

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

**2013/HP/D.131**

**BETWEEN:**

**JAMES HENRY MWELA  
AND  
DOROTHY MANJOLO MWELA**



**PETITIONER**

**RESPONDENT**

**Before Hon. Mrs. Justice M.S. Mulenga this 4<sup>th</sup> day of November 2014.**

For the Petitioner	:	Mr. H. Mbushi of Messrs HBM Advocates
For the Respondent	:	Ms. M. Chanda of National Legal Aid Clinic for Women

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**J U D G M E N T**

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By a Petition dated 17<sup>th</sup> June 2013 the Petitioner herein filed for the dissolution of his marriage to the Respondent. The Petition shows that the parties lawfully married on 31<sup>st</sup> December 2007 at the Anglican Cathedral of the Holy Cross at Lusaka. The parties cohabited at Plot No. 7657 Woodlands Extension Off Buluwe Road, Lusaka and are domiciled in Zambia. The Petitioner is employed as a customs officer at the Zambia Revenue Authority and the Respondent works for Airtel.

That there is one male child of the family now living who is four years old. There have been no other proceedings in any court in Zambia or outside Zambia with reference to the marriage or to any children of



the family or which are capable of affecting the validity of the marriage.

That the marriage has broken down irretrievably for the reason that the Respondent has behaved in such a way that the Petitioner cannot be reasonably expected to live with her.

The Petitioner sets out the particulars of unreasonable behaviour as that the Respondent has no respect for him and threatened to kill him. That she once gave their family car to a male friend and proudly acknowledged that she needs a male friend. However the Petitioner also admits that he also gave the car to a female friend and the Respondent was annoyed and since then their relationship has not been good. Further that it has reached a point where the Petitioner and Respondent cannot talk to each other for weeks.

That the Respondent complains about the Petitioner's relatives that they eat too much and that they spend over K4,500.00 a month and the Respondent also has ungoverned temper. Further that the Respondent has no regard for the Petitioner that at one time she gave the servant's quarters to someone without his authority or approval. The Respondent has no respect for the Petitioner on how to raise their child and the Petitioner is merely responsible for the maintenance of the child and with no authority on the child. That of late, the Respondent has resorted to spending nights outside the matrimonial home giving stories that she works at night when her work does not involve night duties.



That effort was made when relatives of both parties sat the Petitioner and Respondent down and after three days thereafter the Respondent went out without the Petitioner's knowledge and from that time the Respondent goes out without the Petitioner's knowledge. That the above have left no room for faith and trust which are the cornerstone of marriage.

In her Answer and Cross Petition dated 23<sup>rd</sup> September 2013, the Respondent denies the particulars of her unreasonable behaviour and states that the same are within the Petitioner's knowledge. That regarding her threats to kill the Petitioner it was only on one incident and during a fight that she threatened to kill the Petitioner. That the Respondent gave the car to a male friend who had been introduced to the Petitioner way before the car was given to him for his personal use. This person is not a stranger and the Petitioner has always been aware of this platonic and normal friendship between the parties.

Further, that she got annoyed with the Petitioner for giving his car to an unknown female. The Petitioner had been out of town and unknown to the Respondent, the Petitioner had come into town and she only saw the Petitioner's car being driven by a female with him in the passenger's seat. That when the Respondent called the Petitioner and asked him to ask the female to stop the car, he refused and this resulted in the Respondent's anger towards the Petitioner.



In relation to her complaints on over eating by the Petitioner's relatives, the Respondent states that the incident of complaining about the K4,500.00 only occurred once, when the Petitioner's relative came to visit with two children who needed several things that the children's mother could not afford, thus the Respondent was forced to spend money that she had not budgeted for, hence the complaint.

The Respondent denies having an ungoverned temper and admits that sometimes she does get angry with the Petitioner when having marital disputes, which is a normal occurrence. That the Petitioner has always played a significant part in raising the child and he is the one who decided which school the child would go to and on several occasions he has even decided which juice has to be bought for the child of the family. The reason why the Petitioner may complain of not having much influence on the child of the family is that, he is usually not around and only comes to visit once in a month.

The Respondent accepts that she has on several occasions slept out of the matrimonial house due to frustrations caused by the Petitioner. She has also had to work late during most monthends as she has had to carry out stock taking at her shop, which the Petitioner is fully aware of.

That there was a meeting in which relatives had sat the parties down, but on the same day the meeting was held, the Petitioner went back to the matrimonial house around midnight and left for work the next day. The Respondent found this behaviour intolerable as the



Petitioner is well aware that he works out of town and deliberately avoided giving the Respondent a chance to talk to him before he left. The Respondent is not aware of the three days that she slept out of the matrimonial home after the meeting was held with the relatives and that the Petitioner left for work the next day so, she does not know what he is referring to. Further, the Respondent agrees with the Petitioner that there is no faith or trust between the parties and that the marriage should be dissolved.

In her Cross Petition, the Respondent admits that the marriage has broken down irretrievably but that this is due to the fact that the Petitioner has behaved in such a way that the Respondent cannot reasonably be expected to live with him.

She states in her particulars that the Petitioner has unreasonably withdrawn conjugal rights from the Respondent since 10<sup>th</sup> January 2012 and he has a habit of refusing to amicably discuss and resolve issues affecting the marriage and this has led to problems in the marriage remaining unresolved thereby leading to its breakdown. That the Respondent always gets verbally and emotionally abusive whenever the parties have a disagreement in the marriage.

The Respondent ultimately prays that the marriage be dissolved and that the court makes orders for property settlement, maintenance and custody of the child. Further, that each party bears their own costs.



At the hearing held on 14<sup>th</sup> July 2014 the Petitioner repeated the contents of his Petition and stated that they started having problems around 2009. That they would have arguments on issues of social life and going out. That the Petitioner would ask the Respondent why she had to attend all social outings but she would say it is because he would not be at home. The Petitioner also recalled another incident that whenever the Respondent had a problem with his niece that they kept, she would insist that she be taken to boarding school. When on the other hand they kept the Respondent's sisters.

On the alleged nights out by the Respondent, the Petitioner testified that they were some nights that the Respondent had to work but not all of them. He would get reports that the Respondent spent nights out of the home for four (4) days or so in a week. Further that the Respondent now has a child outside marriage as a result of the nights out. That the parties' son informed him that he has a sister. The said girl was born in 2014.

He went on to testify that the Respondent has a hot temper and he cannot negotiate with her and one time she threatened to kill him. The parties were on two occasions sat down by the Petitioner's mother and other members of the family but two days later the Respondent went out without informing him and thus he concluded that talking to her would be a waste of time. From then onwards the marriage deteriorated. The Petitioner admitted having at one time given his vehicle to a female friend. This was after he had drinks with many of



his male and female friends when she offered to take him home and whilst driving back, the Respondent followed them. He thought that one of them could be injured thus they drove off and he was taken home. He concluded that at the stage where they have reached there is no chance for reconciliation as the Respondent has a child with someone else and thus they cannot live together.

Under cross examination, he testified that both parties have contributed to the problems in their marriage. That he works at Chanida Border post and he has done so since they got married. He admitted that the same has played a part as they basically live in different towns. That the parties stopped having conjugal relations in the late 2012 or early 2013.

The Respondent in her evidence also repeated the contents of her Answer and Cross Petition. That she threatened to kill the petitioner out of anger and not that she intended to do so. She maintained that her male friend whom she would drink with was known to the Petitioner. That the parties had earlier agreed to rent out the servant quarter and that is why she never consulted the Petitioner when she found a tenant in 2012. That on the two occasions when the parties were sat down, the Petitioner came back home very late at night and later left for work.



The Respondent denied ever sleeping out. She admitted that she has had a child after their separation born in March 2014 and conceived in 2013.

That parties last had conjugal relations in January 2013. That in as much as they had problems they were supposed to continue having conjugal relations but the Petitioner denied her that. That having been denied conjugal rights meant that the Petitioner was enjoying them somewhere else.

Under cross examination, the Respondent testified that she indeed threatened to kill the Petitioner out of anger. The Petitioner did not threaten to kill her but he attempted to strangle her and she ran out of the bedroom one night. She acknowledged that she did not state this fact in the Cross Petition. She further acknowledged that she had her relatives at the matrimonial home and when the Petitioner suggested that they leave, things got worse in the marriage. The Respondent further testified that the parties have a plot in Libala, a plot and a house in Livingstone. The house was built during the subsistence of the marriage. The parties bought the plot together using their combined resources.

The Respondent also stated that she is not ashamed to have had a child out of wedlock during the subsistence of the marriage because it was not at the time she was in her matrimonial home. The Petitioner told her to move out of the house and handed her divorce documents.



She then moved on with her life. She concluded that it would be unfair if the court did not divorce the parties.

I have considered all the above. The Petition for divorce and the Cross Petition are brought pursuant to the provisions of section 9(1)(b) of the Matrimonial Causes Act No. 20 of 2007. The ground relied on in both cases is unreasonable behaviour. Section 9(1)(b) of the Matrimonial Causes Act provides that:

**"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"**

Section 9(3) and 9(4) of the Act further provides as follows:

**"(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 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."**

The facts before me are that the Petitioner finds it intolerable to live with the Respondent as she has behaved unreasonably by threatening to kill him due to ungoverned temper, complaining about the eating habits of his cousin, by lending her car to a male friend and finally by having a child outside wedlock.

The Respondent advances her grounds for seeking a dissolution of the marriage on the ground of unreasonable behaviour that the Petitioner has unreasonably withdrawn conjugal rights from her since 10<sup>th</sup>



January 2013, that he has a habit of refusing to amicably discuss and resolve issues affecting the marriage and that he gets verbally and emotionally abusive whenever the parties have a disagreement in the marriage.

Both parties at trial prayed that the marriage be dissolved as they want to move on with their lives. The Respondent admits having borne a child outside wedlock during the subsistence of the marriage and the Petitioner states that at this stage where they have reached in their marriage where there is a child from outside wedlock, he does not want to be reconciled with the Respondent. The Respondent's position is also that she does not wish to be reconciled to the Petitioner.

I find that both parties have behaved unreasonably with the Respondent carrying a higher blame for having a child outside wedlock. Both parties have thus proved that the marriage has broken down irretrievably. There appears to be no reasonable likelihood of the parties resuming cohabitation especially in light of the Respondent's illegitimate child.

By virtue of section 9(3) of the Matrimonial Causes Act, I hereby grant the decree nisi which can be made absolute in line with the Act.

The parties are at liberty to file a consent custody order as they seem to be generally agreed or apply.



The aspect of property settlement and maintenance are referred for hearing before the Deputy Registrar.

Each party is to bear its own costs.

Leave to appeal is granted.

**Delivered this 4<sup>th</sup> day of November 2014.**



**M.S. MULENGA**  
**HIGH COURT JUDGE**