

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

2017/HP/D005

BETWEEN:

FRANK CHITALIMA

AND

SHARON LUNGU**PETITIONER****RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 30th DAY OF JUNE,
2017**

For the Petitioner : Ms H. Musonda, Legal Aid Counsel, Legal Aid Board

For the Respondent : In person

J U D G M E N T

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 the dissolution of marriage filed on 9th January, 2017, pursuant to the provisions of Sections 8 and 9 (b) of the Matrimonial Causes Act No 20 of 2007.

The petition states that the Petitioner, Frank Chitalima, was lawfully married to the Respondent, Sharon Lungu, on 24th July, 2004 at the Bread of Life Church in Lusaka, Zambia. That the parties last lived as husband and wife at house number 28 Chimwemwe Road, Chadiza in the Eastern Province of the Republic of Zambia, and are both domiciled in Zambia.

It is stated in paragraphs 4 and 5 of the petition that the Petitioner is a social worker by profession, employed by Bio Carbon Partners, and resides at number 33 Chinsali Road in Lusaka, while the Respondent is unemployed, and resides at Mumba Bar along hospital road, behind the market in Nyimba District.

That there are three children of the family now living, namely Mwamba Chitalima, a girl born on 4th August, 2005, Frank Chitalima a boy born on 9th May, 2009, and Yamikani Chitalima, also a boy born on 9th August, 2013.

Paragraphs 7 and 8 of the petition state that there have been no proceedings in any court in Zambia or elsewhere with regard to the marriage, and which are capable of affecting its validity or subsistence. It is also stated that no arrangements have been made for the maintenance of the Respondent and the children of the family.

The Petitioner alleges that the marriage has broken down irretrievably due to the fact the Respondent has behaved unreasonably, and he cannot be expected to continue living with her. The particulars of the unreasonable behavior are stated as;

- i. *The Respondent complaining that the Petitioner was not providing for the family, and asking him to divorce her when he lost his job in August 2014.*
- ii. *The Respondent starting an extra marital affair when the Petitioner moved to Lusaka in October 2014 in search of a job.*
- iii. *The Respondent becoming pregnant, and the Petitioner not being responsible for the pregnancy, as the parties had lived apart for more than nine months, when she became pregnant.*

iv. The Respondent giving birth to a baby boy, who at the time the petition was filed was two months old, and her admitting having had an affair, and that the Petitioner was not the father of the baby.

The Petitioner avers that he has failed to forgive the Respondent for her infidelity, and that on that basis the marriage has broken down irretrievably. Further that efforts to reconcile the parties by both families, and the church have failed. He prays that the marriage be dissolved, and he be granted custody of the children. That there should be orders for property settlement and maintenance of the children of the family, but that each party should bear their own costs of the proceedings.

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

The Petitioner in his testimony told the court that he is the person that had filed the petition for divorce. He confirmed that he had married the Respondent at Bread of Life Church in Emmasdale, Lusaka on 24th July, 2004. He produced the marriage certificate that was issued after the marriage was solemnized, and it was marked 'P1'.

It was the Petitioner's testimony that the parties last lived as husband and wife at house number 28 Chimwemwe Road in Chadiza, and that they are both domiciled in Zambia. He stated the parties are currently not cohabiting, and the Respondent lives in Nyimba district, at a house behind the market.

That the parties have three children together, the first being Mwamba Chitalima a girl now aged eleven years, the second Frank Chitalima a boy born on 5th May, 2009 and Yamikani Chitalima another boy born on 8th August 2014. It was stated that Mwamba is in grade 7 at Mioma primary school in Chilenje, Lusaka, and that Frank also attends the same school, and he is in grade 3, while Yamikani is in baby class in Nyimba.

The Petitioner further in his testimony stated that another child was born to the Respondent during the subsistence of the marriage, who is not his child. He confirmed that there have been no proceedings with respect to the marriage either in Zambia or elsewhere that would affect its validity.

As regards the arrangements for the children of the family, he stated that he was providing for them whilst they were in Nyimba. The Petitioner's evidence was that the marriage has broken down irretrievably, as the Respondent has behaved unreasonably, and he cannot be expected to live with her. As to the instances comprising the unreasonable behavior on the part of the Respondent, the Petitioner testified that the Respondent gave birth to another man's child, after they had not lived together from September 2014.

He told the court that his contract of employment with his employers came to an end, and they relocated from Chadiza to Nyimba. That he had left the Respondent and the children there, as he came to Lusaka to look for a job, and it took long for him to find a job. However he would occasionally send money to support his family in Nyimba, but the Respondent started asking to be divorced, as there was no marriage, as they were not living together.

It was stated that the Petitioner told the Respondent that he could not move the family to Lusaka as he was not working, but the issue of divorce became prominent for the Respondent, and his family had called for a meeting with the Respondent's family. That at that meeting the Respondent had stated that she had no love for the Petitioner, and insisted on divorcing him, and the two families had advised the two to resolve the issue. He stated that when the two sat to discuss, the Respondent told him that her love for him had died. That when he later

went to Nyimba on personal arrangements, he discovered that the Respondent was pregnant.

His prayer was that the marriage be dissolved, and that he be granted custody of Mwamba and Frank, and that there be an order for the maintenance of Yamikani, and property settlement.

In cross examination the Petitioner stated that have a traditional plot in Chadiza, but he had not followed it up since they left there in 2014. Therefore he was unable to confirm its status, as it belongs to her royal highness of the locality. The Petitioner told the court that where a person allocated land in the chiefdom is not seen for some time, the plot is seized. With regard to Yamikani the Petitioner testified that he under age, and better placed with the Respondent, who is his mother, but that the court can make an order for maintenance in his respect.

The Respondent in her testimony confirmed having received the petition for divorce, as well as the accompanying documents. She agreed that she is the person named as the Respondent in the petition, but stated that she did not intend to defend the said petition. Her statement was that she would however like to be heard on the issue of the custody of the children, maintenance and property settlement.

I have considered the matter. The petition has been brought pursuant to the provisions of Sections 8 and 9 (b) of the Matrimonial Causes Act, No 20 of 2007 which provide that;

“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.

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;”

Thus the question that arises for determination is whether the Petitioner has proved that the Respondent has behaved unreasonably, and he cannot be expected to live with her?

In the case of ***ANNE SUSAN DEWAR V PETER ALEXANDER DEWAR 1971 ZR 38***, it was held that the test required to prove unreasonable behavior is an objective test that takes into account the characters and personalities of the parties concerned. The Petitioner in this case alleges that the Respondent started demanding that he divorces her as they were not living together, and her love for him had died, when he had left her and the children in Nyimba, when he lost his job, and came to Lusaka to look for another job.

Further that the Respondent during the subsistence of the marriage became pregnant from another man, and gave birth to a son.

The reason advanced for the Petitioner being away from his family is that he came to Lusaka to look for a job. To demand to live with a person who has no job, and is striving to look for one in my view is unreasonable. The Petitioner is on record as stating that he would send money for the upkeep of the family occasionally whilst he was alone in Lusaka, which evidence was not challenged in cross examination, neither was the fact that he had lost his job and came to Lusaka to look for a job.

His evidence is thus credible, and i note that the Respondent did not bring out any facts attributable to the characteristics of the Petitioner that can be taken into account when assessing the allegations of

unreasonable behavior on her part. Therefore it is my finding that to demand divorce on account of a spouse having lost their job is unreasonable, as is becoming pregnant during the subsistence of the marriage with another man's child, and giving birth to the said child.

These acts are such that the Petitioner cannot be expected to live with the Respondent as they breach trust which is fundamental in a marriage, and obviously affected the Petitioner's emotional wellbeing, as his failure to be with his family was due to the fact that he was in Lusaka looking for a job to enhance the welfare of the family. As such I find that the Petitioner has proved that the Respondent has behaved in such a way that he cannot reasonably be expected to live with her. I accordingly grant a decree nisi for the dissolution of the marriage between the parties, which shall become absolute after a period of six weeks, if the issues of the welfare of the children of the family are settled.

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

DATED THE 30th DAY OF JUNE, 2017.

Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**