

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

2022/HPF/D089

BETWEEN:

KELVIN KUNDA CHINWAMUFUBA

AND

MWENYA MUSUNGA CHINWAMUFUBA



PETITIONER

RESPONDENT

*Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 14th May, 2024.*

For the Applicant:

N/A

For the Respondent:

Ms. V. Munasinyongwe Messrs. Malisa & Partners Legal Practitioners.

J U D G M E N T

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The matrimonial causes act no. 20 of 2007.*
2. *Rayden and Jackson on Divorce and Family Matters 16th Edition,*
3. *Butterworths.*
4. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' & Magistrates' Courts, 11th Edition, London, Butterworths.*

CASES REFERRED TO:

1. *Brighton Soko vs Petronella Sakala Soko, - SCZ-8-189-2015*
2. *Ash vs Ash (1972) 1. A.E.R. 582*
3. *Mahande vs Mahande (1976) Z.R. 354 (S.C).*

4. *Namuunda Hamalengwe Mutombo vs Livian Haabula Mutombo (2009) ZR Dr. Matibini*
5. *SC, Mable M. Bbuku vs Arthur Yoyo (SCJ) No. 78/1998 unreported)*

1.0 INTRODUCTION

1.1 This is a Petition for dissolution of marriage which was filed on 21st February 2022, pursuant to the provisions of **section 8 and 9 (1)(b) of the Matrimonial Causes Act No. 20 of 2007** on the ground that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her.

1.2 The said **Sections 8 and 9 (1) (b) of the Matrimonial Causes Act** provides that:

“8. 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.

9. (1) For purposes 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

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

1.3 Further, **Section 9(2) of the Matrimonial Causes Act** provides that:

“On a petition for divorce it shall be the duty of the Court to inquire so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.” (Court’s emphasis)

2.0 BACKGROUND

2.1 The Petition indicates that the Petitioner is namely **Kelvin Kunda Chinwamufuba**, who was lawfully married to the Respondent, **Mwenya Musunga Chinwamufuba**, on 28th December, 2013 at Ndola Civic

Centre in the Copperbelt Province of the Republic of Zambia.

2.2 The Parties last lived as husband and wife in Mikango Baracks, Chongwe district in Lusaka Province of the Republic of Zambia. Both the Petitioner and the Respondent are domiciled in Zambia.

2.3 The Petitioner is an officer of the Zambia Army at Mikango Baracks while the Respondent is a house wife.

2.4 The marriage has Three (3) children of the family now living, namely;

i Gift Chinwamufuba she is the first-born child she is now aged 21 years old was born on 3rd March 2003 she was in grade 12 at St. Luke secondary school in Chipata at the time when the Petition.

ii Chilufya Kunda Chinwamufu the second born child of the marriage, she is now 9 years old she was born on 1st September 2014 at Mikango Hospital and she's is at Naledi Primary School in Lusaka.

iii Bwalya Chinwamufuba is the third child of the marriage she is now 5 years old and was born on the 25th November 2018. she is at Mikango Nursery School when the Petition was filed.

2.5 There have been no previous proceedings in the High Court of Zambia or elsewhere with reference to the said marriage or between the Petitioner and the Respondent with reference to any property of either or both of them.

2.6 There are no proceedings continuing in any Court in or outside Zambia which are in respect of the said marriage or which are capable of affecting its validity or subsistence.

2.7 There have been no arrangements made between the parties regarding the maintenance of the children of the said marriage.

2.8 The said marriage has broken down irretrievably.

3.0 THE PETITIONER'S CASE

3.1 The Petitioner alleges that the marriage has broken down irretrievably as the Respondent has behaved in

such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

3.2 The Petitioner has relied on **Section 8 and 9 (1) (b) of Matrimonial Causes Act**, which provides; that *irretrievable breakdown maybe proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner, or vice visa in the case of cross petition, cannot live with the Respondent.*

3.3 The Petitioner avers the following particulars;

- i) *that Petitioner's life is at stake, as the Respondent who is his wife is planning on killing him, the Respondent was found with charms in their matrimonial home which some had been fed to the Petitioner. These charms were brought into their matrimonial home by the Respondent. The Petitioner asked her about the said charms she said she had brought them in the matrimonial home but denied having ever used them on me, the Respondent threatened to kill the*

Petitioner on several times and she told Petitioner's mother that she would kill him.

- ii) that the Petitioner discovered a chat from the Respondent's phone telling her friend that wishes death for the Petitioner so that she can be left alone.*
- iii) that the Respondent has been doing a lot of things behind the Petitioner's back, she even bought a plot and couldn't disclose to the Petitioner, the Petitioner only found out through other people and when he asked the Respondent she accepted that its true she had bought a plot and she couldn't tell the Petitioner because at first when she told the Petitioner about the plot , he didn't show interest.*
- iv) the Respondent is very disrespectful, she insults me in the presence of our children and she calls me all sorts of names among them a "DOG". The Respondent would*

rather listen to her friends than listening to me. she has no regard for me.

- v) the Petitioner discovered that money was missing at their shop worth 50,000.00 and that's when the Petitioner took the shop keeper to the Police. the shop keeper disclosed that the Respondent has been taking the money for her personal use which the Petitioner suspected that the Respondent used it to develop the plot in Ndola. The Respondent has been very dishonest in all her dealings as she told the shop keeper to never disclose anything to me.*

3.4 The Petitioner therefore prays that;

- i the said marriage be dissolved.*
- ii the said children of the family should live with the Petitioner.*
- iii each party bears their own legal costs.*

4.0 ANSWER

- 4.1 The Respondent admits that she did on 10th June 2022 file an Answer to the Petition.
- 4.2 The Respondent admits paragraphs 1 to 9 of the Petition.
- 4.3 The Respondent denies paragraph 10 and will aver that the marriage has not broken down irretrievably. She has further averred that she has not behaved unreasonably and the Petitioner can be expected to live with her.
- 4.4 The Respondent has denied ever planning to kill the Petitioner and that she has never brought charms in the matrimonial house. The Respondent has alleged that the mentioned charms found in the house were actually brought by the Petitioner when he returned from visiting his mother.
- 4.5 The Respondent has also alleged that Petitioner has a habit of having extra marital affairs and on the day in issue she said the Petitioner went home with a used condom. This action made the Respondent angry and

during the heat of passion she received a call from her friend and at that point said to the friend that she wished the Petitioner to die so that she could no longer go through what she was going through with him. The Respondent said she said that in a text message out of anger and did not mean what she said.

4.6 The Respondent over the allegations of her purchasing a plot in Ndola denied purchasing the same but that she did have intentions of buying it although she failed to raise the money for the same. She also said she had informed the Petitioner about buying the land but he said he had enough properties.

4.7 The Respondent denied disrespecting the Petitioner and or even insulting him in the presence of the children except on one occasion when the Respondent had discovered a message between the Petitioner and the mother of the first born child of the family which message annoyed her. In the message the Petitioner was discussing how they were living and he said he was sending the said woman money for buying clothes for

herself and her child, the said child was living with the parties herein.

4.8 The Respondent has denied ever getting money from the shop at the time when the Petitioner was on peace keeping mission.

4.9 The Respondent prays that the marriage should not be dissolved and that instead there be an order for the parties to seek counselling and that the Petitioner bears the Costs.

4.10 The Respondent prayed alternatively that should the Court dissolve the marriage, she should be awarded custody of the children born from her and reasonable access to the Petitioner. That there should be an order for property settlement and the Petitioner should bear the costs of the proceedings.

5.0 HEARING

5.1 At the hearing of the matter on the 5th February 2024 the Petitioner augmented his Petition by testifying on oath that the marriage has broken down irretrievably on

the basis of unreasonable behavior by the Respondent as stated in the Petition.

- 5.2 The Petitioner testified on oath in his own respect and did not call any other witness. Further, he largely recited his averments in his Petition. For avoidance of repetition, I shall only highlight issues he did not aver in the Petition.
- 5.3 In examination in chief, the Petitioner informed the Court that things only changed after he went to Sudan for peace keeping when he found a shortage of K50,000.00 from the total capital of K70,000.00 they had in the business. This was money from an Artel Money Business which he was running.
- 5.4 The Petitioner testified that when asked the sales person about the missing money, the sales person said it was the Respondent who got the K50,000.00. he said the money was used buy a plot in Ndola without his consent and knowledge.

- 5.5 The Petitioner reiterated that, after confronting the Respondent she accepted having gotten the money and bought a plot in Ndola.
- 5.6 The Petitioner submitted that he was not averse to the Respondent having the custody of the children and access to him.
- 5.7 The Respondent on the other hand gave sworn evidence wherein she stated that she was married to the Petitioner as stated in the Petition.
- 5.8 The Respondent further testified that in 2021 when the Petitioner was leaving for School in Kabwe he asked the Respondent to pay him back the K50,000.00 she had gotten from the business or else he was going to divorce the her. The Respondent said she was not going to pay back because she had no money and that she never used the same money as alleged by the Petitioner. The Respondent further said the Petitioner had no proof that she was the one who got the alleged money.
- 5.9 The Respondent prayed that the marriage should not be dissolved.

6.0 SUBMISSIONS

6.1 There were no submissions from both parties filed at the time of this judgment.

7.0 CONSIDERATIONS AND DECISION

8.1 I have considered the parties' pleadings and the oral testimony by the Petitioner and the Respondent.

8.2 Firstly, I take cognizance of the fact that the parties celebrated their civil marriage in the Republic of Zambia as evidenced by the marriage certificate exhibited in the Petition. I therefore make a finding of fact that the parties' marriage was celebrated in compliance with the ***Marriage Act, Chapter 50 of the Laws of Zambia***. I am satisfied that the parties were properly married in compliance with the laws of the Republic of Zambia.

8.3 It is the presence of the marriage certificate which forms the basis of my jurisdiction over the Petition as the same shows that their marriage is not customary but statutory.

8.4 I have also taken cognizance of the position that the both the Petitioner and the Respondent are domiciled in Zambia as indicated in the Petition and residents in the Republic

of Zambia for purposes of **Section 4(3) of the Matrimonial Causes Act**, which bestows jurisdiction on the High Court, to entertain a Petition for dissolution of a statutory marriage, based on the residence or domicile of one or both parties to the marriage. The provision states as follows;

“The Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage...

(a) is domiciled in Zambia at the date of the commencement of the proceedings; or

(b) is resident in Zambia at the date of the commencement of the proceedings, and has been ordinarily so resident for a period of not less than twelve months immediately preceding that date.

8.5 Furthermore, it is my finding that the Petition is properly before the Court because it was issued out of Court at least one year post the solemnization of the subject marriage.

This is in view of **Section 6 of the Matrimonial Causes Act** concerning the timeframe within which a Petition for the dissolution of a marriage can be presented to the Court. The said provision prescribes that a Petition for the dissolution of marriage can only be filed into Court after the lapse of one year from the date the marriage was contracted.

- 8.6 Based on the foregoing findings, it is my position that I have jurisdiction to entertain the present Petition.
- 8.7 I now turn to determine whether the marriage of the parties has broken down on the ground of unreasonable behaviour.
- 8.8 As highlighted already, both parties are in consensus that their marriage has broken down irretrievably, this is for the reason that they have accused each other of having behaved unreasonably and therefore responsible for the breakdown of the marriage.
- 8.9 I wish to begin by stating that the test to apply on whether the Respondent's behaviour was unreasonable to the Petitioner, the eminent author of **Raydens Law &**

Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts, opined as follows at page 203 paragraph 25:

“Nevertheless, in considering what is reasonable, the Court (in accordance with its duty to inquire, so far as reasonably can, into the facts alleged) will have regard to the history of the marriage and to individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable; allowance will be made for the sensitive as well the thick-skinned;...”

8.10 The said eminent authors further opined at page 204, paragraph 26 as follows:

“Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is unreasonable in itself, it may well be even more effective if it consists of a long

continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the Respondent.”

8.11 In the Supreme Court of Zambia Judgment of **Brighton Soko vs Petronella Sakala Soko**¹, their Lordships held as follows at page J28:

“In taking the view which we have taken, we have paid careful attention to the reasoning which we have adopted in Mahande namely that when considering the Respondent’s behaviour in the context of a divorce petition founded on ‘unreasonable behaviour’ as enacted in Section 9 (1) of the Matrimonial Causes Act No. 20 of 2007, it is not just the behaviour of respondent which is decisive but, equally crucial and as much decisive, is the way in which such behaviour relates to or interests with the character, behaviour, personality, disposition and other traits

and attributes of the particular petitioner involved.” (Court’s emphasis)

8.12 In the same case, the Supreme Court of Zambia cited the English case of Ash vs Ash wherein it was stated in part by Bagnall, J at page 140 as follows:

“the general question may be expended thus: Can this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?”

8.13 The **Ash vs Ash**² case was also cited with approval in the Judgment of the Supreme Court of Zambia in **Mahande vs Mahande**³, wherein Cullinan, AJS., stated as follows:

“...The following question then arises, to paraphrase the above words of Bagnall, J, and those of Ormrod, J, in Pheasant vs Pheasant (1972) 1 A.ER. at p. 591 at c to d; bearing in mind the petitioner’s fault and

other attributes, good and bad, and having regards to her behaviour during the marriage, bearing in mind the characters and the difficulties of both parties, trying to be fair to both of them and expecting neither heroic virtue or selfless abnegation from either, has the respondent then behaved in such way that the petitioner cannot reasonably be expected to live with him?”

8.14 I have addressed my mind to Section 13 of the Matrimonial Causes Act, which provides that:

“ where in any proceedings for divorce the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent, but the parties to the marriage have lived with each other for a period or periods not exceeding six months after the date of the occurrence of the final incident

relied on by the petitioner and held by the court to support the petitioner's allegations, that fact shall be disregarded in determining for the purposes of paragraph (b) (1) of section nine whether the petitioner cannot reasonably be expected to live with the respondent."

8.15 I am guided by the above authorities that as can be seen from the above, it is clear and it is my considered view, that the behaviour required to be proved, must be of such gravity that the party's powers of endurance are exhausted, to the point where it is clear that they cannot reasonably be expected to live with each other. The standard is an objective one or that of a reasonable man or woman

8.16 I have carefully considered the Petition for dissolution of marriage, as well as the *viva voce* evidence of both parties. I am satisfied that the issue for determination is whether this marriage has broken down irretrievably due to the fact

that the Respondent has behaved unreasonably such that the Petitioner cannot be expected to live with the her.

8.17 And similarly, in the case at hand the Respondent has testified that the marriage has not broken down and that she has not behaved unreasonably. The Respondent has alleged that the court should instead order for counselling. The Respondent has merely mentioned that the couple has been having arguments on various family issues which according to her have not broken the marriage.

8.18 It has been averred that in about 2019- 2020 the dates the Petitioner cannot remember, he suspected that some money was missing amounting to K50,000.00 from the Airtel Money business.

8.19 The Petitioner averred that when he confronted the Respondent about the missing money, the Respondent accepted having gotten the money and bought a plot in Ndola and when asked why she di inform him before getting the same money she said because I said I was not interested in buying the plot. The Petitioner said there he

then informed the Respondent to sale the plot but still she refused.

8.20 Furthermore, I find that Respondent did not rebut the Petitioner in her Answer and testimony over the allegation of her getting the money although she said that she only got K8,000.00.

8.21 In addition to examining the behaviour of the parties, this Court is also called upon to consider whether cohabitation would resume between the parties since they now stay separately. Section 9(4) provides as follows:

“A decree of dissolution of marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.”

8.22 In the case of **Namuunda Hamalengwe Mutombo vs Livian Haabula Mutombo (2009) ZR Dr. Matibini, SC⁴**, J as he then was, held inter alia that;

“2. A marriage is said to have irretrievably broken down if it stood no chance because the parties to the marriage have ceased

cohabiting, and one of the parties or both intends not to resume cohabitation.

3. *The duty of the Court is to inquire into the facts alleged to establish irretrievable breakdown of marriage. If there is anything inconsistent with irretrievable breakdown of marriage, then the condition has not been met.*
4. *when it is alleged that the respondent has behaved in such a way that the petitioner cannot be reasonably be expected to live with the respondent, the task of the court is not to look at the quality of the respondent's behaviour, but also the effect of the conduct upon the petitioner."*

8.23 It is my finding that clearly there is no chance shown of resuming cordial relations between the parties in the case at hand for the reason that due to the behaviour of the Respondent as alleged in the particulars of unreasonable behaviour the Petitioner has been affected to the extent

that he cannot reasonably be expected to live with the Respondent. The Petitioner does not wish to resume cordial relations with the Respondent even when the Respondent wishes that the parties be ordered to undergo counselling.

8.24 A critical consideration of the facts of this case shows that the Petitioner has cited the character and temperament of the Respondent as the reason he cannot be expected to live with her. The Respondent has not raised any firm denial of this conduct save to also allege character and temperament of the Petitioner towards her as the reason for the arguments although according to her the marriage has not broken down.

8.25 Upon careful consideration of the facts of this case and the demeanor of both parties during trial, I find that the marriage is indeed one riddled with problems relating the behaviour of both parties leading to arguments and the evidence on the record was not discredited in cross examination for either of them that the marriage has

broken down irretrievably since now the Petitioner finds it intolerable to leave with the Petitioner.

8.26 Consequently, on a totality of the evidence before me I find that the marriage has broken down irretrievably due to the lack of “mutual love” between the parties which has been occasioned by the behaviour of the Respondent towards the Petitioner. This is supported by what was stated in the case of ***Mable M. Bbuku vs Arthur Yoyo (SCJ) No. 78/1998 unreported*** Chirwa J⁵, as he then was, stated that:

“It is not a question of maintaining the status of “Mrs.”. there must be mutual love. To my mind, both parties must be able to recognize the existence of their marriage for it to be seen to subsist. The state of mind plays a cardinal part in considering whether the marriage exists or not”

8.27 I also find that the Petitioner and Respondent are unharmonious with each other and the Petitioner herein

finds it intolerable to live with the Respondent due to her behaviour.

8.28 The marriage has broken down irretrievably and I accordingly grant the Petitioner and the Respondent a *decree nisi* and for divorce to be made absolute in 6 weeks from the date hereof.

9.0 I order that the Respondent will have custody of the children she prayed for with reasonable access to the Respondent

10.0 Further I refer all maintenance and property settlement issues to the Deputy Director for determination.

11.0 I order that costs will be in the cause.

12.0 Leave to appeal is granted.

Dated at Lusaka, this 14th May, 2024.



M.M. Bah-Matandala
JUDGE HIGH COURT

