

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

2024/HPF/D231

BETWEEN:

MAUREEN NAMUMBI LUBINDA MSIMUKO

AND

KAZUMBA ARTHUR MSIMUKO

PETITIONER

RESPONDENT



*Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 22nd January, 2025.*

For the Petitioner:

Ms. P. Pio- Makala – Messrs. Equitus Legal Practitioners.

For the Respondent:

*Mr. E. Kaluba Messrs. Munkanta Mulenga Legal
Practitioners.*

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 16th Edition, Butterworths.*
- 3. Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' &*
- 4. Magistrates' Courts, 11th 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 4th 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 **Maureen Namumbi Lubinda Msimuko** who was lawfully married to the Respondent, **Kazumba Arthur Msimuko** on 23rd January 2010 and the marriage was solemnized at Kabwata Baptist Church in the City and Province of Lusaka of the Republic of Zambia.

2.2 The Parties last lived together as husband and wife on 7th November 2017 at house No. 32A 14/F Mean wood Kwamwenu, in the City and Province of Lusaka of the Republic of Zambia.

- 2.3 Both the Petitioner and the Respondent are domiciled in Zambia.
- 2.4 The Petitioner is an Office Assistant at the Energy Regulation Board in the City and Province of Lusaka whilst the Respondent is a retired Banker, but currently working as Lecturer at African Christian University in the City and Province of Lusaka 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 four (4) children of the family now living to the Petitioner and the Respondent namely;
- i Lusungu Msimuko aged 17 years old.*
 - ii Tioenge Msimuko aged 14 years old.*
 - iii Joshua Msimuko aged 12 years old.*
 - iv Jeremiah Msimuko aged 9 years old.*

2.8 Lusungu Msimuko and Tioenge Msimuko were born from the Respondent's previous marriage and Joshua Msimuko and Jeremiah Msimuko were born between the Petitioner and the Respondent.

2.9 No child now living has been born to the Respondent during the marriage as far as it is known to the Petitioner.

2.10 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.

2.11 The said marriage has broken down irretrievably.

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) *that soon after marriage between the Petitioner and the Respondent on the dates unknown the Respondent directed the children from the previous marriage (Lusungu Msimuko and Tienge Msimuko) not to consider the Petitioner as their mother. This made it impossible for the Petitioner to cultivate a mother child relationship with the children.*
- ii) *that the Respondent further said that she was mentally tormented by the Petitioner, such that upon their marriage, the Respondent refused and/or her neglected to remove his late wife's belongings including the beddings from the matrimonial bed and bedroom. In the same vein, on several*

occasions but different instances the Respondent compared the Petitioner to his late wife. The said comparison extended to the party's sexual life.

iii) that the Petitioner reported these issues to their pastor, who counseled the parties. That upon completion of their counseling the Respondent removed his late wife's belongings from the matrimonial bedroom. However, the Respondent did not stop comparing the Petitioner to his late wife during their marriage.

iv) in addition, the Respondent was verbally abusive to the Petitioner, as on several occasions the Respondent said words that were demeaning to the Petitioner. Particularly, sometime in 2014 when the Petitioner was late to pick up the Respondent, the Respondent made such a big issue out of it and when the Petitioner

suggested that the Respondent should have gotten a Taxi, the Respondent got angry and said to the Petitioner “you do not love me and that is why the only reason why I married you was to use your body to have children.”

v) when the Petitioner took issue with the Respondents words he further stated to the Petitioner “you do not appreciate marriage because you were born out of wedlock.”

vi) that further to the above, the Respondent did not treat the Petitioner as his wife, he made decisions without consulting or informing her. That sometime between 2016 and 2017 when the Respondent was transferred to Kawambwa for work, he would visit the Petitioner at their matrimonial home in meanwood. However, when the Respondent moved back to Lusaka, he did not inform the Petitioner and opted to live with his sister in Northmead

- vii) *when the Respondent was confronted by the Petitioner, the Petitioner further discovered that the Respondent had actually opted to retire from his job, without informing or consulting the Petitioner. After the intervention of the families, the Respondent moved back into the matrimonial house being plot No. 13054 phase 4 meanwood Lusaka.*
- viii) *that after the forgoing the parties agreed to complete their house in meanwood phase 1. That during this time it is the Petitioner's money that was used to build the house and organize builders as she was the only one working. Upon completion of house the parties agreed to move into the house making it their matrimonial home.*
- ix) *unfortunately, upon moving into their matrimonial home the Respondent began coming home late without any justification or*

cause. Further, the Respondent, always locked the matrimonial bedroom, locking out the Petitioner and not allowing her to sleep in the bedroom. That's when this persisted, the Petitioner moved into the Children's bedroom.

x) during the said period the Respondent did not speak to the children or the Petitioner. However, each time the Petitioner prepared food, the Respondent would come out of the bedroom to eat but still not say a word to the Petitioner. In addition, each time the Respondent needed to go somewhere he would request the Petitioner to drive him, as he could not drive, however, the Respondent still ignored or neglected to speak to the Petitioner.

xi) that when the situation became unbearable the Petitioner on 7th November 2017, moved out of the matrimonial home into one of the

semidetached flats within the same property. However, the Respondent continued to mistreat the Petitioner, with his actions and words. On these premises the Petitioner moved out sometime in December 2017.

xii) that further to the above the parties have lived apart for a continuous period of five years from 7th November 2017 to date.

xiii) that the marriage has broken irretrievably.

3.4 The Petitioner therefore prays that;

- i the said marriage be dissolved.
- ii the Petitioner be granted full custody of the two children of the family namely; Joshua Msimuko and Jeremiah Msimuko.
- iii that the Respondent be ordered to make periodic payments and provide such secured provisions as are necessary for the children of the family as named in (ii)

above, for their upbringing, education and general wellbeing.

iv that there be property settlement order.

v the Respondent bears costs of these proceedings.

4.0 ANSWER

4.1 The Respondent filed an Answer to the Petition on 15th May, 2024. He has admitted the contents of paragraphs 1 to 10 of the Petition.

4.2 The Respondent denies the contents of paragraph 11 of the Petition and avers that the marriage has not broken down irretrievably as there is still a possibility of the parties reconciling and thus avers as follows;

i) The Respondent denies the contents of paragraph 12 of the Petition and avers that the Respondent has at no time behaved in a way that the Petitioner cannot be reasonably be expected to live with him. The Respondent avers that he is relying on his own desertion.

- ii) *The Respondent denies the content of paragraph 12.1 of the Petition and avers that he had created an environment conducive for the Petitioner to cultivate a mother child relationship with the children. The Respondent indicated that a relationship between the Petitioner and Tioenge was developed at the time when the child was still a toddler to the extent that the child was instructed to call the Petitioner as mother.*
- iii) *The Respondent has denied the content of paragraph 12.2 of the Petition and states that at no time did he refuse and/or neglect to remove the late wife's belongings since at the time he got married to the Petitioner it had been two and half years, so the belongings had been removed by deceased wife's relatives at the instance of the Petitioner's displeasure. The Respondent said it was only the photographic album that was left although it was burnt by the Petitioner. He further denies having ever compared the Petitioner to his late wife, either*

in words or deed but instead showed the Petitioner affection.

- iv) The Respondent admits paragraph 12.3 of the Petition to the extent that the belongings being the bed and beddings were acquired during the previous marriage.*
- v) The Respondent denies the contents of paragraph 12.4 of the Petition and avers that he has never acted or used abusive language towards the Petitioner. He instead avers that in 2014 the parties were affectionately in love towards each other and they had even planned to have children wherein the Petitioner longed to have a daughter to 'spoil'. And indeed, the said affection culminated in Jeremiah being conceived in the same year.*
- vi) The Respondent denies paragraph 12.5 of the Petition and avers that sometime in 2011, whilst the Petitioner was expecting Joshua, the parties had an argument wherein the Petitioner threatened to leave the matrimonial home and raise the*

children alone. He stated that the Petitioner said that she did not need a man to raise the children since her mother raised her single handedly. The Respondent said it was at that point that the Respondent admonished the Petitioner to appreciate marriage more even though she was born out of wedlock. He said this happened in 2011 which was three years before the event to which the Petitioner was claiming about in paragraph 12.4 of the Petition and at no point were the events connected.

vii) The Respondent has denied paragraph 12.6 of the Petition and states that he has at all times treated the Petitioner as a wife who was fully loved and respected wherein when he was in Kawambwa he returned on leave or holidays to the matrimonial home. The Respondent avers that issues only arose when the Petitioner moved in 2016 to a house she called her house. And when the Respondent visited Lusaka for official duties the Petitioner denied and

refused for him to go to her house and as such the Respondent went to be at his sister's house.

viii) The Respondent denies the contents of paragraph 12.7 of the Petition and avers that the Petitioner was at all times consulted of the plans to migrate from a banking to a teaching career. He said the Petitioner would even mock the Respondent that he was not like the Respondent's father who was an academician and served as a lecturer.

ix) The Respondent has denied the contents of paragraph 12.8 of the Petition and avers that there was no family intervention that caused the Respondent to move back to the Petitioner's residence after an incident in paragraph 3.8 but that the parties resolved their marital differences themselves and gave their marriage another chance.

x) The Respondent admits paragraph 12.9 of the Petition and adds that prior to the marriage in 2010, the parties had acquired properties in their personal

capacity wherein the Respondent used his pension and severance package to build the three blocks of flats while the Petitioner developed her own property and did not spend any money or effort to build the flats. The Respondent said he had to engage a known builder to do the same.

xi) The Respondent denies the contents of paragraph 12.9 of the Petition and avers that the Petitioner was aware of the studies the he was doing at Zambia Centre for Accountancy Studies (ZSCAS). The Respondent also avers that Petitioner was also fully aware of the timings of the classes being 17:30 to 19:30. He avers that at no time did he arrive later than necessary considering he was using public transport.

xii) The denies paragraph 12.10 of the Petition and shall state that despite the change in the Petitioners attitude towards him, the Respondent continued to treat the Petitioner as a wife and the relationship with the children was not affected.

- 4.3 The Respondent therefore avers that the dissolution of the marriage will result in a grave hardship on him since he is a lecturer and supplements his salary with rental income from the three flats. The Respondent avers therefore that he cannot accommodate maintenance for himself and the children in one house and the Petitioner in another. The Respondent avers that it would be wrong in all circumstances to dissolve the marriage.
- 4.4 The Respondent opposes the Petitioner's application for custody of Joushua Msimuko and Jeremiah Msimuko but that custody be granted to the Respondent with reasonable access to the Petitioner.
- 4.5 The Respondent opposes the applicant's application for periodical payments for the family to the Petitioner but avers that the Petitioner be ordered to make such payments for the said children of the family as periodical payments and provide such secured provisions as are necessary for the education and general wellbeing.

4.6 The Respondent avers that the Petitioner is not entitled to the reliefs sought.

5.0 HEARING

5.1 At the hearing of the matter on the 25th November 2024 the Petitioner augmented her Petition by testifying on oath that the marriage has broken down irretrievably on the basis of unreasonable behaviour 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 of the Petition. And she wishes the Court to grant them a divorce.

5.4 The Respondent filed an answer to the Petition on 15th November 2024 and he stated that he relied on the Answer on the Petition and prayed for the marriage not to be dissolved.

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 the Respondent has rebutted some of the allegations in his answer to the alleged unreasonable behaviour.

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**¹, 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**² case was also cited with approval in the Judgment of the Supreme Court of Zambia in ***Mahande vs Mahande***³, 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 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 feed up with the marriage for the reason that the Respondent has according to her, a total lack of affection, love as well as being a verbally abusive husband.

7.19 And the Petitioner has stated in her Petition that the Respondent is said to have been mentally tormenting the Petitioner by refusing to remove the personal effects of the Respondent's late wife in their bedroom. The parties have shown in their averments that they could not agree on the issue of the personal and other belongings of the Respondent's late wife. It was observed though that this issue affected both parties deeply.

7.20 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 given by the Petitioner, such as the act of locking the matrimonial bedroom and not allowing her to sleep in the bedroom among other actions. Further that the Respondent would not talk to the Petitioner even when having meals.

7.21 The Petitioner has testified that the Respondent could not stop comparing the Petitioner to his late wife in their interactions. The actions are said to have affected the Petitioner so much to the extent of her wanting out of the marriage.

7.22 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.

7.23 I find that the Respondent has rebutted some of the allegations against him although, I find that none of the denials have discredited the Petitioners submission attributed to his behaviour. What I have noted in the Respondent's Answer is an admission of desertion from the marriage and mere denials without substantiating the issues raised by the Petitioner. For example, the issue relating to the removal of the belongings of Respondent's late wife, the parties have different view points which seems to be an issue for either of them. Furthermore, the issue relating to the Respondent staying with his sister from Kawambwa and the act of not telling the Petitioner about his resignation from work has not been discredited yet the Petitioner has found this act to be unreasonable.

7.24 I further find that arising from the aforesaid, the Petitioner and Respondent are *unharmonious* with each other and the Petitioner herein finds it intolerable to live with the Respondent.

7.25 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.

7.26 I grant joint custody of the two children of the family namely *Joshua Msimuko and Jeremiah Msimuko*. to the Petitioner and the Respondent.

7.27 The application for maintenance is referred to the Deputy Registrar for determination.

7.28 Each party will bear their own costs herein.

8.0 Leave to appeal is granted.

Dated at Lusaka, this 22nd January 2025.


M.M. Bah-Matandala
HIGH COURT JUDGE

