

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
LUSAKA

2016/HP/D080

(Civil Jurisdiction)

**BETWEEN:**

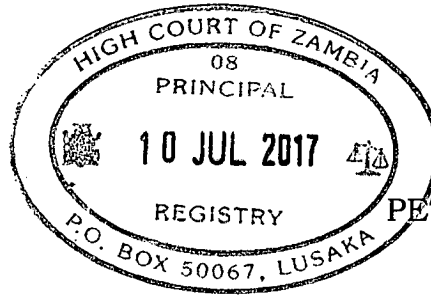
MEPHIAS TIRIBOYI

AND

CHARITY KAYULA TIRIBOYI

RESPONDENT

**BEFORE HONOURABLE LADY JUSTICE M. JUSTICE M. CHANDA THIS** 10<sup>TH</sup>  
**DAY OF** JULY , 2017



**APPEARANCES:**

For the Petitioner : Mrs M. Banda-Mutuna of Mweshi  
Banda & Associates

For the Respondent : Ms W. Musukwa of National Legal Aid  
Clinic for Women

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**JUDGMENT**

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**LEGISLATION REFERRED TO:**

*Matrimonial Causes Act No. 20 of 2007 Section 8 and 9*

**CASES REFERRED TO:**

1. Yoyo v Yoyo Supreme Court Judgment No. 78 of 1998
2. Livingstone-Stallard v Livingstone Stallard (1974) All ER 767
3. Katz v Katz (1973) 3 ALL ER 219

**WORKS REFERRED TO:**

1. Breakdown of Marriage: *Modern Law Review Volume No.30 Issue No. 2* (1967)
2. Paras Diwan *Modern Hindu Law: 17<sup>th</sup> Edition* (2006) Allahad Law Agency, Delhi
3. *Bromley on family law: 9<sup>th</sup> Edition* (2005), Oxford University Press, Oxford, United Kingdom
4. *Rayden's Law and Practice in Divorce, and Family Matters in all Court, Volume I Text, Twelfth Edition* (1974) Butterworths, London 1974

This is a contested petition for divorce which was filed into Court on 4<sup>th</sup> April, 2016. The petitioner **Mephias Tiriboyi**'s prayer was that the marriage to the respondent, **Charity Kayula Tiriboyi** be dissolved on account that the said marriage had broken down irretrievably on the ground that the respondent had behaved in such a way that the petitioner cannot be expected to live with her.

The respondent filed an answer on 18<sup>th</sup> July, 2016 wherein she resisted the prayer for dissolution of marriage.

The particulars of the alleged respondent's unreasonable behaviour were stipulated as follows:-

- i. The respondent has a bad temper leading to irrational outburst and frequently behaves in a disrespectful manner towards the petitioner.
- ii. The respondent had been receiving phone calls from an unknown man and refuses to disclose his identity to the petitioner or to let the petitioner know the purpose of his calls.
- iii. Sometime in January, 2015, the respondent travelled back from Isoka where she had gone to drop off one of the children of the family, a son born to her before the marriage namely Daniel Mwansa at school. She arrived at intercity bus terminus at 02:00 hours in the morning without informing the petitioner prior to embarking on her journey so he could collect her. The petitioner found her sleeping on the veranda of the matrimonial home when he woke up in the morning.

- iv. The respondent has a tendency of jumping out of the petitioner's vehicle and refused to communicate with him whenever a difference of opinion or dispute arises between them.
- v. In May, 2015, the matrimonial home of the parties was broken into by thieves who stole money in the amount of K1, 400.00 and a mobile phone all belonging to the respondent. Upon learning of the break in and missing items, the respondent disrespectfully accused the petitioner of being the master mind behind the break in and theft and did not speak to him for a period of 22 days from the date of the break in even after he made attempts to talk to the respondent. The respondent also accused the petitioner of being the master mind behind the theft of the respondent's skirt she purportedly saw at the petitioner's uncle's residence in Zimbabwe.
- vi. The respondent also used to refuse to move with the petitioner when he would go and pick her up from her place of business opting to use public transportation instead without offering a proper explanation as to why she did not want to move with her husband.
- vii. The relationship between the petitioner and the respondent is beyond reconciliation therefore, it is in the best interest of the parties to dissolve their union.

The petition showed that the parties were lawfully married at Caleb Ministries International in Lusaka on 1<sup>st</sup> August, 2014. They last lived together as husband and wife at Plot No. 114 Tokyo Way, Libala South in Lusaka. There are two children of the family namely **Daniel Mwansa**, a boy born on 1<sup>st</sup> July, 2001 and **Ruth Tiriboyi**, a girl born on 24<sup>th</sup> August, 2015.

Hearing of the matter commenced on 28<sup>th</sup> July, 2016 and both parties gave oral evidence to buttress their respective positions.

The petitioner in his evidence told the Court that their marital problems started as soon as they returned from their honeymoon. The petitioner recounted how he gave the respondent his ATM Card and pin number with a view that she could access the funds from the account for the day to day running of the home. The petitioner stated that the ATM Card was returned to him a few days later in a very disrespectful manner by the respondent. He asserted that the respondent also vehemently declined to have the money deposited in her account on grounds that the petitioner would accuse her of stealing his money in future.

The petitioner went on to testify that on 28<sup>th</sup> August, 2014 when he bought the respondent a car, she rejected it stating that she could not drive a Toyota Corolla.

The petitioner also testified that between 23<sup>rd</sup> October, 2014 and 26<sup>th</sup> October, 2014 he had travelled to Livingstone with the respondent. He stated that while they were in the hotel room the respondent received a call from an unknown man and during the course of their conversation she struggled to express herself. According to the petitioner, upon being confronted the respondent refused to disclose the identity of the man who called her. It took the intervention of the respondent's brother's several days later for her to explain that the call she had received was from her business partner who wanted to buy talktime. The

petitioner stated that when the respondent asked why she had failed to explain the purpose of the call all along, she never gave any response.

The petitioner further informed the Court that sometime in January, 2015 the respondent rudely and unjustifiably accused him of giving her less money for their son's school requisites because the child was not his biological son. The petitioner equally gave an account of how their home was broken into by thieves who went away with K1, 400.00 cash and a cell phone belonging to the respondent. The petitioner asserted that the respondent accused him of masterminding the theft and stopped talking to him until she was counselled by a couple from their church after 22 days. He narrated that the respondent behaved in a strange manner even when they had not differed and was fond of jumping out of the car on trivial differences in opinion. The petitioner cited one such incident which involved the buying of tomatoes. He explained that the respondent stormed out of the vehicle upon being reminded that it was her duty as a woman to buy tomatoes and not the petitioner's. He also explained that on several occasions the respondent would decline to be picked up from her place of business. The petitioner stated that at times the respondent would leave her place of business without the courtesy of informing him not to pass through to pick her up. All in all the petitioner told the Court that he found the home environment to be unconducive and his personal efforts to try and salvage their marriage proved futile. It was his further evidence that the couple underwent several counselling sessions with their parents as well as at church level but to no avail.

He stated that he decided to leave the matrimonial home on 23<sup>rd</sup> May, 2016 and that he did not wish to be reconciled to the respondent. He sought the indulgence of the Court for the dissolution of their marriage as he could not reasonably be expected to live with the respondent.

There were no substantive issues raised by the respondent in cross examination.

The respondent in her answer disputed that Daniel Mwansa was a child of the family as he was born from her before the marriage to the petitioner. The respondent further denied all the allegations of unreasonable behaviour on her part but stated that she only talked or reacted when the petitioner did something that was very bad. In addition the respondent stated that the only thing she did was question the petitioner about his actions which reaction was expected from any human being. The respondent confirmed having received a phone call from her customer who wanted to buy talktime on credit. According to her, when she offered an explanation to the petitioner, he became very angry to the extent that he called the respondent's brother to help resolve the issue.

The respondent confirmed having arrived from Isoka at 05:00 hours but went on to state that when she reached home at 07:00 hours she found the door open and went straight to bed.

The respondent refuted that she was in a habit of jumping out of the petitioner's vehicle and stated that she only remembered the incident that occurred way back in 2015 when the parties had a disagreement. She explained that since she did not want the dispute to erupt into a fight, she requested to be dropped off.

The respondent further denied ever accusing the petitioner of stealing or masterminding the theft of her possessions. She stated that what transpired after the theft was that the parties just prayed together and the house locks were immediately changed.

The respondent averred that the only time she would use public transport was when the petitioner was working out of town. She denied ever refusing to move with the petitioner and that she had witnesses to that effect. She stated that both parties to the marriage had not been perfect but pointed out that issues between them were reconcilable with much effort from both of them.

In cross-examination the respondent, conceded that the couple had several counselling sessions regarding the issues raised by the petitioner. She also conceded that the petitioner would take her out for dinner to discuss their marital challenges. The witness further confirmed that the petitioner had not resumed cohabitation ever since he left the matrimonial home.

Both parties did not file any written submissions at the close of the case.

I have considered the petition, answer as well as the evidence of the parties. This petition for dissolution of marriage has been brought pursuant to *Section 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007* (hereinafter referred to as the Act). *Section 8 and 9(1) (b) of the Act* provide as follows:-

- “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.*
- (b) That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent”*

It is important to state from the outset that the Act does not define the term irretrievable breakdown. However, irretrievable breakdown of marriage was defined in **Breakdown of Marriage: Modern Law Review Volume 30 Issue No. 2 (1967)** as

**“Irretrievable breakdown of marriage is a marriage which stands no chance because the parties have ceased co-habitation and one or both parties intends not to resume co-habitation.”**

Paras Diwan in his book **Modern Hindu Law: 17<sup>th</sup> Edition (2006)** at page 68 defined it as:-



**“Such failure in the matrimonial relationship or such circumstances adverse to that relation that no reasonable probability remains for the spouses again living together as husband and wife.”**

Furthermore, **Bromley on family law: 9<sup>th</sup> Edition (2005) Oxford University Press, Oxford United Kingdom** Illustrate the considerations to be made by the Court in determining whether or not the marriage has broken down irretrievably when it was stated that:

**“In establishing whether or not the marriage has broken down irretrievably, the Court not only looks at the alleged behaviour but also its effect on the petitioner.....whether or not there is mutual love between the parties.”**

The aforesaid proposition was applied by the Supreme Court in the case of **Yoyo v Yoyo, Supreme Court Judgment No. 78 of 1998** wherein it was held that:

**“In order for a Court to refuse to grant a decree of dissolution of marriage, there must be evidence of mutual love.”**

Turning to the issue of unreasonable behaviour as relied upon by the petitioner, this has also not been defined under the Act. But the learned authors of **Rayden’s Law and Practice in Divorce and Family Matter** aptly puts it that:

**“The question of behaviour with regard to the breakdown of marriage relates to the quality of the respondent’s behaviour and the effect of such conduct upon the petitioner. It is a question of fact.”**

This point was further elaborated in the case of **Livingstone-Stallard v Livingstone Stallard (1974) All ER 767** as follows:

**“Would any right thinking person come to the conclusion that this respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with her, taking into account the whole of the circumstances of the case and the characters and personalities of the parties.”**

In **Katz v Katz (1973) 3 ALL ER 219** the Court had this to say:

**“Behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and, in my view; it must have reference to the marriage. Then the question is, what is the standard of the behaviour? The standard is that he must behave in such a way that the petitioner cannot reasonably be expected to live with the respondent....It is behaviour that causes the Court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with.”**

From the foregoing authorities, the question that I ask is whether or not in light of the evidence raised in the hearing of this petition it can be concluded that the behaviour of the respondent has

been so grave that the petitioner cannot be reasonably expected to live with her.

I intently paid attention to the evidence of the two parties and also their demeanour. I would hasten to state that of the two spouses, the petitioner was a more credible witness than the respondent. His character from the inception of the marriage is impeachable. The record indicates that his evidence is more detailed and consistent than that of the respondent whose evidence was mainly premised on bare denials.

It is quite clear from the evidence adduced on record that the parties herein have had a tumultuous marriage which resulted in the petitioner moving out of the matrimonial home following a long trail of counselling sessions and the parties have ceased to cohabit for a period of over one year. It is also apparent that there is no intention on the part of the petitioner to resume cohabitation.

The respondent in her answer prayed that the marriage be saved as dissolving it would not be in the best interest of the parties or the children.

While the respondent has firmly indicated that she still loves the petitioner and believes that there is still room for reconciliation, I find that her evidence conclusively points to the fact that she is the sole architect of the hostility that wrecked the marriage. The respondent's evidence in cross examination clearly confirms that

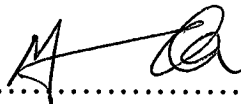
has all the counselling session they attended only involved the marital problems that have been catalogued by the petitioner.

The allegations proved before me show that the respondent is guilty of unreasonable behaviour. I am left with no doubt that the respondent through the many counselling sessions attended by the couple knew that her conduct was destroying the marriage and that the husband was very unhappy about it. Bearing in mind the petitioner's ultimate resolve to move out of the matrimonial home, it is my affirmation that the parties marital differences are irreconcilable and there is no mutual love between them.

I am therefore satisfied that the petitioner has adduced sufficient evident to prove that the respondent's behaviour in its cumulative effect is such that she has conducted herself in a manner that he cannot be expected to live with her and that the marriage has broken down irretrievably. The petitioner is hereby granted the decree nisi. Each party shall bear their own costs.

Leave to appeal is granted.

Dated at Lusaka this 10<sup>TH</sup> day of JULY , 2017



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**M. CHANDA**  
**JUDGE**