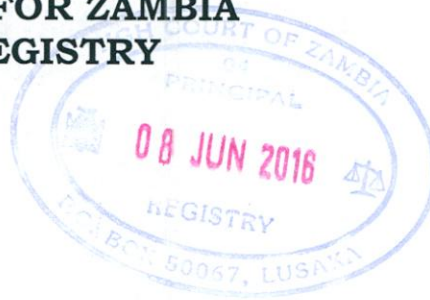


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Divorce Jurisdiction)

2015/HP/D206



BETWEEN:

RITHA MUNGALA SAINA

PETITIONER

AND

EDFIL SAINA

RESPONDENT

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

**FOR THE PETITIONER : Ms. N. Mphande Of National Legal
Aid Clinic for Women**

**FOR THE RESPONDENT : Mr. K. Mweemba of Legal Aid
Council of Legal Aid Board**

J U D G M E N T

Cases referred to:

1. Mundwe Godfrey Mulundika vs. Rhoda Zangose Mulundika (1991) 5J (HC)
2. Katz vs. Katz (1973) 2 ALL ER 219
3. Dewar vs. Dewar (1971) ZR 38
4. Mahande vs. Mahande (1976) ZR 287
5. Chandiwira Frederick Nyirenda vs. Bibian Nyirenda (SCZJ No. 30 of 2008).
6. Parsons vs. Parsons (1975) ALL ER Vol. 3

Legislation and works referred to:

- Matrimonial Causes Act No. 20 of 2007

- Rayden and Jackson's Law and Practice in Divorce and Family Matters 16th Edition, at page 213

The petitioner herein, Ritha Saina seeks the dissolution of her marriage with Edfil Saina which marriage was contracted on 8th January, 1986 at the Office of the Registrar of Marriages. The marriage produced four children who are all now independent of their parents. Currently, the two of them reside at plot 29595 Woodlands in Lusaka.

The petition was brought pursuant to Section 9(b) of the Matrimonial Causes Act No. 20 of 2007. The petitioner particularized the grounds of unreasonable behavior which according to her has led to the irretrievable break down of the marriage, such that she cannot be reasonably expected to live with the respondent.

She indicated that the respondent has been abusive, and gave an instance when he allegedly twisted her breast, and another time when he almost stabbed her with a screw driver. She also indicated that the respondent is verbally and emotionally abusive, in that he has told her that he no longer loves her and she should leave him alone and give him a chance to marry someone else. He had been demanding that they sale the house and share proceeds from the sale.

She also averred that he was disrespectful to the petitioner's feelings by calling her derogatory names, does not trust her as he accuses her of having extra marital affairs. She felt unloved, as

he does not express affection towards her leading to the lack of enjoyment of conjugal rights.

It was also her petition that due to strange happenings in their bedroom, which the respondent failed to explain when confronted, she moved out of the matrimonial bedroom in February, 2015. She said that going by the respondent's conduct, it was patent that he did not want the petitioner, and that she too has lost love for the respondent. She termed his behavior unreasonable and unacceptable. She prayed for the dissolution of the marriage, property settlement and any other relief the Court deemed appropriate and costs.

The respondent filed an answer and cross petition. He basically denied all the allegations of unreasonable behavior leveled against him. He denied being abusive and that he did not twist her breast but that an incident occurred where he accidentally hit her on the breast when he was trying to protect himself from her during an altercation they had. He denied threatening to stab her, that infact she is the one who is rude to him and refuses to cook his food. It was his answer that he has tried on several occasions to reconcile with the petitioner but she has been adamant. On her leaving the matrimonial bedroom, it was his answer that she told him she was depressed.

He cross petitioned that the petitioner has behaved in such a way that the respondent cannot reasonably be expected to live with her. He particularized her unreasonable behavior as per his paragraph 3(b)(c) and (d). He asked that the Court rejects the

petitioner's prayer, but that the marriage be dissolved and costs be borne by the petitioner.

During trial, the petitioner, while being led by counsel went into detail about the contents of her petition. She said among others that the respondent left the matrimonial home on 9th August and she did not know where he lived or what he does as both of them are retirees.

She repeated the contents of her petition and went into detail on the issue of the breast being twisted. She said the same occurred as they got home from a function and had an altercation, and he then pulled the blankets so he could sleep on the floor, but she grabbed the beddings from him and that is when he punched her all over and twisted her breast. She reported the case to the Police, where he was cautioned and warned and upon pleading with her, she dropped the case. However, she did not have any document in support of this. She went over the issue of how he almost stabled her.

As already stated, her evidence was a rehash of her petition. She denied all his assertions as reflected in his answer to the petition.

Under cross examination, she maintained that he had twisted her breast and she had been issued with a medical report but which she did not have to prove her allegation. She confirmed she no longer loved him and agreed she had stopped washing his clothes but had continued cooking for him. That was the case for the petitioner.

The respondent took the stand and confirmed being marriage to the petitioner. He again denied behaving unreasonably. On the breast twisting incident, his evidence was as stated by the petitioner save to say he did not punch her but was defending himself from her and when he put up his hand to do so, he accidentally hit her in the breast, but that he apologized and even took her to the hospital and paid the bill. He confirmed her reporting the matter to the Police. On the issue of wanting to stab her, his explanation was that after changing the locks to the bathroom, he appeared not to have done it properly such that on that day their daughter who had come to visit got locked in the bathroom. He said he took a screw driver to go and open the door, but not to stab the petitioner; and that his daughter was a witness.

On the issue of conjugal rights, he said it was not possible as his wife left the bedroom in February, 2015.

On the scratches that the petitioner allegedly suffered in their bedroom, he said he could not do anything but organized prayers. He said her behavior led to the breakdown of the marriage as she stopped cooking for him and left the bedroom. He explained the steps he took to try and reconcile but to no avail. He repeated his prayers. That was the case for the respondent

Both the petitioner and respondent's counsel undertook to file written submissions by 13th and 27th April, 2015 respectively.

However there were no submissions at the time of writing this judgment.

Section 8 of the Matrimonial Causes Act (MCA) provides the ground on which a party to a marriage may petition for its dissolution, namely that the same has broken down irretrievably. To prove the same, the petitioner should satisfy the Court of one or more facts set out in Section 9(1)(a)(b)(c) and (d) of the Act. In casu, to prove the irretrievable breakdown of the marriage reliance has been placed on behavior of the respondent, that he has behaved in such a way that the petitioner cannot reasonably be expected to live with him.

Section 9(1)(b) is couched thus:

**“9(1) 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”**

I am expected, before I can hold the marriage to have irretrievably broken down to satisfy myself of the veracity of the facts alleged by the parties and that there is no possibility that there will be resumption of cohabitation by the parties. This is because Section 9(2) of the Act places the Court under obligation to enquire, in so far as it reasonably can into the facts alleged by the petitioner and into the fact alleged by the respondent.

Further, Section 9(4) of the Act provides that:

“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”

This is a behavioral petition where each of the parties to the marriage has alleged behavior of the other party to have led to the breakdown of the marriage such as to stop the other one from continuing to cohabit with the other. In the case of **Mundwe Godfrey Mulundika vs. Rhoda Zangose Mulundika**¹, Bweupe J set out the test to be applied in determining behavior namely that the respondent must behave in such a way that the petitioner cannot be expected to live with the respondent.

In **Katz vs. Katz**², Baker P said that behavior is more than a mere state of mind, that it was action or conduct by one which affects the other **“such conduct may take either acts or the form of an act or omission ... and in my view, it must have reference to the marriage”**

In the case of **Dewar vs. Dewar**³ Bacon J stated at page 40 that:

“in a petition alleging unreasonably 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.”

Courts have resisted the attempt at an exhaustive definition of behavior, insisting that each case raised a question of fact and degree and may depend on the personalities of the parties. **(See Mahande vs. Mahande**⁴. It has been suggested that unreasonable behavior is not merely looking at the quality of the

respondent's behavior, but rather the effect of that conduct upon the petitioner.

The learned authors of **Rayden and Jacksons Law and Practice in Divorce and Family Matters 16th Edition P214** say that to determine whether the respondent has behaved unreasonably;

“... 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.” (see the case of **Chandiwira Frederick Nyirenda vs. Bibian Nyirenda**⁵⁾)

In casu, the petitioner alleges that the respondent is violent and cited two incidents in 2014, when the respondent allegedly twisted her breast and also of 30th June, 2015 when he allegedly almost stabbed her. In the earlier incident, both parties conceded that on the night in question, they picked a quarrel. The respondent said that to avoid further altercation, he took down a duvet so he could go and sleep on the floor, that the petitioner grabbed it from him and in the face of her aggression, he accidentally hit her on the breast. The petitioner did not deny that he had actually gotten a bedspread so he could go and sleep on the floor; and that she grabbed the beddings from him. Further, his explanation was that the following day, he offered to take her to the hospital and paid the hospital bill. Meanwhile, she took the case to the Police but later withdrew it.

As regards the attempted stabbing, the respondent's evidence was not controverted. The petitioner did not provide proof of the alleged attempted stabbing. This is a couple that has been married for well over 30 years, but the petitioner could only point to two incidents to show the Court just how violent and abusive this man is. I find that particulars at (I) and (II) of the petition have not been proved.

As regards the (III) particular, I cannot imagine why Andrew the nephew was not brought to lend credence to the assertion that the respondent calls the petitioner derogatory names in his presence and that of her mother. This ground fails.

As regards the issue of feeling unloved and not appreciated, the petitioner has not shown before Court that the issue of being showered with presents had been normal in their thirty plus years of marriage, that its sudden cessation made her feel unloved and unappreciated. This ground has not been proved.

The petitioner spoke about stopping to sleep in the matrimonial bedroom due to strange happenings in the bedroom, the gist of her evidence on this point was basically that these strange happenings were only happening to her and when she told him about them, he kept quiet about it, and that is what prompted her to leave the bedroom. In his evidence, which was not controverted, he said the only thing he could do was bring in people to pray. Further, that when she moved out of the matrimonial bedroom, he sought counseling with Young Women

Christian Association but she never wanted to speak, and that she had some sort of depression, which evidence was not disputed. It was his evidence that he was told to give her time to try and heal from the depression but this never happened. It was this which prompted him to move out also.

From the evidence on record, I do not believe the petitioner has proved her petition on grounds of behavior as a ground on which I can dissolve the marriage.

Section 23 of the MCA provides for relief to the respondent in divorce proceedings and is worded thus:

“23. If in any proceedings for divorce the respondent alleges and proves any of the facts referred to in paragraph (a) to (e) of subsection 1 of Section nine treating the respondent as the petitioner and the petitioner as the respondent, for the purposes of that sub section, the Court may give the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking relief”

In **Parsons vs. Parsons**⁶, the Court had to decide the question whether the respondent was entitled to dispute the grant of a decree; and referred to Rule 18 of the MCA 1973 of the Laws of England, applicable in this jurisdiction by way of the English Extent of Application Act, on the contents of an answer where one intends to dispute the grant of a decree nisi, and said:

“It seems to me important that he must file an answer if he wants to dispute, not the granting of a decree but the granting of a decree on some proof of some facts alleged in the petition ...”

In casu, the respondent has not disputed the grant of the decree, but has disputed the grant on some of the facts alleged in the petition. Going by the evidence before me, I find that it is infact the petitioner who has behaved unreasonably. She is the one who left the matrimonial bedroom, thereby denying the respondent his conjugal rights. She stopped doing his laundry and stopped cooking for him.

The State of mind of the parties to the marriage in a divorce petition must always be considered. A marriage is a voluntary union of two people. Both parties must be willing to stay in the marriage voluntarily. The irretrievable breakdown of marriage is one 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. In casu, the petitioner says she has lost love for the respondent, and insisted that the marriage be dissolved. It appears the efforts at reconciliation by the respondent did not bear fruits hence their being before Court. It appears from my assessment of the parties demeanour during trial that the petitioner is adamant that she does not want to continue in this relationship. I consider that this is a marriage which stands no chance because the petitioner is adamant that she does not intend to resume cohabitation. The respondent has also agreed, ultimately to the dissolution of the marriage.

I therefore order the dissolution of the marriage of Ritha Mungala Saina and Edfil Saina that was solemnized on 8th January, 1986;

and grant a decree nisi. The same to be made absolute in six weeks' time. The issue of property settlement to be dealt with by the Deputy Registrar.

Each party to bear own costs as each one of them is legally aided.

Delivered at Lusaka this 8th day of June, 2016



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