

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

2022/HPF/D472

BETWEEN:

MARCEL KANGWA MUMBI



PETITIONER

AND

LUCY MUKUKA-MUMBI

RESPONDENT

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

For the Petitioner: Mr. M.K. Mumbi (in Person)

For the Respondent: Mr. L.K. Kabaso- Advocate, Messrs KBF and Partners.

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. *Thurlow V. Thurlow (1975) 2 ALL E.R. 979.*
2. *Katz V Katz (1972) 3 ALL ER 219.*
3. *Hyde V Hyde (1866) LR 1P & D 130.*

OTHER WORKS REFERRED TO:

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

On 20th September, 2022 **MARCEL KANGWA MUMBI** (the Petitioner) filed a Petition for Dissolution of Marriage pursuant to **Sections 8 and 9 (1) (b) of the Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia** against **LUCY MUKUKA MUMBI** (the Respondent) on the ground that the Respondent had behaved in such a way that the Petitioner cannot reasonably be expected to live with her.

The gist of the Petitioner's Petition is that on 28th December, 2020 he was lawfully married to the Respondent at the Office of the Registrar of Marriages, Civic Centre, in the City and Province of Lusaka of the Republic of Zambia; that both parties are domiciled in Zambia; that the Petitioner and Respondent last lived as husband and wife at Plot No. 12, Chelstone Obama, Lusaka aforesaid; that the Petitioner is a Key Accountant at Gatbro International Limited and resides at Plot No. 13 Off Chalala, Kasama Road whereas the Respondent is a Receptionist at Energy Regulation Board and whose residential address is unknown to the Petitioner.

The Petition reveals that there is one child of the family now living and born between the Petitioner and Respondent namely **ATARAH MUMBI**, born on 11th April, 2021.

That there is no other child now living having been born to the Respondent as far as is known to the Petitioner.

The Petition further reveals that there have been no previous proceedings in any Court of Law in Zambia or elsewhere with reference to the said marriage or to the child of the family. That no arrangement or agreement has been made or is proposed to be made between the parties for the maintenance of the child of the family or either party.

The Petitioner alleges that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her. The Petitioner has cited the particulars of the Respondent's unreasonable behaviour as follows:

- (i) *On or about January, 2022 the Respondent unilaterally decided to move out of the matrimonial home without any justification.*
- (ii) *The Petitioner made several attempts to bring back the Respondent which all proved futile and she refused to disclose the address where she and the child of the family currently reside.*

The Petitioner therefore prays for the following;

- i. *That the marriage be dissolved.*
- ii. *That the Court makes an order for joint custody of the child of the family.*

The Respondent filed an Answer and Cross Petition dated 10th May, 2023. She states that paragraphs 1, 3, 5, 6, 7 to 9 of the Petition are not in dispute. However, in response to paragraph 4 she averred that she had not refuse to disclose her residential address to the Petitioner.

In her cross petition, she averred that the marriage had broken down irretrievably because the Petitioner had behaved in such a way that the she could not reasonably be expected to continue living with him.

The Respondent cited the particulars of the Petitioner's unreasonable behaviour as follows:

- (i) *That throughout their marriage, the Petitioner had been entertaining several women with whom he would exchange nude photos and messages of a sexual nature.*
- (ii) *On one occasion the Petitioner was found with pictures in his phone where he was cuddling a naked woman.*

- (iii) *The Petitioner rarely spent time at home with the family, instead he would meet the three women with whom he constantly communicated.*
- (iv) *The Petitioner has been having an extra marital affair with the party cited.*
- (v) *That when referred to counselling, the Petitioner would never show up which indicated that he was unrepentant.*

The Respondent prayed for the following;

- i. *That the marriage be dissolved.*
- ii. *That the Court should grant her full custody of their child with reasonable access to the Petitioner.*
- iii. *That there be an order for maintenance of the child of the family.*

The hearing of the matter was on 28th August, 2023 and both parties were in attendance. The Petitioner told the Court during examination in chief, that on or about December, 2021 when he came back from work the Respondent asked to use the vehicle and she left their home around 13.00 hours, and when he tried to phone both her and the sister they were unreachable. The Respondent only returned home at midnight with a taxi and when the Petitioner enquired about where she had been and where the vehicle was, she told him that she had sold it but did not account for where she had been. Infuriated by her response, the Petitioner asked her to return to where she had been but she refused to do so and he grabbed her phone and called the last number on her dialled calls and a man who claimed to be her friend picked up. A few days after later, the Respondent went home with the car.

He further testified that on or about 20th December, 2021 a reconciliation meeting was held for the parties, in the presence of their

parents and the Respondent's uncle, Bishop Ernest Nkole Mumbi. The reconciliation meeting related to allegations that the Petitioner had beaten up the Respondent and that he had been speaking to other women to an extent that he even took photos with a half-naked woman at a work-related event.

Additionally, it was also alleged that he had exchanged naked photos with a woman known as Hope, his former workmate. That Hope spoke to the Respondent and informed her that the photos were taken to spice up the marriage. The meeting resolved that the issue of the photos was not sufficient cause to dissolve the marriage, however the Respondent and her Aunt, insisted that she leave the matrimonial home for a period of two to four weeks.

It was also his testimony that on or about January 2022, the Respondent left the matrimonial home and she told the Petitioner that she had moved to her Aunt's house in Chalala.

In March, 2022 a second meeting was held but it ended without a resolution. However, the Respondent gathered her clothes, kitchen utensils and other household property and left the matrimonial home together with the child of the family. The Petitioner had since then made several attempts to see the child, which had however proved to be futile such that the Respondent stopped him from spending a weekend with the child and had since blocked him on Whatsapp. The Petitioner last saw the child on her birthday around April, 2023.

He finally averred that the Respondent did not disclose her address until their child was operated on. He reiterated that he wished that the

marriage would be dissolved and that he would be granted joint custody and he was willing to provide maintenance for the child only.

During cross-examination by Counsel to the Respondent Mr. Kabaso, the Petitioner told the Court that the Respondent was not pleased when she found a photo of him and a half naked woman in his phone. That the Respondent had not found messages of a sexual nature between himself and Hope. He further indicated that he was aware that the Respondent found it unreasonable to find such pictures and messages in his phone and that it was unreasonable to have pictures of a half naked woman on a phone. Moreover, that the Petition was as a result of the Respondent coming home late.

Additionally, the Petitioner stated that he did not recall ever asking the Respondent to buy him a Playstation in order for him to spend time at home but that she bought it at his request. Further, he testified that they only had one vehicle which was purchased by the Respondent but was registered in his name.

In re-examination, the Petitioner testified that the vehicle was purchased by the Respondent through an interest free loan which she obtained from her work-place and that the vehicle, a Toyota Allion with registration number BAB 7802, was purchased for K100, 000.00.

Regarding the pictures of Hope, the Petitioner stated that he had explained that they were taken at a work event which also incorporated swimming. In conclusion, he testified that the Respondent had a habit of going through his phone.

The Respondent in her examination in chief testified that the Petitioner became distant after the birth of their child and he would find excuses

to stay away from home during weekends. She stated that he would leave their home early in the morning to go and play Basketball, Football and go to the GYM and only return home in the afternoon to freshen-up and leave shortly thereafter. Whenever the Respondent asked him to stay home, he would refuse to do so and would instead return home late smelling of alcohol.

She went on to testify that the Petitioner told her that he would only stay at home if she bought him a playstation which she did, but he continued to be distant and his focus shifted to the playstation and his phone. The Petitioner stopped having sexual intercourse with her when he was sober. She averred that on one occasion, she checked his phone and she found sexual stickers and messages from Hope which she transferred to her phone.

When the Respondent confronted the Petitioner, he seemed not to find anything wrong with what she had found which infuriated her further. It was her testimony that she gave up on the marriage when the Petitioner continued having engagements with another woman to an extent that he even had lunch with her.

The Respondent further testified that on or about January, 2022 when she found the sexual stickers, she decided to have lunch with her sister in order for her to air out her frustrations. That on her way home, she stopped at a shop where she bought drinks and run into a friend with whom she exchanged numbers and only returned home around 23:00 hours at which point the Petitioner pushed her against the wall and hurt her. She finally averred that she wanted the Court to dissolve the marriage and to grant her custody of the child of the family with reasonable access to the Petitioner.

During cross-examination, the Respondent testified that after the birth of their child, she did not recall ever going to a restaurant with the Petitioner. However, she confirmed that a living in maid was hired and her sister visited.

In conclusion, it was her testimony that the playstation she had bought for the Petitioner was not a birthday present and that he used to work night shifts at Shared Value Africa from 17hours to 02hours from June, 2020 to November, 2020.

I have carefully considered all the evidence that has been placed before me. I will begin by referring to the legal position on dissolution of marriage under **Section 9 of the Matrimonial Cause Act, No. 20 of 2007** which provides inter alia that:

“9(1) for purposes of Section eight, the Court hearing a petition for divorce shall not hold a marriage to have been 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.”

Furthermore, Sir B. McKenna, defined irretrievable breakdown of marriage as 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 casu, the fact being relied upon by the Petitioner is that of *unreasonable behaviour*. According to **Passingham² in Law and Practice in Matrimonial Causes** 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 **THURLOW V. THURLOW [1]**, the Court 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.”

Therefore, it is trite that the test for unreasonable behaviour is an objective one. The test takes into account the characters and personalities of the parties and the whole background to the history of the marriage.

In the case of **KATZ V. KATZ [2]** Baker P had the following to say about behaviour:-

“...Behaviour in this context is action or conduct by one which affects the other. Such conduct may take either acts or the

form of an act or omission or may be a course of conduct, and in my view, it must have some reference to the marriage.”

In light of the above authorities, I find that the Petitioner has failed to substantiate his Petition for the Dissolution of his Marriage to the Respondent. He has not demonstrated that the Respondent has behaved unreasonably such that he finds it intolerable to live with her. He has merely stated that the Respondent kept one late night and moved out of their matrimonial home without justification. He has therefore failed to show that the Respondent behaved unreasonably.

However, the Respondent in her Answer and Cross Petition which were augmented by her oral testimony successfully proved the unreasonable behaviour of the Petitioner.

The Respondent adduced evidence of the Petitioner's unreasonable behaviour. She testified that the Respondent rarely spent time at home, he was in the habit of exchanging naked pictures with several women and he did not deny this during cross examination. Moreover, that he only had sexual intercourse with the Respondent when he was drunk. This clearly caused her pain to the point where she had to leave their matrimonial home. Their reconciliation meetings did not yield any positive fruit for the married couple.

None of the parties are also willing to resume cohabitation following their separation in January, 2022 which is more than two years ago.

I am of the considered view that the cumulative conduct of the Petitioner is such that the Respondent cannot reasonably be expected to live with him.

In considering the Petition for Dissolution of Marriage it is pertinent to consider the state of mind of both parties because a marriage is a voluntary union between two parties which cannot be imposed on a party. In the case of **HYDE V. HYDE (3)** the Court defined marriage as the:-

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

Therefore, to stay in marriage, both parties must be willing. In the case *in casu*, it is evident that both the Petitioner and the Respondent are not willing to stay in the marriage. Both parties have agreed that the marriage has broken down irretrievably.

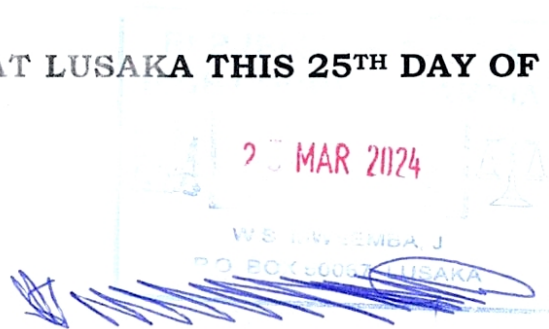
I therefore find that this marriage has broken down irretrievably on the ground of unreasonable behaviour of the Respondent and stands no chance because there is clearly no more love and affection between the parties herein.

In view of the foregoing, I hereby dissolve the marriage of **MARCEL KANGWA MUMBI** to **LUCY MUKUKA MUMBI** which was solemnized on 28th December, 2020 at the Office of the Registrar of Marriages at the Lusaka Civic Centre, in the Lusaka Province of the Republic of Zambia. I have found that the marriage has broken down irretrievably in terms of **Sections 8 and 9(1)(b) of the Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia.**

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. The Petitioner and the Respondent shall have joint custody of the child of the family namely **ATARAH MUMBI** with reasonable access to the party not having custody at any given time.
3. The Petitioner and Respondent are to contribute equally towards the maintenance of the child of the family.
4. Each party is to bear their own costs of this action.

DELIVERED AT LUSAKA THIS 25TH DAY OF MARCH, 2024.



**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**