

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

**2017/HPF/D212**

BETWEEN:

**MANKOMBA EMELDA**

AND

**JOB PHIRI**



**PETITIONER**

**RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 20<sup>th</sup> DAY OF  
FEBRUARY, 2018**

*For the Petitioner : Ms Jean Lumamba Mckees, Legal Aid Counsel, Legal  
Aid Board*

*For the Respondent : in person*

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## **J U D G M E N T**

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LEGISLATION REFERRED TO:

**1. The Matrimonial Causes Act No 20 of 2007**

This petition for the dissolution of marriage was filed on 24<sup>th</sup> August, 2017, pursuant to Sections 8 and 9 (1) (b) and (d) of the Matrimonial Causes Act, No 20 of 2007.

The petition states that the Petitioner, Emelda Mankomba, was lawfully married to the Respondent, Job Phiri at the Lusaka Civic Centre on 20<sup>th</sup> July, 2001. That the parties who are both domiciled in Zambia lived as husband and wife at house number H16, Lilayi Paramilitary Camp. The petition further

states that the Petitioner is a teacher at Parklands Secondary School, and resides at Plot 564/24, Flat 3 Kabanana Compound in Lusaka, and that the Respondent is a taxi driver, and resides in Chilenje Compound.

That there are four children of the family now living, namely, Kimwesho Phiri born in 2002, aged 14 years and is in grade 9 at Kabulonga Boys Secondary School, Lusekelo Phiri born in 2008 and she is in grade 5 at Nyumba Yanga Primary School, Chipso Phiri born in 2010 and she is in grade 3 at Nyunga Yanga Primary School, and Chilelo Phiri, born in 2013 and she is in pre-grade at Mount Sinai School.

The petition states that there have been no proceedings in any court in Zambia or elsewhere with respect to the marriage or the property of either of the parties, and there are no proceedings continuing in any court outside that are capable of affecting the validity of the marriage. It is stated that the marriage has broken down irretrievably as the parties have lived apart for a continuous period of two years immediately preceding the presentation of the petition, and the Respondent consents to divorce being granted.

Further that the Respondent moved out of the matrimonial home without giving any reasons, and that during the subsistence of the marriage, he was verbally abusive towards the Petitioner, and insulted her on different occasions, and spoke ill of her. That the Respondent was also physically abusive towards the Petitioner, and was so violent on one occasion that he beat her up badly. The Petitioner prays that the marriage be dissolved, and she be granted custody of the children of the family. Further that each party bears their own costs of the proceedings.

The Respondent did not file an answer but completed the acknowledgement of service, and signed the consent to dissolve the marriage. At the trial both parties testified, and did not call any witnesses.

The Petitioner in her testimony repeated the contents of her petition and added that the first child Kimwesho Phiri a boy was born on 27<sup>th</sup> September, 2002 and is currently in grade 10 at Chikankata Secondary School. She also testified that the second born child Lusekelo a girl born in 2008, is a pupil at Bayuni Secondary School, while the third born child Chipu, a girl born in 2010 is at Bayuni Secondary School, and the fourth born child Chileleko is in grade 1 at St Monicas Primary School.

That the marriage has broken down irretrievably as the parties have lived apart for a continuous period of two years, immediately preceding the presentation of the petition, and the Respondent consents to divorce being granted. Further that he had signed the consent to divorce to that effect. She also testified that the two had failed to relate in a good manner, and would quarrel always, and that the Respondent moved out of the house. She further testified that the Respondent was abusive and one time he beat her up and she went to the Victim Support Unit to report him. The Petitioner asked that the marriage be dissolved, and she be granted custody of the children, and that each party bears their own costs.

In cross examination, the Petitioner stated that they were married for sixteen years before the Respondent moved out of the house. She agreed to having demolished a government house in Lilayi, and that she had terminated pregnancies, but denied having terminated six of them. It was also her evidence that the Respondent stopped her from going for APU classes, as she would return home late and wash her private parts. She denied that the pants that she bought were for the Respondent, and that she refused to go and see his disabled mother in Katete, saying that she could only go there during body viewing.

The Petitioner denied having sent the Respondent text messages threatening to burn him or poison him, but she agreed to having ran away with his phone and deleting the text messages on it. She stated that the Respondent had been

having a love affair with a woman for some time, and he would lie that he had gone on duty, yet he would be with that woman.

In re-examination, the Petitioner stated that she was the Geography Coordinator, and she would take the pupils to do projects and one time they had gone to research place in Chilanga, and had walked there and back, and that is why she had returned home late. That when she reached home there was not enough water, and that is how she got a bucket and washed her private parts. On the issue of the pants, the Petitioner testified that the Respondent had not worked since one year into the marriage, and she bought four pants and gave two to her nephew, and two to the Respondent. She added that she had been the main provider at home, and would postpone the visits to her mother in law due to financial constraints. She agreed to having ran away with the Respondent's phone, stating that she had discovered that he was cheating on her and when she went home, she had found that he had left.

The Respondent in his testimony told the court that he consented to divorce being granted as the parties had lived apart from 30<sup>th</sup> August, 2016. That he signed the consent to divorce freely and voluntarily, and that he would like to be heard on custody of the children, property settlement and maintenance.

In cross examination, the Respondent stated that he would like to have custody of the children of the family, and that he has the means to keep them, as he is supplier and had registered a business. That he could be communicating with the Petitioner on how they would access the children.

I have considered the petition. It was brought pursuant to Sections 8 and 9 (1)(b) and (d) of the Matrimonial Causes Act No 20 of 2007. The said provisions state 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.**

**(a) that the 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 the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;**

**(d) that the 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 a decree being granted; or**

**(e) that the parties to the marriage have lived apart for continuous period of at least five years immediately preceding the presentation of the petition.**

Going by the above, in order to prove that a marriage has broken down irretrievably, one or more of the facts stated in Section 9 (1) of the Act need to be established. It has been seen from the petition that the Petitioner relies on the facts stipulated in Section 9 (1) (b) and (d) of the Act, which are that the Respondent has behaved in such a way that she cannot reasonably be expected to live with him, and that the parties have lived apart for a continuous period of two years immediately preceding the presentation of the petition, and the Respondent consents to divorce being granted.

I will start with the fact of the parties having lived apart for a continuous period of two years immediately preceding the presentation of the petition, and the

Respondent consenting to divorce being granted. The Petitioner in her evidence stated that the Respondent left home and that he consented to the divorce being granted, and that he signed the consent to divorce. However, she did not state when the Respondent moved out of the matrimonial home. The Respondent on the other hand whilst agreeing that the parties had been living apart and he consents to divorce being granted, told the court that the parties separated 30<sup>th</sup> August, 2016.

The petition was filed on 24<sup>th</sup> August, 2017, a few days short of the parties having lived apart for a year. Section 9 (1) (d) of the Matrimonial Causes Act No 20 of 2007 requires that the parties should have lived apart for a continuous period of two years immediately preceding the presentation of the petition for that fact to be proved. Clearly in this case, two years of the parties having continuously lived apart had not elapsed when the petition was filed, and therefore the fact has not been proved, even if the Respondent consented to the divorce.

This leaves the fact of the Respondent having behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The Petitioner in the petition alleges that the Respondent was verbally abusive to her during the period that they lived together, and one time he physically beat her up. The Respondent did not deny these allegations when he cross examined her, but rather accused her unreasonable behavior on her part. This behavior was stated as the Petitioner having had six abortions, having demolished a house and returning home late and then washing her private parts. Further that she refused to visit his disabled mother in Katete, and that she threatened to either burn him with hot water or poison him.

The Petitioner explained her failure to visit the Respondent's mother as being due to financial constraints as she was the only person working. This is a reasonable explanation. Over the washing of her private parts, the Petitioner testified that she had gone on a school trip and had returned home, and found

that there was not enough water, and she had then used water in a bucket to wash her private parts. This evidence was not challenged further, and I therefore find that it did not amount to unreasonable behavior on her part. The Respondent in cross examining the Petitioner alleged that she had ran off with his phone and deleted the messages on the said phone. The Petitioner denied having threatened to pour hot water or poison the Respondent and this was not pushed further, so was not established as a fact. She however agreed to having ran away from home with the Respondent's phone and deleting the messages on it, stating that it was because she had found out that he was having an affair with a woman, and he left home.

The Respondent did not dispute these allegations. Therefore they are credible. The Respondent left home because the Petitioner found out that he was having affair. This was unreasonable, and it was not expected that the Petitioner could continue living with him. She has therefore proved that the Respondent has behaved in such a way that she cannot reasonably be expected to live with him. I accordingly grant a decree nisi for the dissolution of the marriage, which shall become absolute after a period of six weeks.

The parties are at liberty to agree on the custody of the children of the family and file a consent order to that effect. In default thereof, either party can apply to me at chambers. Issues of property settlement and maintenance are referred to the Learned Registrar for determination. Each party shall bear their own costs of the proceedings.

**DATED THE 20<sup>th</sup> DAY OF FEBRUARY, 2018**

                    Kaunda                      
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**