

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

2015/HP/D191

BETWEEN:

CAROLINE BANDA WALKER

AND

SYDNEY CHANDA WALKER



PETITIONER

RESPONDENT

Before the Honourable Justice Mrs. M. C. Kombe

For the Petitioner : *Mrs. K. M. Kabalata – National Legal Aid
Clinic for Women.*

For the Respondent : *In person*

J U D G M E N T

Cases referred to:

1. **Arthur Yoyo v. Mable Mary Bbuku Yoyo 1995/HP/D.64.**
2. **Ash v. Ash (1972) 1 ALL ER 585.**
3. **Mahende v. Mahende (1976) Z.R 293.**
4. **Livingstone-Stallard v. Livingstone Stallard (1974) 2 ALL ER 766.**
5. **O'Neil v. O'Neil (1975) 3 ALL ER 292.**

Legislation referred to:

1. **Matrimonial Cause Act No. 20 of 2007.**
2. **The Marriage Act, Chapter, 50 of the Laws of Zambia.**

3. Bromley's Family Law Eighth Edition (Sweet and Maxwell) London at pages 192 and 195.

4. Principles of Family Law Fifth Edition (Butterworth's) London at page 107.

On 3rd April, 2017 the Petitioner **CAROLINE BANDA WALKER** filed an amended petition for dissolution of marriage pursuant to Section 8 and 9 (1) (b) of the Matrimonial Causes Act No. 20 of 2007.

The petition shows that on 20th day of July, 2005, the Petitioner was lawfully married to **SYDNEY CHANDA WALKER** at the office of the Registrar of Marriages, Lusaka; that immediately after the marriage, the parties resided at House No. 30/11 off Vubu Road Emmasdale, Lusaka and that they last lived together as husband and wife at the aforementioned house.

The petition further shows that there is one child of the family now living by the name of Ansheck Walker, a boy born on 6th September, 2009; that there are two (2) children now living born to the Respondent before the marriage in so far as is known to the Petitioner; that there have been no proceedings in any court in Zambia or outside with reference to the marriage between the parties capable of affecting its validity or subsistence.

The Petitioner therefore alleges that the marriage has broken down irretrievably as the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

The Petitioner outlined the particulars of the unreasonable behavior as follows:

- (i) The Petitioner and the Respondent separated on the 10th day of July, 2013, and they have not cohabited as husband and wife since then.
- (ii) During the period of separation alluded to, the Respondent has engaged in a very close friendship with a female one Pamela Chabinga

and this very proximate friendship is evident from the social media platform known as Facebook and in particular the Facebook page belonging to one Pamela Chabinga.

- (iii) The very proximate friendship that the Respondent and Pamela Chabinga have is so apparent to the extent that Pamela Chabinga updated her Facebook page with pictures which show her and the Respondent engaging in the act of kissing.
- (iv) The said Pamela Chabinga has further updated her Facebook page as being married to the Respondent herein
- (v) The Respondent has neglected the Petitioner and does not make any financial provision towards the Petitioner; the last amount that the Respondent paid to the Petitioner was Three hundred kwacha (K300.00) in June, 2013.
- (vi) The Respondent has on a number of occasions been violent towards the Petitioner and has physically beaten the Petitioner such that the Petitioner suffered a swollen right eye and a painful right side of the face and neck and had to obtain a medical report in that regard dated 11th July, 2013 which is a day after the parties separated.
- (vii) The Respondent's violent behaviour towards the Petitioner caused her severe embarrassment and torture as the beatings would in certain instances occur in the presences of their child Ansheck Walker.
- (viii) The Respondent whilst living with the Petitioner frequently resorted to using abusive and insulting language towards the Petitioner thereby demeaning the Petitioner's self-esteem as a mother and a woman.
- (ix) The Respondent has had and has no regard and respect for the Petitioner's relatives despite the Respondent's mother-in-law exhibiting courtesy to the Respondent by opening the door for him when he would return home late, the Respondent disrespects her and at one occasion the Respondent attempted to beat up the Petitioner's younger brother.

- (x) The Petitioner has brought the matters afore stated to the attention of her mother-in-law (the Respondent's mother) but nothing has been done which can show that the Respondent intends to change his attitude and way of life.
- (xi) The Respondent's behavior therefore is unpredictable and unreliable and he has not displayed any love, affection or even mere concern towards the Petitioner in any avenue whatsoever.
- (xii) The Petitioner cannot reasonably be expected to live with the Respondent as a direct consequence of the circumstances and matters aforementioned.

By reason of the Respondent's behaviour the Petitioner has suffered distress, pain and great emotional suffering.

She therefore prayed that:

- (1) The marriage be dissolved
- (2) There be an Order for custody and maintenance of the child of the Petitioner and the Respondent.
- (3) There be an Order for property settlement.
- (4) Costs be in the cause.

The Respondent filed his **ANSWER** on 30th June, 2017 to the amended petition.

In his answer, the Respondent admitted that the marriage had broken down but however, he denied the reasons given by the Petitioner.

The Respondent's answer to the particulars as outlined in the petition was that:

- (a) That the Respondent has never engaged in any proximate relations with the said Pamela Chabinga as she is just a good friend.

- (b) That the mere fact that the said Pamela Chabinga has changed her Facebook profile is not proof enough that she is married to the Respondent or that she has close proximate relations with the Respondent.
- (c) That the Respondent has been sending money for the upkeep of the child of the family through my brother and the last amount of K300.00 was sent in March, 2017 and not June, 2013 as alleged by the Petitioner.
- (d) That the Respondent has not been violent as alluded to by the Petitioner and only had a quarrel with the Petitioner when she insulted the Respondent and made fun of him that he was unemployed
- (e) The petitioner left the matrimonial home at her free will upon seeing that the respondent was no longer employed.

The Respondent therefore prayed that:

1. The said marriage be dissolved.
2. That the Respondent be granted custody of the child of the family namely Answeck Walker with reasonable access to the Petitioner.
3. That each party bears its own costs.

1. THE PETITIONER'S CASE

At the hearing of the petition, the Petitioner aged forty seven (47) years old of House No. 7797, Buluwe Road Woodlands gave on oath and did not call any witnesses.

She testified that she got married to the Respondent on 20th July, 2005 at the Office of the Registrar of Marriages, at the Lusaka Civic Centre and that they were issued with a Marriage Certificate. She identified the Marriage Certificate which was admitted in evidence and marked P1.

The Petitioner testified that the parties had agreed that the Respondent would be giving the child K300.00 but that he had stopped supporting the child.

She told the court that she decided to petition for dissolution of the marriage because her husband had not shown any change during the subsistence of the marriage. She stated that he was a violent man who would beat her in the presence of her mother and their child; that she would have a swollen face after the beatings.

She also testified that her husband was a jealous man because as a marketer, she would go and attend conferences but he would threaten her that he would beat her together with the people who used to take her home. She stated that on 10th July, 2013, he beat her in the presence of their child and she reported the matter to the police and she was issued with a medical report; that this was what made her leave the matrimonial house because it became too much for her.

She identified the medical report which was at page five (5) of the Petitioner's bundle of documents.

In terms of the Respondent's language, the witness told the court that the Respondent used abusive language and he was fond of insulting her; that he also insulted her late brother and they had a fight. This was in March, 2013 when they had a function at home.

The Petitioner went on to tell the court that there was a lady on Facebook by the name of Pamela Chabinga who had put her husband's picture with a child who was younger than her son. She stated that according to the Facebook page, the two were married as the said Pamela had posted a picture where her husband and Pamela were kissing. She added that her husband had also put on his Facebook page that he had married her.

The Petitioner identified the pictures which she had downloaded from Pamela's Facebook page. The same were at pages 1, 2, 3 and 4 of the Petitioners bundle of documents.

The Petitioner also testified that the Respondent had not shown love and affection to her and the child because he had stopped supporting the child and he had not seen him for four (4) years; that the Respondent never called her to have friendly chats and he last called her three (3) months ago when he told her that he wanted to see the child.

In view of the foregoing, she told the court that she wanted the marriage to be dissolved as she had gone through bad emotions mentally because of the Respondent's behavior. She was of the view that there was no hope that they could resume cohabitation.

In cross examination she told the court that she believed the Respondent had a child with Pamela because she had put a picture of her husband on her Facebook page when she was pregnant.

The Petitioner denied that the Respondent had called her three (3) months ago and that she was not at home. She told the court that the Respondent knew where she lived and that he was free to visit the child.

She maintained her position that the Respondent had not been supporting the child as the last time she received money from him was six (6) months ago

There was no re-examination.

2. RESPONDENT'S CASE

The Respondent aged forty four (44) years of House No. 1212 off Salima Road in Matero, Lusaka also gave evidence on oath and did not call any witnesses.

He told the court that he came to know the Petitioner in 2002 when they worked together at Polythene Products.

He denied that he had not been a loving husband because they stayed together before they got married from 2002 until 2005. From that time, he had been a loving husband and that the Petitioner's friends used to laugh at her that he was just using her and would not marry her.

The Respondent stated that problems started in 2009 when he lost his job and because of this the Petitioner started going home late; that in 2011, the Petitioner's brother told him that if he did not find a job, his wife was going to leave him.

He testified that after a year his wife decided to leave the matrimonial home. He followed her on three (3) occasions but she refused to go back home. That's how it had been and later he learned that she wanted a divorce.

The Respondent denied the allegations made by the Petitioner that he was in a relationship and had a child with Pamela Chabinga.

He told the court that Pamela was just a mere friend and the child that she had was not his child. He also denied that he used abusive language as her mother told the Petitioner that she should not worry because he was going to find a job.

In relation to the medical report, he told the court that the two had quarreled on the material day. However the Respondent denied ever assaulting the Petitioner because the police never summoned him to go to the police station.

He further told the court that he still wanted his wife back because he was now working as the main reason why she left was because he was not working. He

added that they had been together from 2002 to 2013 and that if they used to fight, they would not have lived together for that long.

He also told the court that the Petitioner was the one who had behaved unreasonably as she used to go home late and used to tease him that he had no job. He stated that he wanted the court to dissolve the marriage.

In cross examination he testified that he still wanted his wife back as he was now ready to live with her again; that he only stated that the marriage should be dissolved because that is what the Petitioner wanted; that it had never been his wish that the marriage should end. However, he admitted that he had not been in touch with her or sent her any message in the past years.

He also admitted that he had not alleged any unreasonable behaviour on the part of the Petitioner in his ANSWER, and therefore he had not adduced any evidence in that regard.

When asked about Pamela Chabinga, the Respondent told the court that he only became aware of what she had posted on Facebook when he saw the pictures that the Petitioner had produced before court. He denied that he was still intimate with her but admitted that he had kissed her because she was his friend; that the relationship he had with her was different from the relationship he had with the other female friends.

The Respondent also admitted that he had never tried to correct the image of what the pictures posted on Pamela's Facebook page had portrayed and also that the picture at page 3 of the Petitioner's bundle of documents created an impression that they were in an intimate relationship. He also admitted that a rightful thinking woman would not be happy to see her husband kissing a woman. He stated that it would not be right to base the petition for the dissolution of the marriage on the picture because he had never been unfaithful as he had never slept out ever since he married the Petitioner.

The Respondent also told the court that he didn't know if the contents of the medical report produced by the Petitioner were correct because what he knew was that he quarreled with his wife on 11th July, 2013 and not 10th July, 2013 as alleged by the Petitioner. He also admitted that he had not sent any birthday wishes to his wife during the period that they had been on separation; that this was an indication that they had both lost interest in each other and therefore he had no interest in living with her.

That was the close of the Respondent's case.

3. THE LAW

The Petitioner filed an amended petition for the dissolution of marriage. The sole ground on which a marriage can be dissolved is set out in Section 8 of the Matrimonial Causes Act No. 20 of 2007. The said section reads as follows:

'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.'

The Petitioner has presented this Petition on the basis that her marriage to the Respondent has broken down irretrievably. On the issue of proof of the breakdown of marriage, the Petitioner relies on Section 9(1) (b) of the Matrimonial Causes Act which provides as follows:

"For the purpose 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."

I have given consideration to the contents of the petition, the answer and the facts disclosed therein and to the testimony given by the parties.

The Petitioner alleges that the marriage has broken down irretrievably due to the fact that the Respondent has behaved in such a way that she cannot reasonably be expected to live with the Respondent. The Respondent has admitted that the marriage has broken down irretrievably but denies that the breakdown is as a result of his behaviour.

In the case of **Arthur Yoyo v. Mable Mary Bbuku Yoyo** ⁽¹⁾, the Court observed that:

'In cases where the divorce petition is based on a contentious fact like unreasonable behavior, each party portrays himself as the angel and the other as the devil.'

However, the test applicable in determining whether a party would find it unreasonable to live with the other party was spelled out by Bagnall J in the case of **Ash v. Ash** ⁽²⁾ that:

'I have to consider not only the behaviour of the respondent ...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 or bad and having regard to his or her behaviour during marriage, reasonably be expected to live with the respondent?'

This was the approach adopted by the Supreme Court in the case of **Mahende v. Mahende** ⁽³⁾ when it held that:

'The phrase "cannot reasonably be expected to live with the respondent" necessarily poses an objective test and "the petitioner" means the particular petitioner in the case under consideration,

bearing in mind the petitioner's faults and other attributes, good and bad, and having regard to her behaviour during the marriage.'

Further, it was observed in the above case that the court must consider:

'The effect of the behaviour on the particular petitioner and ask the question: is it established, not that she is tired of the respondent or, colloquially, fed up with him, but, that she cannot reasonably be expected to live with him?'

Therefore in dealing with the fact of the Respondent's behavior, I ask myself the question asked by Dunn J in the case of *Livingstone-Stallard v. Livingstone Stallard*⁽⁴⁾ and adopted by the Court of Appeal in the case of *O'Neil v. O'Neil*⁽⁵⁾ that and which is echoed in the above cited cases that;

'Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties? (Underline mine)

Further, the Learned Authors of Bromley's Family Law 8th Edition stated that:

'The court must...assess the impact of the respondent's conduct on the particular petitioner in the light of the whole history of the marriage and their relationship.'

It is on the basis of the authorities cited above that I approach the evidence in this case.

4. FINDINGS

The Petitioner has adduced evidence to support the allegations of unreasonable behaviour as contained in paragraphs (i) to (xii) of the petition.

The Petitioner alleged in her petition that the Respondent has engaged in very close friendship with a female called Pamela Chabinga and that this very proximate friendship is evident from the social media platform known as Facebook.

To substantiate this allegation, the Petitioner told the court that Pamela Chabinga has posted pictures of her husband on her Facebook page and that she has indicated that the two her married. She produced pictures in her bundle of documents to show that they have been intimate.

The Respondent on the other hand denied that he was in any intimate relationship with Pamela as she was just his friend. However, he admitted that he has kissed her and that he has never tried to correct the image portrayed by the pictures posted on Pamela's Facebook page.

The Petitioner also alleged that the Respondent has neglected her and does not make any financial provision towards her. In her evidence, she told the court that they had agreed that he should be giving her K300.00 for maintenance of the child but he has stopped supporting the child.

The Respondent denied this allegation and indicated in his Answer that his brother used to send K300.00 for the child's upkeep and the last amount was sent in March, 2017 and not June 2013 as alleged.

On the allegation that the Respondent was a violent man and that he had assaulted her on 10th July, 2013, the Petitioner produced a medical report. This report shows that at the time she was being examined by the medical doctor, her right eye was affected and that she was bleeding from the nose. She also stated that the Respondent was in the habit of using insulting and abusive language in the presence of her mother and the child.

The Respondent admitted that the two had a quarrel but he denied having assaulted her and being an abusive man.

I have given careful consideration to the evidence adduced in support of the allegations. Although the Respondent has denied the allegations that he has had a very close friendship with Pamela Chabinga and I do not accept his evidence that they are just mere friends as there is pictorial evidence which was produced by the Petitioner to show that the two are intimate.

In actual fact, the Respondent admitted in cross examination and that he has not attempted to correct the impression that these pictures have created that he has been intimate with a female called Pamela Chabinga. In my view, this evidence is proof that the two are not just mere friends as he contends but that he is in a close relationship with Pamela Chabinga.

I therefore do not accept his evidence that he has not been unfaithful to the Petitioner because he has never slept out from the time they got married. I say so because cheating in any relationship does not only mean sleeping out.

In this regard, I have no difficulties in accepting the Petitioner's evidence and I find that this allegation has been proved that during the time the Petitioner and the Respondent were on separation, the Respondent has had a very close relationship with a female called Pamela Chabinga.

On the allegation that he has been violent and used abusive language, there is evidence to show that the Respondent has been violent as the Petitioner produced a medical report to show that he assaulted her on 10th July, 2013. It is because of this incident that is why the Petitioner left the matrimonial home.

Furthermore, the Respondent made a bare denial that he has been using abusive and insulting language. I am therefore inclined to accept the evidence of the Petitioner because I intently paid attention to the evidence of the

Petitioner and examined her demeanour in order to determine her credibility. From my assessment, the Petitioner did not strike me as a person who had fabricated a story that the Respondent had resorted to using abusive and insulting language. Furthermore, her evidence was not challenged in cross examination.

In this regard, I find that the Petitioner has proved the allegation that the Respondent has been violent towards her and that he has physically beaten her. I further find that the Respondent has used abusive and insulting language towards the Petitioner.

Regarding the allegation that the Respondent has not made any financial provision towards her and the child, the Respondent's contention is that his brother has been sending K300.00 for the child's upkeep and that the last time money was sent was in March 2017 and not June 2013 as alleged by the Petitioner. The Petitioner did not challenge this evidence.

I am of the considered view that if the Respondent was not supporting the Petitioner financially, she would have applied for maintenance pending suit. That would have been credible evidence to support her allegation that the Respondent has not been supporting her and the child. I therefore find that this allegation that has not been substantially proved.

Having made the above findings of the Respondent's behaviour, I have to consider the effect of this behaviour on the Petitioner because as was stated by the learned authors of the Principles of Family Law Fifth (5th) Edition at page 107, it is not the behaviour that needs to be unreasonable but the expectation of cohabitation.

In doing so, I will in effect, determine in line with the ***Livingstone-Stallard case*** if the Respondent's behaviour is sufficiently grave to fulfill the test namely: whether any right thinking person can come to the conclusion that

this husband has behaved in such a way that 'this' wife cannot reasonably be expected to live with him taking into account the whole of the circumstances, characters and personalities of the parties.

The Petitioner indicated in her petition that by reason of the Respondent's behaviour, she has suffered distress, pain and great emotional suffering. She repeated this in her evidence when she told the court that the behaviour attributed to the Respondent has had a negative effect on their relationship as she has been affected emotionally because of what she has gone through. She added that the Respondent has not shown love and affection towards her and the child and this has affected her.

In my view, the effect that the Respondent's behaviour has had on the Petitioner shows that the marriage has stopped to be the loving union it is supposed to be. That is why the Petitioner contends that she cannot reasonably be expected to live with the Respondent. In the case of **Yuyo v. Yuyo** which I have already alluded to, the Supreme Court stated that in order to refuse to grant a decree of dissolution of marriage, there must be evidence of mutual love between the parties.

However, in the present case, it is evident that the Respondent has another female friend and he is violent towards the Petitioner. Therefore, even though the Respondent told the court that he still wants his wife back because he has now started working, I do not consider this request to be honest because of the behaviour he has displayed openly to the general public that he is in a relationship with another woman Pamela Chabinga.

If the Respondent was sincere and truthful, he would have made efforts to correct the impression that has been created by Pamela that the two are in an intimate relationship. However, what the pictures produced in court prove is that the Respondent is unfaithful.

I should hasten to mention that trust is the foundation of any relationship and it's significantly more sacred in a marriage. Therefore being unfaithful to one's spouse betrays this fundamental element of a relationship. This explains why the Petitioner has experienced distress, pain and emotional suffering as a result of the Respondent's behaviour. Hence, I do not believe that if the two resumed cohabitation, the Petitioner will be able to overcome the distrust with Pamela Chabinga standing in the wings.

Furthermore, I have made a finding that the Respondent is a violent and abusive man. Violence has no place in any healthy relationship and it can never be justified because once it escalates overtime, it increases the risk of injury or even death. In this country, there are so many reported and unreported cases of spouses who have died as a result of domestic violence. This is an affront to civilized society as a whole.

In view of the foregoing, I find that the evidence adduced by the Petitioner of the Respondent's behaviour is sufficiently grave to fulfill the test that any right thinking person can come to the conclusion that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

Furthermore, I am satisfied that there is no likelihood of resumption of cohabitation or reconciliation as the Respondent has admitted that the parties are no longer interested in each other.

On the totality of the evidence adduced, I find that the Petitioner has proved her case. I hold that the marriage contracted under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **CAROLINE BANDA WALKER** and **SYDNEY CHANDA WALKER** on 20th July, 2005 at the office of the Registrar of Marriages in the Lusaka District of the Lusaka Province of the

Republic of Zambia has broken down irretrievably in terms of Section 9(1) (b) of the Matrimonial Causes Act, No. 20 of 2007.

I accordingly decree that the said marriage be dissolved and a decree nisi is hereby granted dissolving the marriage. The said decree is to be made absolute within six (6) weeks of the date hereof unless sufficient cause is shown to the Court why it should not be so made.

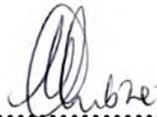
I order that either party is at liberty to file a formal application before the learned Deputy Registrar for the determination of the issue of maintenance or property settlement.

The issue of custody of the child of the family shall be heard before this court upon filing of a formal application by either party.

Each party to bear their own costs.

Leave to appeal is granted.

Delivered at Lusaka this 28th day of September, 2017.



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M.C. KOMBE
JUDGE