0IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 84/2000**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

EDWARD ANTHONY MALAMA APPELLANT

AND

JACQUELINE MALAMA (NEE MUKANDWA) RESPONDENT

Coram: Ngulube, CJ, Chirwa and Chibesakunda, JJS
on 6th June 2000 and 5th December 2000

For the Appellant: Mrs J Kabuka of Messrs J Kabuka & Company, Ndola
For the Respondent: Mrs J C Kaumba, Principle State Advocate, Legal Aid Directorate

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JUDGMENT

Chibesakunda JS, delivered the judgment of Court

Cases referred to:

1. Dewer V Dewer (197) S.J.Z 143 at 147
2. Mahande v Mahande (1976) Z.L.R. 287 at 297
3. Stallard v Livingstone – Stallard (1974) 2 All. E.R 766 Ibid. in the Digest Re-issue vol. 27(2) Husband and Wife para. 4718 at P.120
4. Katz v Katz (1972) 3 All E.R. 219

Acts referred to

1. The Matrimonial Causes Act of 1973
2. The High Court Act, Cap 27

This is an appeal against the High Court Judgment in favour of Jacqueline Malama (nee Mukandwa), the respondent, in the petition for divorce by Edward Anthony Malama, the petitioner now the appellant.

In the court below, the facts which were common ground are that, the respondent and the appellant married on 27th June 1987 at St. Anthony's Catholic Church, Kanseshi, Ndola. Thereafter they cohabited at House No. 2808, Ndeke Compound. The couple had three children by the said marriage; namely: Jacqueline Malala, Mwiche Malama and Evenly Malama. It was also common ground that there was no matrimonial harmony from 2nd September 1991 because the appellant believed that the respondent used love portions and herbs to her body and introduced some to his food. Because of this suspicion the appellant in September searched the matrimonial home and recovered what is said to have been love portions and some concoction which distressed him very much. The appellant because of this discovery of love portions sought the assistance of church counselors. After being counselled by the church leaders, the couple decided to try to maintain their marriage and the respondent undertook to reform her ways by avoiding using any love portion. In 1996 on the 16th of November after some reports from the maid the appellant once again searched the bedroom of the matrimonial home and found a fresh consignment of these love portions. These love portions freshly discovered, he told the court, were unacceptable and offensive to him. The respondent's evidence before the lower court is that it is true that these love portions were found in the matrimonial home but that she never applied these love portions to the appellant's food. She only applied these love portions to her body to cement their marriage.

The learned trial Judge after listening to the evidence and evaluating it dismissed the petition on the grounds that the appellant had not established proof beyond reasonable doubt, using a higher standard of proof, equivalent

to criminal standard of proof, that because of this conduct by the respondent the marriage had irretrievably broken down. The appellant has come to this court challenging these findings by the lower court. His arguments are that:-

1) the learned trial Judge misdirected himself on facts and law in failing to apply the correct standard of proof to establish that the marriage had broken down irretrievably. His learned counsel, Mrs Kabuka argued very convincingly that the learned trial Judge misdirected himself in applying a higher standard of proof in resolving the issue of unreasonable behaviour of the respondent in accordance with section 1 (2) (b) of the Matrimonial Causes Act of 1973. She submitted that the learned trial Judge erred in applying higher standard of proof instead of applying a well established civil action standard by specifically ruling out the application of balance of probability standard of proof. Citing the case of **Dewer v Dewer** (1) by Baron J, as he was then, she elaborated on this argument by quoting his diction:-

> **"I stress that for the provisions of S. 1(2)(b) to be met, the conduct need not be as serious as would have amounted to cruelty under the pre-1971 laws."**

She further quoted Cullinan A.J.S in the case of **Mahande v Mahande** (2):-

> **"This court must now determine whether the petitioner on a balance of probabilities proved the essential fact pleaded under S.1(2)(b)."**

The second point she canvassed was that the learned trial Judge further misdirected himself in attempting to analyse the gravity of the conduct of the parties in relation to the breaking down of the marriage irretrievably. According to her, the correct approach is as stated in **Livingstone – Stallard v Livingstone – Stallard** (3), quote:-

> **"In construing S. 1(2)(b) of the Matrimonial Causes Act, 1973, it is not appropriate to import notions of constructive desertion or analyse the degree of gravity of conduct which would be sufficient to justify the dissolution of the marriage."**

She further advanced her inputs on the definition of the conduct by one' spouse which would cause the other party not to be able to cohabit with that spouse stating that that conduct or behaviour must be conduct which affects the other spouse in the said marriage, vide **Katz v Katz** (4). She then argued that since the court held that the discovery of the love portions amounted to repugnant behaviour and could have been dangerous if the herbs or love portions were applied to the appellant's food, he should have concluded that that conduct fell within the ambit of unreasonable behaviour as envisaged by Section 1(2)(b) of the **Matrimonial Causes Act**. Her other argument is that the court's findings as a fact that many women in Zambia resort to using love portion in their marriages was not supported by evidence. Therefore, his reliance in resolving the issue of irretrievable breakdown of the marriage was a serious misdirection.

2) The learned counsel submitted that the court also erred by totally disregarding or failing to consider all the circumstances in the case before declining to grant a decree nisi. She argued very forcefully citing Halsbury's Laws of England 4th Edition, Volume 13, page 283 paragraph 574, and also as per Cullinan J, in Mahande v Mahande that the trial court is obliged under the law to consider the effect of the respondent's behaviour whether such behaviour is voluntary or involuntary on a particular petitioner particularly taking into account that particular petitioner's fault and other attributes in order to consider the issue of whether or not that particular petitioner could be reasonably expected to go on living with the respondent. Therefore she submitted that in the case before us the appellant had established on the balance of probability that the conduct of the respondent was such that he could not reasonably be expected to live with her as the application of love portion fell within the ambit of unreasonable behaviour. Therefore the marriage had irretrievably broken down. She therefore urged this court to dissolve and quash the High Court Order.

Mrs Kaumba, learned counsel for the respondent responded to the arguments by the appellant more or less conceding to most of the arguments. These were the arguments before us.

This court having listened to the arguments and having looked at the record of appeal upheld the appeal, quashed the order of High Court and granted decree nisi. We however reserved the reasoned out judgment. This is our reasoned out judgment.

We do accept the learned counsel's arguments on behalf of the appellant. Firstly, It is indeed a well-established principle at law that the standard of establishing facts in divorce matters is the same as in other civil matters. Also as per section 11 of the **High Court Act** the English Matrimonial Law applicable at the time applies in Zambia. The court has to conduct an inquiry and to arrive at the conclusion that the conduct of the respondent party is such that the marriage has broken down irretrievably. If for whatever reasons, whether because of the matrimonial offence or any other conduct the court arrives at the conclusion that the other party cannot reasonably be expected to continue to live with the other party then the court must conclude that the marriage has broken down irretrievably. In this case before us we hold that the conduct of the respondent was such that the appellant could not reasonably be expected to live with her in that she resorted to application of love portions, even after the protestation of the appellant. The marriage had broken down irretrievably. This is more also because the lower court held that the application of the love portion amounted to repugnant behaviour and that this was a dangerous practice if the love portions was applied to the appellant's food he misdirected himself. He ought to have concluded that the marriage had broken down irretrievably and as such to have granted a decree nisi by dissolving the marriage.

Secondly, we accept Mrs Kabuka'a arguments that there was no evidence to support the lower court's conclusion that applying love portion to cement the marriages is a prevalent practice of Zambian women and as such the lower court misdirected itself in using that as a reason for refusing to dissolve the marriage. As stated in our remarks on the day we quashed the lower court's order and substituted the lower court's order with our order of a decree nisi. We dissolved the marriage. We however take the view that the respondent has no means to meet the legal costs. So costs are to be borne by each party.

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M M S W Ngulube
CHIEF JUSTICE

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D K Chirwa
SUPREME COURT JUDGE

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L P Chibesakunda
SUPREME COURT JUDGE