



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE 79 OF 2005

IN THE MATTER OF THE MARRIAGE ACT 2014 OF THE LAWS OF KENYA

JKN.....PETITIONER/APPLICANT

VERSUS

PTK.....RESPONDENT

JUDGMENT

1. The Petitioner herein JKN filed this Petition against the Respondent PTK on 23rd November, 1999 seeking the following orders;
 - (a) **THAT this Court decrees the dissolution of the Marriage between him and the Respondent.**
 - (b) **THAT the Custody, Care and Control of the Children of the marriage be granted to the Petitioner until they reach the age of maturity.**
 - (c) **THAT the Respondent be Condemned to pay the Costs of this Petition.**
2. The Petitioner and Respondent got married on 9th August 1991 at the Marriage Registrar's Office in Nairobi.
3. After the Celebration of the marriage, the couple cohabited in Nairobi and were blessed with three issues namely;
 - (a) **EM born in 1988**
 - (b) **NM born on 5.2.1990 and**
 - (c) **PM born on 26.12.1991**
4. The Petitioner seeks dissolution of the marriage on the grounds of adultery and cruelty. The particulars of adultery were as follows:
 - (a) **THAT the Respondent during the existence of the marriage committed adultery with a white man by name R who was her boyfriend before the marriage.**
 - (b) **THAT the Respondent continued to communicate with the said boyfriend despite the Petitioner's warning that she should not communicate with him.**
5. The Petitioner stated in the Petition that on 15th November 1999, he left the matrimonial home at [Particulars withheld] due to the great and continued cruelty practiced on him by the Respondent.
6. The Respondent filed an answer to Petition dated 10.12.1999 and denied the averments in the Petition. She said in the answer to Petition that the Petitioner left the Matrimonial home out of reckless decision and lack of care and commitment to the Respondent and the Children of the marriage.

7. On 14.10.2004, the Respondent amended the answer to Petition and cross Petitioned for Judicial Separation on the grounds of adultery, cruelty and desertion.
8. The particulars of adultery were that since the celebration of the marriage, the Petitioner had committed Adultery with one LMK and had purported to marry her while their marriage was still subsisting.
9. On the Particulars of Cruelty, the Respondent stated in the Cross Petition that the Petitioner had refused to provide the upkeep and maintenance for her and the children of the marriage and that he was unaffectionate to the children.
10. The Respondent also stated that the Petitioner had deserted her by moving out of the Matrimonial home in 1999 and he had never returned.
11. She asked for Judicial separation and custody of the Children until they attain the age of the majority.
12. The hearing commenced on 29th November, 2018. The Petitioner told the Court that he got marriage to the Respondent in 1991 at the Office of the Registrar of Marriages in Nairobi.
13. At the time of the marriage, the Petitioner said he was working in the Army while the Respondent was working with prisons Department.
14. The Petitioner said the marriage was blessed with 3 children who are all adults namely:
 - (a) EM born in 1988
 - (b) NM born on 5.2.1990 and
 - (c) PM born on 26.12.1991
15. The Petitioner said during subsistence of the marriage, the Respondent continued to have a relationship with a white man who was her friend before the marriage. The Petitioner said he moved out of the matrimonial home and he is now seeking dissolution of the marriage.
16. The Petitioner said after they separated, he rented a house for the petitioner at Kahawa Sukari and later she moved out and he does not know where she stays.
17. The Respondent did not cross examine the petitioner – she asked for another date to cross examine him and to give her evidence. The Court directed that the hearing proceeds on 20.1.2018. However, the Respondent did not turn up in Court on 20.12.2018 and the Petitioner closed his case.
18. The Civil Procedure is very clear that if any person does not turn up for hearing of their case after notice has been given the case may proceed in their absence. I find that the Respondent knew that her case was coming for hearing and she failed to come to Court. This court will proceed to deliver Judgment on the evidence on record.
19. Dissolution of marriages is governed by the marriage Act. Section 65 provides for the grounds of dissolution as follows;

S. 65. Grounds for dissolution of a Christian marriage

A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—

- (a) One or more acts of adultery committed by the other party;
- (b) Cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or
- (c) Desertion by either party for at least three years immediately preceding the date of presentation of the petition;
- (d) Exceptional depravity by either party;
- (e) The irretrievable breakdown of the marriage.

20. In his petition for divorce, the petitioner accused the respondent of committing the matrimonial offences of desertion and cruelty. He provided testimony in support of his claim. I rely on the following cases;

In **DIVORCE CAUSE APPEAL BETWEEN ALEXANDER KAMWERU VS. ANNE WANJIRU KAMWERU (2000) e KLR** being an appeal from a Judgment of the **HIGH COURT OF KENYA DIVORCE CAUSE NO. 75 OF 1992**, the Court of Appeal gave guidelines on the applicable burden of proof as:-

“Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”

21. On cruelty in **DM -VS- TM (2008) 1 KLR, 5, Chesoni, J.** as he then was, said:-

“To establish cruelty the complainant must show to the satisfaction of the court:-

(i) misconduct of a grave and weighty nature

(ii) real injury to the complainant's health and reasonable apprehension of such injury

(iii) that the injury was caused by misconduct on the part of the Respondent, and

(iv) that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.”

22. The establishment by a court of law of the existence of cruelty depends on the circumstances of each case. In the present case, in order to prove the allegation of cruelty, this Court must satisfy itself that there is evidence indicating that the respondent, without any justifiable cause, deliberately conducted herself in such a manner as to endanger the other party's physical or mental health, or to cause that party anxiety over the imminence of such danger.

23. Having considered the evidence adduced before by the petitioner and on the basis of the above authorities, this Court finds that the allegations of adultery and cruelty made by the Petitioner against the Respondent have been established to the required standard.

24. I therefore find that the marriage between the Petitioner and the Respondent has broken down irretrievably and it cannot be salvaged.

25. On the issue that the marriage has broken down irretrievably, Section 6 of the Act provides as follows;

S. (6) 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 for at least three years immediately preceding the date of presentation of the petition;

(f) A spouse has been sentenced to a term of imprisonment of the 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

26. My findings are as follows:

(i) I find that the Petitioner has proved that he separated with the Respondent on the grounds of cruelty and adultery. I find that the Respondent did not controvert the petitioner's evidence.

(ii) There is no evidence that the Petitioner connived or condoned the Respondent's behavior.

(iii) I find that the parties have not stayed together since 1999 and the marriage has broken down irretrievably.

(iv) The children of the marriage are now adults and the prayer for custody has been overtaken by events.

(v) I find that the Respondent did not pursue her cross petition and the same is accordingly dismissed.

(vi) I find that the Petitioner has proved his case to the required standard and I accordingly grant prayer (a) of the Petition as prayed.

(vii) The Marriage between Petitioner and the Respondent is accordingly dissolved. Decree Nisi to issue and the same to be made absolute after 30 days.

(viii) On the issue of Costs, I order that each party to bear its own costs of this Petition.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 25TH DAY OF JANUARY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA,

NAIROBI