

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

2023/HPF/D465

(Divorce Jurisdiction)

BETWEEN:

LOMBE LUCHEMBE CHISANGA

PETITIONER

AND

FRANCIS CHISANGA

RESPONDENT

CHIKWANDA KATONGO

CO-RESPONDENT



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

For the Petitioner: Ms. L. Mulasikwanda Messrs. National Legal Aid Clinic for Women
For the Respondent: In Person
For the Co-Respondent: N/A

J U D G M E N T

Cases Referred To:

1. *Ash vs. Ash* (1972) 1 ALL ER 585
2. *Mahende vs. Mahende* (1976 Z.R 293.
3. *Livingston -Stallard vs. Livingstone Stallard* (1974) 2 ALL ER 766.
4. *O'Neil vs. O'Neil* (1975) E.R 292.
5. *Khalid Mohammed v the Attorney General* (1982) ZR 49.
6. *Venter vs. Venter & Joubert*, (1966) ZR 60 HC

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).*

1.0 INTRODUCTION

1.1 This is a Petition filed into Court on 28th August 2023 by

Lombe Luchembe Chisanga, the Petitioner herein,

against **Francis Chisanga**, the Respondent herein, and **Chikwanda Katongo**, the Co-Respondent, for dissolution of marriage.

1.2 The Petitioner alleges that the marriage, which was lawfully solemnized on 4th October 2020, 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(1) (a) 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 4th October 2020 at University Christian Centre-Lusaka in the City and Province of Lusaka of the Republic of Zambia.

2.2 Immediately after the celebration of the marriage, the Petitioner and the Respondent lived together as husband

and wife in Chilanga in the City and Province of Lusaka of the Republic of Zambia.

2.3 The Petitioner and the Respondent last lived together as husband and wife along Shantumbu Road, in the City and Province of Lusaka of the Republic of Zambia.

2.4 Petitioner and the Respondent are both domiciled in Zambia.

2.5 The Petitioner is currently unemployed and resides along Shantumbu Road, Lusaka whilst the Respondent is an Agent at Discover Insurance and also resides along Shantumbu Road, in the City and Province of Lusaka of the Republic of Zambia.

2.6 There is One (01) child born of the family namely;

- i Kasuba Francis Chisanga a male born 14th February 2022 aged 1 year 6 months and is not yet in school.*

2.7 There are Two (02) other children born to the Respondent before the marriage so far as is known to the Petitioner namely;

- i Bukata Chisanga (female) born on the 26th September 2010 and aged 14 years.*

ii *Kalima Chisanga (female) born on the 8th December 2014 and is aged 9 years old.*

2.8 There is one (01) child born to the Respondent during the subsistence of the marriage so far as is known to the Petitioner namely:

i *Grace Chisanga aged 1 year.*

2.9 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.

2.10 There are no previous 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.

2.11 No arrangement or agreement has been made or proposed to be made between the parties for maintenance of the children and the Petitioner arising out of or connected to these proceedings.

2.12 The Petitioner alleges that marriage has broken down irretrievably due to the reason that Respondent has

committed adultery and the Petitioner finds it intolerable to live with the Respondent.

2.13 In the particulars of the Respondent's alleged adultery, it was stated that the Respondent committed adultery with the Co-Respondent namely **Chikwanda Katongo**.

3.0 PARTICULARS OF ADULTERY

- i sometime in April, 2023 the Petitioner found out that the Respondent committed Adultery sometime in 2021 with Chikwanda Katongo.*
- ii the Respondent confirmed the Adultery to the Petitioner in August 2023.*
- iii as a result of the Adultery by the Respondent, there is a child born namely Grace Chisanga.*
- iv the Petitioner finds the Adultery intolerable to live with the Respondent.*
- v that since April 2023, the Petitioner and the Respondent have not had intimate relations as Husband and Wife.*

3.1 **Particulars of the unreasonable behaviour;**

- i the Petitioner has on more than one occasion found pornographic videos on the Respondent's mobile phone of his intimate relations with other women.*
- ii sometime in June 2023 the Petitioner found sealed and open packs of condoms in the Respondent's clothing.*
- iii the Petitioner has found different female garments in the Respondent's motor vehicle.*
- iv the Respondent does not sleep at the matrimonial home and has a tendency of returning home the following morning or after a few days.*
- v the Respondent is physically abusive against the Petitioner and has a tendency of having violent outbursts when he returns home intoxicated.*

- vi *the Respondent has a tendency of threatening divorce process against the Petitioner whenever an argument arises. For instance, when the Petitioner found out about the child the Respondent has with Chikwanda Katongo, the Respondent threatened to divorce her.*
- vii *the Petitioner has attempted to reconcile with the Respondent but he has not shown any willingness to reconcile.*

4.0 THE PETITIONER THEREFORE PRAYS THAT;

- i *the said marriage be dissolved*
- ii *the Petitioner be granted custody of the child of the family namely; Kasuba Francis Chisanga (male) with reasonable access to the Respondent.*
- iii *that there be an order for property settlement.*
- iv *that there be an Order for child and spousal maintenance.*

v that the Petitioner be granted an Order for damages by the Respondents.

vi that the Respondent bears the costs of incidental to these proceedings.

5.0 RESPONDENT AND CO-RESPONDENT'S CASE

5.1 The Respondent did not file an answer to the Petition but filed an acknowledgement of the service of the Petition on 16th January 2024. The Co-Respondent did not enter appearance and or file an Answer.

6.0 HEARING

6.1 At the hearing of the matter on 20th March 2024, the Respondent was present but the Co-Respondent was not present. The Respondent did not defend the Petition because he did not file an Answer to the Petition.

6.2 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 the Respondent committed adultery

with the Co-Respondent and she feels that they need to go their separate ways.

6.4 The Petitioner stated that Respondent has committed adultery with the Co-Respondent named **Chikwanda Katongo**. The Petitioner further alluded that the Respondent has a child with the Co-Respondent.

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

6.6 There was no cross-examination.

6.7 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 since the Respondent did not file an Answer to the Petition. The Co-Respondent did not respond to petition and did not appear at the hearing of the Petition.

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 4th October 2020, at University Christian Centre - Lusaka in the 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.

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. *“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.”*

7.8 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 with **Chikwanda Katongo** who is the Co-Respondent and the Respondent has admitted having committed adultery with the Co-Respondent. Further the record shows no contrary evidence to this allegation.

7.9 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? In answering the first question, I have considered the Petitioner's evidence and the fact that there is no defence of having an intimate relationship with the Co-Respondent at the hearing on 20th March 2024. 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.

7.10 The next question is, has the Petitioner proved that, as a result of the adultery committed by the Respondent with the Co-Respondent, the Petitioner 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.”

7.11 From the provision quoted above, it is clear that, where adultery is alleged against a Respondent, 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.

7.12 In the current case, the Petitioner's evidence indicates that since she had discovered that the Respondent had committed adultery with the Co-Respondent, she had proceeded with the filing of the Petition herein on 28th August 2023. 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 due the adulterous relationship the Respondent has with the Co-Respondent namely **Chikwanda Katongo**.

7.13 The test applicable in determining whether a party would find it unreasonable to live with the other party was spelled out by Bagnail J. in the case of **Ash vs. Ash**¹ 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."

7.14 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?'

7.15 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?’

7.16 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. The Petitioner has proved the allegation of Adultery, as facts and I find so.

7.17 Consequently, on the basis of the Petitioner'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 with the Co-Respondent and that the Petitioner finds it intolerable to live with the Respondent.

7.18 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.

7.19 I order that custody of the child of the family born between the parties is granted to the Petitioner with reasonable access to the Respondent.

7.20 And I further order that property settlement and maintenance applications will be determined by the Hon. Deputy Registry on application by either party.

8.0 Costs are awarded to the Petitioner.

Delivered at Lusaka, this 4th December 2024.



M.M. Bah-Matandala
HIGH COURT JUDGE