

Between : ROSELA NIKO

Petitioner

And : SHEDRAK NIKO

Respondent

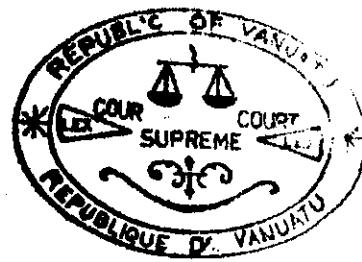
Coram. Mr. Justice Lunabek
Mrs. Mason for the Petitioner/wife
Respondent in person (not represented)

JUDGEMENT

By an Amended Petition, dated 21st June 1996, Mrs Mason, Counsel for the Petitioner/Wife herein, sought a decree nisi for the dissolution of the marriage between the Petitioner and the Respondent/Husband. The original Petition was filed on 30 October 1995 and included custody of four (4) children. The Petition has first been heard by the Magistrate's Court on 20 November 1995. But during the course of the hearing, the Respondent/Husband indicated that he will defend the Petition. The matter was then adjourned and referred to Supreme Court on the basis of Section 1(c) of the Magistrate's Court (Civil Jurisdiction) Act 1981 CAP 130. On 21st June 1996, Counsel for the Petitioner applied to amend the original Petition by omitting the names of four(4) children mentioned in paragraph 2(a), (b), (c), (d) of the Petition and further that reference to the custody of the above children be struck out. The Petition was then amended accordingly.

There are, thus, two (2) matters to be dealt with by this Court:

- 1- The Dissolution of the Marriage between the Petitioner and the Respondent; and
- 2- The Matrimonial Property settlement.



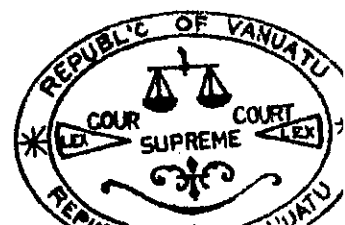
I will deal with the Dissolution of the Marriage first.
The Matrimonial Property disputes will be the subject of a different proceedings depending on the outcome of the present proceedings.

APPLICATION FOR DISSOLUTION OF MARRIAGE UNDER SECTION 5 (a) (iii) OF THE MATRIMONIAL CAUSES ACT 1986 CAP 192.

The parties were married on October 22, 1989 at the Seventh Day Adventist Church at Nambatu, Port Vila, Vanuatu. In or about 1991 a son was born but was then died 8 months later. So after the marriage, these two people have no children now living. The parties are both ni-Vanuatu, domiciled in Vanuatu. The dissolution of the marriage is sought on the ground of persistent cruelty under Section 5 (a) (iii).

EVIDENCE OF THE PETITIONER/WIFE

The Petitioner gave evidence on oath to the effect that on 27th August 1995, her husband assaulted her on the head and kicked her on the ribs with his shoes. She was injured. There was blood running out from her nose and eyes. She had got blue face. She went to the doctor. She said she could not combed her hair for one (1) week. She said he humiliated her by attempting to remove all of her clothes in the public but he could not succeed to do so completely. She further said she applied for restraining order for her protection on the basis that the Respondent threatened to kill her and pestered her at her place of work. The Respondent breached the said terms of the restraining order. He was brought to the Court and was, then, sentenced for two weeks imprisonment for contempt. He humiliate her, swear at her in front of her mother. She said further the Respondent said she was stupid and she was not educated. Further she said, the Respondent could not look after his family. He could not financially support the family. He went and played into the casino almost everyday. She stressed that in 1991, when they have a child the Respondent never gave any single vatu or a can of milk. Chiefs attempted to solve their problem but they could not. They tried to talk about everything including irrelevant matters. She also gave evidence of an assault occurring in 1989 when she was picked up by the Respondent at her place of work. He drove her to Rentabao Road instead of going home and told her: " I am going to kill you". She tried to escape . She opened the door and got out from the car. She was injured. There was scratches on her body. She was picked up by an other car and brought to her friend's house (Louisa) who boiled water to clean her scratches. She said she reported the matter to the Police. The Respondent was charged with intentional assault and was convicted and orderd to pay fine of 2 000 vatu by the Magistrate's Court in Port Vila. She said she was sad and since that time she has some health problem and she lost confidence in him. She could no longer reconcile and go back and live with the Respondent. She said she looked after some of



her sister's children. They all went back to their natural parents except one of them, Bredda, who is still living with the Petitioner.

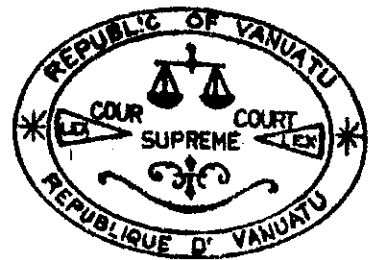
Under cross-examination, she was asked by the Respondent/Husband about the grounds for divorce she then said:

"As I have already said, you assaulted me, you swear at me, you said I am stupid, you are educated but I am not educated, you said I sell my cunned around, I cannot come back to you. I finish with you".

Tom Nalaye is the second witness for the Petitioner. Tom is 36 years old. He is the husband of the Petitioner's elder sister, Roselyne. Tom and Roselyne lived on the same yard with the Petitioner and Respondent. He referred to a custom meeting where the chiefs asked the Petitioner if she still wanted to live with the Respondent and he said the Petitioner said : "No". Then, the Respondent led a group of his friends and relatives and took off roofs of the house of the Petitioner's mother. He said he lived with them on the same yard. He knew how the Respondent behaved and at once he prevented the Respondent from assaulting the Petitioner. On some occasions the Respondent threatened to kill the Petitioner. He further said he did tell the Respondent to stop playing at the casino. As to the assault on the Petitioner, he said he was not there when this occurred but he did see the blue marks on the Petitioner's face after his return from Tanna Island.

THE EVIDENCE OF THE RESPONDENT/HUSBAND.

In his evidence on oath, he stated that there was six (6) customary meetings attempting to solve their problem. The chiefs did not see the reason why their marriage should be dissolved. He admitted he did assault the Petitioner at Tebakor area and secondly on 27th August 1995 at Seven Star area. He said he followed and watched the Petitioner because he heard from one of his friends that the Petitioner went out with a man from Ambae. He said she was angry because he watched her so she threw stones on the screen of his car and he in turn got angry and assaulted the Petitioner. He further said since their marriage, the Petitioner is not honest to him when he gave her some money she refused. He said there is no reason why the Court should dissolve their marriage. In his cross-examination, he admitted he assaulted the Petitioner on three separate occasions. He admitted also he did appear before the Courts and thus, Restraining Orders were issued against him. He admitted also he was in breach of the terms of the said orders and was sent to prison for two weeks. He admitted he did play at the casino but not every day as alleged by the Petitioner. He claimed he did help and share with the Petitioner their living expenses. As to why he broke the Petitioner's mother's house, he said the mother did support the Petitioner in their problem whereas he should not do so.



This petition was filed on the ground that the Respondent has since the celebration of the marriage treated the Petitioner with persistent cruelty under section 5 (a) (iii) CAP 192.

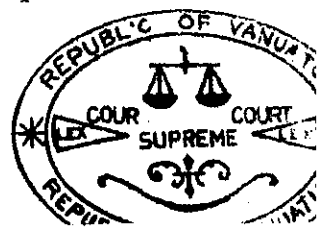
The concept of cruelty is not legally defined by statute. The Court was referred to the meaning of cruelty in Halsbury's Laws of England 3rd Edition Volume 12 (at p. 269). Cruelty is generally described as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger.

It is further submitted on behalf of the Petitioner that to find cruelty it is not necessary to find physical violence. Series of minor acts could amount to cruelty when a number of acts each of which is serious in itself or when a long continued series of minor acts are considered together. Further, that threats of actual personal violence sometimes constitute cruelty, and the Court does not wait to act until such threats are carried into effect.

In this case, the evidence of the Petitioner shows that there were two (2) assaults on her by the Respondent. In 1989, he was criminally convicted for intentional assault and in 1995, he breached the terms of the restraining orders obtained by the Petitioner against him and as a result was sent to prison for two (2) weeks. There is also evidence of threat against the Petitioner's life and this was also corroborated by the evidence of Tom Nalaye (the second witness of the Petitioner) and the Respondent did not deny that. The Petitioner gave also evidence of her humiliation by the Respondent whilst referring to her lack of education, swore at her in front of the mother. The Respondent attempted to remove all of the Petitioner's cloth in front of the public. The Respondent fails to support the family. This also was corroborated by the evidence of Tom Nalaye when some of the money were spent at the casino. It is alleged that the lack of support of the Respondent to his family extended to the birth of his first baby. It is said that such a course of conduct combined together have a direct effect on the Petitioner's self-confidence, health. Further that since the separation of the couple, four (4) customary adopted children were returned to the care of their natural parents whereas before they were in the care of the Petitioner as from when she was yet a single women. It is thus submitted that these matters combined together amount to persistent cruelty and that the marriage between both parties is not reconcilable. The Respondent admitted almost all the allegations against him but yet said there is no reason why this Marriage should be dissolved.

Section 9 (2) of the Matrimonial Act CAP 192 provides that :

"Before hearing any petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged and whether any collusion exists between the parties, and also to inquire into any countercharge which is made against the Petitioner."



In this case, condonation is not pleaded. It is not necessary that it should always be pleaded, but it must be noted that failure to plead condonation does not relieve the judge of the duty of investigating that question if there is any material indicating the possibility of the existence of condonation. In the present case, I am satisfied that there is no such material showing the existence of condonation of the alleged cruelty.

Section 9(3) of the same Act provides that :

"If the Court is satisfied on the evidence that (a) the case for the petitioner has been proved; and (b) ... where the ground of the petition is cruelty, the Petitioner has not in any manner condoned the cruelty; ... the Court shall pronounce a decree of divorce."

Before I proceed further, I must say something about standard of proof in divorce proceedings. It should be bear in mind that the Matrimonial Causes (Vanuatu) Act of 1986 CAP 192 gives a right to obtain the dissolution of a marriage for persistent cruelty by the decree of the Courts of Law of this country, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised.

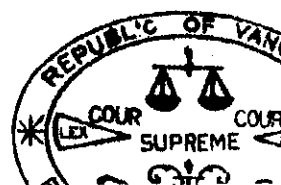
Accordingly, in order to determine the principles regulating the standard of proof in the divorce Court, it is necessary to go to the provisions of the statute, which, in this case, is the Matrimonial Causes Act 1986 CAP 192.

The sections which are directly relevant to the present case are sec. 5 and 9 (1), (2), (3). Section 5 is a governing section applying to all facts alleged as grounds for a petition for divorce, cruelty, adultery, desertion, etc...

Having regard to the language of section 9 and in particular Section 9 (3) of the same act, the words are simply *"If the Court is satisfied on the evidence that (a) the case for the Petitioner has been proved, and (b) ... the ground of the Petition is cruelty ... the Court shall pronounce a decree of divorce."* These words are applicable to all grounds upon which a petition can be presented.

I am of opinion that the ordinary standard of proof in civil matters must be applied to the proof of persistent cruelty in divorce proceedings, subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of persistent cruelty is established. As put it by Sir William Scott in Loveden -v- Loveden [(1810), 2 Hag. Con. 3; 161 E. R. 648]: *"The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion ..."*

In that respect, I share the view that: *"The requirement by the Court of corroboration where cruelty is alleged is merely a matter of practice, and not a rule of law, and it has never been decided that the Court is not entitled in a proper case, where it is in no doubt where the truth lies, to act on the*



uncorroborated testimony of the Petitioner." [As per Tucker, L. J. in Re Kafton -v- Kafton All. E. L. R. Vol. 1 K. B. D. 435].

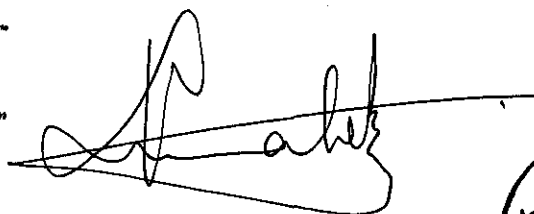
Further one can observe as it was rightly pointed out by Lord Denning M. R. in re Davis -v- Davis (1950) 1 All E. R. 40; 43 that if corroboration were required of all facts of cruelty, it would mean that many petitioners would be unable to prove their cases because it often happens that cruelty is committed in the privacy of the matrimonial home. The injuries caused by the acts are often the subject of corroboration, but not the acts themselves.

In this case, having considered all the evidence, I am satisfied that the allegation of persistent cruelty is established and that the marriage between the Petitioner and the Respondent is not reconcilable as the Petitioner asked directly in Court looking at me: "Mi wantem talemaot nomo se Kot i kivim mi divorce, please. Mi nomo save live wetem Shedrack.". This could be best translated in this way: " I pray that this Court grants me divorce, please; I could no longer live with Shedrack." . I have before me a clear situation of two (2) unwilling parties. What do I do then? I am not prepare to force two (2) unwilling parties to go on living together as wife and husband.

On the basis of these considerations, the Court,hence, hereby ordered :

- (1) That, the marriage between the Petitioner and the Respondent celebrated on the 22nd day of October 1989 at the Seventh Day Adventist Church at Nambatu, Port Vila, Vanuatu, be dissolved; and
- (2) That, a Decree Absolute be issued after a period of three (3) months commencing from today the 21st day of June 1996; and
- (3) That there is no order as to costs.

DATED AT PORT VILA this 21st Day of JUNE 1996.



LUNABEK VINCENT J
Judge.

