

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2014/HP/D238

BETWEEN:

MARY AMY SMITH MUYANI

AND

MATHEW MUYANI



BEFORE : **HON. G.C. CHAWATAMA - IN CHAMBERS**

For the Petitioner : *In Person*

For the Respondent : *In Person*

RULING

CASES REFERRED TO:

1. *Santos V Santos (1972) 2 ALL ER 246*
2. *CVC and H (1977) ZR 12*

AUTHORITIES REFERRED TO:

1. *Section 8, 9 (1) (a) of the Matrimonial Causes Act No. 20 of 2007*
2. *Section 1 of the Divorce Reform Act (1969)*

The Petitioner in a petition filed on the 21st June, 2012 is seeking dissolution of her marriage to the Respondent. According to the petitioner the marriage has broken down irretrievably due to the fact that the Respondent has behaved in such a way that the

Petitioner cannot reasonably be expected to live with the Respondent and secondly that the Respondent has committed adultery and the Petitioner cannot reasonably be expected to live with the Respondent.

Particulars of the unreasonable behaviour are:-

- I. *On or about 26th September, 2013 the Respondent savagely battered the Petitioner on account of her decision to leave the Respondent because of his immoral and promiscuous behaviour.*
- II. *The Petitioner and the Respondent agreed to get a loan from Stanbic Bank PLC in her name amounting to K15,000.00 which they used to finance their wedding on the understanding that they would both pay it back but the Respondent has refused to do so.*
- III. *The Respondent committed adultery with a woman only known to the Petitioner as Chitemweko Nkowanani as a result of which a male child was born around June, 2014 who is known as Luyando. The Petitioner got this information from Diana Muyani Sikazwe.*

The parties were heard on the 30th April, 2015.

According to the Petitioner, there are no children born to her and the Respondent. It was her testimony that the marriage has

broken down due to adultery and abuse. She informed the court that the Respondent has failed to fulfill his duties as a husband. It was her testimony that during the subsistence of their marriage the Respondent was in a relationship with an unnamed woman and a son was born. It was her testimony that she learnt of the relationship after she was told of the unnamed lady. It was her testimony that Respondent and her began to sleep in separate rooms and he stopped allowing her to do anything for him.

It was further her testimony that it became difficult for them to see eye to eye. She finally left the matrimonial home because the Respondent abused her physically. It was her testimony that on one occasion he choked her to the extent that she failed to breathe, further that he beat her when she told him she wanted to move out of their home. The Petitioner testified that before they got married both had agreed that she gets a loan to finance the wedding. The Respondent had agreed to help pay off the loan. The Petitioner informed the court that the main reason why she was seeking a divorce was due to adultery.

It was her testimony that she found out about the relationship between the Respondent and the unnamed woman in 2013. It was further her testimony that she tried talking to the Respondent about it but he kept denying the woman's existence however, his behavior suggested otherwise. She pointed out that

communication in the home broke down, the Respondent began to go home at odd hours. The fact that they slept in separate rooms and the fact that she moved out of their matrimonial home is evidence of the state of their marriage.

The Petitioner recalled that late last year in December, the Respondent sister informed her that the Respondent had admitted to his parents that he was going to be a father. The Petitioner recalled how at his niece's burial when asked how his son was his response to her was a confirmation that he had a child. Family meetings on what the couple was facing in their marriage did not bear fruit. In fact it was at one of these meetings that he agreed to a divorce.

The Respondent informed the court that there was a lot of mistrust in their marriage. For this reason he became close to a certain lady whom he did not name. It was his testimony that the Petitioner found flirtatious messages from the same lady and accused him of having an affair. He distanced himself from the Petitioner. He lost his temper when the Petitioner sought out his parents over their issues. He admitted that they slept in separate rooms. It was his testimony that his wife packed her belongings in September, 2013. He admitted that there was a time he pushed her and she fell. He denied brutally battering her.

It was after this incident that he found that his wife had left their matrimonial home. He stated that he was upset when he found that his wife had gone to his parents' house for a meeting. He admitted that he found comfort in the unnamed woman who in the process became pregnant and bore him a son on the 2nd July, 2014. He admitted that his son was born within the subsistence of his marriage to the petitioner however, the two were on separation. Like the Petitioner he was not seeking maintenance nor property settlement.

Section 8 of the Matrimonial Causes Act No. 20 of (2007) states:

“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.”

Section 9 (1) (a) states:

“For the purpose of Section 8 of 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. There are five facts in this provision the applicable one states:

“That the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent.”

In the case of *Santos V Santos (1972) 2 ALL ER 246*, Sachs J held that:

“The sole ground on which a Petitioner can secure a divorce is by proving that the marriage has irretrievably broken down. But as a condition precedent to securing a divorce on that ground the Petitioner has to satisfy the court of facts that come within one or more of the five heads specified in Section 2 (1) (a) to (e). Once such facts are proved, a presumption – in practice a strong presumption – is raised that there has been a breakdown which is irretrievable; although it is open to the Respondent under Section 2 (3) that is not the fact.”

The Supreme Court gave direction regarding the standard of proof in the case of *C.V.C and H (1977) ZR 12* when it held that:

“While the criminal standard of proof no longer applies to the charge of adultery nonetheless it seems that a high standard of proof is required and the onus is on the party alleging adultery.”

In the case before me the Petitioner informed the court that her husband had met a woman during the subsistence of their marriage. The Petitioner informed the court that a child was born out of this relationship, a fact confirmed by the Respondent himself. There is no evidence to suggest that the Petitioner relied on the ground of adultery committed by the Respondent after it became known to the Petitioner that the Respondent had committed adultery, the parties lived or were infact living together. According to the evidence before me the adultery was

committed before the parties went on separation. It was only the birth of the child that came after.

I have no difficulties in holding that the Petitioner has proved that the marriage has broken down due to the fact that the Respondent has behaved in such a way that the Respondent cannot be reasonably expected to live with her and not due to adultery which resulted in the birth of a child. My decision is based on the issues admitted by the Respondent that there was mistrust in the marriage, he admitted that they slept in separate bedrooms, he also admitted to assaulting the Petitioner and lastly that they have been living apart for a substantial period.

A decree nisi is hereby granted and either party is at liberty to apply to make the decree absolute after six weeks. I order no costs and since there were no children born to the Petitioner and the Respondent the issue of custody does not arise nor does the issue of property settlement at the parties' own request.

DELIVERED AT LUSAKA THIS.....^{24th}..... DAY OF.....^{JUNE}..... 2015


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G.C.M CHAWATAMA
JUDGE