

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

**2016/HP/D.0237**

*(Divorce Jurisdiction)*

BETWEEN:

**KAMANA MAKWATI**

AND

**CHUNGA MANZI MAKWATI**



**PETITIONER**

**RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 15<sup>th</sup> DAY OF JUNE, 2017.**

*For the Petitioner : In person*

*For the Respondent : No appearance*

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

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CASES REFERRED TO:

1. ***Anne Susan Dewar V Peter Alexander Dewar 1971 ZR 38.***

LEGISLATION REFERRED TO:

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

This is a petition for divorce filed on 25<sup>th</sup> August, 2016, pursuant to Section 9 (1) (e) of the Matrimonial Causes Act, No 20 of 2007. The petition states that the parties were lawfully married on 25<sup>th</sup> October, 2003 at St Peters Anglican church in Libala, Lusaka, and they last lived as husband and wife at Plot No 323 Kabwata Site and Service. That the Petitioner is a businessman, while the Respondent is a Civil Servant.

The petition further states that there is one child of the marriage now living, namely Bandama Makwati, who was aged twelve years when the petition was filed. It is stated in the petition that there are no proceedings continuing outside Zambia in respect of the marriage that is capable of affecting its validity or substance, and that there have been no proceedings in any court in Zambia with reference to the marriage, the child of the marriage, or the property of either or both of them.

The Petitioner in the petition alleges that the marriage has broken down irretrievably due to the Respondent's unreasonable behavior. The particulars of the unreasonable behavior are stated as the Respondent having borne a child with another man. The Petitioner therefore prays that the marriage be dissolved, and that the Respondent disclose the man who impregnated her, and asks for costs of the proceedings.

The Respondent did not file an answer or complete the acknowledgment of service. She did not appear at the hearing either.

In his testimony, the Petitioner repeated the contents of the petition, stating that the parties were married on 23<sup>rd</sup> October 2003 at St Peter's Anglican Church in Libala, Lusaka. He stated that the marriage certificate that was issued to the parties was attached to the case record. That the parties had last lived as husband and wife on 17<sup>th</sup> November, 2013 at Plot number 223 Kabwata Site and Service.

The Petitioner further testified that there is one child of the family now living namely Bandama Makwati, a boy born on 8<sup>th</sup> May, 2004. He stated that there have been no proceedings with respect to the marriage, child of the family or the property of either or both of them, either in Zambia or outside the country. It was his evidence that the marriage had broken down irretrievably due to the Respondent's unreasonable behavior.



He testified that the Respondent is dishonest as she had not disclosed who had impregnated her. That after she got a job in 2008, she had worked as a communications officer for the first lady, and would travel out leaving the Petitioner to look after the child of the family. That when she would come back she would deny the Petitioner sex, and that after a family meeting the Respondent's parents had chased the Petitioner from the matrimonial home. That the parties had separated for six months and another family meeting was convened, but it did not sort out the problem, and her family had called the Petitioner all sorts of names including a dog and a parasite, who did not deserve their daughter.

He further testified that in 2014 he discovered that the Respondent was pregnant, and she gave birth on 7<sup>th</sup> January, 2015. That since then he had been away from the house, but he had been supporting his son. He also testified that the Respondent's family have been trying to get in touch with him so that they could reconcile, but he had declined. The Petitioner stated that at the meeting the Respondent had informed him that she could not get back with him, as she had met someone while on national duty in Namibia, and she was expecting his child.

He prayed that the marriage be dissolved, and that he be granted custody of his son, and that the parties jointly maintain him. Further that there be property settlement.

I have considered the evidence. Section 8 of the Matrimonial Causes Act No 20 of 2007 provides for the ground for divorce. It states that;

***“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 of the said Act stipulates the facts that need to be proved in order to establish that a marriage has broken down irretrievably. It provides that;

***“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) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;***
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;***
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;***
- (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or***
- (e) that the parties to the marriage have lived apart for continuous period of at least five years immediately preceding the presentation of the petition.***

The petition filed shows that the Petitioner relies on Section 9 (1) (e) of the Act. This provision deals with the fact of the parties have lived apart for a continuous period of five years immediately preceding the presentation of the petition. When one goes to the body of the petition, they will note that the Petitioner relies on the fact of the Respondent



having behaved unreasonably. This is covered in Section 9 (1) (b) of the Act, thus I will take it that this is the section that is relied on this matter.

The test required to prove unreasonable behavior is an objective test that takes into account the characters and personalities of the parties concerned, as was held in the case of **ANNE SUSAN DEWAR V PETER ALEXANDER DEWAR 1971 ZR 38**. The Petitioner, with regard to the evidence establishing the unreasonable behavior on the Respondent's part in this matter, told the court that the Respondent had been impregnated by another man, whom she had refused to disclose. His evidence was that whenever the Respondent returned home from her duties, she would deny him sex. He also testified that at a meeting she had disclosed that she had met someone when she was on duty in Namibia, and that she was expecting his child. That the Respondent had since given birth to a child on 7<sup>th</sup> January, 2015.

The Respondent did not file an answer to the allegations so the petition is undefended, and she did not appear at the hearing. Thus the question for determination is whether the fact the Respondent was impregnated by another man amounts to unreasonable behavior, and the Petitioner cannot reasonably be expected to live with her.


In a marriage such as this one which the parties contracted under the Act, it was a union of the two to the exclusion of all others. Therefore it was expected that both parties would dedicate their lives to each other. The Petitioner is on record that the Respondent would deny him sex, yet she fell pregnant by another man, and gave birth to his child. The Respondent did not adduce any evidence to show any attributes on the Petitioner's part that I can take into account in establishing the unreasonable behavior on her part.

The Respondent's behaviour in my view was unreasonable, as it was not expected that whilst married to the Petitioner, she would have sexual relations with other men and bear their children. Such behaviour has obviously affected the Petitioner, and his evidence was that he declined to hold any reconciliatory meetings with the Respondent's family. I would however state that the Respondent's family calling the Petitioner all sorts of names and stating that he did not deserve their daughter, would not be unreasonable behaviour on the Respondent's part, as such utterances were not attributed to her.

He has therefore proved that the Respondent has behaved unreasonably, and he cannot reasonably be expected to live with her, and he succeeds on a balance of probabilities. I accordingly grant a decree nisi for dissolution of the marriage between the Petitioner and the Respondent, which shall become absolute after a period of six weeks, if all the issues regarding the welfare the child of the family are resolved.

The parties are at liberty to agree on the custody of the child, and in default thereof either party shall be at liberty to make the application before me at chambers. Issues of maintenance and property settlement are referred to the Registrar for determination. Each party shall bear their own costs of the proceedings.

**DATED THE 15<sup>th</sup> DAY OF JUNE, 2017**

  
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**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**