

IN THE HIGH COURT FOR ZAMBIA

2019/HPF/D374

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

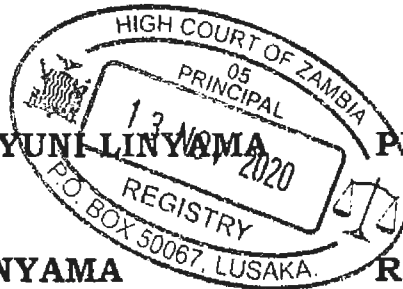
(Divorce Jurisdiction)

BETWEEN:

MUTINTA LINA MAYUNI LINYAMA PETITIONER

AND

DAVID MBUMBI LINYAMA RESPONDENT



BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
IN OPEN COURT, ON THE 13TH DAY OF NOVEMBER, 2020.

For the Petitioner: Mrs. E. M. Chabwera & Ms. J. Ngandu –
Messrs. Kaumbu Mwondela Legal
Practitioners.

For the Respondent: Ms. I. Nambule – Messrs. Howard &
Marietta Legal Practitioners.

JUDGMENT

CASES REFERRED TO:

1. *Young v Young* (1962) 3 ALL E.R. 120;
2. *Thurlow v Thurlow* (1975) 2 ALL E.R. 979;
3. *Mahande v Mahande* (1976) Z.R. 287 (SC);
4. *Garven v Garven* (1962) 3 ALL E.R. 241;
5. *Brighton Soko v Petronella Sakala Soko* - SCZ-8-189-2015; and
6. *Ash v Ash* (1972) 1 A.E.R. 582.

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Matrimonial Causes Act, Act No. 20 of 2007;*
2. *The Marriage Act, Chapter 50, Volume 5 of the Laws of Zambia;*

3. *Rayden and Jackson on Divorce and Family Matters 16th Edition, Butterworths;*
4. *Bromley's Family Law, Nigel V. Lowe & Gillian Douglas, 9th Edition, Butterworths; and*
5. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts, 11th Edition, London, Butterworths.*

1 INTRODUCTION

1.1 The Court has been moved to determine whether or not the marriage contracted by the parties herein has broken down irretrievably, thus warranting a dissolution of the marriage.

2 BACKGROUND

2.1 On 1st November, 2019, the Petitioner, **MUTINTA LINA MUYUNI LINYAMA**, petitioned for the Dissolution of Marriage pursuant to **Sections 8 and 9 (1) (b)** of **The Matrimonial Causes Act¹** on the ground that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

2.2 The Respondent responded to the Petition for Dissolution of Marriage by filing an Answer and Cross Petition on 21st February, 2020, in which he alleges that the marriage has indeed broken down irretrievably but due to the fact that the Petitioner has committed adultery.

3 PLEADINGS

3.1 The evidence adduced by the Petitioner in her Petition reveals, *inter alia*, the following facts: -

1. That she was lawfully married to the Respondent on 13th October, 2006, at the Registrar's Office, in Lusaka, Zambia;
2. That the Petitioner who is a Medical Doctor at CFB Medical Centre last lived with the Respondent who is a Medical Doctor at Victoria Hospital, as husband and wife, at Plot No. 5678B, Lufubu Road, Kalundu, Lusaka and both parties are domiciled in Zambia;
3. That there are three children of the family now living namely:-
 - (i) Luyando Sepiso Linyama (male) born on 18th March, 2001 and enrolled at University;
 - (ii) Inonge Nabanji Linyama (female) born on 9th September, 2007 and enrolled in Grade 8; and
 - (iii) David Mbumbi Linyama (male) born on 18th April, 2013 and enrolled in Grade 1.
4. That there have been no proceedings continuing in any Court in Zambia relating to the marriage or property of either party and there have been no proceedings outside Zambia pertaining to the validity or subsistence of the marriage;
5. That the marriage has broken down irretrievably because the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with her;
6. The particulars of the unreasonable behaviour were itemised as follows: -
 - (i) The Petitioner and Respondent stopped living together in October, 2018 and they have not cohabited since;
 - (ii) The Respondent's conduct has caused the Petitioner to live apart from the Respondent;
 - (iii) The Respondent admitted being unfaithful, in the course of the marriage, to the Petitioner in the presence of their relatives at a family meeting held in June, 2019;

- (iv) *The Respondent admitted that he was relieved that the Petitioner had left the matrimonial home at a family meeting held in February, 2019;*
- (v) *The Respondent has on several occasions called the Petitioner demeaning words;*
- (vi) *The Respondent occasionally says unpleasant things to the Petitioner attacking her character; and*
- (vii) *That the Respondent has psychologically broken the Petitioner by constantly using demeaning words against the Petitioner;*
- (viii) *She prayed that the marriage be dissolved; that she be granted an Order of Custody of the children; and that the Court makes an Order for property settlement.*

3.2 In response to the Petition for Dissolution of Marriage the Respondent, **DAVID MBUMBI LINYAMA**, filed into Court an Answer and Cross Petition. Therein, the Respondent averred, *inter alia*, as follows: -

- 1) *That he admits that the marriage has broken down irretrievably but denies that he has behaved in such a way that the Petitioner cannot be expected to continue living with him;*
- 2) *That the marriage has broken down irretrievably due to the fact that the Petitioner has committed adultery;*
- 3) *That in November, 2018, he left Zambia for further studies and upon his return to Zambia on 2nd February, 2019, the Petitioner abandoned the matrimonial home without explanation;*
- 4) *That while there was some tension between the parties, the same was not insurmountable nor did it justify bringing an end to the marriage;*

- 5) *That he admitted having committed adultery more than 10 years ago but in any event the Petitioner agreed to condone such infidelity when she accepted late in 2019 to reconcile the marriage;*
- 6) *The Respondent only admits having lost his temper and uttered unpleasant words when it was communicated to him in or about 6th May, 2019, by the children of the family, that a man (unknown to the Respondent) had begun living with the Petitioner and the children of the family, in the Petitioner's home;*
- 7) *That the Petitioner has since about 6th May, 2019, committed adultery with an unknown person, following of which the parties agreed that the children of the family will primarily reside with the Respondent as it was his desire and intention to shield them from the Petitioner's relationship;*
- 8) *That on 8th June, 2019, the parties met and agreed to seek to reconcile the marriage, notwithstanding the fact that the Petitioner had committed adultery, but failed to reconcile and the Petitioner continued her relationship with a third party, which resulted in her being pregnant. Thereafter, she requested the Respondent to look after the children of the family well.*
- 9) *He prayed that the marriage be dissolved based on his Cross Petition and that the parties be granted joint custody of the children of the family with primary care and responsibility being granted to the Respondent. He also prayed for an Order of property settlement; and that each party bears their own costs.*

4 EVIDENCE AT TRIAL

4.1 Section 9 (2) of The Matrimonial Causes Act¹
provides that: -

"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." (Court's emphasis)

- 4.2 In accordance with **Section 9 (2)** of **The Matrimonial Causes Act¹**, I set this matter down for hearing, in order for me to inquire into the facts alleged in the Petition for Dissolution of Marriage and Answer and Cross Petition presented before this Court by the Petitioner and Respondent.
- 4.3 At the scheduled hearing on 9th July, 2020, the Petitioner augmented the contents of her Petition by giving *viva voce* evidence during trial that this was the second time that she has left the matrimonial home, the first being in 2013, but they reconciled. That the Respondent has had multiple extra marital affairs and in a family meeting held in June, 2018, he admitted to having seven extra marital affairs during the course of the marriage, which left her traumatised.
- 4.4 She further testified that their sexual relations have been minimal, during which activity the Respondent covered her face with a pornographic magazine. That the Respondent refers to her as prostitute and other demeaning words. The parties have not been intimate since November, 2018, when the Respondent left for his studies in South Africa.
- 4.5 Furthermore, the Petitioner testified that she could no longer allow such a situation to prevail, thus she left the matrimonial home for good in February, 2019.

- 4.6 In response to the Cross Petition, the Petitioner testified that the marriage has broken down irretrievably due to the disharmony that has been there all along and not because of her current relationship with another man. She admitted that she is in a relationship with another man, which resulted in her giving birth to twins on 30th April, 2020, but that this relationship commenced after the parties separated.
- 4.7 She prayed that the marriage be dissolved; that there be property settlement; and that they be granted joint custody of the children of the family.
- 4.8 In cross examination, the Petitioner testified that she conceived the twins in September, 2019 and commenced these proceedings in November, 2019. She conceded that at the time of conception of the twins, she was legally married to the Respondent and that she committed adultery six months prior to commencing this action. Further, the Petitioner testified that the action herein was commenced nine months after she left the matrimonial home. Furthermore, the Petitioner testified that when the Respondent left the matrimonial home for his studies in South Africa in October, 2018, he had indicated to his Aunt that he may not come back and based on the communication exchanged via SMS between the parties, the Petitioner assumed that the marriage had ended.
- 4.9 Additionally, the Petitioner testified that the Respondent has had intimate relations with other women

throughout the marriage and that the final straw that caused her to leave the matrimonial home was a text from another woman who was having an affair with the Respondent.

4.10 In re-examination, the Petitioner reiterated that she left the matrimonial home in February, 2019 and had informed that the Respondent that it marked the end of their marriage. In response, the Respondent even wished her well.

4.11 The Petitioner did not call any other witness and that marked the close of her case.

4.12 The Respondent adopted the contents of his Answer and Cross Petition, which he augmented with oral testimony. He testified that he only used insulting language against the Petitioner after he found out that she was living with another man. He reiterated his averments that while there had been tension between the parties from October, 2018 to June, 2019, they were still communicating with each other with a view to reconcile and had family meetings in March, 2019 and June, 2019.

4.13 He further testified that whilst in South Africa pursuing his studies, the Petitioner communicated with him on her intentions to end the marriage and upon consultation with his family, he abandoned his studies and came back home on 4th February, 2019, to save the marriage.

4.14 Furthermore, the Respondent testified that all his attempts to have a discussion with the Petitioner have failed and as such, he prayed that the marriage be dissolved on account of the Petitioner's unreasonable behaviour. He further prayed for joint custody of the children of the family and an Order for property settlement.

4.15 In cross-examination, the Respondent testified that during communication with the Petitioner whilst he was in South Africa, the Petitioner did not state that she intended to remain in the matrimonial home and was clear from the beginning that she was ending the marriage. The Respondent agreed that the marriage has broken down irretrievably.

4.16 The Respondent did not call any other witness and that marked the close of his case.

5 SUBMISSIONS

5.1 By the Petitioner's Submissions filed herein on 21st July, 2020, Learned Counsel for the Petitioner highlighted the ground and facts on which a divorce may be granted as provided under **Sections 8** and **9 (1)** of **The Matrimonial Causes Act**¹. Counsel cited various authorities which are instructive as to what ought to be proved in order to succeed where a party relies on the fact of unreasonable behaviour to show irretrievable breakdown of a marriage as in *casu*, amongst being the cases of **Young v Young**¹, **Thurlow v Thurlow**² and **Mahande v Mahande**³. She further

stated that the fact that the Respondent admitted to being unfaithful, warrants the Petitioner's failure to continue living with him, which situation was exacerbated by the psychological effect of the Respondents utterances and behaviour towards the Petitioner who found it intolerable to live with him.

5.2 Furthermore, it was submitted that the Petitioner has discharged the burden of proof according to the standard set out by law. Counsel cited various High Court cases to fortify her contention. Counsel also invited the Court to the provisions of **Section 10 (1) of The Matrimonial Causes Act¹**, which requires joining to the action any third party that is alleged to have committed adultery with a party to a marriage and submitted that the Respondent did not meet this requirement, thus the Court ought not to give his allegation due consideration.

5.3 By the Respondent's Submissions filed herein on 22nd July, 2020, Learned Counsel for the Respondent submitted *inter alia* that an allegation of unreasonable behaviour should not be read in isolation, but in conjunction with **Section 13 of The Matrimonial Causes Act¹**, which provides a test which ought to be used in order to determine a Petition based on unreasonable behaviour. To this end, Counsel argued that the Petitioner did not state the dates when the alleged unreasonable behaviours listed in her particulars occurred and failed to lay down in

chronological order the list of instances by numbering them consecutively, which makes it difficult to ascertain if the incidences meet the requirements of the cited provision of the law. To fortify her argument, the case of **Garven v Garven**⁴, where it was held as follows: -

“(i) A paragraph in the petition which contains allegations of a general kind, e.g. nagging, neglect or assaults, should be confined to conduct of one sort and specific instances of the conduct should be described in particulars or in separate paragraphs.

(ii) There should be no overlapping between one general paragraph and another.

(iii) In drawing particulars, it is convenient to set out in chronological order a list of the instances numbered consecutively and to state at the beginning of the document to which paragraph of the petition the various incidences relate.”

5.4 It was further submitted that the Petitioner failed to satisfy the legal standard for pleading unreasonable behaviour and that since the incidences stated in her oral evidence all occurred before the Petitioner could leave the matrimonial home, this Court ought not to place reliance on them. To fortify this contention, **Section 13** of **The Matrimonial Causes Act**¹, was cited which requires the Court not to place reliance on incidences that occurred when the parties lived together for a period or periods exceeding six months after the occurrence of the last incidences. Furthermore, it was submitted that no evidence was led by the Petitioner

that six months before she left the matrimonial home in February, 2019, there was a last straw in the line of the Respondent's affairs that led her to leave the matrimonial home, thus the Petitioner condoned the alleged seven affairs of the Respondents.

5.5 Finally, it was submitted that the Respondent has proved that the Petitioner committed adultery, which has not been denied by the Petitioner who admitted that she conceived twins from this improper relation. Counsel argued that this falls squarely within the provisions of **Sections 13 of *The Matrimonial Causes Act***¹. She reiterated the Respondent's prayer that the Cross Petition be upheld and the marriage be dissolved due to the Petitioner's unreasonable behaviour of committing adultery with an unknown person, which improper relation resulted in the Petitioner giving birth to twins and that costs be awarded to the Respondent.

6 POINT FOR DETERMINATION

6.1 I have considered the Petition for dissolution of marriage, the Answer and Cross Petition and the *viva voce* evidence of both parties. I have also considered the written submissions filed herein by both parties and list of authorities, which made my task considerably easy.

6.2 The issue to be determined is whether or not this marriage has broken down irretrievably due to the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him or due to the fact that the Petitioner has committed

adultery and the Respondent finds it intolerable to live with her.

7 THE LAW

7.1 The person who starts divorce proceedings must prove that the marriage has irretrievably broken down by establishing one of the five facts prescribed in **The Matrimonial Causes Act**¹. The prescribed five facts are the only facts that can be relied on by a party to a marriage who alleges that the marriage has broken down irretrievably.

7.2 **Sections 8 and 9 (1) (a) and (b)** of **The Matrimonial Causes Act**¹, which are relevant to this action, provide 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;...”

7.3 For the High Court to entertain a Petition for Dissolution of marriage, proof must be shown that the marriage was

contracted under *The Marriage Act*². To this end, **Section 90** of *The Matrimonial Causes Act*¹, provides that: -

“Proof of marriage, etc.

In proceedings under this Act, the court may receive as evidence of the facts stated in it a document purporting to be either the original or certified copy of a certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Zambia or elsewhere.”

7.4 In determining this Petition for Dissolution of Marriage, this Court must evaluate the competing evidence of the parties. **Section 9 (3)** of the *Matrimonial Causes Act*¹, provides that: -

“If the Court is satisfied on the evidence of any fact mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably it shall grant a decree of dissolution of marriage.”

8 DECISION OF THE COURT

8.1 From onset, I must state that having considered and inquired into the Petition for Dissolution of Marriage and the Answer and Cross Petition in accordance with the provision cited above, I am satisfied that the Petitioner was lawfully married to the Respondent on 13th October, 2006, at the Registrar’s Office, in the Lusaka District of the Lusaka Province of the Republic of Zambia under *The Marriage Act*². My finding is

supported by **Section 90** of *The Matrimonial Causes Act*¹, which is cited in paragraph 6.3 above.

8.2 The evidence of fact that the Petitioner was married to the Respondent as per her testimony is the original Certificate of Marriage admitted into evidence as "P1", which was issued to the parties in accordance with **Section 27** of *The Marriage Act*².

8.3 In *casu*, the Petitioner relies on **Sections 8** and **9 (1) (b)** of *The Matrimonial Causes Act*¹ and particulars presented before this Court, which the Respondent challenged. The Respondent also relied on his Answer and Cross Petition made pursuant to **Sections 8** and **9 (1) (a)** of *The Matrimonial Causes Act*¹. I will now move on to address the allegations by both the Petitioner and Respondent which they raised in their respective Petitions.

8.4 **Section 9 (1) (b)** of *The Matrimonial Causes Act*¹, which I have cited in paragraph 6.2 above, provides that irretrievable breakdown may be proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent, while **Section 9 (1) (a)** of *The Matrimonial Causes Act*¹, provides that irretrievable breakdown may be proved by satisfying the Court that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent. Accordingly, in the circumstances presented before this Court, I will have to decide the

question whether the Respondent has so behaved in a way that it is unreasonable to expect the Petitioner to live with him or that the Petitioner has committed adultery and the Respondent finds it intolerable to live with her.

8.5 The Learned Authors ***Rayden and Jackson on Divorce and Family Matters***³, cited by the Petitioner, stated that in order to answer the said question, it is necessary to make findings of fact as to what the Respondent actually did, and findings of fact as to the impact of that conduct on the Petitioner.

8.6 In the case cited by the Petitioner of ***Thurlow vs. Thurlow***², the Court deciding the question of “unreasonable behaviour” held that: -

“In order to establish that a respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with the respondent, it was not sufficient merely to establish that the marriage was dead and that it was impossible for the petitioner to cohabit with the respondent. It had to be shown that it was the respondent’s behaviour which justified a conclusion by the Court that the petitioner could not reasonably be expected to endure cohabitation.”

(Court's emphasis)

8.7 The learned authors of ***Bromley’s Family Law***⁴, also cited by the Petitioner, had this to say at **Page 228**: -

“This provision (relating to unreasonable behaviour) is frequently but erroneously, abbreviated to ‘unreasonable behaviour’, thereby suggesting that all one has to look at is the quality of Respondent’s

behaviour, whereas in fact what is important is the effect of that conduct upon the Petitioner.” (Court’s emphasis)

8.8 On the test to apply on whether the Respondent’s behaviour was unreasonable in relation to the Petitioner, the eminent authors of ***Rayden’s Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates’ Courts***⁵, opined as follows at **page 203, paragraph 25**: -

“Nevertheless, in considering what is reasonable, the Court (in accordance with its duty to inquire, so far as reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable: allowance will be made for the sensitive as well as the thick-skinned;...” (Court’s emphasis)

8.9 The said eminent authors further opined at **page 204, paragraph 26**⁵ as follows: -

“Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is unreasonable in itself, it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the Respondent.”

8.10 In the Supreme Court of Zambia Judgment of ***Brighton Soko vs. Petronella Sakala Soko***⁵, their Lordships held as follows at **page J28**: -

“In taking the view which we have taken, we have paid careful attention to the reasoning which we have adopted in Mahande namely that when considering the Respondent’s behaviour in the context of a divorce petition founded on ‘unreasonable behaviour’ as enacted in Section 9 (1) of the Matrimonial Causes Act No. 20 of 2007, it is not just the behaviour of respondent which is decisive but, equally crucial and as much decisive, is the way in which such behaviour relates to or interacts with the character, behaviour, personality, disposition and other traits and attributes of the particular petitioner involved.”

(Court’s emphasis)

8.11 In the same case, the Supreme Court of Zambia cited the English case of *Ash vs. Ash*⁶ wherein it was stated in part by Bagnall, J at **page 140** as follows: -

“The general questions may be expanded thus: Can this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?”

8.12 The *Ash vs. Ash*⁶ case was also cited with approval in the Judgment of the Supreme Court of Zambia in *Mahande vs. Mahande*³, cited by the Petitioner, wherein Cullinan, AJS., stated as follows: -

“...The following question then arises, to paraphrase the above words of Bagnall, J, and those of Ormrod, J, in Pheasant vs. Pheasant (1972) 1 A.E.R. at p. 591 at c to d; bearing in mind the petitioner’s faults and other attributes, good and bad, and having regard to her behaviour during the marriage, bearing in mind the

characters and the difficulties of both parties, trying to be fair to both of them and expecting neither heroic virtue or selfless abnegation from either, has the respondent then behaved in such way that the petitioner cannot reasonably be expected to live with him?"

8.13 I have addressed my mind to **Section 13** of **The Matrimonial Causes Act¹**, cited by both parties, which provides that: -

"Where in any proceedings for divorce the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent, but the parties to the marriage have lived with each other for a period or periods not exceeding six months after the date of the occurrence of the final incident relied on by the petitioner and held by the Court to support the petitioner's allegation, that fact shall be disregarded in determining for the purposes of paragraph (b) of subsection (1) of section nine whether the petitioner cannot reasonably be expected to live with the respondent." (Court's emphasis)

8.14 I am guided by the above authorities. As can be seen from the above, it is clear, in my view, that the behaviour required to be proved, must be of such gravity that the Petitioner's power of endurance is exhausted, to the point where it is clear that she cannot reasonably be expected to live with the Respondent. The standard is an objective one or that of a reasonable man or woman.

8.15 I have had regard to the whole history of the marriage in *casu*. The particulars of both the Petitioner and Respondent's behaviour were disclosed in the Petition

for Dissolution of marriage and Answer and Cross Petition, which they entirely relied on and augmented with *viva voce* evidence.

8.16 It was the Petitioner's testimony, *inter alia*, that the parties have had marital challenges, for which they sought intervention from family members. She further testified that the Respondent hurls insults at her. Furthermore, it was her testimony that the Respondent would cover her face with a pornographic magazine during their sexual encounters, which encounters were minimal and that the parties have not been intimate since November, 2018. The Petitioner also testified that the Respondent has had numerous inappropriate relations with other women during the subsistence of the marriage, which left her devastated, the last of such relation came to her knowledge a day before the Respondent travelled to South Africa, in November, 2018. She admitted having committed adultery, which led to her having twins with another man, but stated that she conceived in September, 2019, after she had left the matrimonial home. She testified that there was no hope of reconciliation and prayed that the marriage be dissolved.

8.17 On the other hand, the Respondent testified that the Petitioner committed adultery which led to her having twins with unknown man. He confirmed that he used insulting language against the Petitioner in June, 2019, when he found out that the Petitioner and children of

the family were living with another man, whom it is alleged that the Petitioner committed adultery with. Further, the Respondent admitted having committed adultery, but stated that this happened 10 years ago and the Petitioner condoned such infidelity. It was also his testimony that the Petitioner has continued her relationship with a third party despite his best efforts at reconciling the marriage. He prayed that the marriage be dissolved and that the parties be granted joint custody of the children of the family. He further prayed for an Order for Property Settlement.

8.18 As can be seen from the evidence from both parties, essentially, the Petitioner is alleging that the Respondent's behaviour of using demeaning words against her; the lack of sexual intimacy between the parties; and his having improper relations with other women has led to the breakdown of their marriage, while the Respondent alleges that the Petitioner has an improper relationship with another man whom she has twins with. Both parties did not in their evidence, reveal the names of the persons whom each party is alleged to have an improper relation with. Further, these persons that they are alleged to have improper relations with, were not made parties to the proceedings as required by **Section 10 (1) of The Matrimonial Causes Act¹**, which provides that:-

"Where in a petition for divorce or in an answer to such a petition, a party to the marriage is alleged to have committed adultery with a specified person,

whether or not a decree of dissolution of marriage is sought on the grounds of the adultery, that person shall, except as provided by the rules, be made a party to the proceedings." (Court's emphasis)

8.19 I emphasised the word "shall" in **Section 10 (1)** of **The Matrimonial Causes Act**¹ cited above. In my view, the requirement to join "*that person*" whom it is alleged as having inappropriate relations with, is mandatory, in order for the Court to give the allegation due consideration. This affords "*that person*" an opportunity to be heard and if at the end of the evidence concerning the adultery allegation "*that person*" is found innocent, their name may be removed from the proceedings in accordance with **Section 10 (2)** of **The Matrimonial Causes Act**¹.

8.20 As I have already stated above, the Court has a statutory duty to inquire, so far as it reasonably can, into the facts alleged by the Petitioner and Respondent, and this means that the Court has the duty, on the balance of probabilities, to investigate the allegations raised by the parties. According to the Learned Authors of **Rayden and Jackson on Divorce and Family Matters**³, cited by the Petitioner, in investigating whether a party finds it intolerable to live with the other, the Court may have regard to the history of the marriage; to the circumstances in which the adultery was committed; and to the conduct of both parties before and after the commission of the adultery.

8.21 In his Answer and Cross Petition, the Respondent alleged that the Petitioner conceived and gave birth to twins outside the marriage, with a man who is unknown to the Respondent. In her oral testimony, the Petitioner admitted having committed adultery and giving birth to twins with another man. However, she stated that she conceived after having left the matrimonial home and communicated to the Respondent that the marriage has ended. The parties have not cohabited since the Petitioner left the matrimonial home. In the circumstances of this case, where the Petitioner has clearly admitted that she committed adultery when the parties are still legally married, establishes the fact of adultery even though the person that she committed adultery has not been cited herein. Moreover, the Respondent averred that after learning of the Petitioner's pregnancy by an unknown man via a text message received from the Petitioner, he gave up hope of reconciling with the Petitioner as he found it intolerable to remain married to the Petitioner. Accordingly, from her own admission, I am satisfied and find that the Petitioner committed adultery.

8.22 It was also the Petitioner's testimony that the Respondent has had improper relations with other women throughout their marriage, but she did not mention the names of these persons that the Respondent is alleged to be having inappropriate relations with and when these relationships actually

occurred. However, the Respondent admitted to having had improper relations with other women, but stated that these relations occurred 10 years ago and the Petitioner condoned them. From his own admission, the Court is satisfied that the Respondent had improper relations with other women but is unable to determine, when these relationships took place as the Petitioner did not specify the dates when these relations occurred. Further, the Petitioner did not challenge the Respondent's testimony that these improper relations occurred 10 years ago. This clearly shows the Respondent's inappropriate relations with other women, were condoned by the Petitioner as she still continued with this marriage. Therefore, such an allegation in the circumstances of this case does not support the Petitioner's Petition and is hereby disregarded.

8.23 Furthermore, "*those persons*" with whom the Respondent is alleged to have had inappropriate relations were not joined to the proceedings. Consequently, I cannot consider this evidence of the Respondent's alleged inappropriate relations relied upon by the Petitioner in her Petition. It is therefore the finding of this Court that the inappropriate relations alleged to have been committed by the Respondent, have been condoned by the Petitioner. Accordingly, in the circumstances of this case, I am not satisfied that the Petitioner has successfully proved her allegation of purported inappropriate relations of the Respondent.

8.24 The Petitioner also averred that the marriage has broken down irretrievably, due to the Respondent's behaviour that she found to be so unreasonable such that she can no longer be expected to live with him. According to **Section 13** of **The Matrimonial Causes Act**¹, which I reproduced in paragraph 8.13 above, where the parties to the marriage have lived with each other for periods exceeding six months after the final incident of behaviour that each finds that they can no longer be reasonably expected to live with, they cannot be entitled to rely on that fact for the purposes of **Section 9 (1) (b)** of **The Matrimonial Causes Act**¹. In *casu*, the final incident of the Respondent's behaviour cited by the Petitioner occurred a day before the Respondent left the matrimonial home for his studies in South Africa, in November, 2018, when she learnt via text messages that he was involved with another woman. Shortly after that, in February, 2019, the Petitioner left the matrimonial home. The parties have never resumed cohabitation after that incident and in November 2019, the Petitioner commenced these proceedings. The Respondent confirmed that the Petitioner had indeed left the matrimonial home in February, 2019, but stated that the parties were still communicating with a view to reconciling the marriage, which was not rebutted by the Petitioner. To this end, meetings were held with family members from both sides of the parties, in March, 2019 and June, 2019. This was confirmed by the Petitioner.

If at all, the text message alluded to by the Petitioner, had been the final straw, she would not have attended these meetings. In my view, her conduct of attending these meetings intended to reconcile their marriage, clearly establishes that she condoned the alleged text message. Accordingly, I am not satisfied and find that this allegation, in the circumstances of this case, does not support the Petitioner's case and is hereby disregarded.

8.25 The other particulars that the Petitioner relied on, such as the Respondent covering her face with a pornographic magazine during their few sexual encounters and lack of sexual intimacy between the parties, were not challenged by the Respondent. I have considered these averments and assessed the impact of such behaviour on the Petitioner. In my view, such behaviour can be the cause of the breakdown of the marriage. However, in *casu*, the Petitioner did not lead evidence that six months prior to her leaving the matrimonial home in February, 2019, such incident of covering her face with a pornographic magazine occurred and led her to leaving the matrimonial home. In the absence of a date being tied to the last incident of such behaviour, the Court is not able to determine that the Petitioner found such behaviour intolerable. The fact of unreasonable behaviour can only be sustained if after the last incident relied upon, the parties have not lived together more than six months. In my considered

view, this allegation does not support the Petitioner's Petition as I find that she has not satisfied the requirements led down in **Section 13** of **The Matrimonial Causes Act¹** and it is therefore disregarded.

8.26 I have further assessed the impact of the conduct of both parties and whether they can be expected to resume cohabitation with each other. Enough evidence was adduced by both parties that they have not cohabited nor been sexually intimate since the Respondent left for his studies in November, 2018. I have considered not only the cumulative effect of this behaviour of the parties as alleged and established in evidence, but the character, personality disposition and behaviour of the parties. In my opinion, their conduct of failing to resume cohabitation and having sexual intimacy, has effectively brought cohabitation to an end. I also infer from Petitioner's action of leaving the matrimonial home that she evinced an intention to bring cohabitation permanently to an end. The fact that the Petitioner is involved in another relationship is a clear determination that the Petitioner is not willing to cohabit not have sexual relations with the Respondent. In the circumstances of this case, it is therefore the finding of this Court that sexual intimacy is unlikely to resume between the parties, thus effectively ending cohabitation.

8.27 Further, I critically considered the behaviour of the Petitioner which led to her having twins out of wedlock, which in my view has not been tolerated by the Respondent. Additionally, the uncontroverted evidence is that there is no hope of the parties reconciling or resuming cohabitation.

8.28 Taken together, including weighing the evidence of both parties, I find that the Petitioner did not adduce sufficient evidence of the Respondent's behaviour, particularly in the cumulative effect to prove her case and satisfy the requirement of **Section 13** of **The Matrimonial Causes Act**¹. Her allegations of the Respondent having improper relations with other women throughout the marriage had been condoned by the Petitioner, as that seemed to be Respondent's pattern of behaviour from the time that they got married. Having lived with the Respondent who was painted as a womaniser, clearly the Petitioner cannot now state that she finds such behaviour intolerable as she had condoned it all along. Similarly, having not led evidence on the dates of the incidences of the Respondent's behaviour, the Petitioner is deemed to have condoned the alleged behaviour. Therefore, I am not satisfied that the Respondent's alleged behaviour is of such gravity, as alleged by the Petitioner. On the totality of the evidence, I find that the Petitioner has failed to prove the allegations in her Petition and accordingly, I dismiss it.

8.29 Instead, I find that the Respondent has established the fact that the Petitioner committed adultery, such that he finds it intolerable to live with the Petitioner. Accordingly, the marriage has therefore broken down.

8.30 For the foregoing reasons, I dismiss the Petition and uphold the Cross-Petition on account of established adultery of the Petitioner. In view of that, I hereby hold that the marriage solemnised between **MUTINTA LINA MUYUNI LINYAMA** and **DAVID MBUMBI LINYAMA** has indeed broken down irretrievably due to the fact that the Petitioner has committed adultery such that the Respondent finds it intolerable to live with her.

9 CONCLUSION

9.1 I refer to **Section 9 (3)** of the *Matrimonial Causes Act*¹, which provides that: -

"If the Court is satisfied on the evidence of any fact mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably it shall grant a decree of dissolution of marriage."

9.2 I also refer to **Section 71 (1) (b) (i)** of the *Matrimonial Causes Act*¹, which provides that: -

"Restrictions on decrees for dissolution, annulment or separation affecting children

(1) The court shall not make absolute a decree of divorce or nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied—

(b) that the only children who are or may be children of the family to whom this section

applies are the children named in the order and that—

(1) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances;..." (Court's emphasis)

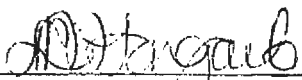
9.3 Accordingly, it is hereby **ORDERED** that the Marriage solemnised by the Petitioner and the Respondent on the 13th October, 2006, **BE** and is **HEREBY DISSOLVED** and a **DECREE NISI** is granted to be made Absolute within six weeks from date of the **DECREE NISI**, upon application by either party to the Deputy Registrar, provided the issues relating to the welfare of the children of the family who are receiving education at established institutions are heard and determined. Either party may formally make an application for the welfare of the children of the family.

9.4 The issue of property settlement is referred to the Deputy Registrar.

9.5 In the circumstances of this case, each party shall bear their own costs.

9.6 Leave to Appeal is granted.

Delivered at Lusaka on the 13th day of November, 2020.



P. K. YANGAILO
HIGH COURT JUDGE