maintenance be dealt with in terms of an existing magistrates’ court order in case number M1975/01.

The defendant in his plea denied that he was violent and that he treated the plaintiff in a cruel manner. He portrayed himself as a loving and caring husband. He denied engaging in extra marital affairs. He also denied that the parties separated.

On custody the defendant contended that custody should be awarded to him and not to the plaintiff.

At a pre-trial conference on 4 July 2012, the parties agreed that:

1. Maintenance issues be regulated in terms of the existing maintenance order in case number M1975/01;
2. That the defendant be awarded all the movable property except the fridge;
3. The plaintiff shall buy and give to the defendant a television set, a Video Cassette Recorder (VCR) and a Satellite dish which she had sold; and
4. The plaintiff be awarded the fridge.

On that date parties could not agree on the state of the marriage and custody of the children. The issues referred to trial thus comprised:

1. Whether or not the marriage relationship between plaintiff and defendant has irretrievably broken down; and
2. Which parent should get custody of the children?

These are the issues the parties were called upon to testify on. The plaintiff gave evidence after which the defendant gave evidence. In his evidence the defendant conceded that he was no longer seeking custody of the minor children. He now agreed that custody be awarded to the plaintiff with him enjoying rights of access. Upon being given an opportunity to deliberate on the issue of access the parties agreed that-

1. The defendant will have access during school holiday as follows-

i) The first week of the school holidays the children will be with the plaintiff and the defendant will be with the children for the rest of the school holidays;

ii) The plaintiff will allow the defendant access to the children when he needs to attend with them important family gatherings such as weddings, funerals etc.

iii) The defendant may have access to the children at least one weekend per month if he so wishes.

The issue of custody and access having been so resolved the only outstanding issue is whether or not the marriage relationship has irretrievably broken down.

The plaintiff’s evidence in this regard was to the effect that due to the reasons already stated the marriage relationship has indeed irretrievably broken down. She testified on the reasons for the breakdown and maintained that she has lost love and affection for the defendant. She thus wishes to be divorced from him.

On his part, the defendant maintained that the marriage relationship can be resuscitated if the parties are given chance to discuss. He suspected that the plaintiff was seeking divorce so that she can marry someone else or that she may be pregnant by another man. It was apparent that these were mere suspicions without having laid any basis for the suspicions.

Though the defendant denied that he was violent towards the plaintiff he conceded that they had quarrels which led to the two of them going for counseling at the police station on a number of occasions. He also conceded he had established extra-relationships with other women in the period 2001 to 2002 when they had parted ways. He however said the relationships only lasted while the two were on separation. When they reconciled and resumed staying together those relationships ended.

The defendant also admitted that they have not been staying together as husband and wife since 2007 or 2008. From that year to the present he has met the plaintiff once when he located her at Mbare where she was working. His efforts to discuss reconciliation were spurned by the plaintiff. Despite that he still felt that given a chance they can reconcile. He however could not lay a basis for his feelings on the possibility of reconciliation.

The question as to whether a marriage relationship has irretrievably broken down or not must be viewed objectively. A party’s desire to cling onto the other would not rescue a failed marriage. It is for court to assess whether from the evidence adduced it is satisfied that the marriage relationship has indeed irretrievably broken down.

Section 5(1) of the Matrimonial Causes Act [*Cap* *5*:*13*] clears confirms this in stating that:

“An appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them.”

It is thus clear that in ascertaining whether a marriage has irretrievably broken-down two aspects are crucial, namely that–

1. The marriage relationship is not normal anymore; and
2. There is no reasonable prospect of the restoration of a normal marriage relationship.

If the evidence adduced shows that the marriage relationship is not normal and that there is no reasonable prospect of restoration of normal marriage relationship, court will grant a decree of divorce despite the other party’s professed desire to remain in the marriage.

In *Kumirai* v *Kumirai* 2006(1) ZLR 13(H) at p 136B-D MAKARAU J (as she then was) opined that:

“In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably, where the plaintiff insists on the day of the trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the marriage relationship since the promulgation of the Matrimonial Causes Act in 1985.”

At p 136D-E, the learned judge went on to say that:

“To satisfy court that the marriage still has some life in it, one has to adduce evidence to the effect that after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife.”

In *Murada* v *Murada* 2008(2) ZLR 326 at 329 E-F NDOU J aptly stated the point when he said that:

“… it is hardly possible for a court to find that there is reasonable prospect of reconciliation between parties when one of them is determined to bring the marriage to an end.”

In *casu,* the manner in which the parties have been living and relating to each other since their separation in 2008 is not normal in a marriage relationship. The parties have not been living together, have not shared bed as husband and wife for that long and have virtually not been communicating as husband and wife. The plaintiff said she does not know where the defendant stays and the defendant said the same of the plaintiff. All this points to a relationship that is not normal for a marriage.

It may also be noted that since their separation no real effort has been made to reconcile. After the issuance of summons for divorce no serious effort was made either. Clearly despite the defendant’s assertion that they be given chance to reconcile, there is no reasonable prospect that they can ever reconcile. The plaintiff has shown her determination to have the marriage ended.

In the circumstances court finds that the marriage relationship has indeed irretrievably broken down. There is no reasonable prospect of restoration of a normal marriage relationship. A decree of divorce will thus be granted with ancillary issues being dealt with as per the parties’ agreement.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children Yolanda Chimbwero born 27 August 1995 and Marcia Chimbwero born 26 May 2001 be and is hereby awarded to the plaintiff.
3. The defendant is hereby granted reasonable rights of access to the minor children to be exercised as follows:

a) During school holidays the plaintiff shall be with the children during the first week of school holidays and the defendant shall be with the children for the rest of the holidays;

b) when there is need to attend important family gatherings such as weddings, marriages, funerals and such other functions as are important for the children to attend; and

 c) at least for one weekend per month during the school term.

1. Maintenance to be regulated in terms of the maintenance order in case number M1975/01.
2. The defendant be and is hereby awarded all the movable property except the Fridge which is hereby awarded to the plaintiff as her sole and exclusive property.
3. The plaintiff shall buy and give to the defendant the Television set, Video Cassette Recorder and Satellite dish which she had sold.
4. Each party shall bear their own costs of suit.

*Farai Nyamayaro Law Chambers,* plaintiff’s legal practitioners