

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

2017/HP/D0075

PRECIOUS NGWENYA MUNKASU

PETITIONER

AND

ATKIN NCHIMUNYA MUNKASU

RESPONDENT



**Before the Hon. Mr. Justice M.L. ZULU
in Chambers on the 11th day of July, 2017**

For the Petitioner:

*Mrs. S.E. KAMPATA – National Legal Aid
Clinic for Women*

For the Respondent:

Ms. K.CHULU – Legal Aid Board

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:

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 24th December, 2001 at Seventh Adventist, Libala Congregation at the Lusaka. The parties are both domiciled in Zambia and last cohabited at Plot No. F1320/4/2250, Kamwena, Lusaka. The Petitioner is a Dental Assistant at....., Lusaka. The Respondent is a Human Resource Trainer at Sanlam. The parties have continued to reside at the above address.

The couple have One child of the family namely Chimuka Adrian Munkasu Hankambi, a boy born on 8th November, 2003. There are no other children born to the Respondent during the subsistence of the marriage.

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.

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 has on several occasions exhibited adulterous behaviour; does not financially support the Petitioner and the Child of the family; has been denying the Petitioner of her Conjugal rights to an extent that he would only submit sexually only once or twice in a year; that the couple have been sleeping in separate bedrooms; they have not been communicating as reasonably expected of a married couple; and that the Petitioner has now lost love for the Respondent.

The Petitioner prayed that the marriage be dissolved; that she be granted custody of the Child; that there be property settlement; and costs be in the cause.

In his Answer and Cross Petition, the Respondent admits that the marriage has broken down irretrievably but denies that the reasons given by the Petitioner and instead alleges that since 2013 the Petitioner has denied him his conjugal rights, because she had stomach complications and was taking medication and did not want the Respondents dirt on her. The Respondent also alleges that in 2016 the Petitioner, of her own volition left the matrimonial bedroom and has refused to return to this date.

The Respondent in his cross Petition also states that the Petitioner embarked on numerous trips to Livingstone alleging they were business trips and would switch off her phone or not pick his calls thereby remaining unable to know her whereabouts and communicate. The Cross Petition claims on one such trip the Petitioner returned home with a new phone with number belonging to a man called Royd. The Cross Petition further alleges that the Petitioner on several occasions lied about her whereabouts citing an example she said was in Kapiri Mposhi but was spotted at a different place in the middle of the night in the company of Royd.

The Respondent in his Cross Petition further alleges that in March, 2017 the Petitioner following an argument removed the Respondents beddings from his bed forcing him to purchase new ones.

Its further alleged in the Cross Petition that the Petitioner has stopped cooking, washing and performing her duties as a wife forcing him to wash his own clothes.

The Respondent states in his Cross Petition that the couple go for work separately and do not speak or communicate with each other at all and prayed that the Petitioner's prayer be rejected but that the marriage be dissolved.

The Respondent seeks to be granted the sole custody of the child of the family Chimuka Adrian Munkasu with reasonable access to the Petitioner.

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 since 24th December, 2001. She largely repeated what is contained in her Petition but added that the Respondent threatened violence in front of child and on one occasion almost struggled her. It was her further evidence that the Respondent failed to support the family with the basic needs including food.

In cross examination, she testified that she had no proof of the Respondents alleged adultery or the names of people he committed adultery with.

That was the evidence in support of the Petition.

The Respondent also gave oral evidence and called no witness. His testimony in addition to what is contained in his Answer and Cross Petition was that he never committed adultery as alleged by the Petitioner. He testified that it was not true that he did not provide for his family. He explained that after the Petitioner bought that plot the couple agreed that he would obtain loans to build their home and that his wife would be responsible for the food in the house. He added that he's been paying the

school fees for the Child of the family and been responsible for the transport to and from school.

Under cross examination, the Respondent testified that he had no proof that he paid school fees for the Child of the family or that they agreed that he would use his money on construction.

Under further cross examination, the Respondent testified that he did not give the Petitioner reason to believe he was cheating on her.

That was the Respondent's evidence.

I have considered the Petition, Answer, Cross Petition and the evidence adduced by both parties. 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.*

This 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 has on several occasions exhibited adulterous behaviour during the subsistence of the marriage. Further that the Respondent has not been financially supporting the family and denied the Petitioner her conjugal rights. There is also evidence that the parties have been sleeping in separate rooms and don't communicate at all. It is clear to conclude that the Petitioner's intention by leaving the matrimonial bedroom was to avoid the Respondent consequently denied him an opportunity to enjoy his conjugal rights.

The Respondent denies that he has committed adultery and that he has not supported the family and denied the Petitioner her conjugal rights. Instead, the Respondent accepts that the marriage has broken down irretrievably, and makes counter allegations that in fact, it is the Petitioner that on her own volition moved out of the matrimonial bedroom and denied him sex for the past three years on account that she had stomach complications and was on medication.

From the evidence and testimony of the parties I find that the couple are not behaving as though they are married. The love for each other expected of a couple in a matrimonial setting is clearly absent. The parties are living separate lives and the only thing in common is that they are sharing a house. Both parties clearly pointed that they wanted the marriage dissolved.

The question is whether the Petitioner can Condon 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 and stated that he no longer loves the Petitioner. Further, the Respondent has failed to show proof of the support to the family. The same applies to the Petitioner who has behaved in the manner not expected of a wife by denying the Respondent his conjugal rights citing a medical condition. The current scenario points to a situation where none of the parties' desire to reconcile their differences which may result in dire consequences if the parties continue to live together.

It is evident that the Petitioners' behaviour of leaving the matrimonial bedroom and refusing to perform her duties expected of a wife takes away the essence of marriage.

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

The parties have all applied for custody of the Child of the family but looking at the circumstances and nature of this case, I order that a separate hearing at the instance of either party be held. In the interim the Petitioner will have custody of **Chimuka Adrian Munkasu** until final determination.

Maintenance and Property adjustment shall be dealt with by the Learned Registrar of the High Court.

Each party shall bear their own costs.

Leave to appeal is granted.

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



M.L. ZULU
HIGH COURT JUDGE