

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

2017/HPF/D148



BETWEEN:

MULENGA CHONZI MULENGA**PETITIONER**

AND

NAMOOPA FAITH BANDA MULENGA**RESPONDENT**

**BEFORE HON MRS JUSTICE S.KAUNDA NEWA THIS 13th DAY OF
OCTOBER, 2017**

For the Petitioner : Mr Kalaluka Mututwa and Mr Simbwalanga Zunga,
Lewis Nathan Advocates

For the Respondent : Mrs P.S. Mumbi, Charles Siamutwa Legal Practitioners

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 Judgment on a petition for the dissolution of marriage, filed pursuant to Sections 8 and 9 (b) of the Matrimonial Causes Act, No 20 of 2007. The petition states that the Petitioner and the Respondent were lawfully married on 1st June, 2013 at Mary Immaculate Catholic Church in Kabulonga, Lusaka. That the parties last cohabited as husband and wife at No 50 Mulungushi University Housing Complex, Great North Road Campus, Kabwe.

It is also stated that both the Petitioner and Respondent are domiciled in Zambia, and the Petitioner is a lecturer at Mulungushi University and resides at No 50 Mulungushi University Complex, while the Respondent is a business administrator of an unknown address.

The petition further states that there are no children of the family now living, and that there have no proceedings in Zambia or elsewhere with regard to the marriage that are capable of affecting its validity or substance, and that there have also been no proceedings with regard to the property of either or both of them. That no arrangement has been proposed for the support of either party to the marriage. The Petitioner alleges that the marriage has broken down irretrievably on account of the fact that the Respondent has behaved in such a way that he cannot reasonably be expected to live with her. The particulars of the unreasonable behavior are stated as;

- 1. The Respondent's behavior being inconsistent with that of a married woman*
- 2. In or around July, 2015, whilst living in Ibex Hill, Lusaka the Respondent began flirting with a male neighbor, and the Respondent found text messages on her phone from the said neighbor, and when confronted the Respondent admitted having had a relationship with the neighbor, and confessed to the Petitioner and her grandmother who is her guardian.*
- 3. The Respondent has a tendency of packing her bags and leaving the matrimonial home to unknown places whenever the two have an argument.*
- 4. In or around February 2016, the Respondent whilst living alone in Woodlands, Lusaka and the Petitioner was living in Kabwe, was*

found in the bedroom around 02:00 with an unknown man in unexplained circumstances by the Petitioner. That when the Petitioner asked her to open the door so that he could talk to the man, she refused forcing the Petitioner to break the windows of the house, and the car belonging to the same man that was parked outside the house.

5. *That whilst living in India for studies at the Petitioner's instance, the Respondent began confiding with one of the Petitioner's friends about private sensitive bedroom matters that should have been kept only between the two, an act which the Petitioner finds highly unreasonable.*

It is stated that the Petitioner fears contracting diseases as a result of the Respondent's behavior, if he continues in marriage with her, as such he cannot reasonably be expected to live with her.

In the answer and cross petition filed, the Respondent states that the parties last lived as husband and wife in Vasant Vihar, New Dehli, India, and that a proposal had been made for the financial support of the Respondent. The Respondent denies that she has behaved in such a way that the Petitioner cannot reasonably be expected to live with her, stating that her behavior is not inconsistent with that of a married woman. She denies having flirted with a male neighbor in July, 2015, or that she would leave the matrimonial home after the two argued.

The Respondent alleges that it is in fact the Petitioner who demands that she leaves the matrimonial home after any argument, and denies that the Petitioner found her with an unknown man in her bedroom in February, 2016. She also denies having confided with one of the Petitioner's friend's on private and sensitive bedroom issues. She alleges

that it is in fact the Petitioner who has had numerous adulterous affairs with different women, from which he risks contracting diseases.

The Respondent cross petitions that the marriage has broken down irretrievably as the Petitioner has behaved in such a way that she cannot reasonably be expected to live with him. She names the incidences of the unreasonable behavior as;

1. *Shortly after the parties got married in June 2013, the Petitioner started having an affair with a woman whom the Respondent confronted, and in 2015 he began another affair with a student at the University causing the Respondent a lot of embarrassment. That the Respondent tried to stop the said affair, and even elicited the help of the Dean of his school, and the Registrar to stop the same.*
2. *That the parties resumed living together, but that this lasted only a few months as the Petitioner asked the Respondent to leave the matrimonial home in June, 2015. That whilst the parties were on separation the Petitioner had called the Respondent in February, 2016 and informed her that he wanted to divorce her, and went to where she was living late in the night, and caused damage to the house that she was living in. In June, 2016 he informed her that he has a child with another woman, a fact that he had kept to himself during the marriage.*
3. *Every time there is an argument or dispute the Petitioner tells the Respondent to leave the matrimonial home. The Respondent left her job in January 2017 to go and join the Petitioner in India but after several weeks of living there, the Respondent asked her to come back to Zambia for a breather as the Respondent conversed with her*

family on the phone, and that he would come and get her in May, 2017.

4. *The Petitioner is physically and emotionally abusive to the Respondent, and is very insecure, and would among other things consistently check on her whereabouts, how much time she took in traffic to get home from work, call her friends to ensure that the Respondent is with them, and demand to speak with whoever the Respondent is with.*

At the hearing, both the Petitioner and the Respondent testified and called no witnesses. In his evidence the Petitioner confirmed having filed the petition. He explained to the court that he had been a loving, caring, committed and faithful husband to the Respondent, but that she had not reciprocated this, and they should therefore divorce.

That the Respondent's behavior is not what is expected and is consistent with being a wife, as a reasonably married woman is expected to be loving, caring, committed and faithful. He testified that the Respondent has behaved unreasonably, citing one example as when they argued, she would pack her bags and leave the matrimonial home, and she is therefore not committed to the marriage.

The other incidence of unreasonable behavior was stated as that in July 2015 when the Respondent had left the matrimonial home, and was living in a flat in Ibex Hill with a roommate, the two had reconciled and the Petitioner went to see her. That she did not receive him well and she rushed into the bedroom and did not offer him food. He went on state that she would not let go of her phone and would go with it to the bathroom, and excuse herself to go and answer it. The Petitioner told the

court that he had grabbed the phone from her and she slapped him, and screamed to alert her roommate.

That in the meantime he had locked himself in the bathroom and checked the messages on her phone, and found some from a man she had introduced as a neighbor. It was his testimony that the messages were sexual, stating that the oral sex that they had was nice and they should do it again, this time without a condom.

The Petitioner testified that they separated until January, 2016 when the Respondent started communicating with his sister who is in South Africa asking her mediate their problems. That relatives of both families met to reconcile the two on a number of occasions, and the Respondent apologized for what she had done, including her unfaithfulness, and they reconciled. He stated that from there the Respondent would travel to Kabwe and he would also come to Woodlands where the Respondent was residing.

However in the middle of February she phoned him and told him she was going to buy groceries, but he received a message informing him that the Respondent was with a man and they were behaving inappropriately, and he was in Kabwe at the time. That around 21:00 hours she had sent him a message that she was going to bed, which was unusual, as she normally slept around 23:00 hours, and he became suspicious.

He testified that he asked her to send him a nude picture which she did immediately, and he was again suspicious as he had previously asked her to do so, and she had declined. The Petitioner stated that he then drove from Kabwe and arrived in Woodlands around 02:00 hours, which was Sunday morning. When he hooted at the gate there was no response,

and it was again his evidence that he was suspicious as the Respondent was a light sleeper and would open for him at such hours previously.

He told the court that after spending about twenty minutes outside the gate, he jumped over it, and noticed an unfamiliar vehicle parked in the yard, yet the Respondent had told him that she was alone at home. That when he knocked at the door there was still no response, and after about fifteen minutes he went to the window and knocked. The Petitioner stated that there was still no response and he heard a door open, and he broke the bedroom window, and saw a male person that he did not know rush out of the bedroom.

Further in his evidence, the Petitioner testified that at that point the Respondent shouted asking what he wanted, and accused him of being drunk and that he should go away. That he became angry and retaliated uttering bad words, and demanded that the man he had seen should come out, or she should let him into the house. He stated that she refused to let him enter the house, and he said that he would break the car that was outside the house. It was his evidence that he started breaking the car, and the door opened but the grill door was locked, and a man appeared. This man did not answer when asked what he was doing there, and the Respondent asked the Petitioner to leave.

The Petitioner's other evidence in relation to the Respondent's unreasonable behavior was that in January 2017 she had joined him in India where he is pursuing his PHD. That during that period she confided in a colleague who also comes from Zambia, and is studying there. He explained that they have an open policy of communication between them which extends to not hiding their phones from each other, and when he got her phone, he discovered that the Respondent had been exchanging whats up messages with his colleague stating that she was

bored and needed to go out, meet people and have fun. That the messages also related to sensitive bedroom issues relating to an incident that occurred when he had gone out with friends and he was poisoned, and when he returned he had demanded to have intercourse with the Respondent but she had pushed him away, and slept in the sitting room. She had complained that he had forced her to have sex when she did not want.

His evidence was that it was wrong for the Respondent to confide in that colleague as he was junior than him, and was studying for his master's degree, and moreover he was a stranger. The Petitioner went on state that he overheard her complain to the same colleague about the same issues as he came out of the shower. It was testified that the Petitioner asked the Respondent to enroll in school, as his PHD studies are for four years, but she was negative, and just wanted to play. That she was communicating with a man and deleting the messages as the phone she was using was a Samsung which would show that a message had been received, even when it had been deleted. He testified that she told him that the man was a workmate who wanted to start business with her. This he stated was a problem as they had agreed to be open with each other, but she had kept him in the dark.

He further stated that the Respondent wanted to be going out to drink and he would be sent photographs of her in clubs when drunk, and that is what she wanted to do in India. That in March they had discussed her complaints and she had moved out of the bedroom and started sleeping in the sitting room. He then asked her to return to Zambia so that she could continue her life, and she had agreed. The Petitioner stated that he then facilitated her return in March, and in conclusion he stated that she had behaved inappropriately, and he cannot continue living with her.

When cross examined, the Petitioner testified that he had lived with the Respondent for a week after the marriage was celebrated, and that thereafter the Respondent had returned to Lusaka, resigned from her job and went to live with him. That they lived with each other between two to three months after that. He agreed that by resigning from her job, the Respondent was committed to the marriage. He denied that he had an affair with a student in the two to three months that he lived with the Respondent.

Whilst admitting that he knew a student named Edna, and that she took a course that he taught, the Petitioner denied having had a relationship with her. He also denied knowing any lecturer or student called Fatima. He agreed that the Respondent complained to Dean that he was having inappropriate relationship with students, having heard about it in the corridors. It was his testimony that there is a code of ethics prohibiting lecturers from having intimate relationships with students, and therefore his superiors would have called him or written to him over the Respondent's allegations.

He also stated that he is loving and caring, and he tried to speak with the Respondent but she told him that she would fix him, and she left home after they argued. The Petitioner testified that he had been told that he could be a father of a child but that he was not sure, as after being informed so in 2016, he had been trying to establish paternity by way of DNA testing without success. He added that he was informed after the child was born, but could not state when this was.

The Petitioner also agreed that he had been on separation constantly with the Respondent, and that he had told her about the child after he had known for some time. His explanation for not having told her earlier was that he was not sure if the child was his. He agreed to having broken

the windows of the house that the Respondent was living in in February, 2016, and that such incident was unreasonable. He also agreed that he was aggressive during the incident and began breaking things, and that he had jumped over the gate. The Petitioner stated that he broke the door as he wanted to see who the Respondent was letting out of the house. That he had consulted Father Mwelwa and he had asked him to reflect on forgiveness, and he asked the Respondent to join him in India.

He stated that he had however feared that the Respondent would resume her behavior, and start having a relationship with his colleague as he is young and she could not start sharing intimate aspects of their relationship with him. He did however acknowledge that there was nothing wrong in confiding with someone, but stated that what was wrong was revealing certain issues to strangers.

It was also his evidence that he asked the Respondent to return to Zambia, adding that she had packed all things, entailing that she had no intentions of returning to India. That when she left he had gone to Thailand, and had asked her aunt to receive her, and her aunt did not respond. He testified that when the Petitioner arrived she had greeted him and there was no communication between them after that.

In re-examination the Petitioner stated that there is a code of ethics at Mulungushi University, and anyone who contravenes it is suspended and investigations are instituted and thereafter a disciplinary hearing is held. That no such disciplinary process had been instituted against him, and that since the report was made by the Respondent, his relationship with management had not changed.

That he has not had a DNA test to determine the paternity of the child alleged to be his, as the mother of the child has been elusive in providing

specimens for both herself and the child for testing. He stated that he had petitioned for divorce because despite forgiving the Respondent he feared that she would repeat her acts in a foreign country.

The Respondent in her testimony told the court that the relationship between herself and the Respondent has been unstable. She explained that three months into the marriage the Petitioner had told her that he did not love her anymore, and she was shocked. That she had told him that she would leave as he did not love her anymore, and he had agreed.

The Respondent testified that after a few weeks the families had sat to discuss, and the Petitioner had indicated that he did not mean what he had said to her, and just wanted to see her reaction. Further in her testimony, the Respondent testified that they were reconciled and she went back to Kabwe, and the Petitioner gave her his old phone to use. That the phone still contained the whats up messages he had sent and received, and she found that some were from women.

It was explained that there was one message that the Petitioner had sent to a woman he was trying to sleep with, and she had responded that he should go to the Respondent, and he had replied that he wanted her. That there was another message he had sent to a woman when they were on separation, in which he had told her that he missed her, and she had responded asking whether it was her or the sex that they had that he missed, and he had responded that both.

The Respondent testified that she had confronted him over the messages and he had asked her that they start a new page, and she had agreed. Her evidence as regards the open policy testified about by the Respondent was that it was not a policy. She explained that on one morning one of the women, called Champe who had sent the messages

that she had confronted him about called at 06:00 hours when he was bathing, and she then sent a text message when the Petitioner did not answer the phone call.

That the Respondent had read the message in which the woman was asking the Petitioner how he was feeling, as he had had a headache the previous day. She stated that she had responded stating that she would appreciate it if she did not send messages early in the morning to other people's husbands, and the woman had called her back telling her that if that is how she wanted to keep her marriage, it would not work.

That the woman went on and on until the Respondent cut the line. It was her evidence that when the Petitioner finished bathing and she had explained to him what had happened, he had told her that she had brought it upon herself for answering phone calls not meant for her. She also testified that the Petitioner used to call Friday, Daddy's day out, and when he left home at 06:00 hours on those days, he would return between 04:00 and 06:00 hours the next day. It was explained that one time his uncle who as a student at the same university had visited them on a Friday, and the Petitioner was out late. She told the court that she phoned him around 01:00 hours, but his phone was off.

The at 03:00 hours she had asked his uncle to call him, but again his phone was off. The Petitioner only arrived home at 06:00 hours playing very loud music, and switched on his phone as he came in, and he was in a good mood. She testified that she then packed her bags and left after the Petitioner told her that he was sorry.

Her other evidence with regard to the unreasonable behavior on the Petitioner's part was that he is very insecure, and would always check her phone and ask when she received messages. That when she was out,

the Petitioner would ask to speak with whoever she was, and call on whats up to check who she was with, and that this extended to when she was at work. She explained that one lunch time she was in a meeting with her boss, and did not answer her phone when he called.

With regard to the sexual messages found in her phone, the Respondent's explanation was that she was on separation with the Petitioner and he would show up in the night, citing one incident as when she lived in PHI and he went there in the night and knocked at the bedroom window, and she refused to open. As regards the Ibex Hill incident, she testified that they were in the process of reconciling and the Petitioner showed up unexpectedly, and he tried to touch her but she refused as he was in the habit of spying on her. That they had argued and went their separate ways, and he drafted a letter for divorce but she declined to sign it, after he did.

She went on to state that the Petitioner thereafter got her phone and checked her messages, and he slept in the sitting room. That the next day he drove her to Kafue to her mother, and explained that he had found sexual messages on her phone and had taken her back.

The Respondent also testified that she had left three jobs to be with the Petitioner, stating that she has the responsibility of looking after her grandmother and the girls that look after her. She stated that the Respondent believes in providing everything, and that a family meeting was held over this, but was not resolved. She further testified that when she was out of a job, he only sent K500.00 to her grandmother twice, and when she asked for airtime he would ask who she wanted to call. It was explained that when she went to India, she was six months from her gratuity of K23, 000.00, but the Petitioner told her that it was money

that she should stay for, and that he would look after her grandmother and take her to university.

She stated that she thought that it was a fresh start, and her testimony was that she did tell the Petitioner that she was bored in India but that she did not say this in a way to suggest that she wanted to return to Zambia. She declined having asked to go out whilst there, stating that it was the Petitioner who went out with his friends and returned at 04:00 hours very drunk. That he had then said that she should return home and he would support her whilst here.

With regard to incident of the intimate sexual details that she had confided with the Petitioner's colleague about, she stated that when the Petitioner had returned from the night out with his friends, and he had no erection so she had pushed him away. She stated that he had apologized the next day saying that he had smoked something. That thereafter after a few weeks the Petitioner had again asked her to return to Zambia stating that it was because she was calling her family every day. The Respondent added that he again asked her if she wanted to come home, and threw the ATM card at her saying that she should buy her own ticket. However she refused.

The Respondent prayed that the marriage be dissolved as they had been going round and round in circles.

When cross examined, the Respondent stated marriage entails living together in mutual love and respect. She agreed that marriage is intimate and should be loving and affectionate. The Respondent however disagreed that by the Petitioner buying all the groceries he was loving, stating that it was policing the money.

She denied that the phone call from the lady which resulted in her sending a text message was stray, as the said lady had earlier sent messages to the Petitioner using the same number and her name was in his phone. That the Petitioner had told her that what had happened with Mulenga was none of her business.

It was the Respondent's evidence in cross examination that she did not have a special day, but the Petitioner called Friday, daddy's day out, and that he came at unreasonable times every Friday. Her further evidence was that she packed her bags and left, and that such behaviour was reasonable for a wife if her husband returned home late every night.

She maintained that the Petitioner was insecure and stated that he had exhibited the insecurity even before they married, adding that it worsened after they got married. She however denied that the insecurity was about her, as she explained that when he had come to Lusaka to trash her house, he had during that process received a phone call from someone he called baby saying he had not travelled, and he hoped that there were no boys there. That he had displayed the insecurity by asking to speak with people she said she was with, and showing up at night at unreasonable times when they were separated. She did however agree that even when they were on separation, they were still married.

The Respondent also agreed that the Petitioner found text messages on her phone, and he took her to her mother's house the next day. That the messages were about sex and football, and that the Petitioner was upset about the sex messages. Her view was that there was nothing wrong with her having sex chats with men. While agreeing that on daddy's day put the Petitioner returned home between 04:00 and 06:00 hours, she testified that she did not expect him to do that when his uncle was around. She explained that when she had told the Petitioner that she

was bored when they were in India, she did not think that it was caring for him to say that she needed a break.

She denied not having responded to the Petitioner's messages when she came back to Zambia. Her evidence was also that she knew Edna and she had reported to the Dean and Registrar about her, but as the Registrar knows the Petitioner's family he had asked her if she had reported it to his family, stating that students are adults. She denied that the Petitioner was insecure as he found her in the house with another man.

In re-examination it was stated that the Petitioner had given the Respondent an I phone that had messages that the woman had sent. That they had argued previously over her, but he had told her that she was married with two children. Therefore when she called, the Respondent was sure that it was her.

I have considered the evidence. The petition was brought pursuant to Sections 8 and 9 (b) of the Matrimonial Causes Act, No 20 of 2007. The said sections 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;"

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. In this case each of the parties has petitioned for divorce on the fact that other has behaved in such a way that they cannot reasonably be expected to live with them. The allegations of unreasonable behavior centre mainly on the allegations that each of them has had been involved in sexual relationships with other people since the marriage was contracted.

The Petitioner alleged that whilst the two were on separation the Respondent had an affair with a neighbor in Ibex Hill, and that after having forgiven her they again differed and separated again, and she had an affair with another man whom he found at the house she was living in Woodlands. This resulted in him breaking the windows of the house, and damaging the man's car that was parked outside. That from there the Respondent still engaged in other flirtatious behavior and confided in the petitioner's colleague over sensitive bedroom issues in India after he had forgiven her.

The Respondent in response to those allegations denied that it was her behavior that was unreasonable, stating that three months into the marriage the Petitioner had told her that he did not love and he agreed that she leaves. That she had left the matrimonial and the two were reconciled by the family, and when she went to live him she found messages from a woman whom they had quarreled about, and she also found that the Petitioner was having affair with a student, and she sought the Registrar's and Dean's intervention.

She did not deny having been caught with the sexual messages on her phone or having been found with a man in the night at her home, stating

that they were on separation at the time of these incidences. Her evidence was that the allegation of the Petitioner having had an affair with a student was never resolved as the Registrar knows his family. This is an assertion that he did not deny, and neither did he deny that the woman whom they had discussed and resolved was in the past actually phoned him when the two had reconciled and were living together.

Therefore while the Petitioner alleges that the Respondent has behaved unreasonably by engaging in sexual relationships with men, he was also not faithful to her, as her evidence which was unchallenged is that he began an affair three months into the marriage, and he told her that he did not love her. The Respondent then began her own relationships with men justifying them on the basis that she had them when the parties were separated. It can therefore be said that the Respondent engaged in the behavior following what the Petitioner had done.

The question that therefore arises is whether the Respondent was unreasonable in doing so, and whether the Petitioner has equally behaved unreasonably? Marriage is about love, commitment and faithfulness. Therefore three months into that marriage the Respondent did not expect to be told by her spouse that he did not love her, let alone that so early into the marriage he would be unfaithful to her.

Being early in the marriage, the acts of unfaithfulness engaged in establish that there was no commitment to each other, as correcting a wrong with another wrong did not pay. The Petitioner did not advance any attributes towards the Respondent that can be said to have led him to have had an affair three months into the marriage. He only led evidence with regard to these attributes being displayed after they had separated on account of his having had an affair.

The infidelity by both parties so early in the marriage resulted in lack of trust and respect for the marriage, which is very fundamental to the growth and success of any marriage. There were also allegations made that the Petitioner was controlling as he would buy all the household requirements when the Respondent was not working. In as much as it was argued that this was a sign of his love for the Respondent, it is a matter of common knowledge that the woman is responsible for the running of home, of course together with the husband.

As a primary care giver, the woman or wife is expected to make the house into a home, and in order to do this a reasonable husband would facilitate such by providing the resources needed, especially if the wife has no source of income. To do all the household purchases as a man without the involvement of the wife, is unreasonable as it takes away the spirit of oneness in a marriage, and tantamount to controlling the other spouse.

As for the Respondent, while she may have been separated from the Petitioner at several intervals, the two were still married, and it was therefore expected that she would be behave as a wife even during the periods of separation, no matter that such separation was brought about by unpleasant incidents, such as unfaithfulness.

The parties before me have had a turbulent and relatively short marriage, and that they both appeared unprepared for the responsibilities that come with marriage, and had engaged in destructive behavior. It is therefore my finding that the marriage has broken down irretrievably as the parties have shown inability to resolve their differences, and each has engaged in unacceptable behavior as married people. Each of them cannot reasonably be expected to live with the other, as their behavior as shown that each will do what they want without regard to the institution

of marriage. I accordingly grant a decree nisi for the dissolution of the said marriage which shall become absolute after a period of six weeks.

Issues of property settlement and maintenance are referred to the learned Registrar for determination. Each party shall bear their own costs.

DATED THE 13th DAY OF OCTOBER, 2017

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**