

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

2020/HPF/D111

BETWEEN:

SHEILA MPILA MACHAYA

AND

DENNIS MACHAYA

PATRICIA MICHELO



PETITIONER

RESPONDENT

CO - RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE W. S. MWEEMBA AT LUSAKA.

For the Petitioner: Ms. Sheila Mpila Machaya – In Person.

For the Respondent: Mr. D. Machaya – In Person

J U D G M E N T

LEGISLATION REFERRED TO:

- 1. The Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia.***

CASES REFERRED TO:

- 1. Hyde V Hyde (1866) LR 1P & D 130.***
- 2. Mahande v Mahande (1976) ZR 287.***
- 3. Thurlow V. Thurlow (1975) 2 ALL E.R. 979.***
- 4. Mable M. B. Yoyo V Arthur Yoyo SCZ, Judgment No. 78 of 1998***

WORKS REFERRED TO:

- 1. Mckenna, Breakdown of Marriage, Modern Law Review, Vol 30 No. 2 (1967).***
- 2. Passingham, Law and Practice in Matrimonial Causes (3rd Ed), London: Butterworths (1979).***

Sheila Mpila Machaya (*the Petitioner*) filed the Petition for Dissolution of Marriage on 11th March, 2020 seeking to dissolve her marriage to **Dennis Machaya** (*the Respondent*).

The Petition was launched pursuant to the **Section 8 and Section 9 (1) (b) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia**.

The Petitioner avers that she got married to the Respondent on 31st of May, 2014 at the Office of the Registrar of Marriages at Lusaka Civic Center in the City and Province of Lusaka of the Republic of Zambia; that both parties are domiciled in Zambia; that immediately after the marriage the Petitioner and the Respondent lived together as wife and husband at Zambia Revenue Authority (ZRA) Flats Airport Road, Chelstone, Lusaka; that the Petitioner is currently unemployed and resides at Ngwerere Farm 1528, Lusaka; while the Respondent is an IT Officer working at Zambia Revenue Authority (ZRA).

The Petition further reveals that there is one child of the family now living and having been born between the Petitioner and Respondent during the subsistence of the marriage whose name is **James Machaya**, born on 26th July, 2014.

That there have been no previous proceedings in any Court of law in Zambia with reference to the said marriage between the Petitioner and the Respondent or with reference to any property of either or both of them.

It has also been averred that there are no proceedings continuing in any Court in Zambia or elsewhere which are, in respect of the marriage capable of affecting its validity or subsistence. There is however an agreement or arrangement that has been made between the Parties for the support of the Petitioner or Respondent.

The Petitioner alleges the irretrievable breakdown of the marriage on the ground that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The following particulars of the unreasonable behaviour have been cited:

- i. *That the Respondent has been having a string of extra marital affairs, including with his cousin Patricia Michelo the Co – Respondent cited herein;*
- ii. *That in August, 2019 the Petitioner found the Respondent having intimacy with the Co-Respondent in the bathroom which caused her great anger and pain such that she cannot live with the Respondent;*
- iii. *That each time the Petitioner confronted the Respondent over this incident, he told her that he would rather dissolve his marriage with the Petitioner than ask his cousin to leave the matrimonial house;*
- iv. *That the Respondent was currently living with another woman whom he intends to marry; and*
- v. *That the Respondent has been violent and disrespectful to the Petitioner and did not show her love and affection which has consequently caused complete loss of love by the Petitioner towards the Respondent.*

Given these particulars, the following were the Petitioner's prayers:

- i. *That the marriage be dissolved;*
- ii. *That the Petitioner be granted custody of the child of the family;*

- iii. *That the Court makes an order regarding property settlement;*
- iv. *That the Court makes an order for the maintenance of the child of the family; and*
- v. *That the Respondent bears the costs of these proceedings.*

The Respondent filed an Acknowledgment of Service dated 20th April, 2020 wherein he stated that he was served with the Divorce Petition on 13th March, 2020 and that he did not intend to defend the Petition.

However, on the same date he filed a Response/Answer to the Petition wherein he stated the following in sum:

He denied having had extra marital affairs with women, let alone his own sister/cousin; that it was not true that the Petitioner had caught him having sexual intimacy with the Co – Respondent; that the Petitioner had been looking for excuses to leave the matrimonial home to go to the mothers house; that the Petitioner had been phoning the guards at his house to enquire about his visitors in her absence; that he had not been violent or aggressive towards the Petitioner and to the contrary on 16th April, 2020 it was the Petitioner who sent people to his home to attack him and he had a medical report to that effect attached; that their marriage was generally good until 2015 when the Petitioners father died and he left his mother in law and his wife and her siblings rental income which she would spend alone and after it was done she would return home; that on several occasions, he had suggested that she use the said money to further her education and he had bought her study books for use at

home which she had never used; that he was physically challenged due to a bomb accident, thus he used two artificial legs and elbow crutches to give him balance; that on several occasions the Petitioner had threatened to break the only normal hand and on one occasion, she became violent and tried to break it and he had attached a medical report to prove this.

Given these particulars, the following were the Respondent's prayers:

- (i) *That the marriage be dissolved;*
- (ii) *That the Respondent be granted custody of the child of the family given that he lived near good schools whilst the Petitioner would just leave the child with her mentally ill aunt;*
- (iii) *That the Court makes an order for property settlement;*
- (iv) *That the Court makes an order for his maintenance; and*
- (v) *That the Respondent bears the costs of these proceedings.*

The Petitioner filed a Reply to the Respondent's Answer on 28th May, 2020 wherein she stated the following:

That it was still her firm position that the Respondent had been having various extra marital affairs including with his cousin the Co-Respondent and she had found them in the act; That she did not do things in a way that would result into her leaving the matrimonial home, particularly to avoid the Respondent's relatives; that the parties had been counselled by the church elders at the Petitioner's Mothers Church; however that it was resolved at church that a family meeting be held which the Respondent refused to attend; she

maintained that the Respondent had been violent and disrespectful towards her and did not show her any love and affection; that she did not send anyone to attack the Respondent but only sent the taxi driver to serve the Respondent with the Divorce Petition out of fear of getting close to him; she admitted that the marriage had been good until she discovered the Respondent's extra marital affairs and that she would send him financial support from the rentals from her late fathers property.

Given that this Petition was premised on the ground of unreasonable behaviour, it is pertinent that I consider whether the Respondent's behaviour was indeed unreasonable in relation to the Petitioner. In doing so the starting point of authority for my guidance is **Section 9 (1) (b) of The Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia**. It provides that:

“Irretrievable breakdown may be proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent, or vice versa in the case of a Cross-Petition.”

Having been guided by the above authority, it is clear in my view that the behaviour required to be proved must be to the point where it is evident that parties cannot reasonably be expected to live with each other.

I am also guided by the case of **HYDE V HYDE (1)** where the Court defined marriage as the:-

“Voluntary union for life of one man and one woman to the exclusion of all others.”

I have carefully considered all the evidence before me, and it is evident that the issue to be determined is whether this marriage has broken down irretrievably due to the fact that the Respondent has behaved so unreasonably that the Petitioner cannot be expected to live with the Respondent.

What then is irretrievable breakdown of marriage? According to Sir B. McKenna, irretrievable breakdown of marriage refers to a marriage which stands no chance because the parties to the marriage have ceased co-habiting and one of the parties (or both) intends not to resume cohabitation.

In this case, the fact being relied upon by the Petitioner is that of *unreasonable behaviour*. Commenting on unreasonable behaviour, Passingham in Law and Practice in Matrimonial Causes states as follows:

“the Courts have refrained from any attempt at an exhaustive definition of behaviour...Each case raises a question of fact and degree may depend on the personalities of the parties...the phrase “cannot reasonably be expected to live with the Respondent,” poses an objective test...But the words “the Petitioner” and “the Respondent” do not refer to ordinary reasonable spouses who are placed in that position, but to the actual persons concerned in the case.”

In the case of **MAHANDE V MAHANDE (2)**, Cullinan, AJS extending this argument further with specific reference to the question, whether the Petitioner can or cannot reasonably be expected to live with the Respondent, stated as follows:

"I have to consider not only the behaviours of the Respondent as alleged...but the character, personality, disposition and the 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 and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?"

In the case of **THURLOW V. THURLOW (3)**, the Court in deciding the question of "unreasonable behaviour" held that: -

"In order to establish that a Respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with the Respondent, it was not sufficient merely to establish that the marriage was dead and that it was impossible for the Petitioner to cohabit with the Respondent. It had to be shown that it was the Respondent's behaviour which justified a conclusion by the Court that the Petitioner could not reasonably be expected to endure cohabitation."

With these authorities in mind, I note that the Petitioner has maintained from her Petition all through to her Reply that the Respondent has had various extra marital affairs with different women as well as with his cousin with whom she actually caught him being intimate in August, 2019 which angered and pained her; that the Respondent was currently living with another woman in the matrimonial house whom he intends to marry and that he has been violent and disrespectful towards the Petitioner.

While the Respondent in his Answer denied having had these extra marital affairs, and denied having been aggressive or disrespectful to the Petitioner. He did not however, deny the fact that he has been cohabiting with another woman. He averred that the Petitioner had from 2015 after her father died been leaving the matrimonial home to go to her mother's house at any opportunity to avoid living with his relatives. He also pointed to the fact that the Respondent had been violent towards him. That she attempted to break his hand and he produced a medical report to this effect.

In my view, the particulars of unreasonable behaviour raised by the Petitioner that the Respondent has had numerous extra marital affairs with various women and that he is currently living with another woman in the matrimonial home are actions which are unreasonable and clearly intolerable to the Petitioner. Given the foregoing and having weighed her evidence in totality, I am satisfied that the Petitioner has successfully proved her Petition.

My analysis of the evidence of both parties has also pointed to the fact that they are no longer cohabiting and there is no indication that they intend to resume cohabitation, and neither is there any more love and affection between them.

Apart from the requirement that the Petitioner must prove her allegation of unreasonable behaviour to the required standard of proof of a preponderance of probability, the state of mind of the parties must be considered. This is because a marriage is a voluntary union of two people and it cannot be imposed on a party. The cases of **HYDE V HYDE (1)** and **MABLE M. BBUKU YOYO V ARTHUR YOYO (4)** bring to the fore the point that to stay in a marriage, both parties must be willing to stay in it voluntarily and there must be mutual love.

In casu, the Petitioner is adamant that she does not want to stay in the marriage and she does not intend to resume cohabitation with the Respondent. She left the matrimonial house in September, 2019 over 4 years ago. Her conduct speaks volumes about her wish not to continue with the marriage. I watched the Petitioner's demeanour during the hearing and I am of the firm belief that she has no intention of resuming cohabitation or continuing with the marriage.

The Respondent has also agreed that the marriage has broken down irretrievably and consents to a decree of divorce being granted.

In the case of **YOYO V YOYO [4]** the Supreme Court stressed the need to consider the state of mind of the parties and guided that Courts should always help to reconcile warring parties but in the

process should not create fertile ground for homicide. It is clear to me that both the Petitioner and the Respondent do not wish to resume cohabitation and the marriage to continue.

While I agree that Courts should always assist married couples to reconcile, I am guided by the **YOYO** case, that I should not create a fertile ground for homicide. I find that this marriage has broken down and stands no chance because there is no longer love and affection between the parties herein; they ceased cohabiting four (4) years nine (9) months ago and neither party intends to resume cohabitation. I am satisfied that there is no reasonable likelihood of cohabitation being resumed as per **Section 9(4) of the Matrimonial Causes Act, 2007**.

In the circumstances, I am therefore satisfied that the Petitioner has sufficiently proved the contents of her Petition not only on the ground of the Respondent's unreasonable behaviour, but on the ground that the two parties have lived apart for more than two years and the Respondent clearly consents to the divorce herein in his Answer.

I therefore find that the Petitioner is entitled to a *Decree Nisi* particularly that the Respondent is not contesting the divorce which is sufficient evidence that the parties do not wish to continue being married.

Furthermore, I have arrived at the inescapable conclusion that this marriage has broken down and stands no chance because the parties ceased cohabiting and as such, I am satisfied that there is

no reasonable likelihood of cohabitation being resumed as per **Section 9(4) of the Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia** which states that;

“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.”

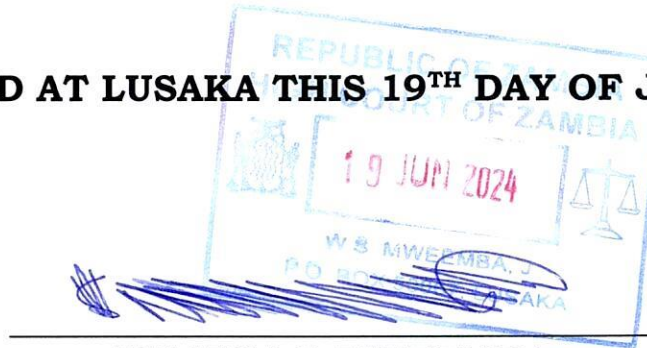
Therefore, on the evidence of the Petitioner, I am satisfied that the marriage solemnized between **Sheila Mpila Machaya** and **Dennis Machaya** on 31st May, 2014 at the office of the Registrar of Marriages at Lusaka Civic Center, in the City and Province of Lusaka of the Republic of Zambia has broken down irretrievably in terms of **Section 8 and Section 9(1)(b) and (d) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia**. I am further satisfied that granting a Decree Nisi will not cause grave financial or other hardship to the Respondent.

I accordingly Decree that the said marriage be dissolved and a *Decree Nisi* is hereby pronounced dissolving the marriage and I make the following Orders: -

1. The *Decree Nisi* shall become Absolute six (6) weeks from the date hereof unless cause be shown why the same cannot be made Absolute.
2. I refer the issue of custody of the child of the family **James Machaya** to mediation pursuant to **Order 31 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia**.

3. I refer the issue of maintenance of the child to the Deputy Registrar for determination.
4. I refer the issue of property settlement to mediation pursuant to **Order 31 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.**
5. Each party is to bear their own costs of this action.

DELIVERED AT LUSAKA THIS 19TH DAY OF JUNE, 2024.



**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**