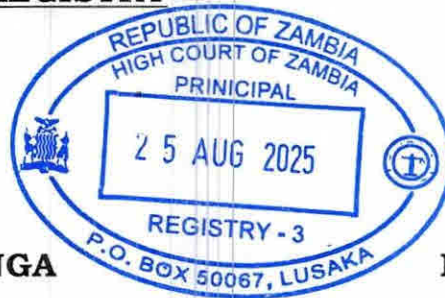


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

2021/HPF/D/099



BETWEEN:

IDAH CHAMA MULENGA

PETITIONER

AND

JACKSON MULENGA

RESPONDENT

BEFORE THE HONOURABLE MRS. JUSTICE M.C. KOMBE

For the Petitioner:

Ms. C. Jere – Legal Officer - National Legal Aid Clinic for Women.

For the Respondent:

Mr. P. I. Maganda – Messrs. Victor Kachaka & Co.

J U D G M E N T

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. *Arthur Yoyo v. Mable Mary Bbuku Yoyo* (SCZ Judgment No. 78 of 1998) (Unreported).
6. *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. INTRODUCTION

- 1.1 The petition filed by the Petitioner **IDAH CHAMA MULENGA** on 10th March, 2021 shows that she was lawfully married to **JACKSON MULENGA** the Respondent herein at the office of the Registrar in Ndola, on the Copperbelt Province in the Republic of Zambia. Immediately after the marriage, the parties lived together as husband and wife at house number 3872, Martin Banda Road, Northrise, Ndola.

2. THE PETITION

- 2.1 According to the petition, the Petitioner alleged that the marriage had broken down irretrievably because the Respondent had behaved in such a way that she could not reasonably be expected to continue living with him.
- 2.2 The particulars of the unreasonable behaviour were itemized in the petition as shown in paragraphs (1) to (10). These are:

- (i) *That in 2020 the Respondent admitted that he had an affair but we agreed to continue with the marriage.*
- (ii) *In 2014 the Respondent had another extra marital affair with a Ndola based woman named Patricia Thewe. We gathered our family members; my brother-in-law, my older sister and our Reverend and sat to discuss the matter. The matter was not resolved but we continued to live together as husband as wife.*
- (iii) *On 3rd November, 2018, I discovered that the Respondent was having an affair with a married woman when I saw an intimate message on his phone. I then took his phones and went away from home for three (3) days.*
- (iv) *I then received a phone call from Lusaka Central Police alleging that I had sent unpleasant messages to a lady from my husband's phone and that I was required to go to the police station. We were then advised to go for counselling by the police and our Reverend was going to counsel us.*
- (v) *We only managed to go for counselling twice but we didn't conclude.*
- (vi) *From the 3rd of November, the Respondent would leave the marital home at any time and come back home late at night or early in the morning.*

- (vii) *The Respondent does not talk to me about anything, he will not even sit with me; if I am in the room he will leave or if he finds me in the room, he will not enter that room. The few times I have spoken to him, he responds with sarcastic and hostile behavior.*
- (viii) *The Respondent also has also not supported me financially since November 2018 and spends the money secretly without my knowledge and does not consider any input from me as a wife nor discuss with me any matter of family importance.*
- (ix) *The Respondent and I sleep on separate beds in separate rooms.*
- (x) *Since 3rd of November 2018 the Respondent has denied me conjugal rights and does not care for my physical and emotional wellbeing.*

2.3 The Petitioner therefore prayed that the marriage between her and the Respondent be dissolved and that joint custody of the children of the family be granted to her with liberal access to the Respondent. She also prayed that there be an order of maintenance of the children of the family and that there be an order for property settlement.

3. RESPONDENT'S ANSWER AND CROSS PETITION

3.1 The Respondent filed an answer and cross petition to the petition in which he averred that the Petitioner had made arrangements as to the children of the family which he disputed.

3.2 However, he admitted that the marriage had irretrievably broken down but denied that it was for the reasons contended by the Petitioner but for the following reasons:

(i) *The Respondent denies in totality, the contents of paragraph 1 of the Petition*

(ii) *The Respondent denies in totality the contents of paragraph 2 of the Petition and shall at trial show that the said Patricia Thewe was merely an old acquaintance that the Respondent knew from Ndola and at no point did the Respondent have an extra marital affair with her and will at trial show that it is the Petitioner who developed a narrative that the Respondent and the said Patricia Thewe were having an affair owing to her insecurity and lack of trust.*

(iii) *The Respondent denies the contents of paragraph 3 of the petition and will aver instead that the Petitioner has always been suspicious of every call or text message that the Respondent receives to the extent that she frequently checks his phones in the hope that a "girlfriend" will call.*

- (iv) *The Respondent admits the contents of paragraph 4 of the petition in so far as it suggests that the Petitioner was summoned to the police and shall at trial show that for three (3) days, she fled the matrimonial home with the Respondent's phone and she used the phones to send profane messages and insults to women that she suspected of having had affairs with the Respondent.*
- (v) *The Respondent admits the contents of paragraph 5 of the petition and will at trial show that the Petitioner frustrated every attempt at counselling with unreasonable demands such as that all the women she accused the Respondent of having extra marital affairs with should have been present which all counsellors informed her was contrary to the spirit of the counselling.*
- (vi) *The Respondent denies the contents of paragraph 6 of the petition and will at trial show that at no point did he leave the matrimonial home for more than a day without informing the Petitioner where he was going or where he would be staying while out for work.*
- (vii) *Further in response to the contents of paragraph 6, the Respondent concedes that his schedule changed since the 3rd of November, 2018 when he retired from work as it then meant*

that he had to attend to assignments and errands as and when the situation demanded, as opposed to maintaining a predetermined work schedule of 07:00 to 17:00 hours.

- (viii) The Respondent denied the contents of paragraph 7 of the petition and shall at trial show that it is the Petitioner who is hostile towards the Respondent and is always moody and never responds to the Respondent's overtures and has since taken a habit of locking herself in a room only coming out for meals.*
- (ix) The Respondent admits the contents of paragraphs 8 of the petition in so far as it alleges that he has not given the Petitioner hard cash since November, 2018 because he retired in December, 2018 after the company he had worked for over 15 years wound up and he is currently not in gainful employment save to add that he has spent the better part of his retirement benefits on the Petitioner as when he bought her the car she still drives.*
- (x) Further in response to paragraph 8 of the petition, the Respondent will at trial show that even without a formal job he still supports and provides for his family.*

- (xi) *The Respondent admits the contents of paragraph 9 of the petition in so far it suggests that the Petitioner and Respondent sleep on separate beds and in separate rooms.*
- (xii) *Further in response to the contents of paragraph 9, the Respondent avers and shall at trial show that it was the Petitioner who deserted the Respondent and the matrimonial bedroom. The Respondent shall further show at trial that after the Petitioner left home on 3rd November 2018, she only returned 3 days later, she relocated to the walk in wardrobe within the bedroom where she slept for a week and then she moved to the library which happens to be within the bedroom but with a lockable door.*
- (xiii) *The Respondent denies the contents of paragraph 10 of the petition and shall at trial show that it is the Petitioner who deserted the matrimonial bed and is in the habit of frequently disappearing from home for days on end without word of her whereabouts and further that it is the Petitioner who has denied the Respondent conjugal rights and does not care about the Respondent's wellbeing.*

3.3 The Respondent's cross petition was as follows:

- (i) *The Respondent avers that the Petitioner has behaved in such a manner that the Respondent cannot reasonably be expected to live with her.*
- (ii) *The Respondent avers and shall at trial show throughout the subsistence of the marriage, the Respondent has been a loving and devoted husband and it is the Petitioner who has not reciprocated the Respondent's love and affection.*
- (iii) *The Respondent avers and shall at trial show that throughout the subsistence of the marriage, the Petitioner has never trusted the Respondent and has always been suspicious of every female acquaintance and friend that the Respondent has had to the extent that on 3rd December, 2018, she snatched the Respondent's phones and disappeared from the matrimonial home for three (3) days. During those 3 days, she sent insults and other profanities to all women in the Respondent's phonebook that she suspected of having had an affair with the Respondent and it took the police at Central Police on complaint of the women and their husbands that she stopped and handed over the phones to the Police Officers, thereby causing the Respondent extreme anguish and embarrassment.*

- (iv) *The Respondent avers and shall at trial show that the Petitioner abandoned the Respondent and has been denying him conjugal rights, when she moved out of the matrimonial bedroom in or around the month of November, 2018 when she furnished and moved into the library adjoining the master bedroom where she spends most of her time locked up.*
- (v) *The Respondent avers and shall at trial show that the Petitioner now keeps to herself and has abandoned the entire family as she locks herself in the library adjoining the master bedroom where she stays, which room is fully furnished with DSTV whilst entire family watches ZNBC.*
- (vi) *The Respondent avers and shall at trial show that throughout the subsistence of the marriage, the Petitioner has been unfaithful and has had several extra-marital affairs.*
- (vii) *The Respondent avers and shall at trial show that the Petitioner's behaviour is inconsistent with that of a married woman as she frequently locks herself for hours on end to speak to boyfriends, in one particular incident, the Respondent trailed her to the bedroom and listened to her conversation and she was speaking to a man she had met on a trip to Malawi and during the call, she expressed how she missed him and what a wonderful time they had in Malawi.*

Despite my protests, the Petitioner continued to have prolonged calls with him for up to five (5) months after that trip, which caused me a great deal discomfort and anguish.

- (viii) The Respondent avers and shall at trial show that the Petitioner's behavior is inconsistent with that of a married woman as all her affairs are shrouded in secrecy which arose when he once picked a call on her phone from a stranger from Savoy Hotel Ndola whom I confronted her about it, she denied but immediately put a password on her phone which built a lot of mistrust between the parties and caused me the Respondent a lot of anguish.*
- (ix) The Respondent avers and shall at trial show that between 2008 and 2009, being suspicious of the Petitioner and her cousin's behaviour, I placed a microphone in the bedroom where they chat from and when I retrieved it, it revealed details about the extra marital sexual escapades that the two of them would engage in which I brought to the attention of her family members and it caused me a lot of anguish.*
- (x) The Respondent shall at trial also show that unlike a married woman should, the Petitioner fails to keep even the pettiest of issues within the bedroom and when she finds suspicious messages in the Respondent's phone, she keeps copies and*

files which she distributes to church members in the pretext of asking for help which behavior causes the Respondent a lot of embarrassment.

- (xi) The Respondent avers and shall at trial show that the Petitioner's behavior is strange and could be described as posing a danger to my life. In one incident, she established a relationship with the husband to a woman she suspected that the Respondent had an affair with and invited him to the matrimonial home and opened for him in the wee hours in an attempt to cause the Respondent harm and when he couldn't find the Respondent, the Petitioner handed over his phones to the said man who then went away with the phones which were only retrieved by the Police.*
- (xii) The Respondent shall at trial show that the Petitioner also has a habit of fleeing home for days on end without notice to the Respondent or an explanation of where she went.*
- (xiii) In sum, the Petitioner has behaved in such a manner that the Respondent cannot reasonably be expected to live with her.*
- (xiv) The Respondent shall at trial show that the Petitioner's main reason for wanting the marriage dissolved is because the Respondent is jobless and she doesn't want to support him.*

This evident in the fact she left the matrimonial bedroom a few weeks before the Respondent retired in December.

- 3.4 The Respondent therefore prayed that the marriage be dissolved and that custody of the children of the family be granted to him with reasonable access to the children of the family. That the parties contribute equally towards the maintenance of the children of the family.

4. THE PETITIONER'S REPLY TO ANSWER AND CROSS PETITION

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

- (i) The contents of paragraph 1 are not disputed.*
- (ii) The contents of paragraph 2 are disputed and the Petitioner will aver that the Respondent is a private consultant and a business man. The Respondent is a director and partner at Frost Hydrate Limited.*
- (iii) The contents of paragraph 3 are not disputed.*
- (iv) The contents of paragraph 4 are disputed and the Petitioner will aver that there is no formal agreement between the Petitioner and the Respondent in relation to the arrangements of the children of the family and that the Petitioner has never*

made any proposal to the Respondent in relation to the arrangements of the children of the family.

- (v) The contents of paragraph 5 are not disputed to the extent that the marriage has broken down irretrievably and the Petitioner will aver that the marriage has broken down irretrievably because of the Respondent's unreasonable behavior.*
- (vi) The contents of paragraph 5(1) are disputed and the Petitioner will aver that the Respondent was having an extra, marital affair sometime in 2010 and the Petitioner and Respondent discussed the matter and thereafter the parties continued to live as husband and wife.*
- (vii) The contents of paragraph 5(2) are disputed and the Petitioner will aver that the Respondent had an extra marital affair with Patricia Thewe and the Respondent would send the said Patricia money of the sum of K2,500.00 and the said Patricia had called the Petitioner on her phone asking if the Petitioner knew the Respondent's whereabouts. The Petitioner saved the number and discovered that Respondent's picture was appearing as a display picture and the said Patricia had unloaded some pictures of herself and the Respondent on social media.*

- (viii) Further to paragraph 7 above, the Respondent admitted to having the extra marital affair and claimed that the said relationship was done. A meeting was held with some of the family members of both parties and the Respondent admitted to dating the said Patricia but then insisted that he had ended the relationship.
- (ix) The contents of paragraph 5(3) are disputed and the Petitioner will aver that on 3rd November 2018, the Petitioner's phone went off because the battery was low. The Petitioner wanted to make a phone call and requested to use the Respondent's phone. When the Petitioner was in the process of making a phone call, a message popped up and its contents included a woman appreciating the Respondent for the enjoyable sex they had. The Respondent then grabbed the phone, deleted the message and the parties had a heated argument.
- (x) The contents of paragraph 5(4) are not disputed to the extent that the Petitioner fled the matrimonial home with the Respondent's phone but the Petitioner did not send profane messages and insults to women, she only sent messages warning the women who were having extra marital affairs with the Respondent to stay away from the Respondent because he was a married man.

- (xi) *The contents of paragraph 5(5) and (6) are disputed and the Petitioner will aver that the process of counselling was not concluded because the Respondent did not cooperate with the counsellors. Further a counsellor was engaged through the Petitioner's lawyers but the Respondent refused to show up for the session.*
- (xii) *The contents of paragraph 5(7) and (8) are disputed and the Petitioner will aver that the Respondent would never inform the Petitioner of his whereabouts even when the Respondent retired, he still did not communicate his whereabouts. The Respondent still leaves the matrimonial home at any time and would come back late at night or in the early hours of the morning.*
- (xiii) *The contents of paragraph 5(9) are disputed and the Petitioner will aver that the Respondent does not talk to the Petitioner about anything, the Respondent doesn't sit with her and if she is in the room he will leave or if he finds her in the room he will not enter that room. The few times the Petitioner has spoken to the Respondent, he responded in a sarcastic and hostile manner.*
- (xiv) *The contents of paragraph 5(10) are disputed and that Petitioner shall aver that the Respondent has not been*

supporting her financially and the said vehicle was bought sometime in March 2017 and registered on 4th April, 2017 while the Respondent retired sometime in December, 2018.

(xv) The contents of paragraph 5(11) are not disputed save to state that he has neglected to support and maintain the Petitioner as a spouse.

(xvi) The contents of paragraph 5(12) are not disputed.

(xvii) The contents of paragraph 5(13) are disputed and the Petitioner did not move out of the bedroom but she was compelled to move into the library room within the matrimonial bedroom due to the Respondent's infidelity and hostile behavior that the Petitioner could no longer tolerate.

(xviii) The contents of paragraph 5(14) are disputed and the Petitioner was compelled to move into library room within the matrimonial bedroom because of the Respondent's infidelity and hostile behavior which has resulted into the Petitioner not enjoying her conjugal rights.

(xix) Further to paragraph 18 above, the Petitioner is a Principal Nutritionist at National Food and Nutrition Commission, where at times she performs duties outside Lusaka. Such duties at times take several days to be completed. As a result of the breakdown in communication, the Petitioner has always

found it extremely difficult to notify the Respondent whenever she was required to perform her duties outside Lusaka.

4.2 In the Petitioner's answer to the cross petition, she stated that:

- (i) The contents of paragraph 1 are disputed as it is the Respondent who has behaved in such a way that the Petitioner cannot reasonably be expected to continue living with the Respondent.*
- (ii) The contents of paragraph 2 are partially admitted to the extent that the Respondent had been loving and devoted husband before he started engaging in extra marital affairs in 2010 and that the Petitioner reciprocated, to the Respondents, love and affection during the said period.*
- (iii) The contents of paragraph 3 are disputed and the Petitioner avers she never had any suspicions against female acquaintances and friends of the Respondent and it was a mere coincidence that the Petitioner discovered the Respondent had extra marital affairs. It was on 3rd November 2018 when she got the Respondent's phone as a result of the message he received from a lady stating that she enjoyed the sex she had with the Respondent. The Petitioner was summoned by the police, however, she left the phones at the*

place she was living and after hearing the parties, the police advised the Petitioner to surrender the phones to the Respondent and that the parties go for counselling. The Petitioner avers that she gave back the phones to the Respondent when they got home and not to the Police officers.

- (iv) The contents of paragraph (4) are disputed and the Petitioner avers that she moved out into the library room because of the Respondent's extra marital affairs and the Petitioner's room is usually unlocked and the Respondent has never tried to enter the said room, does not talk to the Petitioner and further the Respondent's extra marital affairs has affected the Petitioner from enjoying her conjugal rights.
- (v) The contents of paragraph 5 are disputed and the Petitioner avers that she interacts and keeps with all the other family members who do not avoid her and the Petitioner has access to TV programmes through the subscription of GOTV while the Respondent's television set which is available to all other family members, accesses TV programmes through DSTV which has ZNBC channels and various other channels.
- (vi) The contents of paragraph 6 are disputed and the Petitioner avers that she had been a faithful wife and has never had any extra marital affairs.

- (vii) *The contents of paragraph 7 are disputed and the Petitioner avers that she does not frequently lock herself for hours to speak to boyfriends and the Petitioner will aver that she has never been to Malawi.*
- (viii) *The contents of paragraph 8 are disputed and the Petitioner avers that she has always behaved in a manner that signifies that she is a responsible married woman and she has never had affairs and she has been honest with the Respondent. Regarding the said incident, the Petitioner received a call from a strange number in the presence of the Respondent and she put the call on loud speaker as she usually does, the caller identified himself and said he was calling from Savoy Hotel Ndola but he realized that he called a wrong number and apologized. The Petitioner has always been a faithful and honest wife and her phone has no password.*
- (ix) *The contents of paragraph 9 are not disputed to the extent that the Respondent informed the Petitioner that he had secretly recorded the conversation between the Petitioner and her cousin and the Petitioner will aver that the conversation did not include extra marital sexual escapades and when the Respondent called for a family meeting, he never produced the said recordings in the meeting.*

- (x) *The contents of paragraph 10 are disputed, the Petitioner will aver that she has painfully and unpleasantly kept to herself many acts of the Respondent's mischief and it was only on one occasion when the Petitioner decided to engage third parties who are counsellors to resolve an issue arising from some messages which was unpleasant and unacceptable. The said third parties include a Reverend from Pentecostal Assembly of God and the Catholic priest who are both from the Petitioner's church.*
- (xi) *The contents of paragraph 11 are disputed and the Petitioner avers that the Petitioner did not invite the man to come to the matrimonial home because the Petitioner is not privy to and has no knowledge as to when and how the husband to the woman who had a relationship with the Respondent came to learn about the Respondent's extramarital relationship with his wife. When the said man arrived at the matrimonial house, the Petitioner thought that the man was a friend to the Respondent. The true identity of the same man only became known to the Petitioner when he introduced himself as Mr. Phiri and said Mr. Phiri demanded to see the Respondent. In relation to the phones, those facts are within the peculiar knowledge of the Respondent.*

- (xii) *The contents of paragraph 12 are disputed and the Petitioner will aver that her job sometimes requires she performs duties outside Lusaka which may take several days to be completed and the Petitioner found it extremely difficult to inform the Respondent because of the breakdown in communication between the parties.*
- (xiii) *The contents of paragraph 13 are disputed and the Petitioner avers that it is because of the unreasonable behavior of the Respondent that the Petitioner cannot reasonably be expected to live with the Respondent.*
- (xiv) *The contents of paragraph 14 are disputed and the Petitioner will aver that the Respondent retired in December 2018 and the Petitioner continued to live with the Respondent. The only reason for the Petitioner's application for the marriage to be dissolved is because of the Respondent's unreasonable behavior.*

4.3 The Petitioner's response to the Respondent's prayer was that the said marriage be dissolved based on her petition and that the Petitioner and Respondent be granted joint custody of the children of the family. That there be an order for maintenance of the children of the family and an order for property settlement.

5. THE PETITIONER'S EVIDENCE

5.1 At the hearing, the Petitioner aged fifty- five (55) years old, a Principal Nutritionist at the National Food and Nutrition Commission and of Plot No. 252, Meanwood Ibex Lusaka testified as **PW1** and did not call any witnesses.

5.2 She stated that she intended to end the marriage due to the Respondent's unreasonable behaviour. That they got marriage on 15th November, 1995 at the Office of the Registrar in Ndola and they were issued with a marriage certificate which she identified and was admitted in evidence and marked **P1**. She further stated that they had four (4) children namely:

- (i) Chisama Mulenga (Female), born on 15th September, 1994 who was working as a Teacher in Chongwe.
- (ii) Sabi Mulenga (Male), born on 17th November, 1997, studied Civil Engineering at Copperbelt University and was doing part time job with his uncle.
- (iii) Chama Mulenga (Male), born on 28th January, 2001 a second-year student at University of Zambia and;
- (iv) Mwenge Mulenga (Male) born on 23rd August, 2003, a student at the University of Zambia.

- 5.3 She denied that she made any arrangements for maintenance. The witness further denied that there were any proceedings in Zambia or outside Zambia.
- 5.4 The witness told the Court that in 2010 the Respondent had an extra marital affair with a woman. They had a discussion and he admitted and promised to stop the relationship. They continued to live as husband and wife.
- 5.5 That to her dismay, in 2014 the Respondent had another extra marital affair with a Ndola based woman by the name of Patricia Thewe. The Petitioner stated that she was emotionally injured and she involved the family members to help them resolve their marital issues. During the process of reconciliation, a Reverend of Pentecostal Assemblies of God was given to them so that he could counsel them over the extra marital affairs the Respondent had. Despite being counseled, the Respondent continued the relationship with Patricia.
- 5.6 She travelled to Ndola Victim Support Unit to report the matter with the Reverend. The witness clarified to the Court that the police became involved in marital issue because at the time, the Reverend wanted to remind Patricia that the Respondent was a married man. That after all the effort they

made to travel, there was no conclusion to the problem and they continued to live as husband and wife.

5.7 The witness further stated that painfully on 3rd November 2018, she discovered that the Respondent had another extra marital affair with a Lusaka based married woman by the name of Jennifer Siachilubi Phiri. She knew about the affair while she was using the Respondent's phone. A message from Siachilubi popped up on his phone's screen. She read through the message and found out that it was a love message of how the Respondent and the sender enjoyed sex on previous dates.

5.8 After the Respondent saw that the Petitioner was reading the message, he grabbed the phone from her. They picked up a heated quarrel and the Respondent left the phones unattended to as he went to the bathroom. She picked the phones and left home to a lodge called Shearwood in Woodlands where she spent three (3) nights. True to her expectations, when she opened the phone, she found several love messages most of them where between the Respondent and Jennifer.

5.9 She screen-shot the messages and sent them to her phone as part of the evidence she presented in Court. She informed

the Court that she was disgusted and she felt betrayed and this made her not to return home. That the messages were more on intimacy and this left her emotionally injured.

5.10 On the 3rd day after she left home, she received a call from a police officer based at Lusaka Central Police. He informed her that he was with the Respondent and another woman and that the Respondent had reported that she had gone away with his phones and was sending unpleasant messages to that person. She was told to report to the police and she did.

5.11 At the Police, she found the Respondent with a certain lady who was also with a man who she claimed was her husband. She narrated the story to the officers and the police did not find any insulting messages. Later, the police released the lady and her husband and she remained with the Respondent. The police noticed that they had a problem as a couple and were advised to be counseled.

5.12 At that time, she informed the police that she had invited the person who usually counseled them when they had marital problems. The Reverend was allowed to enter the room and was given the mandate to continue with counseling them as a couple.

5.13 The witness told the Court that the issues were not resolved because they only attended the counseling sessions twice and the problem remained unresolved. That the Respondent could leave home at any-time and went back around midnight or early hours of the following day. To date, that's the life the Respondent was living.

5.14 The Petitioner also stated that from 3rd November, 2018 to date, he didn't talk to her concerning any issue even family matters and that he couldn't be in the same room or place with her.

5.15 It was also her testimony that the Respondent completely stopped supporting her financially and that he changed in the manner he related to her. He became hostile and sarcastic when she wanted to talk to him and that was what made her move out of the matrimonial bedroom and go to the library which was within the matrimonial bedroom.

5.16 She added that the Respondent was not remorseful and he deprived her the opportunity to enjoy conjugal rights. She further stated that she was last intimate and enjoyed conjugal rights with the Respondent on 3rd November, 2018.

5.17 When the witness was referred to page 4 of the Petitioner's bundle of documents, she told the Court that there was a

picture of Jennifer Mutinta Siachilubi Phiri and a message which stated that she loved the Respondent and he also responded that he loved her. She was also referred to page 5 of Petitioner's bundle of documents where Jennifer wrote about how she enjoyed having sex with him.

5.18 Then on page 13, the Respondent wrote a message to Jennifer expressing his love for her and how happy he was to have met her.

5.19 The witness told the Court that she cried while reading the messages from the Respondent's phone. That the messages were disheartening and that she couldn't even believe what she read. She said that they had encounters where the Respondent had extra marital affairs but in relation to this affair, she felt that something had gone wrong. (At this point, the Petitioner became emotional and broke down).

5.20 The Petitioner further told the Court that she had evidence that she spent the nights at Shearwood Lodge when she left the matrimonial home. The receipts were on page 3 of the bundle of documents.

5.21 In relation to the Respondent's answer, the Petitioner still maintained that the Respondent had a relationship with

Patricia and that she filed evidence that showed that the WhatsApp photo showed the Respondent and Patricia.

5.22 The Petitioner disputed that she was suspicious of every call the Respondent made and that she was in the habit of checking his phone. She explained that it was sheer coincidence that on 3rd November, 2018, a message popped up while she was still using his phone. That if it was true that she frequently checked his phone, she could have seen the messages earlier.

5.23 The witness also disputed the statement that the counselling failed because of her demands to have the women the Respondent was allegedly involved with to be present during the counselling sessions. She stated that it failed because the Respondent demanded to be alone in the third session with the Reverend. From that time, the Reverend told them that they could only go back when the Respondent was ready to go back to the Petitioner and not what the Respondent alleged in his statement.

5.24 The Petitioner further denied that she deserted the Respondent. That it was the Respondent who didn't give the Petitioner an opportunity to enjoy her conjugal rights as the

Respondent always went home late at night or in the early hours of the morning.

5.25 The witness acknowledged that the Respondent noticed that the marriage had broken down. However, she stated that it was not because of her but because of the Respondent's unreasonable behavior.

5.26 In relation to the allegation that the Petitioner was unfaithful, she denied the allegation and added that the Respondent had not produced evidence to prove his allegations. She denied the statement by the Respondent that she had an affair with a Malawian man stating that she had never been to Malawi and wondered why the Respondent did not take action. She also denied the allegation of having an affair with her cousin.

5.27 Regarding the allegation that she had an affair with a man from Savoy Hotel, she explained that whilst she was with the Respondent in the kitchen, she received a call that was not meant for her. Immediately she answered the call, the stranger recognized the voice and quickly apologized that it was a wrong number. After that, they picked a quarrel and argued over the said call.

5.28 In relation to the allegation that she distributed suspicious messages, she denied this allegation. She stated that she sent the messages she had produced in Court to some of the Reverends at United Church of Zambia (UCZ) where she congregated.

5.29 The witness further denied the allegation that the Respondent's life was in danger because she allowed a stranger in their home. She explained that a man called Mr. Charles Phiri went to their house to look for the Respondent who at that time was not home. Mr. Phiri introduced himself as the husband to Jennifer and that was when she knew who the visitor was and also his full names. Mr. Phiri informed her that he wanted to meet the Respondent in the same way he was meeting Jennifer at his house. On that day the Respondent fled home with their last born's phone and didn't spend the night there.

5.30 The Petitioner also denied the allegation that she fled home without an explanation. She explained that from 3rd November 2018, it was difficult to communicate with the Respondent when she was going to work out of town because he did not talk to her. She narrated that at one point the Respondent disconnected all the bulbs around the house

and when she asked him to put at least one bulb for each side, his response was that “who do you think you are, if you want your own bulbs around the house buy your own electricity”. That’s how they stayed without any light outside.

5.31 The Petitioner also denied the allegation that she wanted the marriage to end because the Respondent was out of employment. She told the Court that as a responsible and faithful wife she would have loved to enjoy his retirement package. She said that she was not aware of his retirement at that time as he had contract jobs and only retired in December, 2018. That she was not privy to how much his retirement package was.

5.32 She added that there was no hope of reconciliation between them. She explained that when she started the process for counseling which failed, she went to the Legal Aid Clinic for Women where she was told that she needed to reconcile with the Respondent. However, the Respondent only went there once. The Respondent told the counselor that he was not ready for the process and even when he was summoned for the two (2) years separation, he refused to sign. They wrote a letter to her lawyer demanding for reasons for divorce. That

was the reason she came to Court as there was no room for reconciliation as she tried all efforts.

5.33 The Petitioner prayed that the marriage be dissolved because of the Respondent's unreasonable behavior which she no longer tolerated. She maintained the other prayers as filed in the petition.

5.34 **In cross examination**, the witness told the Court that the first sign of trouble started in 2010 and that despite her learning about his extra marital affairs, she petitioned for divorce in 2021 and lived with those problems painfully.

5.35 In relation to the receipts that she produced that she stayed at Shearwood Lodge, she agreed that that they were handwritten. However, she didn't know if the swiping machine printed receipts.

5.36 When she was referred to pages 4 – 41 of the Petitioner's bundle of documents, she agreed that there were screen shots of Respondent's phone and she pointed at the name "Jackson" as a feature she identified as the Respondent's phone. That the name saved by the sender was "Jackson" and therefore she denied that she searched for his name.

- 5.37 The witness informed the Court that she travelled to Ndola with the Respondent and the Reverend but it was the Reverend and the Petitioner who went to report the matter to Victim Support Unit (VSU).
- 5.38 The Petitioner further stated that she left the matrimonial bedroom because the Respondent was hostile. She denied that she abandoned him.
- 5.39 The witness admitted that the Respondent paid school fees for the children of the family and that the vehicle she drove was bought by him as a gift in 2017.
- 5.40 Further, that she could not recall how many times she spent away from home because she worked outside of town as she was a Nutritionist.
- 5.41 **In re-examination**, the witness informed the Court that after 3rd November 2018, the Respondent most of the time covered himself with separate beddings. When she tried to use the same, he would push her away. That was the kind of hostility that she experienced.
- 5.42 Apart from that, there was also verbal abuse and that led her to move out of the matrimonial bedroom to avoid physical abuse.

5.43 That marked the close of the Petitioner's case.

6. THE RESPONDENT'S EVIDENCE

6.1 The Respondent aged fifty-seven (57) years old, a retired Engineer in the Public Service and of Plot No. 252 Ibex Hill Meanwood testified as **RW1**. He did not call any witnesses.

6.2 He told the Court that he was sued by the Petitioner for divorce for a number of reasons which she submitted to this Court.

6.3 The witness told the Court that the Petitioner claimed he had an extra marital affair in 2010 and that he did not remember it because there were no details given to that effect.

6.4 That the Petitioner also claimed that he had an affair with a married woman basing her assertions on the messages she found on his phone. He stated that all the messages which she downloaded to her phone, printed and distributed to her family members, friends and churches were all taken out of context. This was because she copied the messages without getting the full context of the whole conversation.

6.5 He stated that this was done in order to suit the outcome that she wanted. All those were false accusations that had no merit. He explained that when they tried to sit down to

resolve the matter, she gave conditions which could not be met by those who wanted to help.

6.6 Further, the Respondent stated that their marriage had been of accusations of extra marital issues to the extent that she would phone his manager and complain that he had a relationship. That affected his work eventually.

6.7 When he was told to give context to his statement that the Petitioner took the messages out of context, he responded that he was a writer who wrote fiction and technical stories. So the texts were taken out of context because he just used to have conversations about certain issues like love stories.

6.8 The witness denied the allegation of hostility and explained that the Petitioner failed to prove any action of hostility that he exhibited towards her. That he had never beaten her or insulted her and he had never used any derogatory language. That he always spent the nights' home and he never left home without her prior knowledge.

6.9 The Respondent further told the Court that he supported the Petitioner and his family financially through-out their marriage. Even when he was out of employment, he still supported them and that the Petitioner stopped assisting in any form. That through their marriage, he helped her buy

property and even his last pension, he bought her a car. It was not the first car. The accusation was therefore false.

6.10 The Respondent added that the Petitioner had access to all his accounts despite him not having access to any of her accounts.

6.11 The witness further told the Court that he retired in November 2018 and the little money he got which was for seven (7) months, he bought the Petitioner a car because he didn't want her to suffer in terms of logistics. That the Petitioner stopped supporting the family after the Respondent was out of employment from 2018 to date.

6.12 On the allegation that he left the matrimonial home, he stated that it was a false allegation. He explained that the Petitioner left the matrimonial bedroom and moved to the walk in ward-rob where she used to sleep. She left and went to the library and then she moved to the girl's bedroom. That he used to sleep on the same bed but she was the one who moved out of the matrimonial bedroom.

6.13 He also added that in November, 2018, the Petitioner left home without telling him where she had gone. He contacted her relatives but they didn't know where she was. That the Petitioner produced receipts in Court to show that she was

actually staying at a hotel. However, there was no witness to testify on her behalf who she stayed with at the hotel.

6.14 The Respondent also testified that their marriage had broken down but not for the reasons the Petitioner alleged. That everything was tied to the time he left employment and the retirement date was November 2018 when she left the matrimonial bed and bedroom. The reason was because he didn't have a job.

6.15 He stated that the calculations were very clear, three (3) years later she submitted a petition for dissolution of marriage.

6.16 He further stated that their marriage had been of accusations and suspicions. Earlier in their marriage, the Petitioner had told him that she would never have access to her phone. From 1996 to date, he had never accessed her phone and wondered why she was able to get his phone and take it away. She downloaded the messages and used the phone to write insults to his friends and workmates. The police called him and detained her because she was using his phone and the phone was handed over to him at the police station.

6.17 The witness further stated that based on the testimony, he wanted the Court to dissolve the marriage but not because of the reasons the Petitioner had given but because she didn't want him to be a burden since he was no longer in employment.

6.18 That she already left the marriage emotionally and technically, and so he wanted the Court to give her chance to go and enjoy her money and her work.

6.19 He prayed for full custody of the children with unlimited access to the children by the Petitioner. He also prayed that the Court grants him the matrimonial house where they stayed because he was retired and he spent all the money to build that house. The Petitioner was still in employment and had access to her pension package.

6.20 Further, that he was a proud husband who took care of the Petitioner and supported her very well. He would allow her to go because she had decided to leave the marriage.

6.21 In **cross examination**, the Respondent denied that he had an affair. When he was referred to the Petitioner's bundle of documents, he explained that he didn't have control of people who put his picture on their post. The pictures were uploaded by the Petitioner. He explained that the messages

that were on his WhatsApp account were written for the purpose of chatting with another woman. When he was referred to page 27 of the Petitioner's bundle of documents, he explained that the context was that there was a question to that message which was not copied and he had asked a question about having sex in the car.

6.22 Referred to page 27, he explained that he wrote the conversations on social media for fun and it was not real. That was why they were so many. He added that what was downloaded were texts messages which were of interest to the Petitioner. If messages were the basis for divorce, he was going to divorce her a long time ago. He denied having an affair and that he never committed adultery.

6.23 The witness was further referred to page 27, and he stated that it was a mere suggestion that a person could have a crush on anyone. He agreed that being a married man, the messages were inappropriate.

6.24 He told the Court that it was strange that the Petitioner moved out of the matrimonial bedroom because he never moved out when he was in that situation and he referred to it in his submissions.

6.25 When he was referred to the answer on paragraph 7 of the cross petition, he stated that the Petitioner met a man in Zimbabwe who was a Malawian. Every time she would hide when speaking to him. On that day he trailed her and listened to the conversation where she was telling the man that she missed him and that they had a good time. He confronted her about the man. He told her that she was a married woman and he could not speak to a man like that but that he didn't leave the matrimonial bed.

6.26 He denied having evidence of the Petitioner travelling to Malawi but that she had been to Zimbabwe.

6.27 There was no re-examination and that marked the close of the Respondent's case.

7. DECISION OF THE COURT

7.1 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.’

7.2 The Petitioner has presented this petition on the basis that her 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.

7.3 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**⁽¹⁾ 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?’

7.4 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.’

7.5 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?’

7.6 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 husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?’

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

7.8 The Petitioner in her petition has raised four main particulars of unreasonable behaviour. That as the marriage progressed, the Respondent started having extra-marital affairs, there was no proper communication, no financial support and she was being denied conjugal rights.

7.9 In support of the allegation that the Respondent was having extra-marital affairs with other women, she stated that she discovered in 2010 that the Respondent had an extra marital affair with another woman. That the Respondent promised to stop.

7.10 Then again, in 2014, he had another affair with a woman called Patricia Thewe who was based in Ndola. That while no proper conclusion was reached after involving their families and counsellors, they continued living as husband and wife.

7.11 The Petitioner further stated in her evidence that on 3rd November, 2018 while she was using the Respondent’s

phone, a message popped up from a married woman called Jennifer Siachilubi Phiri. In that message, the woman was communicating to the Respondent about how she enjoyed the sexual encounter the two had.

7.12 She confronted the Respondent and a quarrel ensued. She later picked up the Respondent's phones and went to a lodge in Woodlands where she spent three nights. True to her expectations, she found several love messages between Jennifer and the Respondent. She took screenshots of the messages and then sent them to her phone. These were the messages she had produced in Court in her bundle of documents.

7.13 The Petitioner also told the Court in relation to the second allegation of lack of proper communication that there had not been any communication between the two of them concerning any issue including family matters. That the Respondent's attitude towards her had changed as he could not be in the same room with her. That he was hostile and sarcastic towards her in the manner that he responded to her regarding certain issues. This is what made her leave the matrimonial bedroom.

7.14 Regarding lack of financial support, the Petitioner stated that the Respondent completely stopped supporting her financially. However, in cross examination she admitted that the Respondent used to pay school fees for the children.

7.15 On the last allegation that the Respondent denied her conjugal rights, she stated that the Respondent was hostile towards her and he deprived her the opportunity to enjoy conjugal rights. That they were last intimate on 3rd November, 2018.

7.16 The Respondent denied these allegations by the Petitioner stating that full details were not availed.

7.17 On the allegation that he had an extra- marital affair with Jennifer as seen from the messages found in his phone, he stated that all the messages that the Petitioner found in his phone and distributed to family and church members as well as friends were taken out of context. This was because the Petitioner did not take the full context of the whole conversation as it was done to suit the outcome that she wanted.

7.18 He explained that he was a writer who wrote fiction stories and therefore the messages were taken out of context.

However, he admitted in cross examination that the messages were inappropriate as he was a married man.

7.19 The Respondent also denied the allegation that he was sarcastic and hostile towards the Petitioner. He stated that he had never beaten or insulted her. He didn't however say anything on the lack of proper communication.

7.20 On the allegation that he never used to financially support the Petitioner, he denied this allegation. He told the Court that he supported the Petitioner financially throughout the marriage. That he helped her buy property and he also bought a vehicle for her. He also paid school fees for all the children of the family and he also supported her when she was at school.

7.21 Regarding the allegation that he used to deny her conjugal rights, he stated that the Petitioner left the matrimonial bedroom and started sleeping in the walk-in wardrobe. She later moved to the library and finally ended up in the girl's bedroom. In this regard, she was the one who moved out of the matrimonial bedroom and that was why she could not enjoy the conjugal rights.

7.22 I have carefully considered the evidence by the Petitioner and the rebuttal evidence by the Respondent.

7.23 On the allegation that the Petitioner was having extra marital affairs with other women, I have not considered the allegations in relation to the alleged affairs he had in 2010 and 2014. This is because the Petitioner in her evidence stated that after she discovered these affairs, they continued living together as husband and wife.

7.24 In relation to the woman called Jennifer, there are several messages which were produced by the Petitioner from pages 4 to 39 of the Petitioner's bundle of documents showing an exchange of love messages between the Respondent and Jennifer. These messages were about the affection that the two had for each other, the valuable time that they used to spend together and the sexual encounters that they used to enjoy together. There was nothing fictional about these messages as it is clear that the messages were about facts and true events.

7.25 For the sake of brevity, I will make reference to very few messages produced in the bundle of documents because there are several messages touching on a wide range of subjects as I have stated above. At page 7 of the bundle of documents, there is a message which reads as follows:

“Good morning my love. Sorry yesterday couldn’t respond only realized I was drunk when I reached home and I don’t know how I found myself asleep. I enjoyed the evening and thank you so much Mutinta for the invitation and for making feel at home throughout the night. I have no words to describe my feelings and emotions and gratitude to you. But only to say I love you so much. Thank you very much for the perfume. You have been such loving and caring person to me. I will just say I love you so much Mutinta.”

7.26 At page 10 there is a photo of the Respondent which he sent to Jennifer on 8th August captioned: ***“Hey babe. What’s up? A photo for you. Hopefully you can have something to look at.”***

7.27 Another message at page 11 reads as follows:

“Thank you so much Mutinta my love. I appreciate your care and all the love because I do love you even more. A day without you always seems long long long for me. Your feelings and love for me are not in vain cos I love you Mutinta so much. I will rest today that’s why I didn’t want to strain myself by driving to Kabwe. Have a wonderful day and love you always.”

The response to this message was as follows:

“Love u more babe, rest well, keep using the hot water bottle and straightening ur back, I’m off to town, then hospital to check on the patient, will check on u later on. All my love babe.”

7.28 At page 20, a message to the Respondent reads:

“When I started this relationship, I never knew that I would fall madly in love with you but I did, Isabi u have become part of my life, loving u has made me realise that I have all I need in u babe, I have no regrets, I’m content with u and with this relationship... Jackson I love u with all my heart...”

The response was as follows:

“Thank you so much very much Mutinta. Knowing you has brought out in me the other side of my life I always felt was my nature.”

7.29 Given the foregoing, it is evident that the messages exchanged were depicting facts and true events happening between the Respondent and Jennifer and not anything imaginary or unreal.

7.30 Therefore, I cannot accept such a bold faced lie by the Respondent which was clearly aimed at showing disrespect to the Court in the light of the overwhelming evidence adduced by the Petitioner. In point of fact, the Respondent admitted in cross examination that it was inappropriate for him as a married man to be exchanging such messages with another woman.

7.31 Given the foregoing, I accept the evidence by the Petitioner and I find as a fact that the Petitioner has proved that the

Respondent was having an extra marital affair with another woman by the name of Jennifer Mutinta Siachilubi.

7.32 On the allegation that the Respondent is hostile towards her and does not communicate to her on family matters, the Respondent did not specifically respond to this allegation regarding communication. Rather, the Respondent brought in a different issue that he was not violent towards the Petitioner.

7.33 On the other hand, the messages that he used to exchange with Jennifer show that he used to communicate with her almost on a daily basis. This to me explains the shift in his behaviour towards the Petitioner by being hostile in his responses to her and not engaging in proper communication with her.

7.34 In this regard, I find that:

- (i) The Respondent never used to communicate with the Petitioners on family issues.
- (ii) The Respondent was hostile towards the Petitioner in the manner he used to respond to her.
- (iii) The allegations have been proved.

7.35 The Petitioner also alleged that the Respondent does not support her financially. On this allegation, I am inclined to

accept the evidence of the Respondent because the Petitioner did not fully substantiate this allegation. Furthermore, she admitted that the Respondent paid the school fees for the children.

7.36 Given the foregoing, I find that this allegation has not been proved. It is therefore dismissed.

7.37 The last allegation was that the Respondent denied her the opportunity to enjoy conjugal rights. The Petitioner's explanation was that after she discovered that the Respondent was having an extra marital affair, she left the matrimonial bedroom and that they were last intimate on 3rd November, 2018.

7.38 The Respondent has blamed the Petitioner for this state of affairs asserting that she was the one who moved out of the matrimonial bedroom and that is why they could not enjoy the conjugal rights.

7.39 I have made a finding that the Respondent was having an extra marital affair with another woman Jennifer Siachilubi. This was evidenced through the various messages the two used to exchange. There is no doubt that the Respondent is the one who created this state of affairs in the marriage by

being sexually intimate with another woman thereby betraying his wife.

7.40 In all fairness, I do not expect the Petitioner to continue enjoying conjugal rights with the Respondent after discovering the explicit messages exchanged between the Respondent and Jennifer. I can safely conclude that the level of betrayal inflicted deep emotional pain and resentment and that is why the Petitioner moved out of the matrimonial bedroom.

7.41 The Respondent cannot therefore shift the blame to the Petitioner when the environment he created by being unfaithful to the Petitioner made it difficult and impossible for her to enjoy any form of conjugal rights.

7.42 It is arduous to comprehend what kind of interaction the Respondent expected to have with the Petitioner when it is very clear from the numerous and graphic messages that he used to exchange with Jennifer that the two used to spend a lot of time together and they used to have sexual intercourse frequently.

7.43 In the light of the foregoing, I find that the Petitioner has proved this allegation that the Respondent used to deny her

conjugal rights. Thus, he intentionally breached one of the ties of marriage.

7.44 Before I proceed to consider the effect that this behaviour has had on the Petitioner, I shall proceed to consider the cross - petition.

7.45 The Respondent in his cross petition has raised allegations against the Petitioner. That through-out the marriage the Petitioner has not loved him as she has always been suspicious of every female acquaintance and friend he has. That she disappeared from the matrimonial home for three (3) days during which time she sent insulting messages to all women in his phonebook.

7.46 It is also alleged that the Petitioner has been denying him conjugal rights, the Petitioner has abandoned the family, she has been having extra marital affairs and that the main reason for her seeking to have the marriage dissolved is because he is jobless and she doesn't want to support him.

7.47 In Court, he stated that their marriage had been of accusations and suspicion. That the Petitioner told him that he would never access her phone and so he wondered why she got his phone and downloaded messages and used the

phone to send insulting messages to his friends and workmates.

7.48 On the allegation that she denied him conjugal rights, he stated that the Petitioner moved out of the matrimonial bedroom and thus, they could not enjoy conjugal rights.

7.49 Regarding the allegation that the Petitioner had abandoned the family, he stated that from 2018 to date, the Petitioner used to go out without telling anyone and when he contacted her relatives, they informed him that they didn't know where she was. That the Petitioner produced documents in Court to show that she was at a hotel but no one would testify on her behalf who she stayed with at the hotel.

7.50 On the allegation that the Petitioner was having extra marital affairs, he stated that the Petitioner met a Malawian man in Zimbabwe and she used to hide when speaking to him on the phone. One day he trailed her and overheard her telling the man that she missed him and that they had a good time together. That he confronted her about the man and that she could not behave in such a manner since she was a married woman.

7.51 The Respondent also alleged that the Petitioner was having an affair with her cousin and also a man from Savoy Hotel.

7.52 The last allegation was that the Petitioner did not want to support him since he was jobless. That's why she had petitioned for the dissolution of marriage. Therefore, he wanted to give her chance so that she could go and enjoy her money and work.

7.53 The Petitioner denied the first allegation that she was suspicious of him through-out the marriage and also that she sent insulting messages to the women in the Respondents phone book.

7.54 She explained that when she got hold of the Respondents phone after a message popped up from Jennifer, she took screenshots of the messages she found in the phone which she sent to the Reverends where she congregated.

7.55 What I have discerned from the foregoing is that the Petitioner has not denied that she got the Respondent's phone and that she sent out messages to third parties. What she has denied is that she sent insulting messages to women

who were in the Respondent's phone book. In my view, if it was true that the Petitioner did that, the Respondent should have adduced further evidence to substantiate these allegations in the same way that the Petitioner produced the messages she found on his phone.

7.56 I say this because in his evidence, he stated that this issue was a subject of the complaint he lodged at the police station. However, no documentary evidence was adduced to the effect that such a complaint was made at the police.

7.57 For this reason, I find that the Respondent has failed to prove this allegation.

7.58 On the allegation that the Petitioner had abandoned the family, she told the Court that after she discovered that the Respondent had an extra marital affair with Jennifer, she left the matrimonial home because she felt betrayed. That she booked in at Shearwood Lodge as seen from the receipts she had produced at page 3 of her bundle of documents.

7.59 This allegation like the first one is linked to the finding that I have made that the Respondent was having an extra marital

affair with another woman by the name of Jeninfer. I have also stated when dealing with the Petitioner's petition that when one is betrayed, there is a sense of resentment. The Petitioner has explained that she felt betrayed and this is the reason she left the matrimonial home.

7.60 Given the foregoing, I cannot bring myself to accept the allegation by the Respondent that the Petitioner had abandoned the family. I find that the Petitioner left home because of the Respondent's behaviour in that the Petitioner had merely retaliated to what the Respondent had made her go through.

7.61 I therefore find that the Respondent has failed to prove this allegation that the Petitioner had abandoned the family.

7.62 Another allegation demonstrative of the Petitioner's behaviour is that the Petitioner was having extra marital affairs. The Petitioner denied these allegations that she had an affair with a Malawian man as she had not even been to Malawi. She also denied that she had an affair with her cousin and wondered why the Respondent had not taken any action in relation to these allegations.

7.63 The Petitioner also denied that she was having an affair with a man at Savoy Hotel. She however acknowledged that she received a phone call which was not meant for her and when she answered it, the caller realized that he had called a wrong number.

7.64 It is very clear that there are two conflicting positions given by the parties. However, an allegation of infidelity is a very serious one which requires substantiated or verifiable evidence.

7.65 In the present case, the Respondent has merely made assertions that the Petitioner was unfaithful without any further proof. Therefore, by merely stating that it is not known who the Petitioner was staying with at the hotel when she moved out of the matrimonial home is inviting this Court to venture into conjecture without providing evidence that the Petitioner was staying with another person. Suspicion is not legal proof.

7.66 If the Respondent had reason to believe that Petitioner was staying with another man, he could have investigated the

matter to establish the true position. There is no evidence that he did.

7.67 In addition, I consider the explanation given by the Petitioner in relation to the man from Savoy Hotel to be reasonable as the Respondent did not adduce any evidence to dispute what the Petitioner had stated.

7.68 In any event, in the view that I hold, if it was true that the Petitioner was having extra marital affairs, the Respondent could not have waited for the Petitioner to file for dissolution and then make this very serious allegation.

7.69 In the absence of any cogent evidence, I am inclined to accept the evidence of the Petitioner and I find that the Respondent has failed to prove this allegation that the Petitioner was having extra marital affairs.

7.70 The Petitioner also denied the allegation that she had petitioned for dissolution of the marriage because she did not want to support the Respondent as he was jobless.

7.71 To begin with, I do not understand why the Respondent has attributed the decision by the Petitioner to petition for the

dissolution of marriage to him being unemployed. Having considered the evidence adduced by the Petitioner against the backdrop of the Respondent's evidence, it is very clear that the main reason for the decision is because the Respondent has betrayed her by having an extra marital affair with another woman by the name of Jennifer.

7.72 In this regard, I decline to accept the reason given by the Respondent as there is no evidence laid before this Court on which I can draw such an inference.

7.73 I therefore find that the allegation is not proved to the required standard.

7.74 On the whole, I find that the Respondent has failed to prove all the allegations raised in the cross petition. It is therefore dismissed in its entirety.

7.75 I shall now move to consider the effect the Respondent's behaviour has had on the Petitioner because as was stated by the learned authors of the Principles of Family Law Fifth (5th) Edition at page 107, it is not the behaviour that needs to be unreasonable but the expectation of cohabitation.

7.76 The Learned Authors of Bromley's Family Law 8th 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.'

7.77 Therefore, in assessing the effect or impact of the Respondent's behaviour on the Petitioner, 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. The test is 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 him taking into account the whole of the circumstances, characters and personalities of the parties.

7.78 The Petitioner stated in her evidence that the messages that she found in the Respondent's phone showing that he was having an extra marital affair with Jennifer were appalling or disgusting. She also stated that it was so disheartening to read the messages in the phone. That she felt so betrayed and that was the reason she decided to leave the matrimonial

home because she could not believe that the Respondent had done this to her.

7.79 It is very clear from the foregoing that the marriage between the Petitioner and the Respondent is diseased because outside influences have worked their way into it.

7.80 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.

7.81 I think it right to state here that while I accept that the Petitioner is not an angel and may not be without fault since she is a human being, what I discern from the evidence from both parties taking into account the whole history of the marriage is that the Petitioner's conduct of leaving the matrimonial home, sleeping in the library and also in the girls' bedroom were acts as a result of the maelstrom of emotions unleashed in the wake of the Respondent's infidelity. This was evident to the Court because the Petitioner became emotional when giving evidence as she broke down and started crying.

7.82 In short, what I have inferred from the evidence adduced is that they were acts done in frustration and retaliation of the Respondent's behaviour as it is clear that she has not accepted the kind of life the Respondent has subjected her to. She therefore decided to go and stay at the Lodge so that she could pick herself up and have a healthy state of mind.

7.83 As I have already alluded to, the Respondent who is a married man saw it fit to not only have an affair with another woman but also to be exchanging explicit and graphic messages with the same woman expressing affection for each other and reminiscing about the time spent together in the past and also the sexual encounters they have had together.

7.84 With this level of betrayal, I am astounded that the Respondent has decided to get the most out of the retaliatory conduct exhibited by the Petitioner and assert that the Petitioner's behaviour is inconsistent with that of a married man as she has denied him conjugal rights, has moved out of the matrimonial bedroom and also seeks dissolution of the marriage because he is jobless.

7.85 I say this because it is the Respondent who has exhibited conduct inconsistent with that of a married man as it is

evident from the messages that he has been exchanging with Jennifer which are repulsive and appalling.

7.86 I therefore find that the evidence adduced by the Petitioner of 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 him.

8. CONCLUSION

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

8.2 The Supreme Court in the case of **Arthur Yoyo v. Mable Mary Bbuku Yoyo**⁽⁵⁾ stated that in order to refuse to grant a decree of dissolution of marriage, there must be evidence of mutual love between the parties.

8.3 Furthermore, I am also satisfied that there is no likelihood of reconciliation because the Petitioner does not trust the Respondent anymore and all efforts to reconcile the parties have failed.

8.4 Just to add, the Supreme Court in the case of **Brighton Soko v. Petronella Sakala Soko** ⁽⁶⁾ 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.”

8.5 In the present case, although the parties have been married since 1995, it is clear to me that the marriage is going down the drain and is not capable of being rescued because the Respondent is so deeply involved with the other woman and this has shifted or changed his behaviour towards the Petitioner. The two no longer communicate in an effective way, that is why there is a sense of emotional distance and disconnection. Furthermore, there is no trust in this marriage.

8.6 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 a mere simulacrum of a marriage by the Respondent who has chosen to disrespect the sanctity of marriage.

8.7 On the totality of the evidence adduced by the Petitioner, I find that:

- (i) The Petitioner in her petition has adduced sufficient evidence to prove that the marriage has broken down irretrievably as a result of the Respondent's behaviour and she cannot reasonably be expected to live with him.
- (ii) The Respondent in his cross-petition has failed to prove that the marriage has broken down on account of the Petitioner's behaviour.
- (iii) There is no likelihood of reconciliation.

8.8 In the premise, I hold that the marriage solemnized under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **IDAH CHAMA MULENGA** and **JACKSON MULENGA** on 15th day of November, 1995 at Office of the Registrar in Ndola on the Copperbelt Province of the Republic of Zambia has broken down irretrievably in terms of Section 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007.

8.9 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.

8.10 I order that either party is at liberty to file a formal application for the determination of the issue of maintenance or property settlement and custody of the children should the parties fail to reach an agreement.

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

8.12 Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 25TH DAY OF AUGUST, 2025.



M.C. KOMBE
JUDGE

