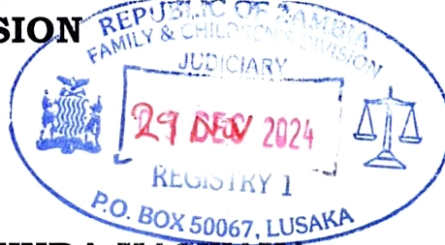


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
FAMILY COURT DIVISION  
HOLDEN AT LUSAKA**

*(Divorce Jurisdiction)*

**BETWEEN:**



**2024/HPF/D230**

**JOYCE MIGABO MUTUNDA KASWAYA**

**PETITIONER**

**AND**

**CHRISTOPHER MUTINTA KASWAYA**

**RESPONDENT**

*Before the Honourable Mrs. Justice M.M. Bah-Matandala*

*Dated this 29<sup>th</sup> November 2024.*

*For the Applicant:*

*In person*

*For the Respondent:*

*In Person.*

---

# **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 16<sup>th</sup> Edition, Butterworths.*
3. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' &*
4. *Magistrates' Courts, 11<sup>th</sup> 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).*

## **1.0 INTRODUCTION**

1.1 This is a Petition for dissolution of marriage which was filed on 4<sup>th</sup> April 2024, 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 him.

**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...”***

1.2 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 ***Joyce Migabo Mutunda Kaswaya*** who was lawfully married to the Respondent, ***Christopher Mutinta Kaswaya***, on the 27<sup>th</sup> May, 2019.

2.2 The Parties last lived together as husband and wife at Silverlands Farms, Happy Rest, Zimba in the Southern Province of Zambia and then Zambeef products Plc, Huntly Farms in Chisamba Central Province of the Republic of Zambia.

- 2.3 Both the Petitioner and Respondent are domiciled in the Republic of Zambia.
- 2.4 The Petitioner is a Personal Secretary in the Civil Service and resides at House No. 154C Hellen Kaunda in the City and Province of Lusaka whilst the Respondent is a Feedlot Manager/Cattle Buyer currently working at Zambeef Products Plc, in Chisamba and resides at Zambeef Products Plc, Hantley Farms in Chisamba, Central Province of the Republic of Zambia
- 2.5 There have been no previous proceedings in any Court in Zambia or elsewhere, with reference to the marriage that are capable of affecting its validity or substance.
- 2.6 There are no proceedings continuing in any country outside Zambia which are in respect of the marriage or are capable of affecting its validity or subsistence.
- 2.7 There are no children of the family now living to the Petitioner and the Respondent. However, the Petitioner has 2 children born to her before the subsistence of this marriage and the Respondent has 4 children from the previous marriage.

- 2.8 No agreement has been made between the Petitioner and the Respondent in relation to the maintenance of either party to these proceedings or property sharing.
- 2.9 The said marriage has broken down irretrievably.
- 2.10 The Petitioner has alleged that Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

### **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 particulars of unreasonable behavior herein are as follows;**

- i) *the Respondent has been denying the Plaintiff of her conjugal rights for a period of 12 months since March, 2023 to date.*
- ii) *the Respondent does not communicate effectively to the Petitioner on various issues affecting their marriage.*
- iii) *that the Petitioner has now discovered that the Respondent has conceived a child outside marriage which situation is not acceptable to the Petitioner and named the child Joseph his middle name.*
- iv) *that the Respondent had at some point stated to the Petitioner that he has no feelings for the Petitioner even when the Petitioner tried to reason with the Respondent to give reason why, could only state that the Petitioner was not warm enough to satisfy him.*
- v) *that the Respondent does not communicate to the Petitioner nor does he provide for the*

*Petitioner and has since deserted the matrimonial home in Lusaka since October 2022 to date.*

*vi) that even when the Petitioner visits the Respondent at Chisamba matrimonial house the Respondent would not pay attention nor show any affection towards the Petitioner, thereby leaving the Petitioner feeling lonely and unwanted.*

*vii) all efforts to resolve these marital problems have been met with futility.*

**3.4 The Petitioner therefore prays that;**

- i the said marriage be dissolved.*
- ii there be an Order for property settlement*
- iii each party bears their own costs.*
- iv any other relief the Court will deem fit.*

**4.0 ANSWER**

4.1 The Respondent did not file an Answer to the Petition but acknowledged the service of the Petition on 25<sup>th</sup>

April, 2024, wherein he indicated that he will not defend the Petition.

## **5.0 HEARING**

5.1 At the hearing of the matter on the 21<sup>st</sup> November 2024 the Petitioner augmented her 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 her own respect and did not call any witness. Further, she largely recited her averments in her Petition.

5.3 The Petitioner informed the Court that she relied on the contents on the Petition. And she wishes the Court to grant them a divorce.

5.4 The Respondent did not file an answer to the Petition but on the day of hearing he informed the Court that he was not going to object to the dissolution of marriage.

## **6.0 SUBMISSIONS**

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

## 7.0 CONSIDERATIONS AND DECISION

- 7.1 I have considered the Petitioners' pleadings and the oral testimony by the Petitioner.
- 7.2 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.
- 7.3 I therefore make a finding of the 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.
- 7.4 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*.
- 7.5 I have also taken cognizance of the position that the Petitioner and the Respondent are both resident 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.***

7.6 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.

7.7 Based on the foregoing findings, it is my position that I have jurisdiction to entertain the present Petition.

7.8 I now turn to determine whether the marriage of the parties has broken down on ground of unreasonable behaviour.

7.9 As highlighted already, the Petitioner has indicated that the marriage has broken down irretrievably, and regrettably the Respondent has not rebutted the allegations.

7.10 I wish to begin by stating that the test to apply on whether the Respondent's behaviour was unreasonable to the Petitioner, and 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;...”***

7.11 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.”***

7.12 In the Supreme Court of Zambia Judgment of ***Brighton Soko vs Petronella Sakala Soko<sup>1</sup>, 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)

7.13 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?”***

7.14 The **Ash vs Ash**<sup>2</sup> case was also cited with approval in the Judgment of the Supreme Court of Zambia in **Mahande vs Mahande**<sup>3</sup>, 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?"*

7.15 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.”***

7.16 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

7.17 I have carefully considered the Petition for dissolution of marriage, as well as the *viva voce* evidence of the Petitioner. 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 him.

7.18 The Petitioner relied on her Petition and testimony. And an analysis of the aforesaid averments is that the

Petitioner is fed up with the marriage for the reason that the Respondent has been denying her conjugal rights, the Respondent has conceived a child outside marriage, a situation which is not acceptable to the Petitioner and the Respondent does not communicate effectively to the Petitioner on various issues affecting their marriage and this makes it difficult to have a productive conversation as a couple.

7.19 Therefore, given the aforesaid, and in consideration of the fact that the basis of decision making in such circumstances is based on an objective test of a reasonable man or woman, I am satisfied that there has been unreasonable behaviour by the Respondent, as established in the evidence by Petitioner, of having a sexual affair with another woman wherein a child was born and that of being denied her conjugal rights among other behaviours. Thus, the Petitioner feels that it would be wrong to continue with the marriage.

7.20 Further the Petitioner has testified that the Respondent does not communicate effectively to the Petitioner on

various issues affecting their marriage and this makes it difficult to have a productive conversation as a couple.

7.21 Consequently, on a totality of the evidence before me I find that the Petitioner has on a balance of probability established that the marriage has broken down irretrievably due to the unreasonable behaviour stated above of the Respondent who has behaved in such a manner that the Petitioner cannot reasonably be expected to live with him.

7.22 I find that the Respondent has not rebutted the allegations against him.

7.23 I further find that the Petitioner and Respondent are *unharmonious* with each other and the Petitioner herein finds it intolerable to live with the Respondent.

7.24 Consequently, this marriage has broken down irretrievably. 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.

7.25 I refer property settlement to the Honorable Registrar upon application by either party.

7.26 Each party will bear their own costs herein.

**8.0** Leave to appeal is granted.

Dated Lusaka, this 29<sup>th</sup> November, 2024.

  
M.M. Bah-Matandala  
**HIGH COURT JUDGE**

