IN THE HIGH COURT FOR ZAMBIA **2013/HP/D0066**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

BETWEEN:

KELVIN KAMETA **PETITIONER**

AND

DORIS BANDA KAMETA **RESPONDENT**

Before the Hon. Mrs. Justice A. M. Banda-Bobo in Chambers on the 8th day of August, 2014.

FOR THE PETITIONER:
FOR THE RESPONDENT:

J U D G M E N T

Cases referred to:

1. Katz v Katz, (1973) 3 ALL ER 219
2. Mundwe Godfrey Mulundika v Rhoda Zangose Mulundika (1991)SJ (HC)
3. Mason v Mason (1980) Times 5 December
4. Young v Young (1962) 3 ALL ER 120
5. Dewar v Dewar (1971) ZR 38
6. Mahande v Mahande (1976) ZR 287
7. Chindiwira Frederick Nyirenda v Bibian Nyirenda (Nee Longwe) (SCZJ No. 30 of 2008
8. Hyde v Hyde & Woodmansee (1866) LR1 P& D 130
9. Santos v Santos
10. Mable M. Bbuku v Arthur Yoyo (SCZJ No. 78 of 1998

Legislation and other Works referred to:

1. Matrimonial Causes Act No. 20 of 2007
2. Passingham Law & Practice in Matrimonial Causes (third Edition, London – Butterworths (1979)
3. Rayden & Jackson's Law & Practice in divorce and family matters, 16th Edition
4. Lillian Mushota, Family Law in Zambia, Cases & Materials
5. Law & Practice, 4th Edition by Bernard Passingham and Caroline Harmer, 1985, Butterworth, London

This is a defended petition for divorce. The Petitioner, **Kelvin Kameta** filed his petition on 22nd March, 2013 seeking the dissolution of his marriage to **Doris Banda Kameta**, the Respondent herein, which marriage was soleminised at New Life Fellowship Church on 31st December, 2002. The petition was brought pursuant to **Section 9(1)(b)** of the **Matrimonial Causes Act No. 20 of 2007 (MCA).**

It was his petition that the parties last cohabited at House No. 16375/1080 Kamwala, and that both of them are business persons domiciled in Zambia. Further that there are three children of the marriage. He petitioned that the marriage has broken down irretrievably due to the Respondent's behavior such that he could not reasonably be expected to live with the Respondent.

He alleged that the Respondent was abusive, both physically and mentally, and was violent. The violence was even reported to the police. Further, that the same violent behavior led her to break his phone in full view of their children. It was also his allegation that the violence was such that one time she attempted to bite his manhood. It was his further petition that the Respondent does not

prepare food in the house, the same being done by a niece and that she denies him conjugal rights, such that the only time she agrees is when she wants. He contended that the Respondent does not respect him and on occasions when he would come home late, she would grab the food and throw it away.

He stated that there is no love in their marriage due to irreconcilable differences, and that though they lived under one roof, they were on separation and he had even taken her to her parents, but she forced her way back, which prompted him to leave the house and stay in a lodge for two weeks. He contended that he is not ready to continue cohabiting with the Respondent.

The Respondent filed her answer and refused to have the marriage dissolved. It was her answer that it was not true that she has behaved unreasonably or that she was violent, abusive or that she mentally abused the Petitioner.

On the issue to denial of conjugal rights, her response was that this problem started when the Petitioner went for circumcision in 2012 whereupon his manhood enlarged such that sex became painful, as the Respondent wanted to have sex even before he had healed properly. She alleged that this led to his coming home late.

On the breaking of the phone, she agreed that she broke the phone, but that this was due to her having found a message to someone he

addressed as "**baby**" but that this was not done in full view of the children, and that she got upset because the Petitioner deleted the message.

On her not preparing food for him, an assertion she denied, she said he used to refuse to eat the food she used to prepare. She said that she was keen to save her marriage and went to several traditional counselling sessions, and that when the Petitioner was called to family meetings to resolve their issues, he never went to meet her family.

On the issue of wanting to bite his manhood, it was her answer that the Petitioner went home late, started beating her and squeezing her neck, so she bit him on the hand to free herself and in the process inflicted the injury on his hand, but never at any time did she attempt to bite his manhood.

On the issue of the parties not loving each other and the irreconcilable differences, it was her belief that these could be resolved as there had been attempts by the church and family to help resolve these differences, and it was her belief that the marriage can be saved.

When the matter came up for hearing, the Petitioner basically repeated the contents of his petition in his oral evidence.

Under cross-examination, he responded that he had only had happiness in the first three years of his marriage, and things started deteriorating after the Respondent started running a business in 2007, as she always gave the excuse of being tired. Further, that she would always come home late and tell him that business at Kabwata Market where she was trading from always peaked at 18.00 hours hence her coming home late.

He repeated that she broke his phone in full view of his children. When asked how many times she had thrown food away, it was his response that the same had happened about 5 times and the food was prepared by the niece since the Respondent only cooked on Sundays. Further, that she would throw the food away if he got home around 21.30 to 22.00 hours.

It was his response that the main problem in their marriage had been lack of sex, which worsened after he went for circumcision in 2010. The Petitioner closed his case.

The Respondent gave her evidence on oath, and stated that she started business in 2009 with resources availed to her by the Petitioner, and that they had a good relationship at that time. It was her testimony that things became problematic after the Petitioner underwent circumcision. It was her testimony that he was told to stay without sex for two months to allow for healing but that he could not and wanted to have sex every day, which sex she

found painful as his manhood had enlarged due to circumcision. It was her testimony that after circumcision, the manhood swells and that that is what happened in this case, but despite all this she still did not deny him sex completely, and that, things went back to normal after his healing.

She testified that it was after getting healed that he started coming home late. Further that in October, 2012, he got home between 23 – 24 hours, and her father-in-law was home and he told him when asked where he had been, that he had come from 15 miles, but that when he got into the bedroom, he told her that he had come from Kafue. She said they fought for the first time. It was at this point, she said, that he squeezed her neck and she bit his hand, and he reported the matter to the police. She went on to repeat the rest of the issues as she deposed in her answer to the petition as the record will show.

She said she did not want divorce but to reconcile since they still talk to each other.

Under cross-examination, it was her answer that she heard him tell his dad that he had come from 15 miles, and that when she queried him, he told her that she liked asking too many questions. She denied fighting while in Woodlands, and denied trying to bite his manhood as he had not slept on the bed that night.

She agreed that she started the fighting, but that since he never slept on the bed, it was not possible to bite his manhood. On the issue of the phone, she said she recalled that he got home first and when she herself got home, she found him asleep, so she got his phone and went to the messages, where she found a message to someone he addressed as **"baby"** and despite being told not to break the phone she broke it anyway, as she was upset.

It was her response that she had been away from the matrimonial home for five months before her relatives took her back to his house.

At the end of the hearing parties opted to file written submissions. However, the Petitioner later wrote and indicated that he would rely on the evidence on record and would not file any submissions.

The Respondent's counsel filed his submissions in which he commenced by analysing the evidence adduced by the parties.

It was submitted that his client in her answer had admitted breaking the phone, but not in full view of the children, and that she broke the phone because of a message she found on the phone that the Petitioners sent to another women which annoyed her. He also made submission on the denial of conjugal rights and that the same was due to the circumcision that the Petitioner underwent

which enlarged his manhood to a point where sex became painful for her.

On the issue of throwing the food, she is said to have, under cross-examination admitted to have thrown away the food, because on that day, she had cooked beans, the only relish that was available and the Petitioner refused to eat the beans. On the issue of violence, and biting of his hand, counsel stated that his client never tried to bite the Petitioners manhood, but rather that the Petitioner went home late, told his father that he was coming from 15 miles but later told the Respondent that he was coming from Kafue. It was this lie that culminated into an argument which escalated into a fight, where the Petitioner squeezed the Respondents neck and in trying to free herself, she bit his hand. She denied wanting to bite his manhood.

Counsel went on to discuss the provisions of Section 9(1)(b) of the **Matrimonial Causes Act No. 20 of 2007**, as the record will show.

After analysis, he contended that the Petitioner had failed to establish the behavior which he cannot reasonably be expected to live with the Respondent. He said that in his evidence in chief the Petitioner had told his relatives that "the main issue is the one who is causing it as there is nothing in the bedroom" and that is why he petitioned for divorce.

Counsel called the Court's attention to the case of **Katz v Katz**[1], where Sir George Baker stated *inter alia*:

> ***"Behaviour is something more than a mere state of mind.***
>
> ***Behaviour in this context is action or conduct by one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a cause of conduct and in my view, it must have reference to the marriage.***
>
> ***Then the question is what is the standard of the behavior?***
>
> ***The standard is that he must behave in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. That is the test. It is for the Judge not the Petitioner alone, to decide whether the behavior is sufficiently grave to fulfill that test, that is to make it unreasonable to expect the Petitioner to endure it, to live with the Respondent. Also the Judge to say whether the marriage has irretrievably broken down. To that extent I agree with what Bagnall J said in ASH V ASH (1972) 1 ALL ER 582. The Court must consider the erect of the behavior on the particular petitioner and ask the question. Is it established, not that she is tired of the Respondent or colloquia shy fed up with him, but that she cannot reasonably be expected to live with him? In a sense it seems to me wrong to call it as we are apt to do,***

unreasonable behavior. It is behavior that causes the Court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him."

Counsel then went on to argue that the phone was broken because the Respondent found a message on the Petitioner's phone, that she bit him because he had been squeezing her neck, and had thrown the food because the Petitioner had refused to eat beans. It was contended that these were single incidences and consequently the alleged behavior is not of such gravity that the Petitioner cannot reasonably be expected to live with the Respondent.

Counsel also referred the Court to the case of **Mundwe Godfrey Mulundika v Rhoda Zangose Mulundika**[2] where it was held that,

"The behavior of the Respondent is the important issue, and the fact that the Petitioner finds it unbearable to live with the Respondent does not of itself permit a decree to be granted."

Counsel went on to state that the reason the Respondent was refusing to have sex with the Petitioner was that he wanted to have sex every day, even when his penis had not healed after his

circumcision. Further that his penis had enlarged after the circumcision and sex became painful.

He said the behavior criteria is whether the particular Petitioner can at the time of the petition reasonably be expected to cohabit with the Respondent. Counsel referred, on this point, to the case of **Mason v Mason (1980) Times 5 December**[3] where the Court of Appeal held that a wife's limitation of sexual intercourse to once a week cannot be such that her husband could no longer reasonably be expected to cohabit.

There was further reference to the case of **Young v Young**[4], where Simon J, said that, the conduct ***"must amount to such a grave and weighty matter as renders the continuance of the matrimonial cohabitation virtually impossible."***

Counsel submitted that the denial of sexual intercourse by the Respondent when it was painful and during the time the Petitioner was undergoing healing cannot amount to gravity as to render continuance of cohabitation impossible.

Counsel submitted that the Respondent had stated in her evidence that she still loved the Petitioner, and that she went to different traditional counsellors for the sake of keeping her family together, but the Petitioner refused.

In conclusion counsel said the Petitioner had not shown the Court that he was totally denied his conjugal rights. Based on the fore going, he submitted that the marriage had not broken down and that the same should not be dissolved.

I have carefully considered the petition, the answer to the petition and the oral evidence by the parties, and the written submissions by counsel for the Respondent.

This petition was brought pursuant to **Section 8** and **9** of the **Matrimonial Causes Act No. 20 of 2007**.

Section 8 sets out the grounds upon which a person can petition the Court for the dissolution of a marriage, namely that the marriage has broken down irretrievably.

Section 9 on the other hand, sets out five facts, out of which the Petitioner must prove at least one or more before the Court hearing the petition for divorce can consider the marriage to have broken down irretrievably. These facts are:

> ***"Section 9 (1)(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.

(c) That the Respondent has deserted the Petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.

(d) That the parties to a marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent consents to a decree being granted, and

(e) That the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."

Section 9(2) of the **Matrimonial Causes Act** obliges the Court to enquire, so far as it reasonably can into the facts as alleged by the Petitioner and into any facts alleged by the Respondent.

In the matter in casu, the Petitioner has based his petition on **Section 9(1)(b)** of the **Matrimonial Cause Act**. This is a behavioural petition. To prove this fact, the Court must be satisfied

that there must have been some action or conduct by one spouse which affects the other. I am therefore obliged to enquire, as far as I reasonably can into the allegations by the Petitioner and the Respondent before I can make the pronouncement that **Section 9(1)(b)** has been satisfied and that the Petitioner cannot reasonably be expected to live with the Respondent.

In the case of **Dewar v Dewar**[5] at page 40, Baron J stated that,

> ***"In a petition alleging unreasonable behavior, the test is objective, having regard to the characters and personalities of the parties and the whole background and history of the marriage must be considered."***

Behaviour refers to the Respondent's conduct. ***"The Courts have refrained from any attempt at an exhaustive definition of behavior ... each case raises a question of fact and degree and may depend on the personalities of the parties."*** **(Passingham Law & Practice in Matrimonial Causes (third Edition, London – Butterworths (1979) p 23 – 24).** See also the case of **Mahande v Mahande**[6].

Authorities have suggested that unreasonable behavior is not merely looking at the quality of the Respondent's behavior, but rather, that what is important is the effect of that conduct upon the Petitioner. The learned Authors of **Rayden & Jackson's Law &**

Practice in divorce and family matters, 16th Edition p214 stated that,

> ***"The Court has to decide the single question whether the Respondent has so behaved that it is unreasonable to expect the wife to live with him. In order to decide that, it is necessary to make findings of fact as to what the Respondent actually did and findings of fact as to the impact of the conduct on the petitioner."***

The above passage was cited with approval in the case of **Chindiwira Frederick Nyirenda v Bibian Nyirenda**[7].

In the matter in casu, the Petitioner alleges that his wife stopped doing household chores as she always got home after 19.00 after she started her business, and that he was told that business peaked at around 18.00 hours. He further said that his entreaties to her to stop the business as it was affecting their marriage fell on deaf ears and that even his report to her sisters on the same failed to yield any results. It was his testimony that not only did she go home late, she also never cooked, and was always too tired to grant him his conjugal rights. It was his testimony that she only acquiesced to sex if she wanted it. He further said this situation existed even before the empowerment, but that it got worse afterwards.

The Respondent on the other hand contends that she experienced pain after the Petitioner got circumcised and his manhood got swollen. However, she did not dispute his assertion that she told him that business peaked at 18.00 hours at the place where she used to conduct business from. She did not dispute that he brought this issue of lack of conjugal activities to her relatives as well as to his own relations when he said the problem was in the bedroom and the lack of sex.

On the issue of his wanting sex every day before he healed, she never stated how many times a week or a month they used to have sex, such that if the trend had been for them to have sex every day, then that is what he was used to prior to his undergoing circumcision. Furthermore, she made a categorical statement that after circumcision, the manhood enlarges. I would accept that there would be some swelling as a result of the removal of the foreskin, but to state that the manhood swells is difficult to accept. No medical proof was laid to prove that fact.

Counsel referred the Court to the case of **Mason v Mason**[3] to the effect that limitation of sexual intercourse by a wife cannot be such a grave issue that the husband can no longer reasonably be expected to continue cohabiting.

As already referred to above in **Passingham (supra),** it is stated that,

> ***"The courts have refrained from any attempt at an exhaustive definition of behavior ... each case raises a question of fact and degree and may depend on the personalities of the parties."***

In the matter in casu, I find as a fact that the Petitioner was denied his conjugal rights even before the issue of circumcision came in. It is the effect of that denial of conjugal rights on the Petitioner that it is the determinant factor, depending on his personality. The Respondent admitted denying him his conjugal rights, but looking at the demeanour of the parties I did not get the impression from the Respondent that her only reason for denying his conjugal rights were due to his circumcision.

In any case, he says, and he should be in a better position to know, that he was circumcised in 2010, while she says the problems in the marriage started in June, 2012. I believe their problems started earlier than 2012.

On the question of breaking the phone, she admitted that she got the phone and went outside, and only her daughter followed her and tried to stop her. She said under cross-examination that when she got home, she found him sleeping, got his phone and went to

the messages, where she found the messages that led her to destroy the phone. Further that he asked her not to break the phone but she went ahead and broke it up anyway.

One sees that she is only referring to one incident here, and yet in her examination-in-chief she says that,

> ***"I got upset because the messages would come at night and he would delete it if I wanted to read the message."***

First it is unreasonable behavior for anyone to want to go through their spouses phone and to read messages, especially without their saying so as happened in this case. The Petitioner was sleep and she got the phone, and because he did not answer when queried about the message she broke the phone in the presence of the daughter. This is proof of unreasonable behavior.

She admitted that as a result of this the Petitioner left home and was away for a week, and she got scared and reported the issue to his brothers. His leaving of the matrimonial home was due to the Respondent behavior which affected him.

On the issue of food, she admits throwing the food away. She did not deny that she said "**tamulile uko mwafuma**". If indeed the Petitioner refused to eat the food, why throw it away? Only an unreasonably behaving person would do that. She stated that he

did not eat beans normally because he got gas afterwards, so why then would she serve him beans, knowing he would not eat and when he does not, she throws it away. It was unreasonable to expect him to eat beans when he normally never ate beans. As was said in **Katz v Katz**[1] ***"behavior is something more than a state of mind. Behavior in this context is action or conduct by one which affects the other."*** I find as a fact that she threw his food away and this was unreasonable.

Counsel contended that these were isolated or single incidents. However, having traversed the law on behaviour, there is no where where it says that there has to be consistent happenings which can be termed grave enough. It is enough that one party is affected by a certain behaviour whether single or continuous. Further, in **Katz**[1], it was said that it is for the Judge to decide whether the behaviour is sufficiently grave. I find this fact proved.

The Respondent has alleged that this marriage has not broken down and it can be saved. The Petitioner on the other hand has alleged that there is no love between the parties and if left together, one is bound to lose a life.

Lillian Mushota, the learned Author of Family Law in Zambia, Cases & Materials states at page 157 therein that,

"The standard of proof of irretrievable breakdown is an objective one." and further

"It is now sufficient to show that a marriage has become to all intents and purposes, an empty shell and without any prospects for future reconciliation."

The Petitioner in this matter, did not only petition for divorce, but also applied for an injunction to restrain the Respondent from continuing to live with him in the matrimonial home until the disposal of this matter.

He had deposed that he took the Respondent parent's place in October, 2012 but she forced her way back into the house. After the hearing, I had ordered that the Respondent moves back home on certain conditions. However, the Petitioner moved out of the home and left it for the Respondent just so that they are not in the same house. The act of moving out of the house because the Court had ordered that she should move back into the house, shows the state of mind of the Petitioner with regard to the marriage. He does not want reconciliation.

In the case of **Hyde v Hyde & Woodmansee**[8], **Lord Penzance** defined marriage as ***"the voluntary union for life of one man and one woman to the exclusion of all others."***

I have cited the above case to bring to the fore the point that to stay in a marriage both parties must be willing to stay in it voluntarily. In the matter in casu the Petitioner is not willing to stay and continue with the union. His conduct speaks volumes about his wish not to continue. He took the Respondent back to her parents, she forced herself back in the house, the Court ordered her back, and the Petitioner left the matrimonial home, all in a bid to avoid cohabiting with the Respondent. I closely watched the demeanour of the parties and I am of the firm conviction that the Petitioner has no intention of resuming cohabitation. Authorities abound to the effect that the state of mind of the parties must be taken into consideration when dealing with a divorce petition. In the case of **Santos v Santos**[9], as appear in **Law & Practice, 4th Edition by Bernard Passingham and Caroline Harmer, 1985, Butterworth, London,** the Court stressed the need to consider the state of mind of the parties.

The Respondent has refused to have the marriage dissolved and is of the view that whatever differences they have can be worked out. Further that she has demonstrated her wish to keep her family together by undergoing traditional counselling. It should be noted that she conceded in her testimony that despite all this, the Petitioner has refused to resume cohabitation. In the case of **Mable M. Bbuku v Arthur Yoyo**[10] the Court observed that marriage was like a personal contract and its success would depend on the

I have cited the above case to bring to the fore the point that to stay in a marriage both parties must be willing to stay in it voluntarily. In the matter in casu the Petitioner is not willing to stay and continue with the union. His conduct speaks volumes about his wish not to continue. He took the Respondent back to her parents, she forced herself back in the house, the Court ordered her back, and the Petitioner left the matrimonial home, all in a bid to avoid cohabiting with the Respondent. I closely watched the demeanour of the parties and I am of the firm conviction that the Petitioner has no intention of resuming cohabitation. Authorities abound to the effect that the state of mind of the parties must be taken into consideration when dealing with a divorce petition. In the case of **Santos v Santos**[9], as appear in **Law & Practice, 4th Edition by Bernard Passingham and Caroline Harmer, 1985, Butterworth, London,** the Court stressed the need to consider the state of mind of the parties.

The Respondent has refused to have the marriage dissolved and is of the view that whatever differences they have can be worked out. Further that she has demonstrated her wish to keep her family together by undergoing traditional counselling. It should be noted that she conceded in her testimony that despite all this, the Petitioner has refused to resume cohabitation. In the case of **Mable M. Bbuku v Arthur Yoyo**[10] the Court observed that marriage was like a personal contract and its success would depend on the

individuals involved. **Chirwa J**, as he was then stated in that case that,

> ***"It is not a question of maintain the status of "Mrs". There must be mutual love. To my mind, both parties must be able to recognize the existence of their marriage for it to be seen to subsist. The state of mind plays a cardinal part in considering whether the marriage exists or not."***

Consequently and in taking the above into consideration, I am of the view that the parties to this marriage are not on the some wave length in considering the status of the marriage. It has ceased to be a voluntary union, and there is no love, and the Petitioner does not want it to continue.

According to **Mushota (Supra)** at page 245, **Section 9(1)(d)** is a functional recognition that a marriage is a contract from which the parties should be freed if the substratum of the relationship, that is mutual love and understanding disappear.

Section 9(4) of the **Matrimonial Causes Act** is to the effect that,

> ***"9(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."***

Reverting to **Mushota (Supra)** once more at page 157, she quoted **Sir B. Mackenna** in describing the irretrievable breakdown of marriage who said,

> ***"A marriage which stood no chance because the parties to the marriage have ceased to cohabit and one of the parties or both intends not to resume cohabitation."***

As already alluded to, the Petitioner is adamant that he does not intend to resume cohabitation. In his own words, he is afraid that if they got back together, one of them is bound to lose his or her life. His actions of taking the Respondent back to her parents, her coming back into the house, and his taking her back and his leaving his house after the Court ordered that she goes back into the house is sufficient evidence that he considers his marriage at an end.

The issue of violence in this marriage has not been denied by both parties. Therefore there is a real danger of the parties harming each other. It will be an irresponsible Court that would insist that the parties continue cohabiting even when it is clear that violence can erupt between the parties that would lead to loss of a life.

Based on the evidence before me, I find that the ground of unreasonable behaviour has been proved. I find that the Petitioner has no intention of resuming cohabitation and that there is no love

subsisting between parties. I formed the opinion that the differences in the marriage appear to be too entrenched that the possibility of resuming cohabitation are minimal.

In sum, I find that the Petitioner has proved the allegations of unreasonable behaviour as per **Section 9(1)(b)** of the **Matrimonial Causes Act,** and that there is no possibility of resumption of cohabitation.

I therefore order the dissolution of the marriage of Kelvin Kameta to Doris Banda Kameta solemnized on 31st December, 2000 at the New Life Fellowship Church, and grant the decree nisi, to be made absolute in six weeks from the date of judgment.

The order of 14th June, 2013 is hereby discharged.

Custody of children of the marriage to be applied for separately.
Costs are in the cause.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 8TH DAY OF AUGUST, 2014.

MRS. JUSTICE A. M. BANDA-BOBO
HIGH COURT JUDGE