

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICTREGISTRY**  
**HOLDEN AT KITWE**  
**(CIVIL JURISDICTION)**

2012/HK/D.59

**BETWEEN:**

**DONALD CHUNGU - PETITIONER**  
**AND**  
**JOLIE MUKE CHUNGU - RESPONDENT**

**Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 28<sup>th</sup> day of May, 2013.**  
**For the Petitioner: Mr. M. Masengu – Messrs Masengu and Company**  
**For the Respondent: Mr. S. Twumasi – Messrs Kitwe Chambers**

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**JUDGMENT**

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**Cases referred to:**

1. *Thurlow v. Thurlow* (1975) 2 ALL E.R 979
2. *Loveden v. Loveden* (1803 to 1813) ALL ER 339
3. *R. v. Luffe* (1803 to 1813) ALL ER. 726

**Legislation referred to:**

1. *Matrimonial causes Act, No. 20 of 2007 of the Laws of Zambia*

This was initially a petition for judicial separation under section 34 of the Matrimonial Causes Act, No. 20 of 2007 on the ground that the marriage had broken down irretrievably. The allegation was that the Respondent had behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. However, upon being served with the Respondent's Answer and Cross Petition, the Petitioner decided to go for divorce on the same grounds that were in the petition for judicial separation.

From the pleadings of the parties as well as the evidence adduced at the trial, it is common cause that the Petitioner and the Respondent, who are both domiciled in Zambia, got married under the Marriage Act at the Registrar's Office at the Civic

Centre at Kitwe on 15<sup>th</sup> September, 2005. They cohabited at various address in Kitwe and abroad until finally at No. 9 Leokadia Flats, Independence Way, Parklands, Kitwe. In the course of their marriage the Respondent had one child, a boy, born on 10<sup>th</sup> April, 2011. It is also common cause that the parties separated on or about 26<sup>th</sup> July, 2012 and have been living apart from each other since then.

As already indicated, the Petitioner alleged that the marriage has broken down irretrievably. He alleged that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. He alleged that as a result, the marriage was under considerable stress and that the relations between the parties has been turbulent and characterised by a lot of intrigue and arguments. He gave the following particulars of the Respondent's unreasonable behaviour:

1. That in July, 2010 four women went to his work place at the Copperbelt University Campus, one of whom informed the Petitioner that his wife was interfering in her marriage by having an affair with that woman's husband. They said the Respondent and her mother had been informed two days earlier and told the Petitioner to stop his wife from such interferences;

**In this judgment I shall refer to that woman as Mrs. CHANDA and to that husband as Mr. CHANDA. These are not their real names.**

2. That the Respondent sued Mrs. CHANDA in the Local Court where the Respondent was found to have had only a business relationship with Mr. CHANDA since the Respondent was in the business of trading. The Petitioner said he had not been aware that his wife was doing any business;
3. That the Petitioner has seen his wife on several occasions in the car of Mr. CHANDA;
4. That following the birth of the child, the Petitioner observed that the child had the physical features of Mr. CHANDA whom the Respondent has been

associating with. When she was asked to submit to the DNA test to establish the paternity of the child, the Respondent refused to do so; and

5. That although the Respondent had completed a diploma course at a college in Ndola at the time of the marriage, she cannot read or write, to the utter shock, surprise and disdain of the Petitioner. The Petitioner has tried to employ different people to teach the Respondent to read and write, but without success.

In her Answer to the petition, the Respondent denied having behaved unreasonably. She contended that in fact it is the Petitioner who has behaved in such a way that the Respondent cannot reasonably be expected to live with him. She gave the following particulars of her husband's unreasonable behaviour:

1. That the Petitioner has during the course of the marriage, on occasions too numerous to mention, stayed away from the matrimonial home without good reason;
2. That the Petitioner has on numerous occasions taken his girlfriends to the matrimonial home;
3. That the Petitioner chased the Respondent and the child from the matrimonial home;
4. That the Petitioner on one occasion committed fraud against the landlord and then asked the Respondent to lie for him; and
5. **That during the marriage the Petitioner on several occasions committed adultery with a named woman who is one of the Petitioner's students. I shall refer to that woman as Ms. ZULU, not her real name.**

The Respondent pleaded that the marriage has broken down on account of the Petitioner's said behaviour, and she prayed that the petition be dismissed but that the marriage be dissolved for the reasons she has given.

At the trial of the petition both parties gave evidence in support of their respective positions. The Respondent also called one witness. I shall return to that evidence later in this judgment. But first let me set out the law applicable vis-a-vis the allegations as contained in the pleadings. Section 8 of the Matrimonial Cause Act, No. 20 of 2007 provides thus;

***“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”.***

“Irretrievably” means beyond redemption or repair.

Further, Section 9 of the Act provides, among other things;

***(1).....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.....;***
- 2. 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.***
- 3. If the Court is satisfied on the evidence of any fact mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall grant a decree of dissolution of the marriage.***
- 4. A decree of dissolution of marriage shall not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed”.***

With regard to allegations of adultery, section 10 (1) of the Act provides:

***“where in a petition for divorce or in an answer to such a petition, a party to the marriage is alleged to have committed adultery with a specified person,***

***whether or not a decree of dissolution of marriage is sought on the grounds of the adultery, that person shall, except as provided by the rules, be made a party to the proceedings”.***

From the provisions of the Act, it is clear that before I can grant the prayer for either or both of the parties in this case I must be satisfied on all the evidence before me that the marriage has indeed broken down beyond repair. Therefore, in evaluating the evidence adduced by the parties, I have borne in mind the provisions of the Act as well as other legal precedents. For example, in the case of THURLOW v. THURLOW (1975) 2 ALL E.R 979, the English Court deciding the question of “unreasonable behaviour” held:

***“In order to establish that a respondent had behaved in such a way that the Petitioner could not reasonably be expected to live with the respondent, it was not sufficient merely to establish that the marriage was dead and that it was impossible for the petitioner to cohabit with the respondent. It had to be shown that it was the respondent’s behaviour which justified a conclusion by the Court that the petitioner could not reasonably be expected to endure cohabitation”.***

It is clear, in my view, that the behaviour required to be proved must be of such gravity that the petitioner’s powers of endurance are exhausted to the point where it is clear that a petitioner cannot reasonably be expected to live with the respondent. The standard is an objective one or that of a reasonable man or woman.

During the trial, the Petitioner testified in support of the allegations in the petition. He said that on several occasions his wife had been leaving the matrimonial home saying that she was going to see her parents. But he suspected it was not true. One day, whilst he was at work at C.B.U Campus, a group of women, who included Mrs. CHANDA, arrived at his office and started shouting that his wife was having an affair with Mr. CHANDA. The women started insulting him and shouting at the top of their voices, which attracted the attention of his colleagues and students, much to his surprise and embarrassment. They told him to tell his wife to stop the affair. He did not say anything to those women. Word of the incident spread on Campus up to his

supervisors who later summoned the Petitioner and told him such kind of incidents could not be tolerated. He felt very embarrassed. He later contacted his aunt who responded that the same women had in fact some four days earlier gone to the home of his wife's parents where they had caused the same fracas.

The Petitioner said he felt so angry that when he went home he asked his wife to leave the matrimonial home, and to go and leave at her parents' home. He felt that he might do some harm to her if she remained in the matrimonial home with him. When he told her the reason for his decision to send her away, she was speechless and only said she had intended to tell her about Mrs. CHANDA at some later date.

The Petitioner said that he later learnt that his wife had sued Mrs. CHANDA at the local court. He only learnt about the suit on the very day the case was coming up for hearing, and not through his wife. He decided to attend the trial in that case, and was shocked when he heard her tell the Local Court Magistrates that it was only a business relationship she had with Mr. CHANDA. This shocked him because he had not been aware all along that his wife was conducting any business. However, the Local Court found that she was not guilty of any marriage interference.

In due course, and whilst the Respondent was still living at her parents' home, the Petitioner learnt that she was pregnant. He then decided to take her back in the matrimonial home for the sake of the unborn child.

After resuming co-habitation, his wife started receiving phone calls from people the Petitioner did not know. He started to suspect that she was up to something bad. He started receiving information that she was being seen in the company of some man. He began monitoring her movements. One day after lunch at home, she told him she was going to see her parents who lived in another part of town. Whilst still in the matrimonial home, her phone rang. She picked the phone and went into the kitchen to answer it. When she returned to where the Petitioner was, he asked her who had called. She told him the phone call had been from their maid. He thought she was lying because the number that had called, which he had seen, was not that of the maid. When she left home that afternoon he decided to follow her movements. When he saw her getting into a waiting car, he hired a cab and instructed the cabbie to

follow that car. Instead of that car going in the direction of the wife's parents' home, it headed out of town towards Kalulushi. Whilst following the car with the cab, the Petitioner phoned his wife and asked her where she was. She told him she was at her parent's home. When the driver of that car sensed that they were being followed, he decided to drop off the Respondent at a bus station in Kalulushi. The driver of the car then drove off and went to park at some guest house. He was followed and monitored by the cabbie while the Petitioner remained near the bus station monitoring his wife. That car later returned to the bus station, picked the Respondent, and headed back to Kitwe, with the Petitioner following behind. That car went and parked at a filling station where the Petitioner observed the driver to be Mr. CHANDA whose wife the Respondent had earlier sued in the Local Court. His wife was later dropped off at her parents' home where the Petitioner confronted her over her movement that afternoon. At first she denied it was the man the Petitioner had been suspecting, but a day later she admitted it was the same man she had been with that day. He told his wife he did not tolerate such behaviour. By then the child had been born. As a result of his suspicions, he was prompted to ask her that they go for a DNA test to determine the paternity of the child. But she and her parents refused, saying that that was an insult to them. He then concluded that his wife was having an affair with Mr. CHANDA. He said the physical features of the child resembled those of that man. He then decided to send his wife away to her parents.

The Petitioner said that in the course of monitoring his wife's behaviour he procured a phone call record from her service provider. It showed that she had been communicating with Mr. CHANDA for a period of two years. The Petitioner gave the Court Mr. CHANDA's real name, which I have decided to withhold for reasons that will be made clear later in this judgment.

The Petitioner testified that he came to know the Respondent when she was about to complete a diploma course at some college in Ndola. He was at the time in the third year of his first degree programme at the CBU. A month into their marriage, after she had completed her course, he was shocked to learn that she could neither read nor write English. He informed her parents about this so that they could help find someone to help her improve her literacy skills. He ended up hiring a teacher for her.

The programme started and went one for some time, but it did not work. This, he said, brought a lot of communication problems between them such that they could not understand each other well.

For the foregoing reasons he prayed that he be granted divorce.

Under cross examination, the Petitioner said that they separated on 26<sup>th</sup> July, 2012 but denied having chased his wife. He said he merely took her to her parents' home because he did not want her any more. He said she had lied to him about Mr. CHANDA, and yet she went with him to Kalulushi. After he confronted her at her parents' home after returning from Kalulushi he went home to pack her personal belongings and took them where he had left her. From that day, he said, she never returned to the matrimonial home.

The Petitioner said that at the time he confronted his wife at her parents home, the parents were not there. However, her grandmother and cousin were present. He said he did not speak to her parents because African custom forbid that.

The Petitioner further testified that he had seen the man he suspected was having an affair with his wife. This was firstly at the Local Court. He did not confront him at the time because his emotions were very high. He also did not want his reputation dented by a confrontation. He was sure his wife had committed adultery with that man. However, the closest he had seen his wife and that man was in the man's car on the day the two travelled together to and from Kalulushi. He said his wife did not go with the man to the guest house and that he never saw the two kissing or embracing each other. He admitted that the Local Court vindicated his wife when she sued that man's wife for alleging marriage interference.

He said he did not know that his wife was a businesswoman. He was even surprised to hear that she even had a stall at the market. He was only aware of his mother-in-law's business. He denied that his wife supported him financially during the time he was studying. He also denied having borrowed K8,000,000 from her when they were preparing for their wedding.



He said that he learnt of her pregnancy when she was living at her parents' home. That was after he had sent her away following Mrs. CHANDA's allegations of marriage interference. Before he sent her away, he did not know that she was pregnant. He said he did not know if indeed he is the father of that child.

He said that he recalled having phoned his wife in early 2013 over the child. He said he did not recall asking to have the child or claiming to be the father of the child. After a recording of that telephone conversation was played back to the Petitioner in Court, he admitted that he wanted the best for the child. I shall return to that telephone conversation later in this judgment.

The Petitioner said that he had a problem with his wife's lack of education. He said there was poor communication between them in both the English and Bemba languages. He would have liked that she speaks 90% more English than she did. However, he denied that that was the reason he chased her from the matrimonial home, or the reason for wanting to divorce her.

He denied having had affairs with other women generally or indeed Ms. ZULU, the one named by his wife. He said that Ms. ZULU was a student at the University of Zambia and a worker and co-Director at his consulting firm in Lusaka. He admitted that his wife had at one time found her with him in the matrimonial home, but he denied having been found kissing the woman. He said his wife confiscated Ms. ZULU's personal items including a cell phone and purse. It was not the first time that Ms. ZULU had been to the matrimonial home but he denied having committed adultery with Ms. Zulu, whom he said only came into the picture after he and his wife had separated. He admitted having exchanged sms text messages with Ms. Zulu some of which he identified from the printout which was produced before Court. I will return to those text messages at a later stage in this judgment.

Finally, the Petitioner said that he did not recall any incident in which he had asked his wife to lie for him concerning rentals.

The Respondent gave evidence in which she gave her occupation as a business woman. She said she sells, among other things, blankets, musical systems, television sets, and floor tiles. She said she was already engaged in business at the time she married the Petitioner.

At the time the parties got married, she said, the Petitioner was a freshman at the C.B.U and, since he was not working, they started living together at her house at Number 4365 Kwacha East Kitwe. They lived there for five years before he secured a flat to which they moved as a family. She said she used to provide for the family from the income she received from the business. She said she even owned a car which the Petitioner was using to go for studies at the campus.

When the Petitioner completed his first degree, he proceeded to the University of Pretoria, Republic of South Africa, for a master's degree programme. She accompanied him to Pretoria where she continued providing for the family from the income she received from her business in Zambia. They stayed in the R.S.A for two years during which time she described their relationship as cordial.

During their time in the R.S.A the Petitioner received an in-law of a friend who entrusted him with the equivalent of K4,000,000 for him to help her enrol at a school. However, the Petitioner misused that money. She learnt of this when she returned to Zambia while he remained in the R.S.A. When the Petitioner rejoined his wife in Zambia, the two went to see that woman where the Petitioner promised to pay back the money he had misused. However, when the time came to pay, the Petitioner did not have the money. He asked his wife to pay for him and promised to refund his wife the money later. His wife paid that money for him, but the Petitioner never refunded his wife the money.

The Respondent said that when the Petitioner finally returned to Zambia they went to live at her house. They also lived with her parents and two cousins of hers, one of whom was a girl. She said during that time her husband started having an affair with her female cousin. She said that one day she caught her husband and cousin red-handed and naked in the matrimonial bed. He packed up and went away for three days, while her female cousin went away for good. When he returned after

three days he pleaded for her forgiveness, but she refused to forgive him. He went away for a week and returned with his mother and aunt who went to plead for him. She agreed to forgive him on condition that he finds alternative accommodation for them. This was because of the embarrassment he had caused.

The Petitioner accordingly found a flat to which the couple moved. This was in 2010 and the Petitioner was by then working at CBU as Lecturer.

She said that during their stay at the flat he used to chase her from home regularly, almost after every five days. She said it felt like she had stayed for a year at peace if he did not chase her after the five days. That was the longest she would stay with him at the flat. Each time she spoke to him about his bad drinking habits, his several women, and his spending nights away from the matrimonial home without good reason, he would pack her personal belongings and throw them outside the flat. She would try to retrieve them back but would fail. She said she used to telephone her husband's aunt who would go and witness her belongings thrown outside their home. The aunt and her mother-in-law used to encourage the Respondent to persevere in the hope that the Petitioner would one day change his ways.

The Respondent said that even after her husband had started working, he never used to buy food for the family. She continued providing for the family from the business she was doing. She said he had lied when he denied knowledge of that business or of her financial support to him. She said she even had a shop from which she used to run her business which she had registered at the Companies Registration Office.

She said that whenever he got drunk he used to become violent towards her and to use abusive and insulting language. When he got paid he would only give her K50,000 for food. But he used to despise the food he was served at home even when he did not contribute much to the food budget.

She said his women used to fetch him from home at times. These were several different women. She said she used to inform his aunt about them.

With regard to Mrs. CHANDA who alleged that she was having an affair with her husband, the Respondent testified that the woman had confronted her at her parents' home in the presence of her mother and made the allegation. This was after the woman had seen her husband leave the house where he had gone to buy some chickens. Despite that explanation, the woman proceeded to insult her. The Respondent ended up reporting the matter to the police. She said Mr. CHANDA had been buying things from her for a long time and that there was only a business relationship with him. She said she later informed the Petitioner about that incident who told her to just forget about it. However, she sued the woman for falsely accusing her of having an affair with the husband and that the Local Court found the Respondent innocent of marriage interference. Mrs. CHANDA was ordered to pay the Respondent K1,000,000 as compensation for the incident.

The Respondent said that the woman in question had even gone to the Petitioner's work place to make the allegation against the Respondent. When the Petitioner returned home that day he was with his aunt who told her that her husband was so upset about what had happened that he did not want her in the matrimonial home from that day; that if she remained in the house, he would beat her very badly or even kill her. The aunt suggested he takes the Respondent to her parents' home. The Respondent accordingly packed her belongings and went to live with her parents. She said she was pregnant at the time and that the Petitioner knew about it.

A week after the judgment in the case at the Local Court, the Respondent returned to the matrimonial home and they lived well up to the time the child was born.

She said that on one occasion the Petitioner gave her the sum of K2,500,000 and told her to go and deposit it in their Landlord's Bank account. She did so and gave him a copy of the deposit slip. Later he gave her a copy of a deposit slip which read K12,500,000. He told her that she should indicate in the rent book when it came around that they had paid for six months rent for the flat they lived in. She did not know at the time that the K12,500,000 deposit slip had been forged. When the rent book came around she signed as instructed. Six months later he did the same thing and he signed in the rent Book. Later the Landlord suspected some fraud was going on and summoned the Petitioner to explain what was going on. The Petitioner went

to inform the landlord that the forgeries had been committed by his wife, which prompted the landlord to call for her also. Her husband begged her to go and admit before the landlord that she was the one responsible for the forgeries. She went and did so but the landlord did not believe that she had committed the forgeries. Her husband then promised to pay the outstanding rentals.

Two days after the forgery incident she told the Petitioner she was taking some food to her parents' home. On her way she met Mr. CHANDA who owed her some money. This was the man she had been suspected of having an affair with. He told her he was going to Kalulushi to get some money to pay her. She said she insisted to go with him so that she could get her money. That is how she went with him in his car up to Kalulushi. When they arrived in Kalulushi, he dropped her off by the bus station and told her to go in a certain shop to get some money and he drove away. She went into that shop and was given K1,500,000. When she left the shop she booked a cab and went back to Kitwe and proceeded to her parents' home.

Upon entering her parent's home, she heard the sound of a car by the gate. When she went over to the car, she found her husband lying on the back seat of the car. When she asked him what he was doing, his only answer was "Thank You". He left, only to return some twenty minutes later with her personal belongings and those of the child. He told her grandmother and her cousin that he did not want her any more. She said that was on 26<sup>th</sup> June, 2012.

He returned two days later to tell her that the child was not his, to which she responded that there was something wrong with his head.

Seven months after separation, her husband phoned her to say he wanted the child. He admitted he was the father of the child. During the pregnancy he never told her he was not the person responsible for that pregnancy. Even after the child was born, he never disputed being the father of the child. It was only after 26<sup>th</sup> June, 2012 that he requested for the DNA test. She had told him then that he could not have kept quiet during the gestation period or even immediately after the child was born if he thought he was not the person responsible for it. He did not even tell her the person he suspected to be the father of the child.

During the time she was on separation from her husband, some people were phoning to inform her of the women who were frequenting the matrimonial home. One day around 16:00 hours after receiving one such phone call, she decided to go there in the company of the Church elders. Upon entering the flat she found her husband kissing the woman he had claimed to be his student during his evidence. She took three pictures of the two using the mobile phone which I viewed in Court. The Petitioner and the woman appeared seated next to each other in those pictures. She said she confiscated that woman's slippers, National Registration Card, student card, purse with K105,000 cash, and a mobile phone. The incident was witnessed by the Church elders she had gone with. She later surrendered those items except for the mobile phone. From that phone she extracted the sms text messages from which she concluded her husband was having an affair with that woman, Ms. Zulu.

With regard to the telephone calls on the call list exhibited in Court by her husband, she admitted having been calling Mr. CHANDA's numbers. That was because he owed her money. She said it was not a secret that she used to phone him several times because he was doing business with him. She, however, denied that there was any sexual relationship between her and that man.

Regarding her education, she said she had gone up to Grade 12 at Mukuba High School. Thereafter she did a one year diploma course in clearing, forwarding and shipping management at a college in Ndola. She said she could speak English, though not fluently. She said she had opted to give her evidence in Bemba because she did not know how to speak "Court English". She said she could also read and write English, though not as well as her husband. She denied that he had offered her literacy lessons. She wondered how he could pay her teachers when he was failing to buy food for the family.

Under cross examination, the Respondent said that they had been in courtship for two years prior to their getting married. She said although she was not the one who sponsored his education; she still used to help him with some of his needs whenever he had a shortfall on his finances. She said she was with him in the RSA for over a year. During her stay there he found her a job as a social worker at the University.

She said during the marriage her earnings from business ranged between K800,000 to K1,000,000 per day on bad days and K2,000,000 on peak days.

She said she has only been in Mr. CHANDA's car once when she travelled with him to Kalulushi.

She said her husband was generally not a good person to live with. She did not petition to divorce him earlier because her in-laws used to encourage her to persevere in the hope that he would change for the better. She said she had been planning to petition for divorce even before he took her to Court.

She said that she did not know at the time she signed the landlord's rent book that the K12,500,000 deposit slip had been forged. She got to know that it had been forged when the landlord summoned them.

She said she conceived during the time they were living together and only went to her mother's place in the eighth month of her pregnancy. She said she told him she was pregnant the same month that she had conceived. She said that if he had doubts about being responsible for the pregnancy he ought to have asked for the DNA test immediately the child was born, not when the child was one year and three months old.

When she surprised him kissing Ms. ZULU in the matrimonial home, he asked her what she was doing there. She answered that it was still her home and that she could go there any time she wanted. They stopped kissing when she said she was going to take pictures of them.

The Respondent called one witness to testify in support of her case. This was Ms. HILDAH MBEWE who had worked as a maid in the matrimonial home from May, 2012 to February, 2013. She said when the Respondent left around June, 2012; a woman friend of the Petitioner started visiting the matrimonial home regularly. That woman, whom she identified from her photographs to be the woman the Respondent had found in the matrimonial home, even used to cook food there. The woman would even enter the matrimonial bedroom apart from all the other rooms in the flat. The

witness said that one day when she reported for work at 07:30 hours it was the same woman who opened the front door for her. She said she did not make any conclusions about that woman having been committing adultery with the Petitioner, but she found it unusual for a visitor to enter the matrimonial bedroom.

After listening to and evaluating the evidence before me, the first question is whether either of the parties' behaviour in this case has been proved to be unreasonable or whether either of them has committed adultery whereby the other party finds it intolerable to live with the adulterous party. In the case of unreasonable behaviour, the second question is whether that behaviour is sufficiently grave to make it unreasonable to expect the other party to endure it. In reaching those decisions, I have had regard to all the circumstances including the temperaments of both parties, the causes of the behaviour and whether the causes were or were not known to either party, the presence or absence of intention, the impact it had on the opposite party, its duration, and the prospects of cure or improvement in the future. If I decide that it would be unreasonable to expect the innocent party to continue cohabiting with the guilty party, or intolerable for the innocent party to live with the adulterous party, then I must grant a decree of divorce to the innocent party, unless I be satisfied that the marriage has not broken down irretrievably, or that there is a likelihood of the parties resuming cohabitation. (see page 988 of the Thurlow case and section 9 (3) of the Act).

At the close of the trial, I invited Counsel for the parties to file written submissions, which they did and which I have taken into account in arriving at my decision.

I propose to first deal with the allegations of adultery made by both parties against each other. Both parties in their evidence identified the person with whom his/her partner was committing adultery with. In fact the Respondent revealed the identity of the Petitioner's lover in her Answer before the trial. But none of them made any attempt to make that person a party to the proceedings as required by section 10 (1) of the Act. The requirement for joinder, in my view, is mandatory for the Court to give the allegation due consideration. This is from the legislatures use of the words "**that person .....shall be made a party to the proceedings**". This is to afford "**that person**" an opportunity to be heard so that if at the end of the evidence concerning



the adultery allegation **“that person”** is found innocent, his/her name may be removed from the proceedings. This is in order to restore integrity of **“that person”** once he/she is found not guilty.

It will be noted that in this judgment I have not revealed the true identities of the persons with whom either of the parties is alleged to have committed adultery. It is because those persons were not joined to these proceedings and given an opportunity to be heard.

Much argument was made by Counsel for the parties about their clients' conduct with regard to the suspected lovers. I do accept the submission by Mr. Twumasi, Counsel for the Respondent that a party does not have to be caught red-handed for the Court to conclude that he committed adultery. He cited the case of *LOVEDEN v. LOVEDEN* (1803 to 1813) ALL ER 339 in which the Hon. Sir William Scott said at page 340 of the report;

**“It is a fundamental rule that it is not necessary to prove the direct fact of adultery, because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from the circumstances that lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.**

**It was held that the only general rule that can be laid down is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion (that adultery had been committed).**

**It is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man”.**

The Respondent had stated in her evidence that she had caught her husband red-handed and naked in bed with her cousin in her parents' home where they used to live at the time. The Respondent also revealed the name of that cousin of hers. That piece of evidence was not challenged at all. My conclusion is that it was true he had committed adultery with that woman. However, the Respondent later forgave her husband and cohabitation resumed. The Respondent is precluded from relying on that fact of adultery because of the provisions of S. 12(1) of the Act which states;

***“For the purposes of paragraph (a) of subsection (1) of section three, 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”***

She cannot be heard to say that, after that discovery of her husband's adultery with her cousin, she “(found) it intolerable to live with (her husband)”.

I have considered the Respondent's other evidence of the Petitioner's alleged adultery with Mrs. ZULU, his student and co-worker in his consulting firm. Although the Petitioner had denied any sexual relationship with that woman, I find that relation to be improper to the point of being proof of such adultery. That woman, whose true identity I have also withheld for the protection of her reputation, started visiting the matrimonial home regularly after the Respondent had been sent away. The Petitioner admitted the woman's visitations but did not explain the purpose of those visits. According to the evidence of their former maid, HILDAH MBEWE, the woman would even enter the matrimonial bedroom, which is not expected of mere visitors to people's homes. She used to also cook food when she was there. On one occasion she was the one who opened the main door for the maid when she reported for work at 07:30 hours. The inevitable conclusion is that the woman had spent the night in the matrimonial home. There was also the undisputed evidence that the Respondent found the Petitioner alone with the same woman when she paid a surprise visit one afternoon after a tip off. The pictures taken at the scene were of the two sitting very close to each other on a sofa.

The relation of the two is further confirmed by the numerous SMS text messages exchanged between them. 70 of those messages were produced at the trial and included the following;

- **Morning my love**
- **Good night my love....sweet dreams. I love you**
- **Baby I am dying**
- **Baby there is no class.....what time are you coming to pick me?**
- **Baby what happened, is everything ok**
- **Baby I am in the Bank now, may I withdraw a K100?**
- **Morning honey, did you sleep well?**
- **Te desidero amor meus, quid tibi?**
- **Good night my love, sweet dreams. I love you!!**
- **Baby, this is the most difficult situation I have ever been into.... and we have to be strong coz we are in this together. I'm just glad that u talked to your mother about this. I think she will give you the best advice.**
- **Baby, I will be there soon**
- **Morning, I hope you slept well. Have a great day. Love you always.**
- **No word or number can explain how much I love you. My love for you is unconditional and I can't afford to lose you my love. To tell you the truth, you are the best thing that has ever happened to me coz I prayed and God answered me with you.**
- **I miss you too my love.**

Following the reasoning in the LOVEDEN case, the Petitioner must have been guilty of an adulterous relationship with that woman. But, again, Ms. ZULU was not joined to these proceedings.

On the other hand the Petitioner's evidence as to the adultery of his wife with Mr. CHANDA whose wife went to cause trouble at the Respondent's home and at the Petitioner's work place, was rather unconvincing. His suspicion emanated from the allegation made by Mrs. CHANDA that the Respondent was having a relationship with Mr. CHANDA. The Petitioner knew Mr. CHANDA's true identity and saw him at the Local Court when their wives' case was being heard. He confirmed that his wife

was found not guilty of marriage interference. In my view the Local Court reviewed the evidence, found her innocent, and fined Mrs. CHANDA K1,000,000 as compensation to the Respondent for peddling falsehoods. As Mr. Twumasi rightly submitted, that finding by the Local Court vindicated the Respondent of that allegation. Indeed, after the said court case, the parties resumed cohabitation for a period in excess of six months. Equally in terms of S 12(1) of the Act, the Petitioner cannot rely on that fact as a reason for divorce, even if I were to hold that the Respondent had a sexual relationship with Mr. CHANDA.

I have indeed considered the evidence as to his suspicions after that court case when he said he saw her travelling with Mr. CHANDA to and from Kalulushi. There was no evidence that the car ever stopped for them to engage in sex. The man drove all the way to Kalulushi where he dropped off the Respondent at a bus station. She did not accompany him to the guest house where the man was said to have proceeded. The Petitioner admitted that he never saw the two kissing or embracing. Even with the very long call list showing the numerous phone calls she had made to that man's name, I refuse to conclude that there was a sexual relationship between them.

The Petitioner testified that he had doubts if he was the father of the child born to his wife during the marriage. The question is whether the Petitioner has raised a legitimate and reasonable issue in this regard. The answer to that question lies in the Latin maxim : PATER EST QUEM NUPTIAE DEMONSTRANT i.e. If a child is born to a married woman, her husband is to be deemed to be its father until the contrary is proved.

The case of R. v. LUFFE (1803 to 1813) ALL ER 726 considered the legal presumption of the legitimacy of a child born to a married woman. The English court held, per Lord Ellenborough, CJ, that;

***“The conclusion to be drawn from the authorities is that circumstances which show a natural impossibility that a husband can be the father of a child of which his wife is delivered are grounds on which the illegitimacy of the child may be founded whether those circumstances arise from the husband's being***

***under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death. Other causes equally potent as these natural causes and conducive to show the absolute physical impossibility of the husband's being the father may be adopted...."***

On the evidence before me, there is no doubt that the child was conceived while the parties were living together. The Petitioner said that when he learnt that his wife was expecting a child, he recalled her from her parents' home where he had chased her. He said this was for the sake of the unborn child. After the child was born he looked after him for a period in excess of one year before he demanded for a DNA test to determine the child's paternity. Even after the parties had separated for the last time, he telephoned his wife to claim the child as his. In my view, those are not the actions of a man suspicious of his wife's fidelity. I, therefore, find the Respondent's refusal to subject the child to a DNA test to have been reasonable. It is the Petitioner's demand for such a test that I find to be not only unreasonable but also insulting. The circumstances of this case compel me to determine that the Petitioner is on the balance of probabilities, the father of that child. His complaint of adultery by his wife cannot therefore be sustained. Because there was no joinder of the woman who was said to have a sexual relationship with the Petitioner, I am unable to uphold the Respondent's complaint of adultery as a ground for divorce. Instead I consider and find that, in the circumstances of this case, the Petitioner is guilty of unreasonable behaviour in that regard.

I am satisfied that the foregoing has effectively dealt with grounds 1 to 4 of the particulars in the petition as well as grounds 2 and 5 of the Respondent's Answer.

I now turn to the petitioner's complaint over his wife's literacy skills. The Respondent had testified that she went up to Grade 12 at Secondary School and then did a one year diploma course at a college in Ndola. She admitted that she may not be as adept as the Petitioner in her literacy skills. In fact, it was obvious during her cross examination that she had great difficulty in reading an English text. She also opted to speak in the Bemba language when she testified, saying that she found the English spoken in Court to be rather difficult. However, I found that during the moments she

broke into the English language she communicated very well and to my satisfaction. Even if it were a requirement that she speaks the English language 90% of the time to communicate with her husband, I do not find that it would pose any problems for her, unless may be if the communication were required to be in writing. However, I found that the parties were both Bemba speaking. As such I would find the Petitioner's demand that she communicates to him in English 90% of the time to be rather absurd.

Further, the undisputed evidence of the Respondent was that the parties were in courtship for a period of two years before they got married. In my view, in that time Petitioner ought to have realised his partner's ineptitude in the literacy skills. I do not think he only wanted a very educated woman for a wife. I do not think it mattered to him whether she knew which planet orbited around the other between the earth and the sun. In any case he endured her illiteracy since they got married.

However, and most importantly, although the Petitioner complained about his wife's lack of reading and writing skills, I find that it cannot be a ground for divorce in this case. This is because when he was cross examined on the issue, it was put to him that he was divorcing his wife because she was illiterate. His response was;

***"No, I do not agree that is the reason I chased her (from the matrimonial home)...No, I am not divorcing her because she is illiterate".***

From the Petitioner's own words that ground cannot stand. It is accordingly dismissed.

I now turn to the other grounds raised by the Respondent in her cross petition.

In my view the allegation of the Petitioner staying away from the matrimonial home without good cause was not fully canvassed. As such I find no credible evidence on the point and I cannot sustain it. However, there was evidence, which was not challenged, of the Petitioner's lack of financial support to the family's food budget. The Respondent was not even challenged in her allegation about the Petitioner's excessive drinking. There was also evidence that the Petitioner used to chase the

Respondent from the matrimonial home very often for no good reason at all. I find all those allegations to have been duly proved to my satisfaction. That is also true of the fraud said to have been committed by the Petitioner regarding their rent account with their landlord.

In the circumstances it is the Petitioner's behaviour which I find to be unreasonable such that the Respondent cannot reasonably be expected to live with the Petitioner.

The result is that the Petitioner's petition is dismissed. I find that the marriage has indeed broken down irretrievably on account of the unreasonable behaviour on the part of the Petitioner. I also find that there are no reasonable prospects of the parties resuming cohabitation.

Therefore, I uphold the Respondent's cross petition and grant the Respondent a decree nisi of divorce. I direct that same shall be made absolute after the expiration of six weeks from the date of this judgment upon application by either party. I further order that the Petitioner shall pay the Respondent's costs of the suit, said costs to be taxed if not agreed.

Leave to appeal granted.

Delivered at Kitwe in Open Court this 28<sup>th</sup> day of May, 2013

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I.C.T. Chali  
**JUDGE**