

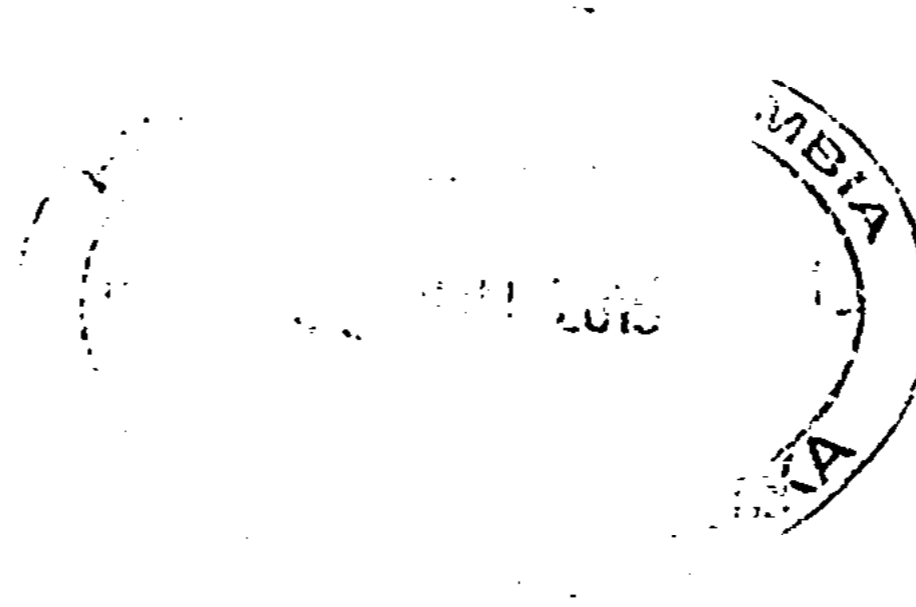
IN THE HIGH COURT FOR ZAMBIA

2015/HP/D072

AT PRINCIPAL REGISTRY

LUSAKA

(Divorce Jurisdiction)



MIZINGA CHIBBABBUKA

PETITIONER

AND

MAZUBA JOAN MULENGA CHIBBABBUKA

RESPONDENT

Before the Honorable Mr. Justice C.F.R. Mchenga SC

For the Petitioner: In Person

For the Respondent: M. Marabesa-Mwenya, Legal Aid Counsel, Legal Aid Board

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## JUDGMENT

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Case referred to:

1. Anne Susan Dewar v Peter Alexander Dewar [1971] Z.R. 38

Legislation referred to:

1. The Matrimonial Causes Act, Act No. 20 of 2007

The Petitioner filed in the petition for the dissolution of his marriage to the Respondent on the ground that it has irretrievably broken down. He relied on the fact that the Respondent has behaved in such a way that he cannot reasonably be expected to leave with her.

At the hearing, he reiterated the contents of his petition and testified that; on 14<sup>th</sup> October 2011, he married the Respondent at the Civic Centre in Lusaka; that the Petitioner and the Respondent are both domiciled in Zambia; that there is no child living born to either the Petitioner or Respondent during the subsistence of the marriage; that there have been no previous proceedings in court in Zambia or elsewhere with reference to the said marriage or between the parties with reference to any property of either party or both of them; that there are no other proceedings in Zambia or anywhere outside Zambia with reference to the marriage that would affect its validity; that no formal agreement or arrangement has been made between the parties for the support of the Respondent.

When it came to giving evidence on the Respondent's unreasonable behaviour, the Petitioner indicated that he was going to rely on the allegations as they have been set out in the petition. They are set out as follows; that he has been verbally abused by the Respondent whenever there are differences; that the Respondent has always assaulted the Petitioner verbally as she has kept on boasting that there are some circumcised men out there who can satisfy her; that the Respondent has boasted to the Petitioner saying that she can be impregnated by other men out there, claims which have left the Petitioner to wonder as to whether their failure to have children is

genuine or deliberate by the Respondent; and that the Respondent has always boasted that there are men out there who drive better vehicles and live in big houses unlike the Petitioner who drives small vehicles and rents a small house.

When cross examined, he admitted that the Respondent would utter the offensive words after arguments at home. He also admitted that they were living together at the time the petition was filed and that they had continued to do so even on the date of hearing the petition. He also said the Respondent has continued to cook for him sometimes and that he drops her at work every day.

As regards their sexual life, he said he could not remember the last time they had sexual intercourse. He admitted that they have continued to have sex but it is probably just once in a month. He denied asking for sexual intercourse a week before the hearing the petition.

The Petitioner admitted fathering a child with another woman during the subsistence of the marriage but denied the suggestion that the fathering of the child has been the source of their arguments and that the verbal abuse started with it. He maintained that he wants the marriage to end because of the verbal abuse. He also said once in a

while the Respondent has indicated to him that she loves him but he is not interested in the marriage anymore.

The Respondent also gave evidence. She reiterated the contents of her reply to the petition. She denied emotionally or verbally abusing the Petitioner. She said the Petitioner has distorted the circumstances in which she uttered some of the words in the particulars of her alleged unreasonable behaviour. It was her evidence, that one day the Petitioner sent her a text message advising her to move out of the house because the marriage was not working. He said they should go through divorce proceedings while she is not staying in the matrimonial home. She refused to accept the suggestion and when she got home, she asked him why he is treating her badly; he had also told some people that she was useless and not good in bed on a number of occasions. On that day, she got upset and told him that in South Africa, one is not considered to be a man unless he is circumcised. He has twisted the story by now claiming that she said there are circumcised men out there who can satisfy her.

He has also told her that she has stuck to him because of her poverty. She denied this and said he had nothing when she started dating him. She said at the time he proposed marriage, she was staying in South

Africa and had a job. He made her quit her job, sell her property and come back to Zambia to get married to him.

The Respondent also testified that they have had regular sexual intercourse since the petition was filed though he does not talk to her, she still cooks for him. She said she has forgiven him for having the child but the only problem is the other woman; his only reason for pushing for the divorce is that he wants to marry her. The same woman has been asking to move into the house he is building in the Meanwood area.

She also said the Petitioner has not taken time to go to the hospital over their failure to have children. She has been to the hospital on her own and the doctors have found her to be fertile. She said one day, on his return from Monze, he told her that she had bewitched him so that he cannot have children like her. That is when she told him that there was nothing wrong with her and what if another man made her pregnant. She was not cross examined.

In the case of *Anne Susan Dewar v Peter Alexander Dewar (1)*, Baron J, at page 39, observed as follows:

*"Thus, even if as a matter of common sense and reality the court is satisfied that a marriage has broken down irretrievably, it is not permissible so to hold as a matter of Law unless one or more of the five requirements is present, the onus in this matter regard being on the Petitioner....."*

From the evidence before me, I find that this marriage has of late been going through a difficult time. Even if the Petitioner denies it, I find that the main cause of the arguments with the Respondent is his association with a woman with whom he has had a child and demands that she vacates the matrimonial house. I have considered the Respondent's explanation of the circumstances in which she talked about circumcised men and falling pregnant from another man and I accept it. The Petitioner has twisted the story and presented it out of context.

At the hearing, the Petitioner declined to give details of the Respondent's unreasonable behaviour he has alleged in the petition. The petition sets out the unreasonable behaviour in very general terms. For example, there is no indication of when or where the Respondent uttered the offensive or abusive words. His decision to rely on them in the manner they appear is not helpful to his case as the responsibility of proving the fact that the marriage has broken down irretrievably and that the Respondent has behaved in such a way that he cannot reasonably be expected to live with her rests on him.

I find that the Petitioner has neither proved that the marriage has irretrievably broken down or that the Respondent has behaved in such a way that he cannot reasonably be expected to live with her. His

attitude towards the Respondent has been the cause of their problems and he cannot use his own misconduct or his claim that he is no longer interested in the marriage to get a divorce. Loss of interest, by a party to a marriage, is not a ground for divorce. Consequently, the petition is dismissed with costs.

Delivered in open court at Lusaka this 3<sup>rd</sup> day of June, 2015



C. F. R. MCHENGA SC

JUDGE