

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:**

2017/HP/D0060

MWAPE MALAMA MAINGA

AND

KWALELA MAKAZO MAINGA



PETITIONER

RESPONDENT

**Before the Hon. Mr. Justice M.L. ZULU
in Chambers on the 13th day of June, 2017.**

For the Petitioner:

*Mrs. B. M. Mulenga – National Legal Aid
Clinic for Women*

For the Respondent:

*Mr. B. Mwandenga, Of M. Z. Mwandenga
and Company*

J U D G M E N T

Cases cited:

- 1. Mahande V Mahande (1976) ZR 287 (S.C)*
- 2. Livingstone-Stallard V Livingstone-Stallard (1974) 2 ALL E.R. P. 766*

Legislation referred to:

- 1. The Matrimonial Causes Act No. 20 of 2007, Section 9(1)(b)*

Work referred to:

- 1. Rayden's Practice and Law of Divorce, 9th Edition, London: Butterworths*

This is a petition for dissolution of marriage on the ground that the marriage has broken down irretrievably. The Petition shows that the parties were lawfully married on 12th July, 2014 at Mary Immaculate Parish, Lusaka. The parties are both domiciled in Zambia and last cohabited at Shantumbu, Chalala, Lusaka. The Petitioner is a Gemologist at Cuts and Facets Limited, Lusaka and currently resides at Plot No. 3446/1, Chalala. The Respondent is a self-employed and resides in Shantumbu, Chalala.

The couple have no child of the family. There is one child born to the Respondent before the subsistence of the marriage, namely Nancy Mainga.

There have been no previous proceedings in any court in Zambia or elsewhere with reference to the said marriage or any property of either or both of them.

However, there was a matter in the Subordinate Court where the Petitioner obtained a Protection Order against the Respondent.

The Petitioner alleges that the Respondent has behaved in such a manner that she cannot reasonably be expected to live with him. The particulars of unreasonable behaviour are that the Respondent is violent and has been emotionally and physically abusive. The Petitioner alleges that the Respondent in August 2014, she was beaten after a marital dispute by having her hair pulled and cut with a knife which also caused her cuts on her hands. The Petitioner also alleges that on 25th July, 2015 once again beat up the Respondent and caused her head to be hit on the door several times and further hitting her with

an electric heater which broke into pieces causing several injuries to the Petitioner. This incidence was reported to Chilenje Police.

The Petitioner also alleges that on 21st October 2016, the Respondent again beat her up and sustained a swollen left eye lid and red eye. Again, this incidence was reported to Woodlands Police.

Further, the Petitioner stated in her Petition that in August 2016, the Respondent threatened to pour boiling water on the Petitioner and was only saved by her Mother in Law. The Petitioner alleges that because of these incidences she moved out of the matrimonial home in fear of her life.

The Petitioner prayed that the marriage be dissolved. She also prayed that costs of this Petition be in the cause.

At the hearing, the Petitioner gave oral evidence and called no witness.

In her testimony, she testified that she has been married to the Respondent and two months after their marriage she was woken up after midnight and forced to drink a mixture charcoal and water and because she refused to finish the said mixture, she was beaten and caused her hair to be pulled and cut off what had remained with a knife. The Petitioner narrated various incidences which have been stated in her Petition when she was physically abused by the respondent.

The Petitioner was not cross examined as the Respondent withdrew his Answer and applied that the Petition proceeds as undefended.

That was the evidence in support of the Petition.

I have considered the Petition and Oral submission of the Petitioner. **Section 9(1) of the Matrimonial Causes Act** sets out the facts upon which a marriage can be said to have broken down irretrievably. These are:

- (a) *That 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 Respondent has deserted the Petitioner for a continuous period of at least two years immediately preceding the presentation of the Petition.*
- (d) *That 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 the decree being granted.*
- (e) *That parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the Petition.*

The Petition is based on the fact of unreasonable behaviour outlined in **Section 9(1)(b)** which is that the Respondent has behaved in such a way that she cannot reasonably be expected to live with him. In determining whether or not the Petitioner cannot reasonably be expected to live with the Respondent the Court has 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. This principle was enunciated by the Supreme Court

in the case of **Mahande V Mahande(1)**. Similar sentiments were echoed in the case of **Livingstone-Stallard V Livingstone-Stallard(2)** in which it was stated that the Court must take into account the whole circumstances including the characters and personalities of the parties.

Thus, the Court must decide whether the Respondent's behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the Petitioner to endure living with the Respondent bearing in mind the individual characters, personalities and disposition of the parties.

The Petitioner's evidence is that the Respondent emotionally and physically abused her on several occasions during the subsistence of the marriage. That the Respondent beat up the Petitioner so severely and pulled her hair in the process and cut off the remaining hair with a knife. This evidence of the Petitioner is unchallenged by the Respondent who was represented.

I, accordingly find and hold that the Respondent has been violent and physically abused the Petitioner. According to the learned authors of Rayden's Practice and Law on Divorce, 9th edition at page 136 even threats of actual personal violence may constitute cruelty. The Respondent actions and disposition clearly point to a violent and cruel man

The question is whether the Petitioner can condone the Respondent's behaviour and be expected to continue living with him.

On the totality of the evidence before me, I am of the considered view that the Petitioner cannot reasonably be expected to live with the Respondent. The Respondent has exhibited dangerous levels of violence, which could lead to dire consequences if the parties continue to live together.

There is no evidence to suggest that the Petitioner was quarrelsome or violent. It is evident that the Respondent's behaviour of beating the Petitioner poses a danger to the Petitioner's health and life and she cannot reasonably be expected to continue living with him.

I, therefore, find and hold that the marriage has broken down irretrievably on account of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. I grant a decree nisi for the dissolution of the marriage to be made absolute within six weeks.

Maintenance and property adjustment if any shall be dealt with by the Learned Registrar of the High Court.

Because of the violent nature of this case and emotional stress caused to the Petitioner, I order that the Respondent bears the costs of this Petition.

Leave to appeal is granted.

Delivered at Lusaka this 13th day of June, 2017.



M.L. ZULU
HIGH COURT JUDGE