

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

2023/HPF/D220

BETWEEN:

HELLEN NDHLOVU CHIGOZIE

PETITIONER

AND

CHARLES CHIGOZIE

RESPONDENT

*Before the Hon. Mrs. Justice M. M. Bah-Matandala
on this 4th June, 2024.*

For the Petitioner: Mrs. S.C. Mulozi – National Legal Aid Clinic for Women

For the Respondent: In Person

J U D G M E N T

Legislation Referred To:

1. *Marriage Act, Chapter 50 of the Laws of Zambia.*
2. *Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia (MCA).*

Cases Referred To:

1. *Ash vs. Ash (1972) 1ALL ER 585*
2. *Livingston -Stallard vs. Livingstone Stallard (1974) 2 ALL ER 766.*
3. *O'Neil vs. O'Neil (1975) E.R 292.*

1.0 INTRODUCTION

- 1.1 This is a Petition filed into Court on 21st April 2023 by
Hellen Ndhlovu Chigozie, the Petitioner herein, against

Charles Chigozie, the Respondent herein, for dissolution of marriage.

1.2 The Petitioner alleges that the marriage, which was lawfully solemnized on 27th June 2012, under the provisions of the **Marriage Act, Chapter 50 of the Laws of Zambia**, has broken down irretrievably. The Petition was filed pursuant to **Sections 8 and 9(I) (a) (b) of the Matrimonial Cause Act No. 20 of 2007 (MCA)**.

1.3 The facts alleged as leading to the irretrievable breakdown of the marriage is that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent.

2.0 THE PETITION

2.1 In the Petition, it was averred that the Petitioner and the Respondent were married on 27th June at the office of the Registrar of Marriages at the Lusaka Civic Centre in the Lusaka Province of the Republic of Zambia.

2.2 After the celebration of the marriage, the Petitioner and the Respondent lived together as husband and wife in Lusaka West.

2.3 Both the Petitioner and the Respondent are both domiciled in Zambia.

2.4 The Petitioner is currently unemployed and resides in Lusaka West whilst the Respondent is a Businessman and currently resides in Lusaka West, in the City and Province Lusaka of the Republic of Zambia.

2.5 The marriage has three (3) children namely;

i Chisomo Chigozie male born on 12th May 2012 and aged 10 years old'

ii Chika Chigozie male born on 30th June 2015 and aged 7 years old.

iii Chidera Chikozie female born on 31st March 2021 aged 3 years old

2.6 There are no children who have been born to the Respondent during the subsistence of marriage as far as it is known by the Petitioner.

2.7 There are no divorce proceedings in Zambia or elsewhere with reference to the same marriage or between the Petitioner and the Respondent with reference to any property of either or both.

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

2.9 There are no agreements made between the Petitioner and Respondent in relation to the maintenance of either party to these proceedings or the children of the marriage.

2.10 The Petitioner has alleged that the marriage has broken down irretrievably.

2.11 The particulars of adultery are as follows

i the Petitioner has suspected the Respondent of adultery for a period of time. This suspicion was heightened when the Respondent would come home between 11pm and 6 am in the morning and he would claim that he had been arrested at Makeni Police without any form of communication to that effect.

ii that sometime in 2022 the Petitioner had noticed that the Respondent's T-shirts had

semen stains on them and he claimed that it was natural for a man to experience premature ejaculation at random times if he does not have sex regularly.

iii on the 4th December 2022 at 9:30 pm, the Petitioner heard the Respondent car approaching their house and decided to wait for him to enter and park his vehicle in the yard. The Petitioner had waited for about 15 minutes but the Respondent did not enter the yard, the Petitioner then got concerned and went outside the yard and noticed the Respondent car parked at the gate. She approached the vehicle and to her surprise she found the Respondent receiving oral sex from another woman.

iv the Petitioner started shouting the word prostitute and the woman got out of the car and ran for about 100 meters, the

Respondent returned home after an hour and pretended that nothing had happened did not acknowledge the incident that took place. the Petitioner was still in a state of shock.

v the Respondent forces the Petitioner to drink herbal drugs from Nigeria, which he claims cures multiple diseases such as HIV, Cancer and sexually transmitted infections.

vi that the Petitioner fears for her life and that she might contract diseases because of the Respondent behaviour, she no longer loves the Respondent.

4.0 THE PETITIONER THEREFORE PRAYS THAT;

- i the said marriage be dissolved*
- ii that there be an order for maintenance.*
- iii that there should be an order for property settlement*
- iv that each party bears their own costs*

5.0 RESPONDENT 'S CASE

5.1 The Respondent did not file any response to the Petition and did not defend the petition.

6.0 HEARING

6.1 At the hearing on 13th March 2024, the Respondent was present.

6.2 In this regard, the Petitioner gave sworn evidence on her own behalf and didn't call any witness. In her evidence she confirmed all the material aspects of her Petition as outlined above.

6.3 The Petitioner has alluded to the reason for seeking for a divorce to the fact that she has not been living in good terms with the Respondent and she feels that they need to go their separate ways.

6.4 The Petitioner stated that Respondent has committed adultery.

6.5 Further the Petitioner averred that at some point she found on the 4th December 2022 at 9:30 pm, the Petitioner heard the Respondent car approaching their house and decided to wait for him to enter and park his vehicle in the

yard. The Petitioner had waited for about 15 minutes but the Respondent did not enter the yard, the Petitioner then got concerned and went outside the yard and noticed the Respondent car parked at the gate. She approached the vehicle and to her surprise she found the Respondent receiving oral sex from another woman, she shouted prostitute. Consequently, the woman ran away and the Respondent followed the woman. The Respondent only returned back home after being away for some good 30 – 40 minutes and pretended as if nothing had happened.

6.6 The Petitioner further indicated that she has on several occasions found whitish stuff on the Respondent's clothes and when asked about it, the Respondent said when a man reaches a certain age the semen could come out on its own when he is answering the call of nature or when defecating the semen would come out.

6.7 In conclusion, the Petitioner repeated the prayer in her Petition.

6.8 There was no cross-examination.

6.9 The Respondent did not give any evidence as he did not file any answer to the petition at the hearing. The Petition was uncontested.

6.10 No written submissions were filed into Court by either party at the close of the trial hearing.

7.0 CONSIDERATION AND DECISION

7.1 I have considered the Petition by the Petitioner, the evidence of the Petitioner and the documents on record.

7.2 As already stated above, this Petition is undefended as the Respondent did not defend the petition at the hearing of the Petition and did not file an Answer.

7.3 From the contents of the Petition, the Petitioner's evidence and the Certificate of Marriage filed together with the Petition which has been exhibited herein, I am satisfied that the Petitioner and the Respondent were married on 27th June 2012, at the office of the Registrar of Marriages at the Lusaka Civic Centre, in city and province of Lusaka of the Republic of Zambia, under the provisions of the ***Marriage Act.***

7.4 I am also satisfied that both the Petitioner and the Respondent are domiciled in Zambia.

7.5 The question, therefore, is: has the Petitioner proved the fact alleged as leading to the irretrievable breakdown of the marriage, that is, that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent?

7.6 In answering this question, I wish to begin by reminding myself that *under Section 8 of the Matrimonial Causes Act*, there is only one ground upon which a Statutory Marriage may be dissolved, namely, that *the marriage has broken down irretrievably*. Further, irretrievable breakdown of marriage can only be established by one or more of the facts stipulated under **Section 9 (1) of the Matrimonial Causes Act**. The portion relevant to this case reads as follows:

“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.

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

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

7.7 From the provision quoted above, it is clear that, where adultery is alleged in a divorce Petition, the Petitioner must prove two elements.

7.8 Firstly, that the Respondent has committed adultery during the subsistence of the marriage. Secondly, that, as a result of the adultery committed, the Petitioner finds it intolerable to live with the Respondent.

7.9 In the current case, the Petitioner has anchored her Petition on her evidence that during the course of the marriage, the Respondent has had an adulterous relationship and that he was caught in the act of oral sex

just outside their matrimonial home and the Respondent has not defended the petition.

7.10 Based on the Petitioner's evidence at this point, the question is: Has the Petitioner proved that the Respondent has committed adultery during the subsistence of the marriage and has the Respondent behaved in such a way that the Petitioner cannot live with him.

7.11 In answering the first question, I have considered the Petitioner's evidence, when she found the Respondent receiving oral sex from another woman, this was not disputed by the Respondent because he did not file an answer to the Petition and did not discredit the same in cross examination. Therefore, in terms of **Section 9 (1) (a) of the Matrimonial Causes Act**, I find that the Petitioner has proved that the Respondent committed adultery during the subsistence of the marriage.

7.12 The next question is, has the Petitioner proved that, as a result of the adultery committed by the Respondent finds it intolerable to live with the Respondent? In answering

this question, I have referred to **Section 12 (1) of the Matrimonial Causes Act** which provides as follows:

“For the purposes of paragraph (a) of subsection (1) of section nine, a petitioner shall not be entitled to rely on adultery committed by the respondent if, after it became known to the petitioner that the respondent had committed adultery, the parties have lived with each other for a period exceeding, or periods together exceeding, six months.”

7.13 From the provision quoted above, it is clear that, where adultery is alleged against a Respondent and or unreasonable and untruthful behaviour, a Petitioner cannot be granted a *decree dissolving the marriage if*, from the date that the Petitioner became aware of this fact, the Petitioner has continued to live with the Respondent for a period exceeding six months before the presentation of the Petition for dissolution of the marriage.

7.14 In the current case, I have considered the Petitioner's evidence indicating that since she had discovered the fact that the Respondent had committed adultery the parties have not been intimate with each and they have lived apart.

7.15 I have also carefully studied the record in this matter which shows that this Petition was filed on 21st April 2023 and that on 4th December, 2022, the Respondent had committed adultery leading to the Petition by the Petitioner. This establishes that the facts have confirmed the provision in **section 12(1)** stated above. Therefore, in terms of **Section 12 (1) of the Matrimonial Causes Act**, I find that the Petitioner has proved on a balance of probability that she finds it intolerable to live with the Respondent. The Petitioner has testified that Respondent has been continually and repeatedly committing adultery until the filing of the Petition.

7.16 The test applicable in determining whether a party would find unreasonable to live with the other party was spelled out by Bagnail J. in the case of **Ash vs. Ash** 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.”

7.17 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?’

7.18 Based on the foregoing case law, I ask myself the questions asked by Dunn J in the case of ***Livingstone-Stallard vs. Livingstons Stallard***² and adopted the Court of Appeal in

the case of **O'Neil vs. O' Neil**³ and which is echoed in the above cited cases that:

'Would any right-thinking person come to the conclusion that this wife has behaved in such a way that this husband cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?'

7.19 In the case at hand the Respondent has not contested the particulars of his behaviour. I am herein inclined to believe the evidence of the Petitioner having observed her *demeanor* during trial as she testified on the said particulars of Adultery. The particulars tie in with the evidence an adulterous act that the Respondent was found in. And unbelievably the Respondent was having oral sex right by his gate at the matrimonial home. In this regard, the Petitioner had proved this allegation of Adultery, as facts and I find so.

7.20 Consequently, on the basis of the Respondent's undefended Petition, the totality of the Petitioner's unchallenged evidence, the authorities I have referred to above, and considering all the circumstances of this case, I find that the Petitioner has proved that the marriage between the Petitioner and the Respondent has broken down irretrievably by reason of the fact that the Respondent has committed adultery. The Respondent has behaved unreasonably such that the Petitioner finds it intolerable to live with him.

7.21 I accordingly declare that the said marriage be dissolved and grant a *decree nisi* to the Petitioner pursuant to **Section 41 of the Matrimonial Causes Act**. I also order that the *decree nisi* shall become absolute after the prescribed statutory period of six weeks from the date of this Judgment unless cause is shown why the same cannot be made absolute.

7.22 I grant custody of the children of the family to the Petitioner and access to the Respondent.

7.23 The parties are at liberty to apply for property settlement and maintenance to the Deputy Registrar for determination.

8.0 Each party shall bear their own costs.

Delivered at Lusaka, this 14th June, 2024.



M.M. Bah-Matandala
HIGH COURT JUDGE

