

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

2023/HPF/D365

BETWEEN:

ARETHA MWILA KAMBOI

AND

RODGER KAMBOI



PETITIONER

RESPONDENT

*Before the Honourable Mrs. Justice M.M. Bah-Matandala  
Dated this 10<sup>th</sup> June, 2024.*

For the Applicant: Ms. L. Mulasekwanda – National Legal Aid Clinic for Women  
For the Respondent: In Person

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## J U D G M E N T

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### 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 13<sup>th</sup> July 2023, 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 ***Aretha Mwila Kamboi***, who was lawfully married to the Respondent, ***Rodger Kamboi***, on the 26<sup>th</sup> May 2007 at Bread of Life International in the City and Province of Lusaka in the Republic of Zambia.

2.2 The Parties last lived as husband and wife in Emmasdale of the Lusaka Province in the Republic of Zambia. Both the Petitioner and Respondent are domiciled in the Republic of Zambia.

2.3 The Petitioner is unemployed and residing in Zanimuone West Lusaka, whilst the Respondent is a businessman and is residing in Zanimuone West, Lusaka.

2.4 There are Three (3) children of the family namely;

- i *Rodgers Kamboi (male) born on 28<sup>th</sup> May 2008 aged 15 years and doing grade 9 at Tatenda School in Lusaka.*
- ii *Samuel Kamboi (male) born on the 10<sup>th</sup> June 2012 aged 11 years and is doing grade 6 at North Park Academy in Lusaka.*
- iii *Dinoer Kamboi (female) born on the 18<sup>th</sup> September 2019 aged 3 years and is not in school yet.*

2.5 There are no other children living born to the Respondent during their marriage so far as is known to the Petitioner.

- 2.6 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.
- 2.7 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.
- 2.8 No agreement or arrangement has been made or is proposed to be made between the parties for the support of either party to these proceedings and the children of the family.
- 2.9 The said marriage has broken down irretrievably. 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 Petitioner lives in fear of her life because the Respondent is in possession of a gun and has threatened to use it against her. This happened during an argument sometime in July/August 2019 when the Petitioner was pregnant and the Respondent threatened to kill himself and accidentally fired a shot in the wall.*
- ii) *the Respondent is physically abusive against the Petitioner, for instance, sometime in June 2023 the Respondent physically attacked the Petitioner while she*

*was recovering from an operation. this was after she approached the Respondent when he returned home early morning from drinking.*

- iii) there is no communication between the Petitioner and Respondent as husband and wife as the Respondent goes for months without engaging in conversation with the Petitioner.*
- iv) the Petitioner has attempted to engage the Respondent's family members over the Respondent's behaviour but he has not changed and chooses not to listen to them.*
- v) the Respondent has denied the Petitioner from being independent as he forbids her from carrying out any form of work to sustain herself.*
- vi) all attempts by family members to reconcile the Petitioner and the Respondent have been unsuccessful.*

- vii) *the Respondent is not forgiving as he holds on to grievances leaving disputes unresolved.*
- viii) *after arguments, the Petitioner and the Respondent go for long intervals without engaging in marital relations.*
- ix) *during the weekend whenever the Respondent goes out to drink, he has a tendency of returning home the following morning and this causes the Petitioner to feel insecure.*

3.4 The Petitioner therefore prays that;

- i *the said marriage be dissolved.*
- ii *the Petitioner be granted custody of children namely; Rodger Kamboi, Samuel Kamboi and Dinoer Kamboi with reasonable access to the Respondent.*
- iii *there be an order for property settlement.*
- iv *there be an order for child maintenance*

*v each party bears the costs incidental to these proceedings.*

#### **4.0 ANSWER**

4.1 The Respondent admits that he did not file an answer to the Petition.

#### **5.0 HEARING**

5.1 At the hearing of the matter on the 12<sup>th</sup> October 2023 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. For avoidance of repetition, I shall only highlight issues she did not aver in the Petition.

5.3 The Petitioner informed the Court that Respondent has been okay until when he stopped working and they started staying with their in-laws, this is when he started engaging himself in beer drinking. Whenever he

goes out for drinking he could sleep out and return the following morning. Further the Petitioner stated that she told her relatives about the behaviour of the Respondent wherein a meeting was called upon. Although the Respondent refused to come out of his bedroom and said it was better to kill himself than to attend the meeting but he later attended the meeting after he was spoken to.

5.4 it was further submitted that the parties remained at the in laws for another two years but the problems still continued between them even after the meeting held. The Petitioner stated that the Respondent's behaviour did not change even after the moved out of the in-law's place.

5.5 The Petitioner testified that the Respondent would not talk to her for weeks or months just over an argument they may have had as a couple. The Petitioner said that about July and August 2019 after an argument, the Respondent got a gun and wanted to shoot himself. And at that time the Petitioner stated that she was 7 to 8

months pregnant. She had to struggle with him so he does not shoot himself and he ended up shooting into the wall. Petitioner seeing what he did she had to run into her mother's bedroom with her 10-year-old child to hide. Later on, she managed to run to her in law's place which was nearby. The in laws had to call for a meeting wherein the Respondent was spoken to and the couple went back to their home.

- 5.6 In June of 2023 the Petitioner said she had to do some errands for her sister who was abroad and she went with her brother do to the same. They returned from the errands about 17:00 hours and she had cooked for the family. The Respondent returned about 19:00 to 20:00 hours. When having the meal, he said nothing to the Petitioner. The next day he went to work and only returned about 04:00 in the morning. The Petitioner said that when she opened the door for him, he was aggressive, he starting banning the doors, threw his keys on the table, switched on the radio with very high volume. The Petitioner said she then asked him to

reduce the volume but instead, the Respondent said that when he does not talk the Petitioner says he does not talk and when he talks it is a problem again.

5.7 Further he alleged that the Petitioner had claimed to do errands for her sister when in fact she went to do prostitution. He told the Petitioner that she had left at 06:00 and only returned at night. Consequently, an argument ensued between them over the issue to the extent that the Respondent started hitting the Petitioner. The Petitioner was beaten by the Respondent despite having had an operation in February of 2023. The incident happened in June 2023.

5.8 The Petitioner said the Respondent was so violent such that he pulled out even her hair and when their firstborn child wanted to stop him, he was also beaten up. And when the child had the courage to push the father in order for him and the Petitioner to escape the Respondent still followed them in the kitchen where they escaped to and beat him up again as if he was beating an adult.

- 5.9 The Petitioner later managed to run to her sister's place with the child. This incident was reported to the police
- 5.10 The Petitioner stated that since the aforesaid incident she has been staying with her sister. And she said that due to the violence and arguments in the marriage there is no intimacy. The Petitioner said that she is now scared for her life. She said if the Petitioner had attempted to kill himself she does not know what else he can do. The reiterated that she wanted the marriage dissolved.
- 5.11 The Petitioner also prayed for custody of the children with reasonable access to the Respondent. And prays for property settlement.
- 5.12 In cross examination by the Respondent, he raised issues that the Petitioner was unfaithful and that is why he stopped her from working but the Petitioner denied the allegations
- 5.13 The Respondent on the other hand informed the court that he did not file an answer neither did he acknowledge service.

5.14 The Respondent did not give the Court any reasonable explanation for not filing his Answer and or acknowledge service. Therefore, upon being satisfied that the Respondent did not have any reasonable explanation for not filing his Answer and or acknowledge service, he was not allowed to testify since the Petitioner will not have an opportunity to rebut his evidence at this point.

## **6.0 SUBMISSIONS**

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

## **7.0 CONSIDERATIONS AND DECISION**

8.1 I have considered the Petitioners' pleadings and the oral testimony by the Petitioner and the Respondent's cross examination herein.

8.2 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. I therefore make a finding of 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.

- 8.3 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.
- 8.4 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.*

8.5 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.

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

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

8.8 As highlighted already, much as both parties are in consensus that their marriage has broken down irretrievably, they have accused each other of having behaved unreasonably and therefore responsible for the breakdown of the marriage.

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

8.10 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.”*

8.11 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)*

8.12 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?”*

8.13 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?”*

8.14 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.”*

8.15 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

8.16 I have carefully considered the Petition for dissolution of marriage, as well as the *viva voce* evidence of both parties.

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.

8.17 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 Petitioner is an abuser who has been physically assaulting her and he is said to be a short-tempered person.

8.18 The Respondent did not rebut the Petition since he did not file an answer.

8.19 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, such as drinking and sleeping out of the matrimonial home, he would say he has gone for work and return home the following day and he would become violent. There has been occasion wherein he even wanted to shoot at himself but ended up being stopped by the Petitioner when she was heavily pregnant. This action put a pregnant in danger for herself and the unborn child. The Respondent's actions were done in the presence of their 10-year-old child which quite traumatic for a child.

8.20 Further even when the child wanted to stop the Respondent from being violent against the Petitioner, the Respondent beat him up together with the Petitioner his mother. This was unreasonable and unacceptable behaviour.

8.21 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 of the Respondent who has behaved in such a manner that the Petitioner cannot reasonably be expected to live with him.

8.22 I find that the Respondent's inability to resolve issues and his unforgiving tendencies towards the Petitioner, his behaviour of sleeping out of the matrimonial home and leaving disputes unresolved to be unreasonable behaviour. The Respondent has not rebutted the allegations herein in cross examination.

8.23 I find that the Petitioner and Respondent are unharmonious with each other and the Petitioner herein finds it intolerable to live with the Respondent. Consequently, this marriage has broken down irretrievably and 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.

8.24 I also grant the Petitioner custody of the three (3) children of the family with reasonable access to the Respondent since the Respondent has not contested for custody.

8.25 I refer all maintenance and property settlement issues to  
the Deputy Director for determination.

9.0 Leave to appeal is granted

Dated Lusaka, this 10<sup>th</sup> June, 2024.



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

