

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

2016/HP/D352

BETWEEN:

DORCAS NGULUBE CHISENGA

PETITIONER

AND

07 JUL 2017

EMMANUEL CHISENGA

RESPONDENT

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Petitioner : Ms. Hawa Musonda of Legal Aid Board

For the Respondent : In Person

JUDGMENT

Cases Referred to:

- 1. Reneville v Reneville (1948) ALL ER at 60*

Legislation Referred to:

- 1. Matrimonial Causes Act No. 20 of 2017*

This is a contested petition for divorce which was filed into Court on pursuant to *Section 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007.*

The petitioner, **Dorcas Ngulube Chisenga's** prayer was that her marriage to the respondent, **Emmanuel Chisenga** be dissolved on

account that the said marriage had broken down irretrievably. The petitioner contended that the respondent had behaved in such a way that she could not be reasonably expected to live with him.

The particulars of the said unreasonable behaviour were stipulated as follows:-

- i. The respondent had lost affection and respect for the Petitioner ever since she disclosed to the Respondent that the Petitioner was pregnant for another man three weeks after their wedding day.
- ii. This manifested by the Respondent's habit of demanding that the Petitioner disclose names of any man who proposed love to the Petitioner whenever the Petitioner went to buy groceries.
- iii. The Respondent promised the Petitioner that the Respondent was going to take care of the pregnancy and the Child when it was born. However after a month the Respondent changed his mind and started threatening the Petitioner that he would kill the baby when it was born.
- iv. On several occasions the Respondent demanded that the Petitioner should be moving around naked whenever home.
- v. The Respondent's bad behaviour was unrelenting which compelled the Petitioner to seek the intervention of family elders to counsel the Respondent in order to resolve the disputes between them, which counsel was in vain.

- vi. After the family members failed to resolve the problems, on 13th January, 2016 at 22:10hours the Respondent took the Petitioner to her elder sister's house and wrote on a piece of paper that he would petition for divorce.
- vii. After delivering the baby, the Respondent told the Petitioner that she could return to her matrimonial house on condition that she moved naked and reported any man who proposed love to her which led to her not returning to her matrimonial home.
- viii. The Respondent had been threatening the Petitioner that if he ever found her with another man he would kill her.
- ix. The Respondent was demanding back his dowry of K7,000 which he paid for marrying the Petitioner and the Respondent had refused to divorce the Petitioner until the said dowry was paid back.
- x. The Petitioner on 31st October, 2016 reported the Respondent to the Police at the Victim support Unit regarding his threats.

The petition showed that the parties were lawfully married at Shechem Baptism Church in Lusaka on 12th September, 2015 and they last co-habited at Matero East, in Lusaka. There was one child of the Petitioner now living aged seven months old at the time of the petition. It also revealed that there was no child now living who was born to the Respondent during the same marriage as far as was known to the Petitioner. The petition revealed that there had been no previous proceedings in Court in Zambia or elsewhere with

reference to the said marriage or to any child of the Petitioner and Respondent. That there were no proceedings continuing in any country outside Zambia which was in respect of the marriage or were capable of affecting its validity or subsistence. The petition also revealed that no agreement or arrangement had been made regarding the maintenance of the Petitioner and the child of the Petitioner.

The Petitioner further prayed that there should be an order for property settlement.

The Respondent filed an answer and cross petition where he also prayed for the dissolution of the marriage and denying that the said marriage had broken down irretrievably.

The Respondent in his answer and cross petition asserted that the Petitioner's Child did not bear the name Chisenga as that was his name and he was not the father of the said child. He further asserted that the Petitioner had behaved in such a way that she could not be reasonably expected to live with him.

He strongly contended that The Petitioner committed adultery with the father of the Petitioner's child and that the marriage should be dissolved on account of the Petitioner's adultery which she admitted in her petition. The Respondent denied ever asking the Petitioner to disclose all the men that proposed love to her as the Petitioner had already confessed to the Respondent that she was already pregnant for another man.

He stated that he admitted to taking responsibility for the pregnancy because it would be a big embarrassment to the parties and both families to divorce immediately after the wedding due to the infidelity of the Petitioner. He also denied ever asking the Petitioner to move around naked in the house.

He denied taking her to her sister's house but that when he returned from work on the day in question, he found the Petitioner on the veranda, months after she started staying with her boyfriend and she was the one who demanded to be taken her to her sister's place.

The Respondent denied taking gifts for the baby to the Petitioner after her baby was born because he was hurt by her adulterous behaviour. He however admitted to having allowed the Petitioner to return to her matrimonial house while she was still pregnant despite knowing that he was not the father of the child but denied giving her conditions for her return.

He stated that the Petitioner was currently living with the father of her child and denied the allegations that he threatened to kill the man. He further stated that the Respondent demanded his dowry back as he never had conjugal rights with the Petitioner as she always refused cutting that she could have complications giving birth since that was not his child.

The Respondent additionally prayed for an order that the K7, 000 dowry paid to the Petitioner's family be paid back to him. That there

be property settlement including the plot which the Respondent purchased. The Respondent also prays for K20, 000 damages for the money wasted during the wedding because the Petitioner did not disclose before the wedding that she was pregnant.

The matter came up for hearing on 19th June, 2017 and both parties gave evidence before Court.

The petitioner in her evidence told the Court that the two of them lived as man and wife after their marriage but she did not have any children with the Respondent during the subsistence of the marriage. She stated that she, however, had a child during the subsistence of the marriage, namely, Tasheni Chisenga born on 1st May, 2016.

The Petitioner stated that the marriage to the Respondent had broken down irretrievably on account of the Respondent's unreasonable behaviour after she disclosed that she was pregnant with someone else's child. She testified that the Respondent threatened to kill the unborn child. She also told the Court that he gave her instructions that if she was to live with him, she should disclose the names of the men who would be proposing love to her and that he demanded that she moves around naked around the house. According to her he further demanded to answer phone calls on her phone and it was for that reason that she requested the Court to dissolve the marriage.

During cross examination the Petitioner disclosed that the father of her child's name was Derrick Mwanza but she was using Chisenga because the Respondent accepted responsibility of the child. According to her while she was going for antenatal, she asked him if she could use his name and he agreed.

She also revealed that after the marriage she told him that she was having her menstrual cycle and later confessed that she was pregnant. She stated that after she disclosed that the child did not belong to the Respondent, he said he would be doing everything for the child. She insisted that the Respondent instructed her to be moving around naked in the house and further added that it was not always that the Respondent was away from home. She maintained that the Respondent threatened to kill her and her child before the child was born. She revealed that she discovered that she was seven weeks pregnant a week before the wedding and everything was in place and she was scared that she would cause damage to both the families if she disclosed. She stated that she did not intend for the Respondent to waste money but allowed the wedding to happen because of her love for him.

In re-examination the Petitioner stated that she had stayed in marriage for five months and stated that they used to have sexual relations.

The Respondent in his evidence in chief testified that when he approached the Petitioner's family for her hand in marriage he was

informed that she was a virgin. According to him, as a requirement at the church where they wed, the woman had to undergo a pregnancy test. He stated that the Petitioner submitted a child's urine as a specimen and the results showed that she was not pregnant.

He explained that when she was taken to his house on the wedding night, she was said to have been on her menstrual cycle and as such could not sleep with the Respondent. He further explained that when they went to their matrimonial house, the Petitioner used to sleep on in the living room to avoid contact with the Respondent. He said she continued like this for 10 days. According to the Respondent, the Petitioner started insulting him when he insisted she goes to the hospital. On the 10th day he found that the Petitioner had left home with her luggage. He started searching for her until midnight when she told him she was with her husband who impregnated her.

He stated that after pleading with her to come and discuss the matter and the Petitioner went to meet with him the following day. She explained that two weeks prior to the wedding she had gone to a bachelor's party where she met a man. She was so drunk that she could not recall the man who impregnated her.

He stated that because he had not even finished paying for their wedding, he decided that the two should stay together to avoid

embarrassment. She then revealed that in fact she spent the night at the same man's house. She told him that they could not meet sexually due to a myth that if she slept with another man while carrying someone else's child, she would die during child birth.

It was his testimony that they failed to resolve the matter and the Petitioner subsequently ran away.

The Petitioner is said to have told her father that she did not love the Respondent but merely wanted a wedding. She was later taken to Emmasdale Police where she was instructed to go with the Respondent.

The Respondent stated that during the night the Petitioner came with two knives trying to kill him. She then left home and never came back until January 2016 when she followed him at his new residence. The Petitioner requested that the Respondent takes her back where he took her from. He then booked a taxi and she was taken to her parents. According to him the marriage had broken down irretrievably. He asked the Court for a refund of the dowry of K7, 000 and to be compensated for the money he spent at the wedding.

During cross examination the Respondent denied ever having sex with the petitioner because she told him she was on her menstrual

cycle and later found that she was pregnant. He also denied forcing himself on her.

He explained that the Petitioner told him that she wanted to go to the man who impregnated her. He however did not know nor had he met this man. He disclosed that he when she left home he made inquiries from the Petitioner's sister as to her whereabouts and her sister informed him that she would look for her but after four months nothing happened.

He explained that when he took the Petitioner to her sister's place in January, 2016, the Petitioner's sister demanded that he go back with his wife which he refused. That's when he signed a document stating that he was not getting the Petitioner because he had refused her.

I have carefully considered the evidence before me and it must be pointed out from the outset that this divorce petition is based on a contentious fact of unreasonable behaviour on the part of the Respondent and adultery on the party of the Petitioner. Each party in this case led evidence to show the other as the erring party.

Having said this, it is now critical for me to take into consideration the key issues raised at trial and in the petition, answer and cross petition. I will begin with the Respondent's claim that he did not have sexual relations with the Petitioner during the subsistence of

the marriage. He strongly contended that the Petitioner refused to sleep with him on account of, firstly, being on her menstrual cycle after the wedding and subsequently due to the fear that she could die during child birth if she had sexual intercourse with another man while pregnant for another. This fact if proven is a ground for nullity of this marriage because it is being asserted that the marriage was a voidable marriage by virtue of failing to consummate the marriage.

According to Greenin the case of ***Reneville v Reneville (1948)*** ALL ER at 60:

“A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction”

Section 29 of the Matrimonial Causes Act No. 20 of 2007 provides the grounds on which a marriage shall be voidable. The said section provides that:

29. A marriage which is celebrated after the commencement of this Act, not being a marriage that is void, shall be voidable on the grounds that-

(a) the marriage has not been consummated due to the incapacity of either party to consummate it;

(b) the marriage has not been consummated due to the willful refusal of the respondent to consummate it;

In the present case, the Respondent claims he did not have sexual relation with the Petitioner while the Petitioner claims that they used to have sex. The evidence of this issue by either party has not been supported by any evidence other than each party's own word and it would be difficult to assume that sexual intercourse actually happened or it did not happen. On that account only, a decree for nullity would fail.

Having said this, the same section 29 gives other grounds that may lead to a marriage being voidable apart from non-consummation. It states that:

29. A marriage which is celebrated after the commencement of this Act, not being a marriage that is void, shall be voidable on the grounds that-

(c) either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(d) at the time of the marriage either party, though capable of giving a valid consent, was suffering, whether continuously or intermittently, from a mental disorder within the meaning of the Mental Disorders Act of such a kind or to such an extent as to be unfitted for marriage;

(e) at the time of the marriage the respondent was suffering from a sexually transmitted disease in a communicable form; or

(f) at the time of the marriage the respondent was pregnant by someone other than the petitioner. (Emphasis mine)

It is not in dispute that the Petitioner in this matter was pregnant with another man's child at the time she married the Respondent. Therefore, while there is insufficient evidence to support the assertion that there was refusal to consummate the marriage, this case still falls under a voidable marriage by virtue of section 29(f) of the Matrimonial causes Act.

Section 30 of the same Act gives instances where the Court will not grant a decree for nullity. Subsections 2 and 3 of that section in particular provide as follows:

(2) Notwithstanding subsection (1), the Court shall not grant a decree of nullity under section twenty-nine on the grounds specified in paragraphs (c), (d), (e) or (f) of that section unless it is satisfied that proceedings were instituted within three years from the date of the marriage.

(3) Notwithstanding subsection (1) and (2), the Court shall not grant a decree of nullity under section twenty-nine on

the grounds specified in paragraph (e) or (f) of that section unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

As a starting point, I wish to point out that this Petition, though was not a petition for nullity, has been filed within the stipulated time frame of 3 years prescribed by law. The parties were married on 12th September, 2015 and the action was commenced on the 15th December, 2016. I am satisfied that the proceedings were instituted within the time prescribed.

I will now move to whether this Court is satisfied that the respondent was ignorant of the facts alleged. Section 30(2) is very clear that a decree for nullity should not be granted unless the Court is satisfied that the Petitioner was completely ignorant of the facts alleged. In the present case there is a petition for divorce before me. However, the circumstances under which this petition is brought raise serious issues that could render this marriage a nullity.

The evidence before me is very clear. It is undisputed based on the Petitioner's own admission that the Petitioner in this case concealed her pregnancy from the Respondent until after the marriage had taken place. This issue once discovered has been the main source of conflict in this marriage as the Respondent did not accept the child that the Petitioner was carrying.

Having therefore considered the totality of the evidence before me, I am satisfied that the Respondent was not aware of the Petitioner's pregnancy when they got married.

I am accordingly satisfied that the marriage solemnized on the 12th of September, 2015 at Shechem Baptism Church in Lusaka under the provisions of the Marriage Act between **Dorcas Ngulube Chisenga** and **Emmanuel Chisengais** voidable in terms of **Section 29(f) of the Matrimonial Causes Act, Number 20 of 2007 of the Laws of Zambia.**

I accordingly decree that the said marriage be annulled and a decree of nullity is hereby granted annulling the said marriage.

With regard to the Respondents claim for the refund of the dowry in the sum of K7, 000 and compensation for money spent on the wedding in the sum of K20, 000, I must state from the onset that the Court has no jurisdiction to grant the relief sought in relation to the dowry refund as that is a matter under customary law which can ably be dealt with by the local Courts.

With regard to the damages sought by the Respondent, firstly, this Court cannot grant the relief sought of compensation for the cost incurred by the respondent during the wedding. The only relief for damages available at dissolution of a marriage is under section 11 of the Matrimonial Causes Act. This section is very clear that

damages can only be awarded where there has been established adultery and the said damages are to be paid by the person who committed adultery with the party to the marriage. In the current circumstances, there has been no evidence led by the Respondent as to the adultery committed by the Petitioner nor has any person been cited for such adultery. In view of this the relief sought cannot be granted.

I order that the Petitioner bears the costs of this action.

Leave to appeal is granted.

Delivered under my hand and seal this 7th day of July, 2017

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

**Mwila Chitabo, SC
Judge**