

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Divorce Jurisdiction)*

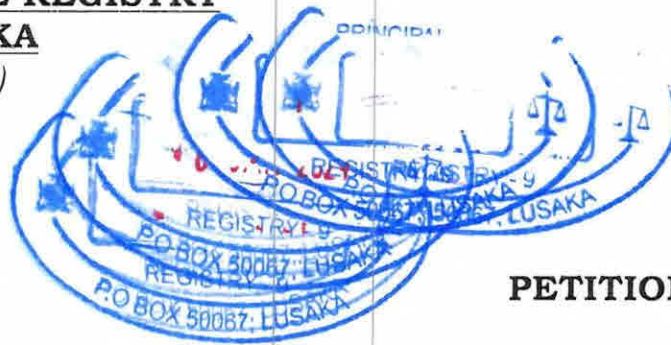
**2021/HPF/D/0023**

**BETWEEN:**

**AARON PHIRI**

**AND**

**UNIKE MWANZA PHIRI**



**PETITIONER**

**RESPONDENT**

**BEFORE THE HONOURABLE MRS. JUSTICE M.C. KOMBE**

*For the Petitioner: Ms. M. Marabesa – Messrs. Legal Aid Board*

*For the Respondent: Ms. N. Nambao and L. C. Lemba – Messrs. Mulungushi Chambers.*

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## **J U D G M E N T**

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**Cases referred to:**

1. **Ash v. Ash (1972) 1 ALL ER 585.**
2. **Mahende v. Mahende (1976) Z.R 293.**
3. **Livingstone-Stallard v. Livingstone Stallard (1974) 2 ALL ER 766.**
4. **O'Neil v. O'Neil (1975) 3 ALL ER 292.**
5. **Jackson v. Jackson (1924) P. 19.**
6. **Weatherly v. Weatherly (1947) 1 ALL ER 563.**
7. **Arthur Yoyo v. Mable Mary Bbuku Yoyo (SCZ Judgment No. 78 of 1998) (Unreported).**

8. **Dr. Namuunda Hamalenge Mutombo v. Lilian Haabula Mutombo (2009/HP/D.181 (Unreported).**
9. **Brighton Soko v. Petronella Sakala Soko (SCZ Judgment No.8/189/2015) (Unreported).**

**Legislation and other work referred to:**

1. **The Matrimonial Causes Act No. 20 of 2007.**
2. **Bromley's Family Law Eighth Edition (London, Sweet and Maxwell).**
3. **Rayden and Jacksons Law and Practice in Divorce and Family Matters Sixteenth Edition (London, Butterworth & Co); 1991.**
4. **Lillian Mushota: Family Law in Zambia Cases and Materials, UNZA Press, 2005.**

**1. THE PETITION**

The petition filed by the Petitioner **AARON PHIRI** on 18<sup>th</sup> January, 2021 shows that he was lawfully married to **UNIKE MWANZA PHIRI** the Respondent herein at the office of the Registrar at Kitwe, in the Kitwe District of the Copperbelt Province of the Republic of Zambia on the 12<sup>th</sup> April, 2007. The Petitioner and the Respondent immediately after the marriage lived in different places and finally at Plot 114, Roma in Lusaka Province of the Republic of Zambia.

According to the petition, the Petitioner alleged that the marriage had broken down irretrievably because the Respondent had behaved in such a way that the Petitioner could not reasonably be expected to continue

living with him. The particulars of the unreasonable behaviour were itemized in the petition as shown in paragraphs (1) to (7). These are:

- (i) *The Respondent constantly denies the Petitioner conjugal rights and has since moved to the spare bedroom.*
- (ii) *The Respondent was heard in an audio recording telling her friend that she had refused to have sex with a certain man on her birthday because the said man did not give her money and she went on to tell her friend that she does not give out sex for free.*
- (iii) *The Respondent was heard on several audio recordings talking to her friends about her extra marital affairs with other men.*
- (iv) *The Respondent has been telling her friends that she would put some charms in Petitioner's food so that the Petitioner can be adhering to every instruction she gives the Petitioner in an audio recording.*
- (v) *The Petitioner no longer eats from the matrimonial home because of what the Respondent said in paragraph (iv) herein.*
- (vi) *The Respondent has been telling her friends that she does not love the Petitioner and that she is in the marriage only to gain*

*from the sharing of matrimonial property all this is in an audio recording.*

- (vii) *The Respondent has been saying she already made arrangements to relocate to the USA since she now acquired a degree and can survive along without the Petitioner.*

He prayed that the marriage between him and the Respondent be dissolved and that there be an order for custody of the children of the family and also an order for property settlement.

## **2. THE ANSWER AND CROSS PETITION**

The Respondent filed an answer and cross petition to the petition on 9<sup>th</sup> February, 2021 in which paragraphs 1, 2, 3, 5, 6, 7, 8, 9 and 10 of the petition were admitted.

The Respondent denied the allegation in paragraph 12(i) and averred that she always provided the Petitioner with his conjugal rights on demand. That she only left the matrimonial bedroom, to move to another bedroom in the house, on 16<sup>th</sup> January, 2021 when the Petitioner expressly stated that there was no marriage between them

and stressed that he had moved on and was dating a more independent woman.

The Respondent also admitted paragraph 12(ii) only to the extent that she refused to have sex with someone else other than her husband and this was because she respected her matrimonial home and not for the reason stated in the petition.

The contents in 12(iii) were also disputed as she averred that had been faithful to the Petitioner.

Regarding the contents of paragraph 12 (v), the Respondent denied the same and averred that it was the Petitioner's own assertion that he was on a thirty (30) days diet and that was the reason why he was not eating from home.

She also disputed paragraphs (vi) and (vii) and averred that she had always loved the Petitioner and had never had the intention of relocating.

The Respondent also averred that most of the negative utterances she may have made were due to frustrations caused by the Petitioner.

She averred that the marriage had broken down irretrievably but denied the reasons given by the Petitioner stating that it was not her but rather the Petitioner who had behaved in such a manner that she could not be reasonably be expected to live with the Petitioner.

In her cross petition, the Respondent itemized the particulars of unreasonable behaviour as follows:

- (i) *The Petitioner openly states that he is having a sexual relationship with someone else whom he refers to as an independent woman.*
- (ii) *The Petitioner usually leaves home early in the morning and comes back after midnight without letting the Respondent know where he's going beforehand. The Petitioner has on a few occasions left home on a Friday, without letting the Respondent know where he is going and back on Sunday during which time he would be completely unreachable.*
- (iii) *The Petitioner has been abusive towards the Respondent both physically and emotionally. On one occasion the Petitioner beat up the Respondent when she cautioned him about his behaviour towards the new female tenant and the fact that AIDS is real. In*

*relation to the emotional abuse, the Petitioner spends days without talking to the Respondent.*

- (iv) The Petitioner does not allow the Respondent to serve her friends food in the house. On one occasion where the Respondent served the friend a piece of cake, the Petitioner deducted K350.00 from the usual K1500.00 monthly maintenances that the Petitioner gives her. On another occasion where the Respondent served her friends drinks at home the Petitioner again deducted from the monthly maintenance.*
- (v) The Petitioner has further tapped the Respondent's phone without obtaining her authorization or obtaining any Court order and listens to every conversation.*

She prayed that the said marriage be dissolved and that the Respondent be granted full custody of the children and that there be property settlement.

### **3. THE REPLY TO ANSWER AND CROSS PETITION**

The Petitioner filed a reply to the answer and cross petition and averred that:

- (a) *That paragraph 1 and 4 of the Respondent's Answer are not disputed.*
- (b) *That regarding paragraph 3 of the Answer, the Petitioner will aver at trial that other than the on and off behaviour of the Respondent moving out of the matrimonial bedroom, the Respondent left the matrimonial bedroom willfully sometime in the first week of December, 2020.*
- (c) *That even before the Respondent finally left the matrimonial bedroom in December, 2020, she denied the Petitioner conjugal rights. What was more shocking was that on 31<sup>st</sup> January, 2021, the Petitioner whilst cleaning the matrimonial bedroom, found a used box of morning after pills namely Depregdina, when in fact the Petitioner and Respondent were not having sexual intercourse. The Petitioner kept the box which he intends to produce at trial.*
- (d) *Regarding paragraph 4 and 5 of the Answer, the Petitioner will aver at trial that there was very clear intent on the part of Respondent to commit adultery, in an audio recording which the Petitioner intends to produce at trial (infidelity Audio 1) the Respondent was heard telling a friend that "it is only this time when I will not give him some because no dollars have been received." The used box of*

*Depregdina found in her ward drop confirms that there has been infidelity on the part of the Respondent considering that there were no sexual relations in the marriage.*

*(e) Regarding paragraph 6 and 7 of the Answer, the Petitioner will aver at trial that the reason he stopped eating from the matrimonial home was for fear of being poisoned and/or charmed by the Respondent. In a recording, the Petitioner intends to produce at trial, the Respondent was heard in a conversation being advised by a friend in vernacular saying that “kumuyika mu botolo” meaning that the Respondent should use a charm to have total control over the Petitioner.*

*(f) In addition, in another audio recording which the Petitioner intends to produce at trial (Audio 2 “Hatred Speech-blackmailing”) there was clear intention on the part of the Respondent to wish the Petitioner bad luck of an accident during travel, to be fired from work and/or social media black mailing and this speaks volumes of hatred towards the Petitioner. (Audio 3: Feedback from Indaba”).*

*(g) Regarding paragraphs 8, 9 and 10, of the Answer, the Petitioner will aver at trial that the Respondent’s sole objective is to relocate to USA on a green card, in another audio recording she is heard*

*referring to her Aunt Bridget (Bri) to work extra hard on green card application (Audio 4 “green card plans unveiled”). In that same conversation the Respondent is even cautioning the person she is speaking to that when she calls, she should not talk about green card on telephone as this will come to light.*

*(h) Further in that conversation, the Respondent also refers to a gentleman who visited Zambia in December, 2020 as the one she did not give “some” on her birthday. This person works and lives in USA. Contrary to the Respondent’s contradictory statement she gave during the indaba that referred to him as being from UK and yet he is from USA. This is audible an audio recording intended for production at trial (Audio 14 “Motivator for Green”).*

In his answer to the cross petition he averred as follows:

*(a) The Petitioner totally denies the contents of paragraph (i) of the particulars and he will put the Respondent to strict proof thereof at trial.*

*(b) The Respondent totally denies the contents of paragraph (ii) of the particulars, he will produce at trial a log sheet showing that he is always at home before midnight, on the other hand the log sheet*

*relating to the Respondent shows that it is the Respondent who in fact comes home late despite being a housewife. With regards to the allegation that the Petitioner leaves home on a Friday and returns on Monday, it is not true as it is a total fabrication and the Respondent will be put to strict proof thereof at trial.*

*(c) The Petitioner denies the contents of paragraph (iii) of the particulars and he will aver at trial that he has never physically and/or emotionally abused the Respondent herein and she will be put to strict proof thereof at trial.*

*(d) The Petitioner denies the contents of paragraph (iv) of the particulars and will aver at trial that with regards to the cake, it was the children of the family that complained to the Petitioner that they did not have any of the cake because the Respondent had given it to a friend of hers. All the Respondent did was admonish the Respondent for depriving the children of the family cake.*

*(e) That the contents of paragraph (v) of the particulars are totally denied, the Respondent will aver at trial that after he was tipped by one of the three domestic workers about the Respondent's intentions of poisoning him and/or charming him he decided to install CCTV and Audio recorders in strategic places within the*

*matrimonial home so that he could prove the allegations against her which turned out to be true from the audio recordings.*

In responding to the Petitioner's answer to the cross petition the Respondent averred that:

- 1. Contrary to what is stated in paragraph 2 and 3, the Respondent was in the matrimonial bedroom up to 16<sup>th</sup> January, 2021 and was having sexual intercourse with the Respondent up to then. Whilst in the matrimonial bedroom, the Respondent used a Chinese pill as a mode of contraceptive and used morning after pills on two occasions funded by the Petitioner when the Chinese pill had run out.*
- 2. As relates to paragraph 4, the Respondent will still aver that she has never committed adultery in her marriage.*
- 3. The Respondent disputes ever hating the Petitioner but may have uttered negative sentiments due to frustrations caused by the Petitioner.*
- 4. The Respondent denies paragraph (b) and will aver that the period August, September and October, the Petitioner was coming home after midnight whilst the Respondent was usually home and would*

*only leave home to spend time with her family when she felt depressed about the situation she was going through at home or when she had a family commitment*

5. *The recordings referred to herein have not been seen by the Respondent and neither has the authenticity been proved.*
6. *Saved as herein stated, the Respondent denies every allegation stated by the Petitioner.*

#### **4. THE PETITIONER'S EVIDENCE**

At the hearing, the Petitioner **AARON PHIRI** aged forty-one (41) years old, a Banker at ABSA Bank Plc. -Head of Sales – Treasury and of Plot 114 Roma Avenue Roma Park, Lusaka testified as **PW1**.

He stated that he filed a petition for dissolution of marriage on 18<sup>th</sup> January, 2021. On 12<sup>th</sup> April, 2007, he married Unike Mwanza in Kitwe and they were issued with a married certificate which bore their names, the names of the parents and a date when it was issued. He filed it in Court as part of his evidence and it was admitted in evidence and marked **P1**.

He also stated that when they got married, they lived at Flat No. 2 Adriatic Court, Parklands in Kitwe and later shifted to Lusaka at Plot No. 114 Roma Avenue, Roma Park. They were both domiciled in Zambia.

He told the Court that he was a banker by profession and the Respondent was an Administrative Officer but later she became a full time house wife. They had children named Tikwiza Phiri who was born on 26<sup>th</sup> January, 2008 and Tapiwa Phiri who was born on 12<sup>th</sup> March, 2011. He added that he had no children born outside the marriage and could not speak for the Respondent if she had children or not.

He further stated that there were no proceedings in Zambia or outside Zambia and there were no arrangements that had been put in place for the support of the children.

He testified that he was in Court because their marriage had broken down irretrievably owing to unreasonable behaviour that had been seen from the Respondent.

The witness told the Court that they were married for fourteen (14) years and in that fourteen (14) years they did not live in a manner that was

expected in an ideal marriage. Out of the fourteen years, nine (9) years had been through misery.

He stated that the Petitioner had consistently denied him conjugal rights. In August, 2020 it was intensified such that with every small argument, the Respondent would leave the matrimonial bedroom for another room and would be in that room for even a week. When she returned to the matrimonial bedroom, she would sleep in her walk-in closet for days. That they used to have sex once or twice a month because most of the times she would be outside the matrimonial bedroom.

On the reasons for denying him conjugal rights, the Petitioner stated that also told the Court that in 2018, he had an opportunity to listen to a conversation with a friend. In the conversation, the Respondent was heard saying that after finishing her school, he would see her true colours. There was an audio that had been filed and in that audio she told her friend that she didn't want to disturb him otherwise he would stop paying her school fees. That she also stated that he would be picking up the kids from school on his own.

He also told the Court that when the Respondent finished school in July, 2020, he saw unprecedented arrogance towards him. This was because as a house wife, she would live the house at 08:00 hours and she would return at 20:00 hours to 21:00 hours and they lived in a gated community. When interrogated on her behaviour, she would leave the matrimonial bedroom and thereby deny him conjugal rights.

In relation to infidelity, he stated that there were instances where she would have conversations with her friend over a man who lived in the United States of America (USA). In the first week of December, 2020, that man was in town and the Respondent told her friend that he could not give her any dollars because she didn't give him sex. Furthermore, she stated that she couldn't give him free sex.

After listening to the audio, he told the Court that he did not take it well and this answered his questions why the Respondent left the matrimonial bedroom over small differences.

Regarding the issue of charms, he told the Court that he had three (3) servants and one of them tipped him off and told him that he needed to be careful about the food he ate because he feared that she could put charms in his food because the servant had been heard a lot of stories

about using charms. Thus, from August to date, he had not been eating from home unless he prepared the food himself. He stated that he related with the tip off because the levels of bitterness had reached unprecedented levels where he was being wished dead, being fired from work or being blackmailed like Chellah Tukuta was done on social media. He felt this was not a reasonable way of living in a home.

When asked how he obtained the audio's, he stated that in 2018, he started investigating the Respondent's behaviour which he deemed unreasonable. So he put up a few recording gadgets in the house which could pick audios on voices of twenty (20) meters radius because he felt that he was in danger and he needed to know what was going on at home. The gadgets were in the form of little data of a USB, that once recorded they would be preserved on iCloud or laptop MAC. He later transferred them to a CD which was light grey in color and written CD ROM for purposes of the Court hearing.

It contained various recordings entitled "*deliberations about the Indaba, infidelity, green card, blackmailing* and short but related conversations which supported the main conversation that he had mentioned. The CD was admitted in evidence and it was marked **P2**.

The witness also testified that on 24<sup>th</sup> December, 2021 an email entitled “groceries” was sent to him by the Respondent advising him about what needed to be bought. He stated that he filed a bundle of documents to demonstrate that they all bought things jointly. He denied the allegation that he put things in the bedroom and stated that it was actually the Respondent who used to put things like cooking oil and juice in her walk in closet for storage.

He further stated that every month, he gave the Respondent K1500.00 as up keep money and continued to do so up to date. The information was contained in a bank statement dated 31<sup>st</sup> October, 2019. Thus, he denied that he had deducted money from her allowance because she gave her friend a piece of cake.

The witness also testified that on 31<sup>st</sup> January, 2021, as he was cleaning the bedroom and her-walk-in closet, he found two used boxes of morning after pills which was a shocker to him as in their fourteen (14) years of marriage, they never used a morning after pill as contraceptive. What they used to use were Chinese contraceptives which she used to take once every month. He denied having bought the morning after pills. Regarding the log in and out statement, he stated

that they had electronic access cards for going in and out of Roma Park and it would show what time a person went out and returned and on what date. He denied the allegation of going home at midnight.

He explained to the Court that on 7<sup>th</sup> February, 2021 the Respondent went out at 16:22 hours and returned at 20:39 hours and on 22<sup>nd</sup> February, 2021, it showed that the Respondent went out at 14:47 hours and went back home at 18:59 hours. Further that other dates for time in were after 19:00 hours. That his log in and out report showed time in 18:59 hours in both documents.

The witness further testified regarding the several audios and gave a brief back ground. He stated that he kept the audios because of what happened in the marriage.

The first audio entitled "infidelity" and that there were fourteen (14) files. He identified the voice of the person who spoke first as the Respondent. That she and she said:

*"I will be coming over I just want to get the report for the child. These people have started showing off because I haven't given them. You have told me my friend. My cousin laughed at me. These things cannot come.*

*My friend it was my birthday, that person sent a happy belated and I replied and said thank you. I never asked that person, no my friend we cannot be using each other. No my friend we just communicate but I never ask anything about money. Just like that we do communicate. That person normally calls, yes we do communicate and my cousin normally laughed at me. She says you are playing with these people. I even remember you my friend it's my life. Yes, they were saying that person will call you when they want. My cousin laughed at me. Someone has just done it deliberately and then I said people were commenting on my Facebook page. Happy birthday, happy birthday but that person was just quiet. That person did it deliberately, and thought I will ask that person where is the dollar. I just left that person, I don't want to appear desperate, no and we laughed and my cousin laughed at me, ha ha ha.... I said let it be. I will come tomorrow. Now my friend I am broke, I just have a K50."*

The Petitioner stated that the conversation was between the Respondent and her friend. That in that audio, what was being said was that people could only give dollar after you gave something and because she didn't give them something, her cousin laughed at her.

In the second audio titled “Blackmailing” his wife said that:

*“I am only wishing that one day this person will be beaten. I want this person to be beaten and published on Facebook just like Chella Tukuta. It means even at that point, that person will lose his job. Okay from there one day, this person will be beaten and published on Facebook and when he reaches home and will find there is a divorce letter. Me I can’t be embarrassed on Facebook. Oh no if it was me, I would just say daddy just start off. You are not affected, now here you just want to find a fault. One day you will be surprised, this is life. Okay my friend talk time has finished.”*

The witness stated that the Respondent was referring to him. She wished that he could be beaten and blackmailed on social media just like Chella Tukuta. That by the time he returned home, he would find a divorce letter waiting- that could lead him to lose his job.

The third audio entitled “*Indaba feedback on food charms*”, on 26<sup>th</sup> December 2020 both parents met. In the audio, the person who spoke first was Petitioner’s father then uncle Ngulube and also Mr. Kwendakwema on her part and it was as follows:

*“Anything can happen to my son. My child is afraid of eating the food prepared by my daughter in law. What is this person going to give me? We should not hide anything. He has been changing his behaviour, he comes from work and finds other tables..... (not clear). She spends time in town looking for plots and then goes to the lawyers my daughter in law. I know law too much. There is no lawyer who can come and disturb me. That’s why I am saying, these lawyers we shall take on each other nicely. They have nothing to do with your marriage. It is none of their business. I don’t want to leave anything unturned.”*

In his argument in relation to the 3<sup>rd</sup> audio, he stated that his father was counselling them. That he said his son spent most of the time at work while his daughter in law spent time looking for plots which he had as well as going to see lawyers who could engage him to determine how much he should be giving her for her upkeep. That he also stated that he had listened to the recordings and what she talked about henceforth he was scared to eat from home the food she prepared.

The fourth audio entitled ‘*Green card plan unveiled*’. In this audio his wife said that:

*"I was poisoned that's how it normally happens. God is there Bri. When you call me on my phone, don't ever touch it. You only greet me. I was with my cousin in Kabwata. I told people that 'I plead with you' please don't call me on this line. Its better they know, yes its true. Even today I called yes. I was calling I was afraid of calling because I knew aunt Bri was going to answer directly. There is a bit of sense from something from America. Maybe next year we can go. What about the green card, yes green card, I don't know. All the children have grown. They are all in boarding schools. Yes, the children have grown, Tikwiza has grown up too much. There is no pressure Aunt Bri. At my aunt's place, she has a maid just keep your eyes open."*

In relation to the fourth audio he stated that the conversation was between the Respondent and Aunt Bri who was arranging a green card for her so that she could migrate from Zambia to USA. Aunt Bri called when he was there so she didn't pick up the call because she knew Aunt Bri would go straight to the point of the green card plan. She was told to put more effort on the application for the green card so that it could be out by January. That because now his children had grown, they could either be put in boarding school or left with the aunt and the maid.

At this point, the Court was informed by counsel that these were the audio's that the Court would have to listen to regarding the petition as the others related to property settlement and custody.

In relation to the police report the witness denied the allegation stating that it was his first time to see the medical report and wondered if it was for physical abuse because he had never abused his wife in the fifteen years. Further, if that was the case, she would not have made the report at Manda Hill Police Station but Roma or Ngombe which had Gender Based Violence (GBV) desks. He also added that he was never served with a police call out and appeared before the Magistrate.

Regarding any attempts to reconcile them, the witness further stated that on 26<sup>th</sup> December, 2020 they had a meeting with both families where they were counseled. It was resolved that they would remain as husband and wife. However, that did not help because there was no change in the Respondent's behaviour. The witness also told the Court that he contacted his church Miracle Life in Roma where he was counselled as an individual because the Respondent was not a member.

However, they had failed to resolve their issues in the marriage and asked the Court that the marriage be dissolved then proceed for child mediation custody and also property settlement.

He concluded by stating that her behaviour had affected him especially from 2020 when their problems started and he resorted not to eat her food. Thus, he could not reasonably live together with her as a married couple and her behaviour had absolved all the love he had for her. He also didn't not think that there was any possibility of reconciliation.

In **cross examination**, the witness told the Court that unreasonable behaviour meant behaviour which was outside the norm of a normal human being. When referred to the first audio and how that was unreasonable behaviour towards him, he stated that the Respondent didn't give him anything that time and hence she wasn't given any dollars. He admitted that there was no reference to the gender thus it could be any man. However, he denied that it could have been him because he never gave his wife dollars.

When he was asked if there was evidence of using charms, his response was that it was an intention and the evidence of the intention was the

tip off which was not in the recordings but that he was warned to be careful as it was discussed when he left home.

On the conversation that the Respondent had with Aunt Bri he admitted that there was evidence concerning the green card in the audios where there was a discussion between her and Aunt Bri where she encouraged Aunt Bri to put in more effort in applying for green card so that by January, she could move.

On the issue regarding blackmailing, he answered that the Respondent stated that she wished he could be blackmailed like Chella Tukuta.

When asked about the Respondent's heart condition, he stated that she was healed in 2020. He admitted that they used to use Chinese pills as contraceptive and not the morning after pill but denied using an emergency contraceptive even when the Chinese pill ran out.

Regarding the log in and out print outs, he admitted that there were print outs which showed that he returned after 20:00 hours but nothing for the Respondent on the pages that had been referred to.

In relation to his total monthly income, he stated that it was K33,000.00. However, he had other income from their properties which were located in Roma and Chalala. The one in Chalala was a one block and they had one tenant and rentals were K4,000.00. The one in Roma accommodated three tenants and each paid K10,000.00. He agreed that he gave the Respondent K1,500.00 as up keep every month although the properties were jointly owned.

He also told the Court that when he met the Respondent, she was in employment and she used to work for Zambia Wildlife Authority (ZAWA). He could not however, remember the exact date she stopped work but it was around 2008. He denied that the Respondent stopped work to committee herself to the running of the family business and to concentrate on the marriage. He stated that he had workers and he ran the boutique himself. He confirmed that from the time the Respondent stopped work, she didn't have an income apart from what he provided.

The Petitioner also agreed that he knew that Legal Aid was a facility put in place for those who could not afford a private lawyer. He drew the Court's attention to the document at page 5 of the Petitioner's Bundle

of Documents where the Respondent opted to go to the Legal Clinic, so he disputed that she opted to have a private lawyer.

He also denied allegations that he was arrested in 2020 by Central Police officers but admitted that he was arraigned to appear before Court on charges of Domestic Violence but that the case was thrown out because it was pre-arranged.

In relation to the audio entitled "*Her lies on Abuse indaba*" the Petitioner admitted that the conversation centered around him having beaten his wife and that there were two allegations of abuse were laid on him.

He further told the Court that he started recording the Respondent's telephone calls in 2018 and that he didn't get anyone's consent for recording her. He also told the Court that when he heard the recordings, he confronted the Respondent. He admitted that he had the recordings edited but it was not meant to paint the Respondent black. He added that the voice in the audio about the indaba was for the Respondent.

He confirmed to the Court that the time he met the Respondent, he was not getting the same money as he used to get and agreed that she was

attractive. He disputed that he had met more attractive women than the Respondent. He further admitted that he no longer felt love for the Respondent but not because he had met more beautiful women.

The witness also stated that he was not aware that the whole episode of turmoil had an effect on the Respondent's ability to sleep but admitted that he was aware that the Respondent underwent treatment for anxiety and insomnia because of the trauma in their marriage. The treatment cost K1,400.00 and the treatment for the heart condition cost K600,000.00.

In **re-examination** the witness stated that he didn't know the name of the agent because it was not him who engaged the agent but the prospecting client. The property was fully furnished apartments which were two bedroomed. The said property could on maximum take up to three clients and minimum one.

The witness further told the Court that the Respondent told him that she stopped work because she was tired and she needed to stay home.

Regarding the issue of going home late, he explained that the purpose of the prints outs was to show the Court that he never slept out or went

home after midnight but he could go home after 20:00 hours because sometimes he worked late. He denied the fact that he wanted to block his wife by going to Legal Aid. That he sought Legal Aid because of indebtedness.

He also stated that the Court threw out the criminal case because the Respondent withdrew the case. When asked further by his counsel, he stated that it was discovered that he was implicated and it was a fabricated story.

He further explained that in one of the audios, the Respondent was asked if in the thirteen years he had beaten her up and she stated that he had only done it once. He denied that he had accepted that he had beaten her as he did not say anything in that meeting but it was his uncle who spoke.

He further told the Court that he didn't need to get consent to do the recordings because the latest technology was recorded from CCTV. That he didn't tap her and that only ZICTA had that mandate.

That closed the Petitioner's case.

## **5. THE RESPONDENT'S EVIDENCE**

The Respondent **UNIKE MWANZA PHIRI** aged forty-two (42) years old, a housewife of House No. 114 Roma Park, Lusaka gave evidence and did not call any witnesses.

She told the Court that they met at work in Chilanga at ZAWA in 2004. The Petitioner was the one who found her a job when he joined as a Management Trainee. They dated for about three years and in 2007 they decided get married.

Before they got married, the Petitioner left ZAWA and was employed by Standard Chartered Bank and was transferred to Kitwe when they were still dating. In 2007 they agreed that she should resign and join him in Kitwe. In Kitwe she got a job with EC Moving as Assistant Logistics Officer. They were in Kitwe for two (2) years and that was where she had her first child. In 2009, the Petitioner was transferred back to Lusaka. While in Lusaka, she found a job at Armaguard Security as an Administrative Officer where she worked for almost two years. By that time, she was expecting her second child. In the same year, the Petitioner opened up a boutique for her and they agreed that she should resign and concentrate on the family business.

In 2011 when she delivered her second child, she developed heart problems and three months later and she was advised to take bed rest because her body was swollen.

She stated that after that, everything was okay until 2016 when she noticed that the Petitioner's behaviour changed as he started drinking would go home at midnight. Whenever she called him, he would tell her that he knew his way home and he would not pick her calls.

She told the Court that she enrolled for a degree program but later stopped school for one year because she had partial stroke because she kept the problems to herself. She never shared with her friends for fear of being laughed at. When she stopped school, the Petitioner's behaviour was worse because whenever they argued, he would tell her that her time could come and she did not know what that meant. Most of the time the Petitioner called her a sadist and that he would also tell her that he was an orphan and that he would make sure that she and her brother became destitute.

Later she went through emotional, physical and even verbal abuse. That on emotional abuse, the Petitioner would go for a month without talking

to her. She was still experiencing that and it was about one (1) year six (6) months.

Regarding the physical abuse, she stated that somewhere in 2018, she noticed that the Petitioner was after their female tenant. So when she asked him about his behaviour towards the same lady, he beat her up and then she reported to Manda Hill Police Station. At the Police she was given a Medical Report but did not open a docket because she feared that the Petitioner was going to lose his job but gave him a copy.

She stated that in August, 2020 the Petitioner left home on Friday and returned on Sunday around 18:00 hours and he didn't tell her where he went. She tried to call him but all his phones were off. When he finally returned, she asked him where he went, he responded that he was in love with an independent woman and that the lady had always been there for him and that she had her own flat and that he had moved on with his life. After she was told that, she investigated and she found the lady.

In relation to the log sheets, she stated there were few occasions where the Petitioner would go home late.

She also told the Court that in 2018, on New Year's Day, the Petitioner bought a cake and her friend went over to visit and she served her a piece of cake. Later, when the Petitioner returned home, he went to the fridge and he asked who had eaten the cake. She told her that it was her friend. He responded that he didn't buy food for other people and when it was month end, he deducted K350.00.

After all the differences, she called for a family meeting. In relation to the recordings that he submitted to Court, she stated that two of them were played in the family meeting and her friend's voices were heard. That apart from that, when she took the phone to a phone specialist, it was proved that her phone was cloned.

When asked about the morning after pill, she stated that she used to take a Chinese pill as contraceptive once a month. At some point she ran out of it and the Petitioner gave her money to buy an emergency pill.

On the issue of rentals, she stated that to her knowledge they charged K18,500.00 so she was really surprised that the Petitioner told the Court that it was K10,000.00. She further told the Court that all the three flats were occupied contrary to what the Petitioner told the Court.

She also testified that she wanted the Court to dissolve the marriage and that if the Petitioner could also bear her legal costs because she was not working. Further, that the Petitioner's unreasonable behaviour had affected her emotionally and physically in the sense that she developed insomnia and that mental health was very important.

In **cross examination**, the Respondent told the Court that the letter which was submitted to Legal Aid Clinic didn't have her signature. She stated that she withdrew free legal representation because she was not comfortable. When the Petitioner served her with divorce papers, she went to the Legal Aid Clinic and paid a K50 and a file was opened. A week after that, someone tipped her off that the Petitioner sent someone to check what was on her file and that was when family members told her to withdraw. She denied that there was no call for reconciliation at the Clinic and also denied accusing the clinic for professional misconduct.

The witness further told the Court that in relation to the rentals and occupation of the flats, she did not have evidence. The Respondent also stated that she last had intercourse with the Petitioner in the second week of January, 2021 and that was when she left the matrimonial

bedroom. She also testified that at some point, she ran out of the Chinese pill and the Respondent gave her money to buy an emergency contraceptive because they were having sex until January 2021 when she moved out of the matrimonial bedroom. She admitted that she told the Court that the Petitioner only gave her K1,500.00 to buy other things but that he gave her money to buy the emergency contraceptive.

The witness also stated that she admitted that the Traditional Chinese medicine was not covered by insurance though she was told to be getting the receipts for insurance.

She confirmed that the voice in the audio which was heard in Court was hers and not her friends and she also agreed that she was the one who said all that was heard in the audio. That she didn't know what they were talking about because it was only her voice that was heard. She added that an expert confirmed that her phone was tapped but the recordings were not from her phone. However, she did not have evidence for the mobile service provider and the phone expert.

The Respondent also stated that the incident of the cake happened in 2018 and that she had a receipt though she didn't buy the cake. That

the Petitioner admitted having deducted K350.00 from her allowance though the bank statement did not show the deduction.

She also stated that she did not know that Manda Hill Police where she got the medical report was a traffic police station but agreed that there were two police stations in Roma. However, she opted for Manda Hill because that's where she felt comfortable. She confirmed that the evidence for beating her once was in the recordings.

The witness also admitted that the Petitioner went home late occasionally but that she did not submit the Petitioner's log sheets because she did not have access to his. She agreed that the log sheets did not show the Petitioner returning home after midnight.

The witness denied that the Petitioner educated her from grade nine (9) up to the time she obtained a diploma. She admitted that the Petitioner paid for her university and she was surprised when he told her that she would suffer. On the stroke that she suffered, she stated that she didn't have any evidence for it. She also stated that the Petitioner was not taking alcohol when they got married but that he started drinking later in the marriage.

In re-examination the witness confirmed that the log sheets were for both her and the Respondent and that the August and September ones were not exhibited.

That was the close of the Respondent's case

## **6. THE LAW**

This is a petition for the dissolution of marriage. The sole ground upon which a marriage may be dissolved is that the marriage has broken down irretrievably. This is in accordance with Section 8 of the Matrimonial Causes Act No. 20 of 2007 which sets out the sole ground for divorce as being irretrievable breakdown of the marriage. The said section reads as follows:

**'A petition for divorce may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably.'**

The Petitioner has presented this petition on the basis that his marriage to the Respondent has broken down irretrievably. On the issue of proof of the breakdown of the marriage, the Petitioner has cited Section 9(1)

(b) of the Matrimonial Causes Act in his petition. This section provides as follows:

**‘For the purpose of section *eight* the Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts:**

**(a)...**

**(b) That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.**

The test applicable in determining whether a party would find it unreasonable to live with the other party was spelled out by Bagnall J in the case of **Ash v. Ash** <sup>(1)</sup> that:

**‘I have to consider not only the behaviour of the respondent...but the character, personality, disposition and behaviour of the petitioner. The general question may be expanded thus: can this petitioner with his or her character and personality, with his or her faults and other attributes, good or bad and having regard to his or her behaviour during marriage, reasonably be expected to live with the respondent?’**

This was the approach adopted by the Supreme Court in the case of **Mahende v. Mahende** (2) when it held that:

**‘The phrase "cannot reasonably be expected to live with the respondent" necessarily poses an objective test and "the petitioner" means the particular petitioner in the case under consideration, bearing in mind the petitioner's faults and other attributes, good and bad, and having regard to her behaviour during the marriage.’**

Further, it was observed in the above case that the Court must consider:

**‘The effect of the behaviour on the particular petitioner and ask the question: is it established, not that she is tired of the respondent or, colloquially, fed up with him, but, that she cannot reasonably be expected to live with him?’**

Based on the foregoing case law, I will ask myself the question asked by Dunn J in the case of **Livingstone-Stallard v. Livingstone Stallard** (3) and adopted by the Court of Appeal in the case of **O’Neil v. O’Neil** (4) and which is echoed in the above cited cases that:

**‘Would any right-thinking person come to the conclusion that this wife has behaved in such a way that this husband cannot reasonably be expected to live with her,**

**taking into account the whole of the circumstances and the characters and personalities of the parties?’**

It is on the basis of the authorities cited above that I approach the evidence in this case.

**7. FINDINGS ON THE PETITION**

The Petitioner in his petition has raised five particulars of unreasonable behaviour. He has alleged that the Respondent denies him conjugal rights; she had refused to have sex with another man because he didn't give her money and that she has extra-marital affairs; she has plans to poison him; she no longer loves him and that she plans on relocating to the United States of America.

The Respondent in her Answer denied the allegations against her. She averred that she never used to deny the Petitioner conjugal rights. The only times when they were not intimate was when she moved out of the matrimonial bedroom in January, 2021 when the Petitioner expressly stated that there was no marriage between them and that he had moved on.

She also admitted that she had refused to have sex with another man but denied that the reason was because she was not given any money. She averred that she respected her matrimonial home. She also denied that she was having an extra marital affair as she had always been faithful to the Petitioner. She also denied that she had intentions of poisoning the Petitioner and that she no longer loved him.

In terms of proof that the Respondent used to deny him conjugal rights, the Petitioner stated in Court that the Respondent consistently denied him conjugal rights as she would leave the matrimonial bedroom every time that they would have an argument. This started in August, 2020. When she returned to the matrimonial bedroom, she would sleep in the walk-in closet.

In her evidence, the Respondent alluded to this allegation but only stated that they used to have sex until January, 2021 when she moved out of the matrimonial bedroom.

It is clear that the Respondent has admitted that she used to leave the matrimonial bedroom although she stated that it was not in August, 2020 but in January, 2021. On the year that she moved out, I am inclined to accept the evidence of the Petitioner because the audio

recording entitled '*Her lies on Abuse-Indaba*' was recorded on 26<sup>th</sup> December, 2020 and the Respondent stated that she would leave him for two days. This therefore means that as at that date, she used to leave the matrimonial bedroom and deny him conjugal rights.

In this regard, I find that Respondent used to deny the Petitioner conjugal rights as she used to leave the matrimonial bedroom prior to January, 2021.

On the reasons, she gave an explanation in her Answer that she left when the Petitioner expressly stated that there was no marriage between them and stressed that he had moved on and was dating another woman. However, in her evidence she never proffered any explanation.

What then is the effect of this?

The learned authors of Rayden on Divorce at page 221 paragraph 30 stated that it may in any given case be unreasonable for a respondent to refuse intercourse. Thus Sir Henry Duke P. stated in the case of **Jackson v. Jackson** <sup>(5)</sup> and cited by Lord Jowit L.C in the case of **Weatherly v. Weatherly** <sup>(6)</sup>, that:

**“Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage.”**

Given the fact that the Respondent did not offer any explanation in Court why she moved out of the matrimonial bedroom, I hold the view that it was wrong for her to have left the matrimonial bedroom and deny the Petitioner conjugal rights as that was an intentional breach of one of the ties of marriage.

In this regard, I find that the Petitioner has proved this allegation that the Respondent used to deny him conjugal rights.

The other allegation is that the Respondent was heard in the audio recording that she had refused to have sex with a certain man on her birthday because the man did not give her money. Furthermore, that she was heard in several audio recordings talking to her friends about her extra marital affairs.

To prove this, the Petitioner referred the Court to the recording of the conversation that the Respondent had with her friend telling her about her refusal to have sex with a certain man.

The Respondent in her Answer admitted the allegation only to the extent that she refused to have sex with someone else other than her husband but not for the reasons that the Petitioner averred in his petition. In her Answer, she further denied that she had extra-marital affairs and averred that she had been faithful to the Petitioner. It was also averred that an expert had stated that her phone had been tapped without her consent or Court Order.

I will at this stage address the evidence of these recordings.

What I have discerned from the recorded evidence **P2** is that only one voice could be heard and not the whole conversation with the other party. In addition, there is no expert evidence that was adduced that the phone was tapped although the Respondent stated that she was informed that her phone was tapped.

In the absence of any expert evidence and due to the fact that only the Respondent's voice could be heard I find as follows:

- (i) The Respondent's phone was not tapped but that the recordings were made using an electronic device placed in the house.

(j) It was the Respondent's voice that was heard in the four recordings that were played as she not deny the identity of her voice.

Having made these finding, it is important to understand the gist of the conversation in the recording entitled '*Infidelity*' as it is clear that both parties have given their own version of what the import of that conversation was.

The recording which was interpreted from the local language to English appears at page 19 of the judgment, albeit not verbatim. Whereas no names were mentioned, there was no express mention of sex and money and no gender was revealed, based on the Respondent's Answer, she admitted that the conversation was about a man she refused to have sex with. However, she denied the reasons given by the Petitioner that she refused to have sex because the man didn't give her money. She stated that she refused to do so because she respected her matrimonial home.

Given these two conflicting positions, I found it prudent to listen to the recording again. As I have already alluded, only the Respondent's voice

was captured and not her friend. My understanding is therefore based on what the Respondent was saying.

From the recording, the Respondent told her friend that a certain man had started showing off because she had not slept with him and that her friend had told her about that. She even remembered what her friend had told her. Thereafter she told her friend that the man can be. The Respondent further stated that her cousin laughed at her and told her that this is what she meant when she told her that the man could not give money if she did not sleep with him.

The Respondent further went on to state that the man learnt of her birthday after two days and he wished her a happy belated birthday. She acknowledged by saying thank you. However, she did not ask him about it. The man informed her that he would send something thinking that she was going to sleep with him. She told her friend that she refused because she didn't want them to be using each other and that the man can be. Therefore, she stopped asking about money.

The Respondent also indicated that she was in communication with the same man but her cousin informed her that she should not play with such people as they would not give money unless she had sex with

them. She even remembered her friend she was talking to. The Respondent stated it was okay, it was her life. The man would send the money when he wanted and she should not talk about it. It was better to just leave him.

That her cousin told her that since on her birthday he didn't do anything, even her on his birthday she shouldn't don't do anything. So she posted on Facebook and other people started saying happy birthday. He was quiet. She thought he had done it deliberately because he thought she was going to ask him about the dollars. She left him because she didn't want him to think that she was desperate. Her cousin laughed at her and she said he can be.

What I have inferred from the foregoing is that the Respondent was telling her friend about a certain man who was not her husband who she used to communicate with. However, she did not have sex with him and because of that, he did not give her any money and she stopped asking about the money because she didn't want to appear to be desperate.

Can it be said that she refused to have sex with him because she did not give sex for free as contended by the Petitioner?

Firstly, there is nowhere in the conversation where the Respondent stated that she did not give free sex. Secondly, the Respondent stated that the man told her that he would bring her something.

In my view, since the man stated that he would give her something, the issue of giving free sex does not arise. However, what the Respondent wanted was money but the man could not give her money if she didn't sleep with him. Since she refused to sleep with him and he didn't give her money, she let that man be because she didn't want to be desperate.

It is for these reasons that I do not accept the Petitioner's contention that the Respondent did not have sex with the man on her birthday because the man did not give her money and that she does not give sex for free.

Given the above, I find that the Petitioner has failed to prove the allegation that the Respondent was telling her friend that she had refused to have sex with a man on her birthday because the man didn't give her money and that she did not give sex for free.

The other allegation related to the foregoing is that the Respondent was heard in several audio recordings talking to her friends about her extra marital affairs with other men.

To begin with, out of fourteen (14) recordings on **P2**, only four were played in Court. The one in which the Respondent made reference to a man was the one entitled '*Infidelity*'. As I have stated, the Respondent admitted that she was communicating with a certain man. Can it be inferred therefore that she was having an affair with that man she was communicating with?

I should pause here and state that in my view, it is not inappropriate for a married woman to talk to another man who is not her husband if they are having a normal conversation.

In the present case, it is not clear what the nature of the conversations she used to have with this man were all about as there is no reference to that in the audio recordings. The recording only revealed that she was expecting to be given money by a man who was not her husband. I find that to be inappropriate given the fact that the Respondent is a married woman and the man expected to sleep with her.

That notwithstanding, the view that I hold is that if she was having an affair with the man, she would have mentioned other things like going out with him on appointments like dinner or lunch dates. That was not the case. Based on her responses in the audio recording, the Respondent appeared to be phlegmatic or unconcerned or detached about the communication she was having with the man because she stated that they used to communicate just like that and she let him be when he did not give her money.

These responses exonerated rather than incriminated her as they were not consistent with a person whose intention was to have a relationship with someone. As I mentioned, the Respondent's focus was money but not money tied to sex. That is why she let the man be.

Then again, the Petitioner also produced before Court a picture of a box of morning after pills to show that the Petitioner was having an extra marital affair. He contends that the type that he found was not what they used to use as a couple.

The Respondent on her part denied this allegation and stated that she bought the emergency morning after pills because she ran out of the

Chinese pill and the Petitioner gave her money to buy emergency contraceptive because they were having sex until January, 2021.

The evidence regarding this allegation is also conflicting. While that is the case, the view I hold is that it would be perverse to reach a conclusion that the Respondent was having an extra marital affair because emergency morning after pills were found in her closet. I say this because the parties are husband and wife and it would not be absurd if a different contraceptive is found which is in the form of pills. Furthermore, it is not known when the said emergency pills were used.

So even if I made a finding that the Respondent used to deny the Petitioner conjugal rights from August, 2020, that would not make me conclude that finding morning after pills is proof of infidelity especially that it is not known when the pills were used. I decline to make such a conclusion or inference.

For these reasons, I find that the Petitioner has failed to prove this allegation that the Respondent in the recordings used to talk to her friends about the extra marital affairs with other men. This allegation fails.

The Petitioner also alleged that he feared to eat from home because the Respondent had intentions to poison him. That this information was given to him by one of the domestic workers. The Respondent denied this allegation.

I have noted from the recording entitled '*Indaba Feedback on Food Charms*' that reference was made to this issue when the Petitioner's father stated that the Petitioner was scared to eat the food that was prepared by the Respondent.

Be that as it may be, there is no proof that the Respondent had such intentions. I should mention here that such an allegation is a very serious one because if the plan was actually executed, it would have led to loss of life or grievous harm to the Petitioner. That is why I find it perplexing that the domestic worker who informed the Petitioner chose not to appear as a witness.

It is trite law that he who alleges must prove. Therefore, if there was this plan or intention, the Petitioner should have adduced cogent evidence to prove this allegation which at this stage remains speculative. It is important to stress that it is the duty of the Court under Section 9 (2) to inquire, so far as it reasonably can, into the facts

alleged by the petitioner and into any facts alleged by the respondent. What this means is that the details or the evidence of the Respondent's alleged plans to poison would have given me a basis to make such an inquiry. However, there was no such evidence.

Related to this allegation is what the Petitioner averred in his Reply to the Answer that the Respondent had intention to wish him bad luck of an accident during travel, to be fired from work and or social media blackmail.

In his evidence, the Petitioner referred the Court to the recording entitled '*Media Blackmailing Wishes*' where he stated that the Respondent was referring him.

Again, on this recording, only the Respondent's voice was heard and the conversation in my view started midstream. Thus, the context in which the words were being used is unclear. It is therefore difficult for this Court to draw a conclusion that the Respondent was referring to the Petitioner as no names were mentioned. I find that this audio recording does not assist the Petitioner to prove that the Respondent had intentions of causing him harm.

As a result, in the absence of any cogent evidence, I find that the Petitioner has failed to prove this allegation. It fails.

The fourth allegation was that the Respondent had intentions of relocating to America since she had now acquired a degree and could survive alone without the Petitioner.

To prove this the Petitioner referred to another conversation which the Respondent had purportedly with Aunt Bri. In that recording, the Petitioner contends that Aunt Bri was arranging for a green card for the Respondent to migrate to America and she was asking her Aunt to put more effort in ensuring that the application was made.

I have listened to the said recording which I should mention is not very clear and the voice of Aunt Bri is not audible. However, the Respondent told Aunt Bri that she wanted to go to America the following year. Reference was also made to a green card but it is not clear in what context because it is not the Respondent who mentioned it first but Aunt Bri. The Respondent also stated that the children had grown and were in boarding schools. Therefore, there was no pressure since they had a maid.

It is very clear from the recording and I find as a fact that the Respondent had intentions to go to America and didn't want the Petitioner to know about the plans. Be that as it may, it is not clear to me that there was an intention to relocate just because there was mention of a green card. I say this because:

- (i) It was not the Respondent who mentioned the green card first but Aunt Bri and the Respondent merely repeated the words. Thereafter she stated that arrangements should be made so that they leave in January, the following year. By the use of the word 'we' which is plural, it appears that the Respondent was not going to go alone but with another person who might be Aunt Bri. There is a possibility that the green card could have been for the same person.
- (ii) I find it odd that she would have wanted to relocate and leave the minor children behind with the Petitioner and the maid.
- (iii) There is no mention of the degree that the Respondent had acquired and also that she would survive on her own without the Petitioner which would motivate her to leave and relocate to America. I am made to wonder where the Petitioner got such information from.

- (iv) The intention of relocation is not clear based on this recording since the whole conversation between the Respondent and Aunt Bri was not recorded. It is difficult to draw such an adverse conclusion for these reasons as the context in which the two had the conversation is not clear.

In view of the above, I find that the Petitioner has failed to prove this allegation and it is dismissed as it is inconclusive.

The Petitioner also alleged that the Respondent no longer loved him and that she would tell her friends that she was in the marriage only to gain from sharing the matrimonial property and that this was in one of the recordings.

In his evidence, he did not lead any evidence on this allegation or even refer the Court to the audio recording where the Respondent mentioned that to her friends.

It follows therefore that the Petitioner has failed to prove this allegation and it is dismissed.

Given the foregoing, I find that the Petitioner has only proved one allegation which is that the Respondent used to deny him conjugal rights.

Having made the above findings of the Respondent's behaviour, I must consider the effect of this behaviour on the Petitioner because as was stated by the learned authors of the Principles of Family Law Fifth (5<sup>th</sup>) Edition at page 107, it is not the behaviour that needs to be unreasonable but the expectation of cohabitation.

The Learned Authors of Bromley's Family Law 8<sup>th</sup> Edition at page 192 stated that:

**'The court must assess the impact of the respondent's conduct on the particular petitioner in the light of the whole history of the marriage and their relationship.'**

Therefore, in assessing the effect or impact of the Respondent's behaviour, I will in effect, determine in line with the ***Livingstone-Stallard case*** if my findings regarding the Respondent's behaviour are sufficiently grave to fulfil the test namely: whether any right thinking person can come to the conclusion that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live

with her taking into account the whole of the circumstances, characters and personalities of the parties.

The Petitioner in his evidence told the Court that because of the Respondent's behaviour, he had lost all the love he had for the Respondent and that he could not reasonably be expected to live with her.

In my view, the effect that the Respondent's behaviour has had on the Petitioner shows that the marriage has stopped to be the loving union it is supposed to be. In the case of **Arthur Yoyo v. Mable Mary Bbuku Yoyo** (7), the Supreme Court stated that in order to refuse to grant a decree of dissolution of marriage, there must be evidence of mutual love between the parties.

In the present case, there is no evidence that there is mutual love between the parties based on the way the Respondent has behaved by denying the Petitioner conjugal rights.

The learned authors of Rayden on Divorce at page 221 paragraph 30 stated that it may in any given case be unreasonable for a respondent to refuse intercourse. In my view, this is one case in which it was

unreasonable for the Respondent to deny the Petitioner conjugal rights because it is one of the ties of marriage. I say this because while being denied conjugal rights on a few occasions may seem not to be so grave, being denied conjugal rights for a long period of time which culminates into years of lack of intimacy between husband and wife cannot be classified as a trivial issue. It is a serious matter as there was no plausible reason given by the Respondent.

In view of the foregoing, I am satisfied and I find that the evidence adduced by the Petitioner about the Respondent's behaviour is sufficiently grave to fulfil the test that any right-thinking person can come to the conclusion that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her.

### **8. THE FINDINGS ON THE CROSS PETITION**

The Respondent in her cross petition has also made allegations against the Petitioner. She averred that the Petitioner was having an extra-marital affair with another woman, he goes home late without informing her, he is both physically and emotionally abusive, he does not allow her to serve her friends food and that he tapped her phone without her consent or order of the Court.

The Petitioner denied all these allegations.

In her evidence to support her allegation that the Petitioner was unfaithful, she told the Court that sometime in August 2020, he left home on Friday and returned on a Sunday around 18:00 hours and he didn't tell her where she had gone. His phones were off. When he returned, he told her that he was in love with an independent woman who had always been there for her.

In his Answer to the cross petition, the Petitioner denied the allegation that he was having an extra-marital affair with another woman and put the Respondent to strict proof.

In his evidence, he did not refer to this allegation and the Respondent was not challenged in cross examination that the Petitioner had told her that he was in love with another woman.

The allegation of infidelity is another serious one. In my view, if the Petitioner had not told the Respondent about it, this would have been addressed in depth during trial. Furthermore, the Petitioner did not dispute the allegation that most of the time he does not answer her phones.

For this reason, I am inclined to accept the evidence of the Respondent which was not challenged and I find that the Respondent has proved this allegation that the Petitioner was having an extra-marital affair with another woman. This explains why he would sometimes ignore the Respondent's phone calls.

On the allegation that the Petitioner disappears from home and goes home late without informing her, the Respondent in her evidence stated that in August, 2020, the Petitioner left home on Friday and returned on Sunday around 18:00 hours. It was also her evidence that there were a few occasions when the Petitioner would go home after midnight. She also produced a log in and out Roma Park Administration form showing the times when he would log in and out of the system.

The Petitioner in his evidence denied that he used to go home after midnight.

I have carefully examined this evidence which is in both the Petitioner and Respondent's bundle of documents. The Respondent did not speak to any of the documents to explain what is contained therein. However, I have not come across any entry which registered after midnight although there are some entries which show times for 20:54 hours on

23<sup>rd</sup> December, 2020 at page 6 of the Respondent's bundle of documents. There is an entry time of 22:20 hours on 29<sup>th</sup> December, 2020 on the same page.

Granted, there were such entries. However, the record does not seem to show that the times recorded were a pattern wherein it could be deduced that the Petitioner used to go home late. I find it particularly difficult to draw such a conclusion especially that the Petitioner works unlike the Respondent who is a house wife.

Based on this evidence, I find that the Respondent has failed to prove that the Respondent goes home late.

The Respondent also alleged in her cross petition that the Petitioner was physically and emotionally abusive. That on one occasion he beat her up when she cautioned him about his behaviour.

The Petitioner in his answer denied this allegation.

In her evidence, the Respondent stated that she asked the Petitioner about his behaviour towards a female tenant but he beat her up sometime in 2018. She reported this matter at Manda Hill Police Station

where she was given a medical report. A docket was not opened as she feared that he would lose his job.

She also stated that the Petitioner used to tell her that she was an orphan and he would make sure that she and her brother became destitute. Sometimes he would not talk to her for a month and that he had not been talking to her for about a year and half.

The Petitioner in his evidence denied the allegation of physical abuse and that in the fifteen years that they had been together, nothing like that happened. On the medical report produced in the Respondent's bundle of documents, he doubted whether the same was for physical abuse and why the report was made at Manda Hill Police Post and not in Roma or Ngombe.

I have carefully analyzed the evidence regarding this allegation. As I have stated, the Respondent adduced documentary evidence in the form of a medical report to show that the Petitioner was physically abusive as he beat her up.

While the Petitioner denied the allegation, I have been persuaded by the evidence of the Respondent which has been supported by a medical

report that the Petitioner beat up the Respondent. In that report, it was indicated by the police that the Respondent complained of body pains after she was allegedly assaulted by her husband. In brackets it was referred to as Gender Based Violence (GBV). The medical officer also indicated that the Respondent had general body pains.

Given the foregoing, although the Petitioner attempted to dispute the authenticity of the document by stating that the report should have been made in Roma or Ngombe, there is no reason for me to doubt the contents of the document that the Respondent was assaulted as the report was issued at a Police Station which is under the Zambia Police Service.

Furthermore, I am inclined to believe the Respondent because even in one of the recordings entitled "*Her lies on Abuse-Indaba*" she informed the meeting that she was beaten once by the Petitioner and that she took him to the police where he was told that next time he would be locked up since it was GBV.

In addition, the Petitioner in re-examination also stated that the case was thrown out because it was discovered that it was a fabricated story. I find it hard to accept this evidence because if that was the position,

he should have pleaded it in his Reply. However, he simply averred that the Respondent would be put to strict proof.

In view of the foregoing, I find that the Respondent has proved this allegation that the Petitioner physically abused her by beating her and she complained of general body pains.

The other allegation was that the Petitioner does not allow her to serve her friends food in the house.

In her evidence, she referred to an incident which happened in 2018 on New Year's Day when she served her friend a piece of cake. That when the Petitioner came back, he asked who had eaten the cake. When the Respondent told him that she served her friend a piece, he responded that he never bought food to be given to other people. Thus at the month end, he deducted a K350.00 from her allowance.

In his evidence, the Petitioner did not address this issue but stated that it was not true that he deducted K350.00 from her monthly allowance as the document at page 3 of the Petitioner's bundle of documents showed that the Respondent received the usual K1,500.00 monthly allowance.

In relation to the document at page 3 which is a bank statement, I find that it does not assist the Petitioner because the statement covers the period between 30<sup>th</sup> September, 2019 -31<sup>st</sup> October, 2019. Meanwhile, the Respondent's evidence is that the incident happened on New Year's Day of 2018 and the Petitioner deducted the K350.00 at the month end and not that he reduced the monthly allowance. This therefore means that the debit of K1,500.00 cannot be taken to have been the amount sent to the Respondent for the period in question.

For these reasons, I find that the Respondent has proved that the Petitioner does not allow her to give food to her friends and that when she did that, he deducted K350.00 from her allowance.

The last allegation is that the Petitioner tapped her phone without her consent or Court order.

I have already made a finding on this allegation that the Respondent's phone was not tapped as there is no evidence to prove that it was tapped. The allegation fails.

In light of the above findings, can it be stated that the Petitioner's behaviour is sufficiently grave to fulfil the test that any right-thinking

person can come to the conclusion that the Petitioner has behaved in such a way that the Respondent cannot reasonably be expected to live with him?

In short, there is need to assess the impact or effect that the Petitioner's behaviour has had on the Respondent. Furthermore, the Learned Authors of Bromley's Family Law 8<sup>th</sup> Edition at page 192 also stated that:

**'The court must assess the impact of the respondent's conduct on the particular petitioner in the light of the whole history of the marriage and their relationship.'**

At page 195 they stated that:

**'Obviously the whole history of the marriage must be looked at: the cumulative effect of a series of acts might well amount to behaviour which the petitioner cannot reasonably be expected to put up with, even though each of them taken separately might be too trivial.'**

In answering the above question, I should hasten to mention that while the behaviour complained of by the Respondent need not be as serious as cruelty, I am persuaded by what Matibini J. (as he then was) stated

in the case of Dr. Namuunda Hamalenge Mutombo v. Lilian Haabula

Mutombo <sup>(8)</sup> that:

**“A Petitioner must nonetheless advance sufficiently serious reasons to say that from a reasonable person’s standpoint, after consideration and allowance of any excuse or explanation which the respondent might have in the circumstances, the conduct is such that the petitioner ought not to be called to endure it.”**

In her evidence, the Respondent told the Court that she had a partial stroke after the Petitioner’s behaviour changed because she kept the problems that she was facing to herself. She also stated that his behaviour had affected her emotionally and physically as he had also developed insomnia.

Given the foregoing, it seems to me perfectly plain that the effect that the Petitioner’s behaviour has had on the Petitioner cannot be taken lightly especially that the Petitioner physically abused the Respondent. I think it right to point out at this stage that violence has no place in a healthy relationship and it can never be justified. I say this because once it escalates overtime, it increases the risk of injury or even death. In this country, there are so many reported and unreported cases of

spouses and children who have died as a result of domestic violence. This is an affront to civilized society as a whole and it is totally unacceptable.

Furthermore, I have made a finding that the Petitioner is having an extra-marital affair. Thus this marriage is diseased because outside influences have worked their way into it.

I will pause here and state this: Infidelity is one of the most distressing and damaging event a spouse can face. It carries with it a devastating force and there can never be any justification for it. In point of fact, when there is infidelity, it is clear evidence that a spouse has no regard for the sanctity of marriage.

In the present case, the Respondent told the Court that she has suffered from insomnia because of the Petitioner's behaviour. In my view, this is as a result of the maelstrom of emotions unleashed in the wake of the Petitioner's unfaithful conduct. The Respondent has not accepted to live the kind of life he has subjected her to and that is why she decided to permanently move out of the matrimonial bedroom so that she can have a healthy state of mind.

I think it right to state here that while I accept that the Respondent is not an angel and without fault, what I discern from the evidence from both parties taking into account the whole history of the marriage is that some of the Respondent's actions like communicating with another man and making plans to go out of the jurisdiction without informing the Petitioner of the plans appear to be acts done in frustration and retaliation of her husband's behaviour.

By saying this, it does not mean that this Court has endorsed this kind of behaviour but I say it is retaliatory as there is nothing on record to suggest that the communication and the plans started when the two just got married but when she started suspecting that the Petitioner was having an affair and also when she was assaulted in 2018.

In short, the cumulative effect of the Petitioner's conduct has made her exhibit her faults and other attributes which the Petitioner is trying to capitalize on, forgetting that he is also not without fault.

I therefore find that the evidence adduced by the Respondent of the Petitioner's behaviour is sufficiently grave to fulfil the test that any right-thinking person can come to the conclusion that the Petitioner

has behaved in such a way that the Respondent cannot reasonably be expected to live with him.

## **9. CONCLUSION**

Having regard therefore to the history of the marriage and the behaviour of the Petitioner and the Respondent in the marriage, I am left with no doubt but to conclude that there is no mutual love between them.

The Supreme Court in the case of ***Yoyo v. Yoyo*** which I have already referred to stated that in order to refuse to grant a decree of dissolution of marriage, there must be evidence of mutual love between the parties.

Furthermore, I am also satisfied that there is no likelihood of resumption of cohabitation or reconciliation because all efforts to have the parties reconciled have proved futile.

Just to add, the Supreme Court in the case of **Brighton Soko v. Petronella Sakala Soko** <sup>(9)</sup> in which the Court shared in the notion widely accepted under English law and which Mushota, L alluded to in her book Family Law in Zambia that:

**“If a marriage which is going down the drain is not capable of being saved or rescued, end it, and do so quickly.”**

In the present case, although the parties have only been married since 2007, it is clear to me having assessed their demeanour that the marriage is going down the drain and is not capable of being rescued. In point of fact, there is no trust in this marriage as shown by the fact that both parties had been investigating each other and the Petitioner went to the extent of putting electronic gadgets in the house so that he could find incriminating evidence against the Respondent.

I found that action to be totally unwarranted and excessive especially that it went on for over two (2) years when there were other ways of dealing with relationship issues like open communication rather than seeking information in a secretive or suspicious manner.

Given the foregoing, it would be futile to pretend that a relationship exists between the Petitioner and the Respondent when it is clear that the trust on which a marriage is built has been broken. In the absence of trust a marriage cannot survive. This marriage has been reduced to a shadow, to the mere simulacrum of a marriage by both parties and therefore it cannot survive.

On the totality of the evidence adduced by both parties, I find that:

- (i) The Petitioner in his petition and the Respondent in her cross petition have adduced sufficient evidence to prove that the marriage has broken down irretrievably.
- (ii) Both the Petitioner and the Respondent have contributed to the breakdown of the marriage as they have behaved in such a way that they cannot reasonably be expected to live with each other.
- (iii) There is no likelihood of reconciliation.

In the premise, I hold that the marriage solemnized under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **AARON PHIRI** and **UNIKE MWANZA PHIRI** on 12<sup>th</sup> day of April, 2007 at Office of the Registrar in Kitwe in the Republic of Zambia has broken down irretrievably in terms of Section 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007.

I accordingly decree that the said marriage be dissolved and a decree nisi is hereby granted dissolving the marriage. The said decree is to be made absolute within six (6) weeks of the date hereof unless sufficient cause is shown to the Court why it should not be so made.

I order that either party is at liberty to file a formal application before the learned Deputy Registrar for the determination of the issue of maintenance or property settlement.

I further order that the issue of custody of the children of the family shall be heard before this Court upon either party filing a formal application should the parties fail to reach an agreement.

Considering the circumstances of the case, I order that each party shall bear their own costs of the petition.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 16<sup>TH</sup> DAY OF JANUARY, 2024.**



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**M.C. KOMBE**  
**JUDGE**