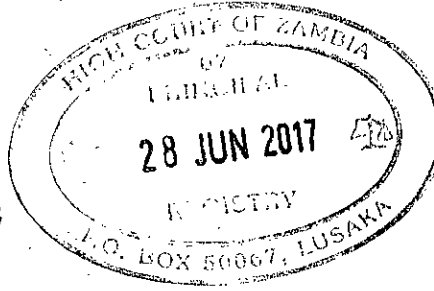


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HP/D0080



EUNICE LIKANDO SIMUMBWE

PETITIONER

AND

BRIGHT SIMUMBWE

RESPONDENT

Before the Hon. Lady Justice F.M. Chisanga, this 28th day of June 2017

For the Petitioner: In person

For the Respondent: In person

J U D G M E N T

Cases Referred to:

- 1. Katz v. Katz (1972) 3 All ER 219***
- 2. Ash v Ash (1972) All ER 582***
- 3. Mahande vs Mahande (1976) ZR 287***

The Petitioner, Eunice Likando Simumbwe, has petitioned this Court for dissolution of her marriage to the Respondent, Bright Simumbwe. The ground upon which the marriage is said to have broken down irretrievably is unreasonable behaviour; that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

The particulars of unreasonable behaviour are that the Respondent has violent behaviour and beats the Petitioner severely, thereby putting her life in danger. He uses bad language in the presence of the children, torturing the Petitioner

mentally by insulting her throughout the night. It is also alleged that the Respondent does not support the Petitioner and the children of the family, and further that he does not like the Petitioner's male relatives and frequently accuses her of having affairs with them. He also does not want church elders to visit the matrimonial home despite knowing that the Petitioner is a Christian.

The Respondent has denied having behaved unreasonably and cross petitions in response to the Petition. He alleges that he has been a responsible spouse and that he maintains the Petitioner financially when he can but that when he has financial hardships, the Petitioner denies him conjugal rights. That the Petitioner uses bad language even to the Respondent's mother as she once ordered her to keep quiet and told her that she looked dirty. He contends that the marriage has broken down irretrievably due to the Petitioner's unreasonable behaviour, the particulars being that the Petitioner has exhibited gross adulterous behaviour, entertaining a married man during night hours of load shedding and would usually arrive home late without an explanation of her whereabouts. When questioned by the Respondent, the Petitioner would use vulgar language.

At the trial, the Petitioner testified that her marriage to the Respondent has broken down as the Respondent does not support her and the children of the family. He does not respect her as a wife and when the couple has a misunderstanding, the Respondent does not listen to anyone. He is violent,

beats her and insults her in the presence of the maid, children and strangers. He has also developed a habit of beating her up outside. She asked the Court to dissolve the marriage.

When cross examined, the Petitioner said the following: the Respondent did not give her any money for buying food for the home. He never paid school fees nor foot bills in times of sickness. The house they live in was built by the parties. The Respondent never gave her money for food, saying he was spending it on the plot. That is why the Petitioner was against building. The Respondent told her he would take three quarters of his salary to building the house, but she never used to see the money. The house has no ceiling board, and the floor has not been done.

The couple bought another plot whilst the Petitioner was in gainful employment. Although the Respondent used to get K5000, he would give her K500, as opposed to the K1000 which she asked for. The Petitioner conceded that the Respondent's salary was K2,750. When she complained that she was not managing, the Respondent said he would divide the K5000 so that construction on the other plot is completed, and when the flats are completed, they would each get K1500 from one flat. She was to use the K1,500 on food, school and illness.

The Petitioner went on to say that she got a loan of K40,000 for the flat which was completed. The Respondent promised to be topping up the money so that she could manage but later changed his mind, saying she should use K1500 for everything.

She proposed that a borehole be sunk. After laying tiles in the flat, as well as installing the ceiling boards, she remained with K7000. She had not sunk the borehole. She contributed after two years of service because that was when she qualified to get a loan. The Respondent starved them and she complained to him that they could not eat the house. She said she had to pay K2000 per term in school fees, and remained with only K1000 in one term. Her salary is K900 and she pays the maid K500. She denies the Respondent conjugal rights because of what she goes through. She has even lost interest in sex. She does not think the Respondent loves her.

She got a loan to buy her own vehicle, which she would use alone because the Respondent said the house was his. The Respondent has never driven the vehicle. She would collect the rentals and go into town alone with the children because the Respondent would prevent her from buying what she wanted. She had demanded K1500 from the Respondent and was tired of living in an incomplete house. She left the matrimonial bedroom because after talking, the Respondent would sleep while she would be injured and remain awake.

She went on to say that if she used abusive language, it was because the Respondent had done so first. She recalled when she passed through a certain man's house after church and he informed the Respondent about it. Thereafter, the Respondent began to say she was a prostitute. She accepted that she was wrong because the Respondent did not accept her explanation. She said she referred to the Petitioner as a dog when he beat her outside where there were a lot of people. She did not know why he beat her up.

This marked the Petitioner's testimony.

The Respondent also testified and did not call any witnesses. He says he is violent, because the Petitioner nags him constantly. She would insult him over small matters and has referred to him as a dog. He denied the claim that he does not support the family. He explained that he struggled to acquire a plot and began construction. The Respondent wanted him to give her three quarters of his salary and only spend one quarter on construction on the house. The Respondent refused to accede to her demands because he had to construct a house. That was a step towards supporting the family. At the time this was happening, the Petitioner was unemployed and would raise a lot of quarrels over money saying she was young, and had to dress well. His response to her was that she would dress later after construction, as they would stabilize.

In response to the claim that he uses bad language towards the Petitioner in the presence of the children and the maid, the Respondent said that the Petitioner is the one who uses bad language. She would raise a sensitive upsetting issue in the presence of the children. He recalled one night when she entertained a drunken soldier in the kitchen. The Respondent was upset at the manner in which he came. Instead of asking him to leave, she entertained him, and said she would visit him. The Respondent asked her why she said she would visit an unmarried man in his presence. He denied insulting her the whole night. The truth was they had water problems and had to wake up at 04:00 hours to draw water. Perhaps this led to her failing to sleep.

He denied refusing to keep the Petitioner's relatives, saying her relatives have been very free to go to the parties' home. At the time he was testifying, they were keeping the Petitioner's niece, whom they have looked after since she was a child. In fact he would cook for the Petitioner's male relatives when they visited in her absence. The only person the Respondent complained about was the man who had chased his wife, and would visit when lights had gone, and they would sit close together on the veranda. This was at the time when she had denied him conjugal rights for about three months.

He also complained that when they collected her motor vehicle, she told him that he would not have access to it. On their way back, they met the man who used to visit her in the night and she smiled and said, "how are you

sweetheart?" Before they met that man, she was not talking to the Respondent. Later, the Respondent met the man who told him that he was unhappy at being addressed as sweetheart by the Petitioner in the Respondent's presence. When the Respondent told his wife about it, the Petitioner was annoyed saying she would ask the man. In the evening, the same man came to the parties' home and told the Respondent that he should first keep quiet when he is talking to the Petitioner. The Respondent got upset at this, and slapped the man who fell down. The Petitioner threatened to report the Respondent to the police. The Respondent slapped the Petitioner twice and told her to go ahead and report the matter to the police.

The Respondent also testified that one of the church elders proposed love to his wife and she told him about it. The Respondent was also suspicious of a priest who used to visit the Petitioner at home. He went on to say he had pleaded with his wife not to divorce but she was bent on doing so. She had even moved out of the matrimonial home and gone to live in Lusaka West in an army house.

When cross examined, the Respondent reiterated that he had been giving her money to go and buy things needed. When he gave her K1,500, he expected her to buy something for the children. The Respondent did not call any witnesses.

I have considered the evidence led by both parties. The parties' marriage was solemnised in the year 2003 at the New Apostolic Church in accordance with the Marriage Act. This is evidenced by the Certificate of Marriage on record.

The petition is premised on unreasonable behaviour and so is the cross petition in accordance with Section 8 and 9 of the Matrimonial Causes Act. The relevant portions state as follows:

- 8. 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.**
- 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.**
 - a.**
 - b. that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.**

It is clear from the evidence that the parties had financial difficulties in the early years of their marriage. The Respondent is a teacher and at the material time, was getting K2,750 as conceded by the Petitioner. It is not indicated that he had other sources of income. That being the case, I conclude that he prudently utilised his small salary on the welfare of the family in that he strove, and managed to build the house which they moved into. It is no small feat to construct a house from such a small salary. It must have taken financial discipline on the Respondent's part. He used to give the Petitioner K500 for

home expenses when she desired to be given K1000. At this point the Petitioner was unemployed and usually complained of the insufficiency of the funds and that she needed to dress well. The Respondent assured her of a much more stabilised life after concluding the construction projects. That the Petitioner was supporting the family is clear from the evidence, contrary to the Petitioner's claim. I find that when the flats the couple was building were completed, the Petitioner began collecting an income of K1,500 from one of the flats as is evidenced from the testimony of the Petitioner in cross examination.

The Petitioner has contended that the Respondent beats her severely, putting her life in danger. She testified that the Respondent does not respect her, beats her and insults her in public. I find that the Respondent has beaten the Petitioner. He admits two occasions when he slapped her in the presence of a soldier and another time when he beat her and she called him a dog. I do not however find that he severely beats her to a point of endangering her life. On both instances, the Petitioner provoked him. As regards the Respondent's dislike for the Petitioner's relatives, I find this allegation untrue. The Petitioner did not dispute the Respondent's testimony that he had been good to her relatives and that he has kept her niece in their home. The Respondent did however express his misgivings and disapproval about one man who visited the Petitioner in the late hours of the evening and particularly when there was no power. From the Petitioner's own evidence, I also find that she denied the Respondent conjugal rights when she stated that due to the financial pressure

she was facing she had lost interest in sex and doubted the Respondent's love for her.

The Respondent has also alleged unreasonable behaviour on the part of the Petitioner, that she has exhibited adulterous behaviour and he cannot reasonably be expected to live with her. His entire testimony was not challenged by the Petitioner in cross examination. I am persuaded to find that indeed the Petitioner spent time with a man who would visit their home in the evening. I am also convinced that the Petitioner addressed the same man on the street as sweetheart. The Respondent spoke to him and he later went in the night, to the couple's home. The Respondent slapped both the man and the Petitioner. I find this to be so because the Petitioner failed to challenge these grave allegations when cross examining the Respondent on those aspects and only proffered a plain denial in her own evidence that she did not carry herself as an unmarried woman.

When the Court is considering irretrievable breakdown in accordance with Section 9(b) of the Matrimonial Causes Act, that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him, it is required to make a value judgment about the behaviour of the Respondent and its effect on the Petitioner. The case of **Katz v. Katz**¹ sets out how a trial judge is to evaluate behaviour in considering whether it is unreasonable:

"Section 2(1)(b) of the Divorce Reform Act 1969 under which this petition is brought, requires first that the husband 'has behaved'. Behaviour is something more than a mere state of affairs or a state of mind, such as for example, a repugnance to sexual intercourse, or a feeling that the wife is not reciprocating his love, or not being as demonstrative as he thinks she should be. Behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and, in my view, it must have some reference to the marriage. Then the question is what is the standard of the behaviour? 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 behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the Petitioner to endure it, to live with the Respondent. Also it is for the judge to say whether the marriage has irretrievably broken down."

*Ash v Ash*², is another case on the approach to be taken by trial court. It was stated there that:

"The court must consider the effect of the behaviour on this particular plaintiff and ask the question: is it established, not that she is tired of the plaintiff or, colloquially, fed up with him, but, that she cannot reasonably be expected to live with him?"

The articulated approach was echoed in *Mahande vs Mahande*³ by the Supreme Court:

"In order, therefore, to answer the question whether the Petitioner can or cannot reasonably be expected to live with the Respondent, in my judgment, I have to consider not only the behaviour of the Respondent as alleged and established in evidence, but the character, personality, disposition and behaviour of the Petitioner. The general question may be expanded thus: can this Petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?... Then, if I may give a few examples, it seems to me that a violent Petitioner can reasonably be expected to live with a violent Respondent; a Petitioner who is addicted to drink can


reasonably be expected to live with a Respondent similarly addicted; a taciturn and morose spouse can reasonably be expected to live with a taciturn and morose partner; a flirtatious husband can reasonably be expected to live with a wife who is equally susceptible to the attractions of the opposite sex; and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other".

What then is the behaviour of the Respondent in relation to the marriage? It is that he was bent on completing the matrimonial house and the flats before he could give his family a luxurious life. He allowed the Petitioner to collect rentals from one flat after its completion. However, the evidence reveals that the Petitioner's attitude toward the Respondent is not one that supports his ambition to provide security for the family. I am not persuaded that she cannot as a result be reasonably expected to live with the Respondent. This view is premised on that fact that despite being formally employed and collecting rentals from a flat, she still complained about financial pressure. Having married a teacher, she expected more than she could reasonably get in the circumstances. She was able to afford a vehicle which the Respondent was disallowed from using merely because he did not assist her in purchasing it. She was able to run the vehicle as a result, meaning that she could spare money for fuel. This particular Petitioner, taking into account her temperament, can reasonably be expected to live with the Respondent but chooses not to because she is fed up of him.

The 'adulterous behaviour' of the Petitioner is the fact relied upon by the Respondent in his cross appeal. The evidence reveals that the Petitioner's behaviour was flirtatious to which the Respondent objected and questioned. He was once involved in a physical confrontation as a result. I am of the view that unreasonable behaviour has been established on the part of the Petitioner. This particular Respondent, with his character and personality, cannot reasonably be expected to live with the Petitioner.

I am satisfied that the marriage between the parties has broken down irretrievably as the Petitioner has behaved in such a way that the Respondent cannot reasonably be expected to live with her. I therefore pronounce a decree nisi in favour of the Respondent. I refer the question of property adjustment to the Deputy Registrar on formal application, and that of custody to a judge in chambers on formal application. Each party will bear own costs.

Dated the^{28th}.....day of.....^{June}.....2017



F. M. CHISANGA
HIGH COURT JUDGE