



**HJO v JAO (Divorce Cause 2 of 2011)
[2024] KEHC 16434 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
DIVORCE CAUSE 2 OF 2011
S MBUNGI, J
DECEMBER 23, 2024**

BETWEEN

HJO PETITIONER

AND

JAO RESPONDENT

JUDGMENT

1. The petitioner and respondent herein had a customary marriage in 1994 then conducted a civil marriage in the year 1996. The respondent had filed separation cause No. 6 of 2009. From the record, it appears the separation cause was abandoned. The petitioner filed a petition dated 25.07.2011 seeking divorce on the grounds of cruelty and that the marriage has irretrievably broken down.
2. He stated that the respondent has been cruel since 2003 and listed the particulars of the cruelty as being denied conjugal rights, being locked out of the bedroom and being denied access to his property. He also cited adultery alleging that she had a baby out of wedlock. He prayed for the dissolution of the marriage, custody of the three issues of the marriage and costs of the petition.
3. The respondent filed a response to the petition and denied the particulars submitted by the petitioner stating that she had never been cruel to the petitioner. She prayed that the petition be dismissed and they have joint custody of their three issues.
4. The petitioner then filed an amended petition on 17.01.2017 maintaining the grounds of cruelty and stating that the baby born out of wedlock by the respondent was now three years old. He prayed that the marriage be dissolved and he be granted legal custody of the three issues of the marriage.
5. In response to the amended petition, the respondent stated that they have both shared custody of their issues save for one, whom the petitioner refused to take any responsibility on his upbringing. She further stated that the petitioner deserted the marriage in 2004 leading to the breakdown of their marriage and has since committed adultery with different women and has since cohabited with one



and had a son out of wedlock. She prayed that they have joint custody of the 4 issues and equal share of the following properties between the petitioner, respondent and children who are all above 18 years:

- a. Semi-permanent house at home Butula
 - b. Plots in Kingandole/Ikonzo, Butula (Mzee John)
 - c. Plots/flats in Nairobi (Eastleigh-Pumwani)
 - d. A permanent house in Embakasi (Utawala)
 - e. A plot/ shamba in Kanjala (Mzee Oteng'o)
 - f. Five vehicles:
 - i. KZT 409 Toyota Corolla
 - ii. EX GK 726M(Suzuki)
 - iii. KBJ 378M
 - iv. KAN 355W
 - v. KCH 402E
 - g. One motor cycle (EX-GK)
6. The petitioner testified on 17.10.2023 and the respondent testified on 23.10.2023 before Hon. Justice P.J.O Otieno so mine is to do the judgment. The judge was transferred.
7. On 19.09.2024, parties confirmed having filed submissions.

Petitioner's Case.

8. The petitioner isolated three key issues for determination by the court.
9. He submitted that the marriage had irretrievably broken down stating that he used to work in Nairobi while the respondent worked and lived in Kakamega. He submitted that the respondent was hostile and denied him access to her home. Further, he submitted that they had been separated for 18 years now which proved that the marriage had irretrievably broken down.
10. In his testimony, the petitioner told the court that they had separated in the year 2006. He testified that the respondent got another baby out of wedlock in the year 2009 and that he married another wife in 2016, with whom they had one issue at the time of the hearing.
11. It was his submission that the respondent deserted him for many years leading him to file this instant divorce so as to move on with his life.
12. Further he submitted that the respondent committed adultery with an unknown man and sired a child out of wedlock.

Respondent's Case.

13. The respondent submitted that despite the cruelty she underwent in their marriage, she supported the applicant emotionally and financially in ways such as: facilitating their wedding, financially supporting his step siblings and parents, supporting the applicant's upkeep while he was pursuing his studies, rent payment and using her influence to secure a job for him thereafter.



14. She submitted that the applicant hid documents of property they had purchased as a couple and left her with no records.
15. She further submitted that the applicant brought other women to their home and has a child out of wedlock. He mistreated her son and vowed not to support him since he was not the father.
16. The respondent avers that she was locked out of their residential home in Nairobi by the applicant, and they have time and again had family negotiations from the family members in an effort to re-unite them but the same has been unsuccessful.
17. Despite all these, the respondent beseeched that the court assists them in reconciling their family for the sake of their children and peace. Should the court deem it necessary to dissolve the marriage, the respondent submitted that it should be in accordance to her prayers stated in her answer to the revised petition.

Analysis.

18. The issue for determination is whether the petitioner has laid out a case to warrant the dissolution of the marriage.
19. The petition is anchored on two grounds, that of cruelty and adultery.

Determination

20. The applicable law is the Marriage Act No. 4 of 2014, "The Act". Section 98 (1) provides that:

“A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.”
21. It is not in dispute that a marriage subsisted which now the petitioner claims has irretrievably broken down and they lay blame on its failure on the respondent. However, the respondent wants the marriage to be salvaged.
22. A marriage certificate was issued after solemnization of the marriage under Civil Marriages Act for initially they had contracted a customary marriage. Section 8(1) of the Act provides that:

A marriage may be converted from being a potentially polygamous marriage to a monogamous marriage if each spouse voluntarily declares the intent to make such a conversion.
23. The Black's Law Dictionary defines solemnization as:

The performance of a formal ceremony (such as a marriage ceremony) before witnesses, as distinguished from a clandestine ceremony.
24. The marriage has been in place from 1996 and divorce proceedings were instituted on 25.07.2011. More than 15 years have lapsed from 1996.



25. Section 66 (1) of the Act provides that:

A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

26. The grounds for dissolution of a civil marriage are as per Section 66(2) of the Act which provides that:

A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—

- (a) adultery by the other spouse;
- (b) cruelty by the other spouse;
- (c) exceptional depravity by the other spouse;
- (d) desertion by the other spouse for at least three years; or
- (e) the irretrievable breakdown of the marriage.

27. It is trite law that he who pleads must prove. Section 107-109 of the [Evidence Act](#) provides:

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

28. The burden is upon the petitioner to prove that the respondent was cruel to him and also committed acts of adultery.

29. Cruelty is defined by the Black's Law Dictionary 8th edition as:

“ the intentional and malicious infliction of mental and physical suffering on a living creature.
”

The dictionary points out that physical cruelty involves actual violence.

It further defines "mental cruelty" the following terms: -

"As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse."



30. Justice G. B. M. Kariuki SC (as he then was) in *W.M. M v B.M.L 2012*] eKLR was of the view that:

“Courts have avoided formulation of an exhaustive definition of cruelty. Acts of cruelty, like acts of negligence in the law of torts, are said to be infinitely variable.”

He went on to state that

“Conduct that may undoubtedly be cruel in one case may dearly not be cruel in another on account of differing circumstances.”

31. The learned judge stood guided by the finding by Sir Charles Newbold in *Colarossi v Colagrossi* [1965] E.A 129 where it was held that:

“no comprehensive definition of cruelty has ever been accepted as satisfactory - much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.”

32. Judge Kariuki referred to the House of Lords findings in *Gollins V Gollins* [1963] 2 All E.R.966 H.L. [1964] AC 644 and *Williams v Williams* (1963) 2 All ER 944 HC [1964] AC 694 which established that the balance in claims of cruelty as a ground for dissolution of the marriage was in favor of giving relief to a complainant in a situation which has become intolerable. Such that if the spouse causes injury to the complainant's health or is likely to do so, “it will amount to cruelty if it is grave and weighty and is such that the Petitioner cannot reasonably be expected to put up with it or to tolerate it.”

33. It was further held that:

“A reasonable apprehension that injury will result if the conduct persists will suffice for the simple reason that the court will not wait for a spouse to be actually injured before affording such spouse relief.”

34. The Petitioner states that the Respondent was cruel to him for denying him conjugal rights, locking him out of the bedroom, denying him access to his property, deserting the marriage and committing acts of adultery which resulted to her giving birth to a baby out of wedlock. The Respondent on the other hand claims that it is the petitioner who has been cruel, deserted and committed adultery with several women and he is co-habiting with one and has a son outside wedlock.

35. They both denied each other's allegations on cruelty. In my opinion both parties have proved mental cruelty as defined by the Black's Law Dictionary. They have further proved that they carry strong views against each other that can lead to mental anguish. Neither party has denied the fact that each has a child outside wedlock. They parted ways in the year 2004, meaning they stopped enjoying the benefits of marriage like: conjugal rights, companionship, helping hand, love etc. in that year. Meaning that, logically and practically the marriage ceased to exist in 2004. What was remaining was marriage in paper so the marriage cannot be retrieved or salvaged as prayed for by the respondent for previous attempts for reconciliation failed. It is almost 20 years after the parting.



36. Section 66 (2) (e) of the Act provides as a ground for dissolution: the irretrievable breakdown of the marriage. Section 66(6) of the Act provides that a marriage has irretrievably broken down if:
- (a) a spouse commits adultery;
 - (b) a spouse is cruel to the other spouse or to any child of the marriage;
 - (c) a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;
 - (d) the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;
 - (e) a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;
 - (t) a spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;
 - (g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or
 - (h) any other ground as the court may deem appropriate.
37. From the above analysis, I find that the petitioner has proved his case to warrant the dissolution of this marriage. There is no evidence that he has condoned the acts of the respondent neither is there anything to show that he has connived with the respondent to bring up these proceedings.
38. The issue of sharing of the property, it is my view that this court sitting as a divorce court has no jurisdiction. The issue of sharing of the property can be taken up in a separate suit on division of matrimonial property. Similarly, though the claim for custody of children was withdrawn, it was also improperly before the court. The same should have been taken before a children's court.
39. From the foregoing, the marriage is hereby dissolved. I note that the *marriage Act* does not provide for decree nisi but I think it is necessary for a decree nisi to issue then followed by a decree absolute within three months for we never know, the parties might think otherwise and reconcile.
40. This being a family matter, each party shall bear its own costs of the petition.
41. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Petitioner – present

Ms. Shibanda for petitioner present online.

Respondent – absent

Court Assistant – Elizabeth Angong'a

