



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**FAMILY DIVISION**  
**DIVORCE CAUSE NO. 28 OF 2011**  
**C R O.....PETITIONER**  
**VERSUS**  
**P K G.....RESPONDENT**  
**JUDGMENT**

**THE PETITION**

1. By a Petition dated the 20<sup>th</sup> June 2011 supported by his affidavit of the same date, the Petitioner seeks the dissolution of his marriage to the Respondent on grounds of desertion, adultery and cruelty. The two married under the provisions of the Marriage Act cap. 150 and the marriage was celebrated on 11<sup>th</sup> November 2000 at [particulars withheld] Church in Changamwe, Mombasa. After the said marriage the Petitioner and the Respondent cohabited in Mombasa as husband and wife. There are no issues of the marriage. The Petitioner prayed for dissolution of the marriage and costs.

**GROUND OF THE PETITION**

**Desertion**

2. The Petitioner argues that since the year 2010 the Respondent had deserted him and the particulars of the desertion are given as follows:

- i. That on 31<sup>st</sup> October, 2010, the Respondent packed her belongings in the absence of the Petitioner and deserted the matrimonial home at Jomvu to stay in Miritini area of Mombasa and has not returned home since then.
- ii. That the Respondent upon realizing that she is expectant out of her adulterous relationships decided to desert the matrimonial home.
- iii. That the Respondent is now cohabiting with another man in Miritini.

**Cruelty**

3. That the Respondent has since the beginning of the year 2008 treated the Petitioner with cruelty whose

particulars were given as follows:

- i. The Respondent has actually deserted the Petitioner and as a result denied the Petitioner his conjugal rights for the period of the year 2010.
  - ii. The Respondent is a liar and loiters around coming home late in the night. When asked about her whereabouts, she keeps mum and insults the Petitioner.
  - iii. The Respondent stopped taking her housework core responsibilities as a wife, forcing the Petitioner to do the same.
  - iv. The Respondent's absence in the matrimonial home has emotionally affected the Petitioner by her aforesaid actions and decision.
  - v. The Respondent has refused to go to the Petitioner's rural home forcing the Petitioner always to go home alone without her, which actions embarrass the Petitioner with his relatives upcountry.
4. That despite efforts of reconciliation, the Respondent has refused to cooperate by not attending meetings when called upon to do so.

### **Adultery**

5. That the Respondent has since the year 2008 been guilty of Adultery within the marriage in that the Respondent had committed adultery having relationships with other men unknown by the Petitioner, which action constitutes to adultery and as a result the Respondent conceived and a baby was born in April, 2011. This has in turn affected the Petitioner causing him anguish, embarrassment and humiliation in the society. It was alleged that the child born on April 2011 father is one J.M. and not the Petitioner.

### **RESPONSE BY THE RESPONDENT**

6. The Respondent filed an Answer to Petition dated 5<sup>th</sup> July 2011 and denied the allegations of Adultery and Cruelty as set out in the Petitioner's petition. Without cross-petitioning for dissolution, she alleged that it is the Petitioner who has lived an adulterous life outside the marriage thereby causing her mental anguish and torture which led the Respondent to seek for a matrimonial affair which succeeded in getting her pregnant with a baby boy. In her answer to Petition she particularized the petitioner's cruelty as follows:

- i. The Petitioner has on several occasions had sexual relationships with other women unknown to the Respondent.
- ii. The Petitioner has on several occasions during the marriage been spending several nights away and has a habit of arriving home late every night and does not communicate with the Respondent.
- iii. The Petitioner insults the Respondent and speaks to her harshly.
- iv. The Petitioner has on several occasions apologized to the Respondent verbally for his way word activities and the Respondent has always agreed to forgive him. Only for the Petitioner to go back to such wayward soon thereafter.

7. The Respondent admits that the marriage between the Petitioner and her has irretrievably broken down and further stated that the Petition had been instigated by women unknown to the Respondent. She claimed that she was forced and chased out of their matrimonial home by the Petitioner in the month of June 2010. The Respondent does not oppose the petition but only requested the court to divide the property which they acquired when she was with the Petitioner, and for damages and costs of the Petition.

8. The Cause was heard and the petitioner (PW1) and his witness (PW2) and the respondent (PW3)

testified before the Court.

## **SUBMISSIONS**

9. Counsel for the parties – M/S Odhiambo S. E. & Co Advocates for the Petitioner and M/S Christine Kipsang & Co. Advocates for the respondent – filed written submissions and judgment was reserved.

10. For the Petitioner, by written submissions filed on 27<sup>th</sup> March 2015, the Petitioner argued that the Respondent in her evidence admitted that she had conceived and had two children. The 1<sup>st</sup> child was with another man and not the Petitioner and the 2<sup>nd</sup> child was born during the pendency of her marriage to the Petitioner. It was further averred that PW2 Bishop E C M had confirmed the irreconcilable differences and that the Respondent had left the matrimonial home in 2010. The Petitioner submitted that the ground of adultery is proved and the court should declare the marriage dissolved. Further, it was submitted that the parties had not been staying together for 4 ½ years and the marriage had irretrievably broken down.

11. On the issue of distribution of matrimonial property it was submitted that the same was subject to HCCC No. 28 of 2011 (O.S) and was pending hearing and determination by another court.

12. For the Respondent by written submission dated 24<sup>th</sup> February 2015. On the issue of desertion the respondent denied the allegation and submitted that she left the matrimonial home due to physical abuse by the Petitioner and fear for her life. She relied on the case of **Frank Mwangi Gathara vs. Faith Waruguru Mwangi** (2007) eKLR

13. On the issue of cruelty, the Respondent submitted that she was always a loving wife and it was the Petitioner who forced her to leave the matrimonial home after physical abuse.

14. On adultery the Respondent submitted that the Petitioner has on several occasions had sexual relationships with other women unknown to the Respondent. She objected that the person with whom the respondent was alleged to have committed the offence should have been involved in and relied on the case of **MK VS GND** (2008) eKLR for the proposition that adultery is a serious matrimonial offence with a higher standard of proof than the balance of probabilities or preponderance of probability or a mere suspicion and opportunity to commit adultery.

## **ISSUE FOR DETERMINATION**

15. The respondent did not file a cross-petition for divorce and therefore the questions before the court are based on the petitioner's petition and the respondent's answer thereto only as follows:

- a. Whether the respondent had deserted the petitioner
- b. Whether the respondent was guilty of cruelty
- c. Whether the respondent had committed adultery
- d. Whether the marriage had irretrievably broken down

16. It was established that there was matrimonial property suit between the parties, filed by the respondent against the petitioner, and therefore the issues of distribution of the matrimonial property the supporting evidence of which the respondent appeared to dwell is proper subject of that suit and not this Divorce Cause.

## **DETERMINATION**

### ***Findings of the Court on the law and facts***

17. I accept the objective standard of proof for matrimonial offences, as set out by Law JA in *Maathai v. Maathai* (1980) KLR 154, (1976-80) KLR 1689, as follows:

*[W]hen considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that **the court must feel satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved.***

There is however, the subjective test of cruelty as propounded by **Madan J.A. in *N v. N* that there were instances where although the objective standard of cruelty is not achieved, the parties may on account of what appear otherwise trivial feel justified to be released for their matrimonial obligations.**

18. In *N v. N*, supra Madan, J. (as he then was) held that –

*“If two spouses have reached a point of not being able to live together reasonably happily for causes some of which may appear trifling to an outside but are of vital effect upon their lives and which are felt by them to be intolerable or unreasonable to continue to bear then they are entitled to be released from their matrimonial union the guilty spouse bearing the consequences.”*

19. The learned Judge further held in that case that because of the husband’s disability as a diabetic patient it was cruel of the wife not to cook food and serve meals. In the present case, if as discussed below it the respondent’s case that the petitioner is the one who had health problems making him unable to bear children, it was cruel for the wife to seek a child with other sex partners outside marriage.”

#### Desertion

20. The petitioner alleged desertion as from the 31<sup>st</sup> October 2010, while the respondent asserted constructive desertion alleging that the petitioner had chased away the respondent from the matrimonial home in June 2010. The only other witness (PW3) the parties’ Bishop who solemnized their marriage and who had attempted reconciliation of the parties did not indicate the actual date and circumstances of the separation of the spouses other than to state that the respondent left home in 2010 over ‘domestic quarrels’. As a matrimonial offence requiring a standard of proof higher than a preponderance of probabilities, the offence of desertion was not proved.

21. Moreover, the ground of desertion was not competent as the statutory period of 3 years had not lapsed between the date of alleged desertion on 31<sup>st</sup> October 2010 and 21<sup>st</sup> June 2011 when the Petition was filed, which is only seven months after the alleged desertion. Section 8 of the Matrimonial Causes Act, cap. 152 (which was then applicable before repeal by the Marriage Act 2014) provided at section 8 (1) (b) as follows:

***“8. (1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent –***

***(a) has since the celebration of the marriage committed adultery;***

***(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition;”***

22. Accordingly, the Court does not have to consider whether the petitioner had in constructive desertion forced the respondent out of the matrimonial and home because of an alleged disagreement over the respondent’s sister who was staying with them and or because the respondent’s perceived failure to conceive.

#### Adultery

23. I respectfully agree with Madan, J. in *N v. N* that circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling and that “*to prove adultery, it is not necessary to have direct evidence of the same. Association coupled with opportunity, illicit affection, undue familiarity and guilty attachment are some which create an inference upon which the Court can act.*” However, in this case, with respect to allegations of adultery against the petitioner made by the respondent in defence of the petition, other than bare reference to late homecomings and outings of the petitioner, the respondent did not prove the allegations of adultery made against the petitioner. It merely was a suspicion which was grounded as follows:

*“In the Church the petitioner was a godly man and he led the Church. I was in the choir. In the house, he was a different man. **I consider that he had other women as he came late in the night and I would hear him talk to female voices on the mobile phone saying that he had arrived home.**”*

24. The respondent’s defence to adultery was that “*I did not sleep with any person during the cohabitation. I got the child in April 2011. I left the petitioner’s house in June 2010.*” This defence is faulty as it suggests that adultery can only be committed while during cohabitation. Whether the conception by the respondent was during **cohabitation** with the petitioner before she left in October 2010 (according to the petitioner) or after she was chased out of the matrimonial home in June 2010 (according to the respondent) is immaterial. The proscription of adultery lasts the length of the marriage, not cohabitation or otherwise of the spouses – section 8(1) (a) of the Matrimonial Causes Act. Adultery is committed any time after marriage before it is lawfully dissolved.

25. In addition, the adultery is not excused because, as the respondent alleged, the petitioner had accused her of being unable to conceive when he in fact was the one who according to alleged medical report had low sperm count, and she was therefore “happy to conceive after she left the petitioner’s home” and saw it as a demonstration of “God’s grace”.

26. Whatever good motives of getting children while the respondent is of child bearing age are irrelevant. She ought to have sought release from the duty of fidelity under her marriage to the petitioner, by petitioning for dissolution earlier, before seeking to conceive a child.

### Cruelty

27. The respondent alleged cruelty in the treatment by the petitioner and his relatives on account of her apparent inability to bear a child. In the absence of a cross-petition, the Court is not able to investigate the matter and, in any event, the alleged cruelty may have been condoned, seeing that the acts were alleged to commence in 2004 and the petition filed herein by the petitioner, without any cross-petition by the respondent, on 21<sup>st</sup> June 2011, as she testified:

*“We lived happily for a short time until 2004 when I could not conceive a child and the petitioner used to insult me as a ‘useless person’. The petitioner complained that I had not had a child for the four years. He would also beat me up. This was in the house. I endured...”*

28. The Court has no hesitation in finding cruelty as proved by the petitioner in this matter. I consider that the act of adultery in a marriage is the worst form of cruelty that one spouse can mete out on the other because it involves breach of matrimonial trust and faith in the fidelity of spouse to each other. When adultery is proved, the offence of cruelty to the victim spouse necessarily follow and the spouse may be forgiven if he or she considers himself or herself so aggrieved as to be no longer bound to live together with the other spouse. In this case, the acts of adultery were laced with not so subtle chiding in the justification that the petitioner could not bear a child. To go out of wedlock to look for a child because one’s partner in marriage cannot bear a child is mean and cruel both objectively and within the principle of subjective cruelty in *N. v. N*, supra.

29. The primary cause of the disagreement between the parties was the failure of a child, with the spouses apparently blaming each other for the inability to conceive. While this might appear a small matter, it obviously in this case had tremendous impact on the ability of the spouses to continue to live together.

## CONCLUSION

30. It was established by evidence presented by the petitioner and conceded by the respondent that the respondent was guilty of adultery, having heard two children born out of wedlock in the years 2011 and 2013 during the subsistence of the marriage. By these adulterous acts the respondent had been cruel to the Petitioner. The parties had lived apart since 2010, in the month June according to the respondent and October according to the petitioner. Whatever the month of separation, the period of five years upto the time of hearing of the petition qualifies the matter for dissolution under the principle of irretrievability of marriage under the Marriage Act 2014 (which applies by virtue of section 98 (2) of the Act to pending proceedings), section 66 whereof provides for instances where a marriage is deemed to have irretrievably broken down of marriage as follows:

*“66 (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 wilfully 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 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.”*

31. The marriage between the petitioner and the respondent has irretrievably broken down on account of adulterous and cruel acts of the respondent.

## ORDERS

32. Accordingly, for the reasons set out above, the court makes an order of decree *nisi* of dissolution of the petitioner’s marriage to the respondent solemnised on the 11<sup>th</sup> November 2000.

33. Despite the matrimonial nature of the matter, the Court considers that the respondent is the guilty party in the breakup of the marriage by her own cruel acts of repeated adultery and the Court, therefore, makes in accordance with section 27 of the Civil Procedure Act, an order for costs in favour of the petitioner to be recovered from her share of matrimonial property on distribution.

**EDWARD M. MURIITHI**

JUDGE

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF MARCH 2017.**

**E K OGOLA**

**JUDGE**

**Appearances**

M/S. Odhiambo S.E. & Co., Advocates for the Petitioner.

M/S Christine Kipsang & Co. Advocates for the Respondent.