

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

2018/HPF/D202

BETWEEN:

VUKANI SAILANDI KAMANGA



PETITIONER

AND

INUTU SILUMESI KAMANGA

RESPONDENT

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Petitioner : *Mr. H. H. Ndhlovu, SC – Messrs H.
H. Ndhlovu and Company*

For the Respondent : *Ms. Catherine Jere- Legal Officer
National Legal Aid Clinic for Women*

J U D G M E N T

Cases referred to:

- 1. Ash v. Ash (1972) 1 ALL ER 585.**
- 2. Mahende v. Mahende (1976) Z.R 293.**
- 3. Livingstone-Stallard v. Livingstone Stallard (1974) 2 ALL ER 766.**
- 4. O'Neil v. O'Neil (1975) 3 ALL ER 292.**
- 5. Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and others (2005) Z.R. 138.**
- 6. Dr. Namuunda Hamalenge Mutombo v. Lilian Haabula Mutombo (2009/HP/D.181 (Unreported)).**

7. **Arthur Yuyo v. Mable Mary Bbuku Yuyo- SCZ Judgment No. 78 of 1998 (Unreported).**
8. **Brighton Soko v. Petronella Sakala Soko- SCZ Judgment No.8/189/2015 (Unreported).**

Legislation and other work referred to:

1. **The Matrimonial Causes Act No. 20 of 2007.**
2. **The Marriage Act, Chapter, 50 of the Laws of Zambia.**
3. **Lillian Mushota: Family Law in Zambia Cases and Materials, UNZA Press, 2005.**

On 22nd January, 2018 the Petitioner **VUKANI SAILANDA KAMANGA** filed a petition pursuant to Section 9 (i) (b) of the Matrimonial Causes Act No. 20 of 2007 for the dissolution of marriage to the Respondent **INUTU SILUMESI KAMANGA** contracted on 16th May, 2009 at Miracle Life Family Church in Lusaka.

According to the petition, the Petitioner alleged that the marriage had broken down irretrievably because the Respondent had behaved in such a way that the Petitioner could not reasonably be expected to continue living with her. The particulars of the unreasonable behaviour were itemized in the petition as shown in paragraphs (a) to (e). These are:

- (ii) The Respondent will aver that contrary to paragraph (b) of the particulars, it is not true that she admitted to having an affair as the screenshots the Petitioner saw do not prove any affair. She is therefore surprised that this matter which was discussed with the Petitioner and the family could be used as a ground in this petition.
- (iii) That the Respondent denies the allegation in paragraph (c) and will put the Petitioner to strict proof.

The Respondent therefore prayed that the marriage be dissolved and that she be granted custody of the children with liberal access to the Petitioner.

1. THE PETITIONER'S CASE

At the hearing, the Petitioner aged forty (40) years old, a Businessman of Plot 62, Twin Palm, Ibex Hill gave *viva voce* evidence and did not call any witnesses.

He relied on his petition filed into Court and stated that he got married to the Respondent on 16th May, 2009 and that they had three children.

He testified that the marriage had broken down irretrievably because the Respondent always opposed the plans that he had. He gave an example when he wanted to construct property for the family.

He also stated that the Respondent had been telling him to leave the matrimonial home as she was tired of him; that her family got involved and asked him to leave the matrimonial home. That he asked to be given fourteen (14) to thirty (30) days so that he could find alternative accommodation.

The Petitioner further testified that he found text messages in her phone which she had left when she went to church. That the messages suggested that she had been communicating with her ex-boyfriend. That one of the messages was that they should stop meeting because they could not keep their hands from each other.

When he confronted her, the Respondent told him that he had misunderstood the message. When he consulted his elder brother, his brother's interpretation of the messages was similar to his; that the messages were inappropriate. He therefore did a screen shot and sent the messages to his phone. The Petitioner identified the messages in his bundle of documents filed on 14th May, 2020.

The Petitioner also stated that the atmosphere at home was not conducive as the Respondent used to tell him to move out and go where he would be happy or where proper food would be cooked for him. He added that the Respondent also locked him out on two occasions and that as a result, he spent two nights out.

In relation to the allegation that the Respondent used to say she would change the surname for the children, the Petitioner stated that this came about as a result of the differences they used to have. That these utterances made him doubt whether he was the father.

That he finally moved out of the matrimonial home and this is what made him petition for dissolution of marriage. He further explained that the Respondent's behaviour stressed him as he thought he would never be separated from his children. That he also developed intestinal congestion and thus, he had to undergo treatment.

In cross examination when asked what drove the Respondent to ask him to leave, he stated that whenever he commented on her cooking, she would ask him to leave instead of addressing the issue. That this happened regularly; that if it only happened once, he would not have made an issue out of it.

He also stated that when he went home late, she would tell him to go back to his prostitutes. However, he explained that he used to go out on business meetings with clients when he used to work for a financial institution.

When asked if it wasn't justifiable for a wife to get upset, he stated that she was unreasonable as he used to communicate with her before leaving. He further stated that the reason advanced by the Respondent's relatives for him to leave the matrimonial house was that he used to stress her. That when he asked her about it, she told him that she didn't know anything.

On the issue of the paternity of the children, he stated that he never doubted that he was the father. However, the twins were conceived during the time when they never used to have sexual intercourse. He added that the Respondent used to threaten that she would change the surname of the children because of the differences that they used to have.

When asked if he didn't cause the Respondent to behave in the manner she used to behave, he responded in the negative. He stated that he would always inform her whenever he went out; that

he wasn't perfect but desired to be at home. However the atmosphere was not conducive; he wasn't happy at home.

In re-examination, he stated that he used to go out and entertain clients because most of them preferred social meetings.

That marked the close of the Petitioner's case.

2. THE RESPONDENT'S CASE

The Respondent **INUTU SILUMESI KAMANGA** aged thirty-five (35) years old, a Banker at Eco Bank also gave evidence on oath and did not call any witnesses.

She told the Court that the particulars in relation to the marriage were correct but she denied that she had behaved unreasonably.

On the allegation that she never used to support him on his projects, she stated that it was not true; that she found it difficult to comment because he had not elaborated what he meant.

Regarding the allegation that she used to lock him out, she told the Court that her husband was never present in the home. That he used to go home around 04:00 hours almost every day. Sometimes

he would leave home for Shibuyunji around 04:00 hours and come back the following day around 04:00 hours. That they discussed these matters several times at his parents' house.

The Respondent told the Court that it was true she locked him out. She explained that he left home to go and buy bread around 07:00 hours wearing a short and a T. Shirt. He went back home after 22:00 hours in a different set of his own clothes. That she called him during the day but he never picked up the call. When he asked him where he got the clothes from and where he had bathed, he never responded. That as a result, she was very upset with him and asked him to leave for the sake of her peace. She called her brother in law who was a Pastor and explained to him what had happened. He asked his brother to go to their father's place in Makeni but he went and spent a night at a lodge and stayed there for a week.

On the issue about the food, she stated that it happened in the first year of their marriage. However, every time they had issues to resolve, he was fond of bringing up old issues.

In relation to the allegation that she was having a relationship with her ex-boyfriend, she stated that she had been dating him before she got married to the Petitioner; that the issue was discussed at a

family meeting and after she apologised, it was established that she was not having a relationship with him.

When asked why she used to tell him to go back to his prostitutes, she stated that he didn't want to stay at home at any point; that he used to get upset very easily. Even when the children were playing, he would get upset.

She also told the Court that she discovered that he had bought a vehicle for a girl he had an affair with; that he used to use the same vehicle sometimes to pick up their daughter from school. So what she used to tell him was based on the information that she had.

On the issue that her relatives chased him from the matrimonial home, she stated that the Petitioner was fond of making business trips. However, she discovered after checking his passport that he used to lie that he had gone out of the country. Whenever she asked where he had been, he would not answer; that the trips were almost every weekend.

The last one was when he told her that he was travelling to Ndola to meet prospective clients. When she asked him to pick a maid she had found from Ndola, he failed to do so because he was not in

Ndola. Therefore, when he got home, she informed her aunties and her in laws and they called for a meeting. That her aunties had noticed that they had problems in the home when they went to help her look after the twins when they were born. So she decided to tell them about the Ndola incident as she could no longer take it. That is when her aunties decided to intervene so that they could help them.

At the meeting, the Petitioner told the family members that he wanted to be given time out. From that day, he had not been home as he only used to go there to bathe. That this continued for three (3) weeks and when her aunt noticed how she was struggling to look after the children, it broke her heart. That the situation also affected her emotionally as she developed mitral valve prolapse, a heart condition which was attributed to severe stress. That her aunt called the Petitioner and he told her that he had been asked to leave. That's how he left the matrimonial home.

The Respondent also admitted that she threatened to change the surname for the children. That this was because the Petitioner never cared about one of the twins who was epileptic. She explained that after being discharged from hospital, the child's temperature

was still very high and the child was vomiting but the Petitioner was not bothered as he left home around 04:00 hours in the morning and told her that he was going for a meeting in Chongwe. Around 09:30 hours, the child had a seizure and there was no one to take them to the hospital.

The Petitioner was assisted by the Landlady who heard her screaming. On the way, he called the Petitioner who didn't answer his phone. However, when her sister called him, he answered and he got to the hospital barely fifteen (15) minutes later meanwhile he had told her that he was going to Chongwe.

That because of this, out of anger she told him that he didn't care about the children and therefore, she was going to change their surname and raise the children on her own.

When asked if the marriage had broken down irretrievably, she stated that it had not because the reasons given were not genuine. However, since the Petitioner had made a request for divorce, she didn't object although she denied that she had behaved unreasonably.

She therefore prayed that the marriage be dissolved. When asked by the Court why she wanted the marriage which had not broken down irretrievably to be dissolved, she stated that the Petitioner had a girlfriend who he was living with. That although the Petitioner had denied this, he was adamant at getting a divorce.

She also prayed for maintenance of the children, property settlement and full custody of the children with visitation rights to the Petitioner.

When asked by the Court if there was any mutual love between them, she stated that there was none.

In view of the answer given by the Respondent that there was no mutual love, State Counsel didn't ask any questions in cross examination.

That marked the close of the Respondent's case.

3. THE LAW

This is a petition for the dissolution of marriage. The sole ground upon which a marriage may be dissolved is that the marriage has broken down irretrievably. This is in accordance with Section 8 of

the Matrimonial Causes Act No. 20 of 2007 which sets out the sole ground for divorce as being irretrievable breakdown of the marriage. 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 his marriage to the Respondent has broken down irretrievably. On the issue of proof of the breakdown of the marriage, the Petitioner has cited Section 9(1) (b) of the Matrimonial Causes Act in his petition. This section 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.

Furthermore, Section 9(2) provides that:

“(2) On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.”

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**⁽¹⁾ 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**⁽²⁾ 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?'

Based on the foregoing case law, I will ask myself the question asked by Dunn J in the case of Livingstone-Stallard v. Livingstone Stallard⁽³⁾ and adopted by the Court of Appeal in the case of O'Neil v. O'Neil⁽⁴⁾ and which is echoed in the above cited cases that:

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

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

4. FINDINGS

The Petitioner in his petition has raised five particulars of the Respondent's unreasonable behaviour. These are that the Respondent is not supportive of him, she is having an affair with another man, she threatens that she will change the surname for the children, she wants him to leave the matrimonial home and that she suspects that he is having an affair with another woman.

The Respondent has admitted some of the allegations but has justified her conduct.

On the first allegation that the Respondent has been opposing all that he does, the Petitioner in Court stated that the Respondent has not been supportive of his plans. For instance, he stated that she didn't support him in relation to the construction of a family property.

The Respondent denied this allegation and averred that she didn't understand what he meant.

I am inclined to agree with the Respondent that this allegation is vague. The Petitioner should have elaborated to the satisfaction of

the Court what he meant that the Respondent was not supportive of his plans/projects. Therefore, while I have noted that the Petitioner made reference to his plan to construct the family property, it is also not clear to the Court what the opposition was about. Is it that the Respondent didn't want him to proceed with the construction or there was just a disagreement on how the construction was going to be done? Since this allegation was not substantiated, it is not my role to hypothesize.

In this regard, I find that the Petitioner has failed to prove this allegation. It therefore fails.

On the allegation that the Respondent admitted that she was having an affair, the Petitioner produced in Court the screen shots of the messages that were exchanged between the Respondent and her ex- boyfriend.

The Respondent in her Answer denied this allegation. In Court she rehashed what she averred in the Answer and therefore stated that the issue was resolved at the meeting and that it was established that the two were not having an affair.

The averment and the evidence were not impugned by way of Reply and questions during trial as no questions were asked during cross examination. In view of the uncontroverted evidence by the Respondent, I am inclined to accept it that it was established that she was not having an affair. I find that the Petitioner has failed to prove this allegation.

Regarding the allegations that the Respondent threatened that she would change the surname for the children, that she wanted the Petitioner to leave the matrimonial home and also that the Respondent suspected that she was having an affair, the Respondent didn't deny these allegations.

In this regard, the Petitioner has proved these allegations as facts and so I find.

Having made the above findings of the Respondent's behaviour according to the petition, can it be said that: the Respondent's behaviour is sufficiently grave to fulfil the test namely 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 taking into account the whole of the circumstances, characters and personalities of the parties?

What is clear from the evidence of the Respondent is that she gave reasons why she behaved in the way she did. In relation to the fact that she stated that she would change the surname of the children, she testified that out of anger she told the Petitioner that he did not care about the children because he left home knowing that one of the twins was sick.

On the fact that the Petitioner was asked to leave the matrimonial home, she stated that her relatives asked him to leave the matrimonial home when they discovered that he was causing her so much stress due to his conduct. She also admitted that she asked him to leave for the sake of her peace because he went home around 22:00 hours when he left home in the morning around 07:00 hours.

On the fact that she suspected that the Petitioner was having a relationship, she stated that the suspicion arose from the fact that he never used to spend time at home. It was also her evidence that she had information that he had a girlfriend and that he had even bought a vehicle for her.

I have noted that these reasons for her behaviour or conduct were not pleaded in the Answer. However, I am guided by what the

Supreme Court stated in the case of **Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and others** ⁽⁵⁾ when it emphasized the long standing principle that where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. State Counsel did not object to this evidence and therefore I have considered the evidence.

Although the evidence adduced by the Respondent about her conduct was her word against the Petitioner's word, I have accepted it as the Petitioner did not challenge it through cross examination.

Furthermore, I closely examined her demeanour in order to ascertain her credibility. While the Respondent cannot be said to be an angel and without fault, she did not strike me as a person who had told lies to the Court about the conduct of the Petitioner. So between the two, I found her evidence to be more credible. I find no reason therefore to discount it.

Now getting back to the test, can the Respondent's behaviour be said to be grave that the Petitioner cannot reasonably be expected to live with her?

In answering this question, I should hasten to mention that while the behaviour complained of by the Petitioner need not be as serious as cruelty, I am persuaded by what Matibini J. (as he then was) stated in the case of Dr. Namuunda Hamalenge Mutombo v. Lilian Haabula Mutombo ⁽⁶⁾ that:

“A Petitioner must nonetheless advance sufficiently serious reasons to say that from a reasonable person’s standpoint, after consideration and allowance of any excuse or explanation which the respondent might have in the circumstances, the conduct is such that the petitioner ought not to be called to endure it.”

In view of the foregoing, from a reasonable stand point after considering the explanation and reasons which the Respondent has advanced regarding her behaviour, it is clear to me that the Respondent conducted herself in the manner attributed to her in frustration and retaliation of her husband’s behaviour.

I say this because I cannot fathom why the Petitioner decided to go and attend a meeting in Chongwe when he knew very well that his child was sick at home. And when the Respondent tried to call him,

he ignored her call. To me this kind of behaviour on the part of the Petitioner showed lack of care and respect for the family.

Furthermore, I find that the Petitioner gave the Respondent every ground to be suspicious of his conduct as he used to leave home early in the morning around 04:00 hours and go back the following day around 04:00 hours when he is a married man.

Therefore, it seems to me perfectly plain that the Petitioner's conduct unleashed a maelstrom of emotions and it was evident during trial that the Respondent has not accepted the kind of life that she had been subjected to.

In this regard, having considered the circumstances of this case and the explanation given by the Respondent, I find that her behaviour was not grave to the extent that a right thinking person can come to a conclusion that the Petitioner cannot be expected to live with her. In short, the reasons advanced are not sufficiently serious.

For this reason, I find that the Petitioner has failed to prove the fact he has relied upon.

That said, it does not end here. I have carefully considered the evidence adduced by the Respondent. As I have mentioned, I have an obligation under Section 9(2) to inquire not only into the facts alleged by the Petitioner but also the facts alleged by the Respondent.

Furthermore, Section 23 of the Act provides that:

If in any proceedings for divorce the respondent alleges and proves any of the facts referred to in paragraphs (a) to (e) of subsection (1) of section nine, treating the respondent as the petitioner and the petitioner as the respondent for the purposes of that subsection, the court may give to the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief.

What is clear from the foregoing is that relief may be granted to a respondent if the respondent proves any of the facts referred to in paragraphs (a) to (e) of Section 9(1) of the Act which the respondent would have been entitled to had he presented the petition.

In the present case, I have made a finding that the Respondent's behaviour was in retaliation of the Petitioner's behaviour. As a

result, she has proved that it was in fact the Petitioner who has behaved unreasonably by going home late almost every day, spending most of his time away from his family, and generally not showing any care for his wife and the children which was evident even to her family. I find this behaviour to be grave and not justifiable.

Moreover, the Petitioner's behaviour as the Respondent stated during trial and as I observed during trial has caused the Respondent emotional stress as she was in tears when giving her testimony.

In addition, the Respondent stated in her evidence that there is no mutual love between the two. In the case of **Arthur Yoyo v. Mable Mary Bbuku Yoyo** ⁽⁷⁾ 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.

While the Petitioner did not state that he does not love the Respondent, it is evident from his conduct towards the Respondent and I therefore find as a fact that he does not love the Respondent as he never used to spend most of his time with her and the children.

Therefore in my view, although the Respondent stated in her evidence that the marriage has not broken down irretrievably, it would be futile to pretend that a relationship exists between the Petitioner and the Respondent when it is clear that there is no love between the two and the trust on which a marriage is built has been broken. In the absence of trust, a marriage cannot survive.

Furthermore, the conduct of the Petitioner and his demeanour during trial speaks volumes. He is not ready to bury the hatchet by resuming cohabitation or reconciliation and so the marriage is in fact going down the drain and cannot be salvaged.

In the case of **Brighton Soko v. Petronella Sakala Soko** ⁽⁸⁾ the Supreme Court shared in the notion widely accepted under English law and which Mushota, L alluded to in her book Family Law in Zambia that:

“If a marriage which is going down the drain is not capable of being saved or rescued, end it, and do so quickly.”

In conclusion, whereas the Petitioner has failed to prove that the marriage has broken down on account of the Respondent's behaviour, for the reasons I have highlighted above, I find that the

Respondent has proved that the marriage has broken down on account of the Petitioner's behaviour. I am therefore inclined to grant relief of dissolution of marriage as in accordance with Section 23 of the Act which I have already referred to and which she prayed for in her Answer.

In the premise, I hold that the marriage solemnized under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia between **VUKANI SAILANDI KAMANGA** and **INUTU SILUMESI KAMANGA** on 16th May, 2009 at Miracle Life Family Church in Lusaka 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 Deputy Registrar for the determination of the issue of maintenance or property settlement.

I further order that the issue of custody of the children of the family shall be heard before this Court upon either party filing a formal application should the parties fail to reach an agreement.

Considering the circumstances of the case, I order that each party shall bear their own costs of the petition.

Leave to appeal is granted.

Delivered at Lusaka this 10th day of September, 2020.



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M.C. KOMBE
JUDGE