

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

2015/HP/D188

*(Divorce Jurisdiction)*

**BETWEEN:**

**RHODAH MWAMBAZI MZIZI**

**PETITIONER**

**AND**

**MUNYEZWA COLLINS MZIZI**

**RESPONDENT**

Before the Hon. Mrs. Justice A. M. Banda-Bobo in Chambers on  
the 8<sup>th</sup> day of June, 2016

**FOR THE PETITIONER : In Person**

**FOR THE RESPONDENT : In Person**

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

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**Cases referred to:**

1. Mundwe Godfrey Mulundika vs. Rhoda Zangose Mulundika (1991) SJ (HC)
2. Katz vs. Katz (1972) 3 All ER 219
3. Chandiwira Frederick Nyirenda vs. Bibian Nyirenda (SCZ J No. 30 of 2008 at page 192)
4. Hyde vs. Hyde and Woodmouse (1866) LRIP and D 130 at 133
5. B Vs. B (1977) ZR 159

**Legislation and works referred to:**

- Matrimonial Causes Act No. 20 of 2007
- Sir B. Mckenna in the (Modern Law Review, Volume 30 No. 23)

This is a petition for dissolution of marriage presented by Rhodah Mwambazi Mzizi, who seeks to terminate her marriage with the respondent Munyezwa Collins Mzizi. The petition is made pursuant to Section 8 and 9(1)(b) of the Matrimonial Causes Act (MCA) No. 20 of 2007.

The petitioner alleges unreasonable behavior by the respondent, namely that he had committed adultery. She prayed for the dissolution of the marriage.

The respondent denied being adulterous and in his cross petition, alleged adultery by the petitioner and drunkenness. Ultimately, he agreed that the marriage be dissolved.

Both parties appeared in person. At trial and after confirmation of the contraction of the marriage, the petitioner reiterated her assertion about her husband's adulterous behavior, namely that after she left to go and write her examinations, upon her return, she found a woman's clothes in her matrimonial bedroom. Later, that she discovered that he was having an affair with her younger sister whom they had been keeping. She said she had confronted the other lady, who initially denied being in an affair with the respondent but later agreed and that she was pregnant for him. Further that they were now living together.

Under cross examination, she maintained that she found women's apparel in the bedroom. Further, that she was in the company of her sister when she found this person doing laundry



outside. On the younger sister, she said she was taken away after the affair became known. She said the respondent called her aunt a prostitute, which she found distasteful.

In clarification, she said the National Legal Aid Clinic tried to reconcile them and asked him to take her back but he refused.

The petitioner called PW2, her sister, whose testimony largely related to the women's clothes they found at the house, and the woman who they found doing the laundry outside. The woman confirmed, according to the witness that she had been living with the respondent for three months.

Under cross examination, she said she had no proof that he was sleeping with her but that the fact that her clothes were in his bedroom convinced her that he was sleeping with her.

That was the case for the petitioner.

In his evidence in chief, he denied committing adultery with his sister in law, but admitted that they had lived with her. He did not know why she left. He denied committing adultery with any other person as alleged.

He reiterated his assertion that the wife was a drunkard , who would leave home in the morning and only came back after midnight. Further, that after she left to go to her aunt, he heard

that she was frequenting bars; and that she had posted on social media that she now had a new husband.

He said at one time after she left, she wanted to come back but he refused to get her back. Ultimately, he said he wanted a divorce.

Under cross examination, he repeated that he did not know why his sister in law left their house. He refused having any affair with a lady as alleged.

On the issue of maintenance, he said he could not maintain her as she was married to a truck driver. On her drunken behavior, he testified that even her parents were aware of that, and went on to cite incidents when she came home after midnight. He basically stated that all efforts by any relative to help her change her behavior fell on deaf ears. He closed his case.

As earlier stated, both parties appeared in person. This petition was brought under Section 8 and 9(1)(b) of the Matrimonial Causes Act, which basically relates to behavior. I have carefully considered the petition, answer and oral evidence presented by the parties in this matter. It is trite that the only ground upon which a marriage can be petitioned for dissolution is that the marriage has broken down irretrievably. Section 8 of the Matrimonial Causes Act 20 of 2007 refers.



However, irretrievable breakdown has to be proved. The petitioner should satisfy the Court of one or more of the facts as appear in Section 9(1)(a) to (e) of the statute.

Section 9(i)(b) on which I believe this petition is anchored, states:

**“9.(i) 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”**

Before I can hold the marriage to have broken down irretrievably, I must be satisfied as to the truthfulness of the facts alleged by the petitioner and the respondent. I need also to determine whether there is no possibility that the parties to the marriage would resume cohabitation. Section 9(2) Matrimonial Causes Act place an obligation on the Court to enquire as far as it can into the facts as alleged by each of the parties, while Section 9(4) prohibits the dissolution of a marriage if there is a likelihood of resumption of cohabitation.

The question I have to determine is whether the respondent's behavior is such that the petitioner cannot be reasonably expected to live with him. The case of **Mundwe Godfrey Mulundika vs. Rhoda Zangose Mulundika**<sup>1</sup> set out the test to be applied in determining behavior. It was said that:

**“The test to be applied in determining the behavior of the respondent is that she must behave in such a way that the petitioner cannot reasonably be expected to live with the respondent.”**

In **Katz vs. Katz**<sup>2</sup>, behavior was said to be action or conduct by one which affected the other, which could be action or the form of an act or omission, or course of conduct which had reference to the marriage.

It must be appreciated that the onus is on the Judge and not the petitioner alone to decide whether the behavior is sufficiently grave to fulfill the test, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. The Court is duty bound to consider the effect of the behavior on the petitioner. It is behavior that causes the Court to come to the conclusion that it is of such gravity that the petitioner cannot reasonably be expected to live with the respondent. To come to that conclusion, the Court is expected to make findings of fact as to what the respondent actually did; and the impact of that conduct. See the case of **Chandiwira Frederick Nyirenda vs. Bibian Nyirenda**<sup>3</sup>.

In casu, the petitioner states in her petition that the respondent has committed adultery, behavior which she finds intolerable. However, she has not cited any person who the defendant committed adultery with. She claims he committed adultery with her sister, but even that sister was not cited or even brought to



Court for purposes of these proceedings. The same goes for the respondent who in his answer said that the petitioner was adulterous and a drunkard. However, he did not state to Court whether or not he tolerated this adulterous behavior, and the drunken behavior. It was his evidence that she would come after midnight or she would go away and not come back for a whole week. It appears to me that that is conduct that he tolerated, for no man would allow his wife to go out to some unknown place for a week and still welcome her back. If her conduct had had an impact on him, he would have taken the first step to take her out of the house, but in this case, he waited for her to go to her aunt's place and later refused to take her back.

Section 10 of the MCA is clear that where there is an allegation of adultery with a specified person, whether the decree for dissolution is sought on grounds of adultery that person shall be made a party to the proceedings.

Section 12 of the MCA is clear that a party cannot rely on adultery committed by the other if after it became known that a party had committed adultery the parties continued to live together for a period exceeding six months.

In casu, there is no evidence of adultery laid before Court by either party against the other. Consequently, the behavior as relates to adultery has not been proved by either one of the two. This ground fails.

According to the petitioner, she found women's clothes and other apparel in her bedroom upon her return to the house in the company of her sister. Unfortunately, it is not clear whose clothes these could have been. She also said she found a lady doing laundry at the house, a claim denied by the respondent. Unfortunately in the absence of evidence, it is his word against hers. She had opportunity to gather those clothes as evidence but did not.

The question I have to determine is whether the behavior as set out by the petitioner concerning the respondent has met the test, namely whether any right thinking person can come to the conclusion that "this" husband had behaved in such a way that "this" wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances, and characters and personalities of the parties. Regrettably no. I am not convinced that the respondent's behavior is such that it cannot be tolerated purely on the grounds that no sufficient evidence has been laid before me.

The same applies to the cross petition by the respondent. Both of them have merely made allegations against the other, therefore the petition fails as does the cross petition.

Lord Pezance in the case of Hyde vs. Hyde and Woodmouse<sup>4</sup> defined marriage as the:

**“Voluntary Union for life of one man and one woman to the exclusion of all others”** (emphasis mine)



Consequently, to stay in marriage, both parties must be willing to stay. Further **Sir B. Mckenna in the (Modern Law Review, Volume 30 No. 23)** described the irretrievable breakdown of marriage as:

**“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”**

Cullinan J in **B Vs. B**<sup>5</sup> defined resumption of cohabitation as to

**“... mean a re-establishment of the ordinary relationship of husband and wife”**

According to Section 9(4) MCA, I cannot dissolve a marriage unless I am satisfied that there is no reasonable likelihood of cohabitation being resumed. I had occasion to observe the demeanour of both parties, and the hostility between them was palpable. Each one was adamant that they had no intention of wanting to continue in this marriage. Both of them had prayed for the dissolution of the marriage. Therefore, taking into account the authorities on what constitutes irretrievable breakdown of marriage and resumption of cohabitation, I am of the view that this marriage has broken down irretrievably and there is no possibility of resumption of cohabitation. The parties are too bitter with each other. Consequently even if the grounds for the petition and cross petition have not been proved, I deem it a matter of prudence to dissolve the marriage as the parties do

not intend to live as husband and wife due to the deep rooted mistrust each has against the other.

Having thus traversed the law and evidence, it is my finding that the marriage has broken down irretrievably and the parties do not intend to resume cohabitation. I therefore dissolve the marriage of Rhodah Mwambazi Mzizi to Munyezwa Collins Mzizi that was solemnized on 10<sup>th</sup> July, 2011. The decree nisi to be made absolute in six weeks' time. The issue of property settlement to be dealt with by the Deputy Registrar on application.

Each party to bear own costs.

**Delivered at Lusaka this 8<sup>th</sup> day of June, 2016**



**Mrs. Justice A. M. Banda-Bobo**  
**High Court Judge**