



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

DIVORCE CAUSE NO. E1 OF 2020

RNO.....PETITIONER

VERSUS

BKJ.....DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Sewe Habil Advocate for the Petitioner

John Bwire Advocate for the Defendant

J U D G E M E N T

This is a Petition for Divorce by the Petitioner RNKO against the Respondent BK – Jibendi for a decree that the marriage between her and the Respondent be dissolved, and orders to this effect be granted.

- a) That this honourable court does presume that there is a presumption of marriage by way of cohabitation between the Petitioner and the Respondent.***
- b) That the ensuing marriage between the Petitioner and Respondent by way of cohabitation herein be and is hereby dissolved.***
- c) A declaration be issued conferring the petitioner the petitioner the entire interest in all that parcel of land known as Kilifi Cr 28644 LR No.1705/233/127 together with the developments situated in Kilifi County Council and interest of the petition.***

The Respondent filed a reply to the petition dated 8th February, 2021. The Petitioner petitioned this Court for dissolution of the marriage on grounds specified under paragraph 7 of the Petition that the Respondent has treated her with cruelty. The acts of cruelty comprised of use of abusive language, spending most of time away from home, failing to provide the petition with emotional support, love, care, consortium rights, being violent, secretive, moody rendering the union toxic. Further the Respondent has been involved with illicit affairs with another woman in Kilifi which has given birth to a baby – girl.

In reply to the Petition, the Respondent contested the allegations of the marriage being irretrievably broken down and stated that it is the Petitioner who is guilty of cruelty. That those allegations were raised in Divorce Cause No. 11 of 2019 which was later withdrawn on 14th November, 2019. That the petition has been filed in bad faith and with selfish interests. That the petitioner treated the Respondent with hostility, failed to appreciate efforts made to take care for the family that despite efforts made to rescue the family. The petitioner has been uncooperative which has ultimately led to the marriage breaking down irretrievably.

As a result of these grounds, the Respondent also prayed for the dissolution of the marriage. That the matrimonial investments be managed by a trust to cater for the daily needs and school fees of the minors maintenance of the issues of the marriage. The Respondent be granted legal custody of the issues herein.

From the record while scheduling the matter by the Deputy Registrar for the session judge, the petition was certified as an undefended petition. However, the crucial position is that way back in February, 2021. The Respondent had moved the Court by filing a reply to the petition with this background. I take it that under procedural the respondent did reply to the petition dated 19th October, 2020.

During the hearing of the Petition, it happened that only the petitioner who adduced evidence in her sworn statement she reiterated the contents of the petition as having been married by the Respondent by having cohabitation. The Respondent in reply did also acknowledge the existence of the aforesaid marriage. They both begot one issue of the marriage by cohabitation began to have cracks soon thereafter rendering the petition for dissolution necessary.

Determination

From the Petition and cross-petition the following issues arise for Court's determination.

- a) *Whether or not the petitioner has satisfied the criteria under the marriage Act for the marriage with the respondent to be dissolved.*
- b) *Whether the other remedies prayed for by both parties are available at this juncture.*

The petition as deduced from the pleadings and evidence is grounded on cruelty and desertion. As a response to the petition, it is clear from the Respondent that he also alleges cruelty on the part of the petitioner. In the first instance has the petitioner discharged the burden of proof to be granted divorce.

The law

It is notable that the kind of marriage being acknowledged by the parties may fall within the scope of section 68 of the marriage Act. The threshold for dissolution of such a marriage takes the ambit of the following grounds; -

- a) *Adultery*
- b) *Cruelty*
- c) *Desertion*
- d) *Exception depravity*
- e) *Irretrievably break down of the marriage*

I have always wondered whether an exhaustive definition of cruelty can be settled and framed with clarity. In the light of this Sir Charles Newbold in *Colarossi V Colagrosi*[1965] EA 129 observed:-

“No comprehensive definition of cruelty has ever been accepted as satisfactory much depends on the habits and circumstances of the matrimonial life of 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, lives or health.”

In *Naveen Kohli vs Neelu Kohli (AIR 2004 All 1)* the Court made a commentary on what constitutes elements of cruelty thus:

“Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in a day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. To constitute cruelty, the conduct complained of should be “grave and weighty” so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than “ordinary wear and tear of married life.” The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions.”

This definition also reflects our local circumstances as stated in *A.M.A. vs G.S.B. Nairobi HCDC No. 134 of 2010, Kariuki J.* (as he then was) had this to say:

*“It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner's health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see *Russell vs Russell* [1895] P. 315, 322. See also *D. Tolstoy on The Law and Practice of Divorce, Sixth Edn.* It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see *Gollins vs Gollins* [1964] AC 644, *Williams vs Williams* [1964] AC 698, 760 *Tolstoy 6th Edn* states that the question in all cases is whether the Respondent's conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see *Gollins vs Gollins (supra)* at page 670 and *Williams vs Williams (supra)* at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see *Jamieson vs Jamieson* [1952] A. C. 525, 535. Moreover, a deliberate intention to hurt may turn into “cruelty conduct” which, without such intention, would not constitute cruelty.”*

For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty, though, should that all be serious enough, and result in injury, then the Court will grant the decree. What the law envisages for the grant of divorce on cruelty is prove of conduct complained of by way of evidence. That is grave and weighty for the Court to come to a conclusion that human dignity and conscience has been implored. It

must be conducted more serious than ordinary wear and tear of married life.

Looking at human relations, marriage union is generally solemnized by two people from different social-economic; cultural/customary or even ethnic backgrounds. Although, in very clear votes the parties covenant to move together for worse, ill health, for poor, while solemnizing the marriage that alone has never sustained the marriage. As a vital step each of the parties to marriage union has address the various inherent personal traits based on the range of possibilities and options to shift the focus on the success of the collation. Conflicts that may arise during the subsistence of the marriage need to be managed through interactive participatory and inclusive approaches for the sake of building interests, power and adjusting parties' expectations to the marriage. There is need to strike a balance among the various components of human relationships namely, goal incompatibility, attitudes, socio-economic status, cultural/customary differences, behavior, etc to ensure peaceful co-existence to avoid any of the spouses using his or her power to suppress the perceivably weak spouse to the marital union.

As such the basis of cruelty as agreed for divorce is case specific within the scope of the marriage act. It is sufficient that one spouse or both proves to the Court that the cruelty being explained is of such a type that its impossible for them to live together. As such the delivering of false allegations by one spouse about the other having alleged that relations with different men or women for that matter outside other recognized marriage can amount to emotional and mental cruelty. Similar circumstances abound when one forms the intention to injure, harass or hurt another's physical, or mental or emotional being without due regard to infringement of his or her human rights.

What happens when one spouse gets to a point of being refused sexual intercourse without a just cause. Often, when this occurs the affected spouse becomes emotionally and intimately immobilized usually, they will choose what I believe will be the least painful alternative. The pattern is refusal of sexual intercourse by the spouse has the negative effect on the other spouse. He or she may suffer because of sexual frustration due to lack of it as a normal adult conditioned to meet that sexual life, or he or she may suffer because of the desire for a family. The non fulfilling of this God given gift amounts to cruelty to the other spouse's refusal to make adequate provision of conjugal rights. In any view, no matter what status of life, the spouses have achieved, they have to deal with these special gifts from the creator, Almighty God.

I beg to ask myself some incredibly disempowering questions which may arise when the marital union, "How come I have no time for intimate connection? Why does not he or she leave me alone? What am I willing to do to make it, the way he or she wants it? How can I enjoy the process while I do what is necessary to make it the way he wants it or the way she wants it or the I want it? Does he or she understand I am not a machine? Why don't I ever get a break. These are the situations which this Court can imagine the sexual frustration checks a kind of emotional state likely to amount to cruelty.

The comparative decision in *White V White [1948] 2 ALL ER 151* remained as follows; -

"In this case the husband had insisted on the practice of Coitus interruptus despite his wife's objections to this and despite the advice of a doctor that to continue would have a serious effect on the wife's health, Wilmer J stated that he did not wish to be taken as holding that in all situations the practice of Coitus Interruptus, would amount to cruelty but he continued I feel that a husband must take his wife as he finds her, and if she is a woman of a type who needs the full and natural completion of the act, then to persist in withstanding it form her in the face of her repeated complaints and objections, is in itself an act of cruelty, and if as in this case, it does result in serious injury to health or does contribute in marked degree to the breakdown of health of the spouse, then, in my judgement it is only right that this Court should give relief."

From the above statement the truth is sexual intercourse should not be equaled with procreation of children treating it as the only justification for that intimate connection between a man and his wife. If the Court has to consistently look for reasons why marriages are screwed up, denial of consummation or trivializing it is not likely to take the spouses out of a well celebrated marriage. Similarly in *Knott V Knott [1955] 2 ALL ER 305 Sachs J* held that; -

"Permanent and unreasonable starvation of the maternal instinct may to my mind, be of itself a cruel thing. There is the added element, and that a serious one, that injury to the wife's health results from the very practice itself, and is an injury which may be distinct form that caused by starvation of the maternal instinct."

This principles in Knott's case seems to hold a clear distinction between the two aspects of sexual intercourse. Once it is accepted that coitus interruptus which injures the wife's or a husband is health because of their sexual needs not being satisfied. That amounts to cruel conduct of either spouse to the marriage the court then approaches the issue only on a question of degree as to whether the victim of the refusal or abstinence complained amounts to cruelty to warrant dissolution of the marriage.

In the instant petition, it is alleged by the petitioner that the respondents acts of cruelty involved violent assault occasioning physical harm to the body parts during the subsistence of the marriage. The petitioner further deposed that the respondent failed to provide her with emotional support, love, care and consortium.

From the perspective of the respondent, it is the petitioner who is guilty of insults, and abusive language to destroy his self-esteem. In respect of conjugal rights commonly referred to as sexual intercourse the respondent on oath avers that the petitioner failed to provide the much needed love, care and attention that is deserving of a loving husband. He also pitched denial of conjugal rights in the context of the petitioner's misconduct to constitute cruelty. On the basis of these various points in the petition and cross-petition apparently there is evidence of immeasurable mental agony and torture which constitutes cruelty.

The undisputed position is that the marriage of the petitioner as presumed by cohabitation with the respondent since 2016 has infact fallen apart as per the averments. Certain key differences cropped up between the petitioner and the respondent in the background of the averments none has stared the other of cruelty. The factual aspects are indicative of a marriage in the rocks. Restitution in conjugal rights is not tenable as the emotions once positive to each other have grown into full blown, crisis of negativity which has turned "love" into "hate" on whatever they hear and feel of each other as husband and wife.'

One of the primary obligations of spouses under the marriage Act is the duty to cohabit and consummate the marriage union. It is an intolerable interference by this Court to insist on sustaining the marriage which is against the rights of the individuals as espoused, in Article 28 and 29 of the Constitution to order that Adults of sound mind continue to live together in a marriage which has irretrievably broken down with no window of a reconciliation.

Having put forward these organization in perspective the conclusion I reach with regard to this petition is to grant it and decree the marriage by presumption as duly dissolved by the Court on this 2018/2021. It follows, that a declaration be issued confirming the entire interest that parcel of land known as Kilifi CR 286414 LR No.1705/233/127 as family owned by both parties to the now dissolved marriage. As a consequence a decree of adherence on the distribution of the marital estate will not be specifically enforced as for now, the issue at hand was on the dissolution of the marriage which takes effect by this order.

As of necessity a decree absolute be issued to the petitioner. Each party to bear their own costs.

DATED, SIGNED AND DISPATCHED VIA EMAIL AT MALINDI ON 19TH DAY OF AUGUST 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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