

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

2021/HPF/D009

BETWEEN:

JEREMIAH NKHUWA

AND

MENDAYI NALISA



PETITIONER

RESPONDENT

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

For the Petitioner: Mr. J. Nkhuwa (In Person).

For the Respondent: Mrs. S.M. Kapata, Advocate-National Legal Aid Clinic for Women.

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 REFFERED 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. Birch V Birch [1908] W.N. 81 CA.**
- 5. Ash v Ash [1972] 1 ALL E.R. 582**
- 6. Pheasant v Pheasant [1972] 1 ALL E.R. 58**

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).**

JEREMIAH NKHUWA (*the Petitioner*) filed the Petition for Dissolution of Marriage on 11th January, 2021 seeking to dissolve his marriage to **MENDAYI NALISA** (*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 Petition reveals that the Petitioner was married to the Respondent on 2nd July, 2016 at New Apostolic Church, Woodlands Congregation in the City and Province of Lusaka of the Republic of Zambia; that both parties are domiciled in Zambia; that the Petitioner and the Respondent are still living together at Apolla Military Camp, Lusaka; that the Petitioner is a driver for the Zambia Army at Arakan Barracks while the Respondent is a housewife.

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, namely **Favour Nkhuwa**, male, born on 11th May, 2017.

The Petition also reveals that there are no children born outside wedlock now living born to the Respondent as far as is known to the Petitioner.

The Petition also reveals that there have been no previous proceedings in any Court in Zambia with reference to the said marriage or the property of the Petitioner and Respondent.

There are no proceedings continuing in any Court or Country outside Zambia which are, in respect of the marriage capable of affecting its validity or subsistence. No agreement or arrangement has been made, or is proposed to be 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 her. The Petitioner cited the following particulars of the unreasonable behaviour of the Respondent:

- i. That the Respondent had no respect for the Petitioner as her husband and she would talk to him anyhow.*
- ii. That the Respondent had attempted to commit suicide after a marital dispute and was only resuscitated after the Petitioner took her to the hospital. That she had been threatening to end her life as well as that of their child which the Petitioner found intolerable and this had resulted into him living in fear.*
- iii. That on one occasion, the Respondent followed the Petitioner to his workplace to shout at him and he was disciplined by his superiors as a result.*
- iv. That the Respondent was violent whenever an argument ensued between them.*
- v. That futile efforts had been made by both families to help the parties resolve their disputes.*

The Petitioner prayed for the following;

- i. That the marriage be dissolved;*
- ii. That there be an Order for joint custody of the child of the family.*
- iii. That both parties maintain the child of the family.*
- iv. That there be an Order for property settlement.*

There is an Acknowledgement of Service filed by the Respondent on the 13th January, 2021 where she stated that she intended to defend the Petition.

There is also an Answer filed by the Respondent dated 30th March, 2021. In her Answer, she admitted that the marriage has broken down irretrievably but not for the reasons given by the Petitioner. In relation to the Particulars of unreasonable behaviour as alleged by the Petitioner, the Respondent states that the Petitioner does not take her advice kindly and he would always feel disrespected whenever she advised him. Further, that she had not attempted suicide but merely took some unprescribed pills which she did not know would have an effect on her health.

The Respondent admitted that she went to the Petitioner's workplace to complain about his failure to provide maintenance for the home and his intention to chase her to his superiors and as a matter of fact, whilst there, she requested that his superiors issue her with a statement to support her claim in the event that the Petitioner accused her of anything to the contrary.

The Respondent further averred that she could not attempt to fight military personnel whose body was huge and bigger than hers and given the fact that his threats on her life and his violent behaviour caused her to live in fear.

The Respondent made the following prayers:

- i. *That the marriage be dissolved;*
- ii. *That she be given custody of the child of the family.*

iii. *That each party bear its own costs.*

At the hearing of the matter on 12th July, 2021 the Petitioner in his evidence in chief averred that he would rely on the contents of the Petition for dissolution of marriage. That although the Respondent was not in gainful employment, she was always away from home without informing him of her whereabouts. That when he conducted investigations, he found that she was having an affair with a person he had introduced her to whose name was Mr. Fred Nkhuwa and that she had admitted to this fact during a family meeting.

Further to this, the Petitioner averred that the Respondent went to his work place where she complained that he did not buy food at home, denied her sex and was not aware if he had been paid his salary. In response to these allegations, it was his evidence that he and the Respondent always budgeted for their home together and he had previously given her access to his ATM card which he only got from her on or about September, 2019 after he noticed that the sum of K5, 000.00 went missing from the account after the Respondent sent the said money to an unknown person she had been conversing with on WhatsApp. Further that it was actually the Respondent that had been denying him sex whenever they had a marital dispute.

Regarding the physical violence, it was his evidence that to the contrary it was the Respondent that became violent whenever they had a misunderstanding. On one occasion, she hit him with an iron bar on the back and bit him on the arm. Due to all this, he had found it intolerable to live with her.

During cross – examination, the Petitioner testified that he had assumed that the Respondent wanted to commit suicide and thereafter kill their son with a pesticide. Moreover, that he introduced the Respondent to Pastor Fred Nkhuwa because she had a spiritual problem which made her pass out.

The Petitioner's witness was **Lazarous Jere (PW2)**. During Examination in Chief, **PW2** told the Court that three reconciliation meetings had been held with the Petitioner and Respondent around 2020 where he counselled them on their marriage after they both confessed to having engaged in extra – marital affairs. That the two forgave each other and re-united.

This marked the end of the Petitioner's case.

During the hearing, the Respondent relied on the contents of her Answer. In addition, she confirmed during her testimony that the Petitioner had introduced her to Mr. Fred Nkhuwa around 2015 before they got married and at no point did, she confess to having engaged in an extra-marital affair with him both to their family or to the Petitioner. However, she testified that she had spoken to his wife Mrs. Victoria Nkhuwa about the Petitioner's allegations because they had affected their marriage.

It was also her testimony that around 2019 she discovered that the Petitioner had a relationship with a lady named Florence which depressed her and she took the drugs *Seprin* and *Panadol* to which she reacted. She also denied having attempted to end her life or that of their child as she had only locked herself and their child in their

bedroom after a quarrel. In concluding her testimony, she admitted having bitten the Petitioner in self defence.

I am grateful for the written submissions received from the Petitioner which I considered.

This Petition was launched pursuant to **Section 9 (1) (b) of The Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia** which provides for unreasonable behaviour as a ground for divorce. 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. The test is therefore objective.

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, it is clear that the issue to be determined is whether the 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 Respondent.

According to Sir B. McKenna, irretrievable breakdown of marriage is 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*. 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."

I also noted the case of **BIRCH V BIRCH [4]** where it was held that:

"Allowance will be made for the sensitive as well as the thick-skinned – conduct must be judged up to a point by the capacity of the complaining petitioner to endure his or her spouse's conduct; the Court would consider to what extent the respondent knew or ought reasonably to have known of that capacity."

Clearly, the question in casu, is whether it is reasonable to expect the Petitioner in this particular case to put up with the conduct of his spouse, bearing in mind the character of each spouse and other relevant matters. The behaviour of the Respondent is the important

issue and the fact that the Petitioner finds it unbearable to live with the Respondent does not, of itself, permit a decree to be granted. The relevant time at which irretrievable breakdown must be established is at the time of hearing of the Petition.

The evidence adduced before me has indicated that this marriage has been marred by extra marital affairs to which both parties have confessed during their failed reconciliation attempts. The Respondent conceded that she had gone to the Petitioner's workplace to make complaints to his superiors which the Petitioner found to be unreasonable and intolerable. She further admitted that due to depression, she had taken a combination of the drugs *Panadol* and *Seprin* unprescribed after she discovered that the Petitioner had been having an extra marital affair with a lady by the name of Florence. She also admitted having locked herself and their child in a room on one occasion following a marital dispute. The evidence from both parties has also indicated that there have been threats and actual physical violence emanating from both parties. According to her testimony, these threats have culminated into the Respondent living in fear for her life.

Before I pronounce whether or not the marriage has irretrievably broken down, I would like to interpolate that a petition for the dissolution of marriage premised on behaviour must amount to more than a bare or mere complaint that, for instance, the parties now consider themselves incompatible; they no longer have anything in common; or that one of them is bored. While the behaviour complained of need not be as serious as cruelty, a petitioner must nonetheless

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

In casu, I am not fully satisfied that this marriage has broken down irretrievably for the following reasons. Firstly, the two parties herein have each had affairs which did not end the marriage and none of them found it intolerable to live with the other on that account. Secondly that the time the Respondent bit the Petitioner was in self defence after he was physically violent towards her. The fact that the parties are still living in the same house is also notable and still leaves room for normal family life to resume despite their differences which require further communication and further exploration of reconciliation of the disputes they have been having. The fact that no police reports or medical reports had been produced in their evidence also points to the fact that there was no serious physical violence that the parties experienced or caused on each other. I have also noted that the Respondent is an unemployed house wife which indicates to me that she totally placed her financial source on the Petitioner and therefore I am not satisfied that granting a decree will not cause grave financial hardship on her part as well as that of the child of the marriage. In light of the fact that the parties are still cohabiting and based on the factors outlined above, I am not satisfied that this particular marriage has broken down irretrievably.

After all is said and done, the following question then arises, to paraphrase the words of Bagnall, J, in **ASH V ASH [5]**; Ormrod, J, in **PHEASANT AND PHEASANT [6]**; and Cullinan, A, JS in **MAHANDE V MAHANDE [2]**; that bearing in mind the Petitioners faults and other attributes, good and bad and having regard to his behaviour during the marriage, bearing in mind the characters and personalities 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 a way that the Petitioner cannot reasonably be expected to live with her? I think not. I think not, because in my opinion, both the Petitioner and the Respondent have barely catalogued a long list of complaints such as the Respondent lacking respect and going to his workplace to complain to his superiors about interalia his failure to provide at home and that he would chase her from their home and that the Petitioner did not appreciate her advice. These in my view are in any event normal and isolated challenges that most married couples' encounter.

Also notable is the fact that the two are still living in the same matrimonial home despite the Petitioner having filed this Petition, coupled with the Respondent's indication that she would contest the dissolution of the marriage in her Acknowledgment of Service.

Looking at the characters of the parties herein, I do not believe that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. In my view the reasons for petitioning for the dissolution of marriage are not

convincing. The Petitioner has not proved his case on a balance of probabilities.


In the circumstances, I therefore find that the Petitioner has not sufficiently proved the contents of his Petition and is therefore not entitled to a *Decree Nisi*.

Furthermore, I find that this marriage has not broken down irretrievably as it still stands a chance once the parties attempt to resolve their marital differences and begin to communicate effectively.

Therefore, on the evidence of both parties I am unable to say that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her. I therefore dismiss the Petition.

Each party to bear their own costs of this action.

DELIVERED AT LUSAKA THIS 10TH DAY OF JULY, 2024.


WILLIAM S. MWEEMBA
HIGH COURT JUDGE

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
10 JUL 2024
W.S. MWEEMBA, J
P.O. BOX 50067 LUSAKA