



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

DIVORCE NO. 1^A OF 2016

E N N.....PETITIONER

VERSUS

C A K.....RESPONDENT

JUDGMENT

1. **E N N**, a female, married **C A K**, a male on 16th April, 2010 under the Marriage Act. They were blessed with one issue of that marriage **A W K** born on 31st May, 2010. Both **E N N** and **C A K** serve as soldiers of the Kenyan Army.

2. **E N N** has petitioned for divorce on two grounds. That **C A K** has committed adultery and has been cruel to her.

3. In respect to the first ground **E N N** in her evidence stated that she was informed of **C A K**'s adulterous affair, with a lady called **M M**, by her sister. No further information was supplied by **E N N**

4. On the second ground **E N N** stated that **C A K** assaulted her in the year 2010, which occasioned her with actual bodily harm. That **C A K** has lost respect for her which has caused her suffer mental cruelty, stress and general ill health. She stated in evidence that the cruelty began before the birth of their child. There after **C A K** When he was transferred from Nanyuki area failed to visit **E N N** and their child and that indeed he played no role in the upbringing of that said child who now attends standard two class.

5. **E N N** narrated how she attended the burial of **C A K**'s brother in 2014 and at the family home she discovered that **CA K** had married a lady called **W**. **E N N** therefore stated that she realized then that **C A K** had moved on with his life. She therefore sought that divorce be granted and that she be granted custody of the child.

6. The court of appeal had an opportunity in the case **J S M – V- ENB [2015]eKLR** to discuss what would constitute a ground of cruelty in divorce proceedings. The court of appeal in that case stated that a party to establish the ground of cruelty they must show to the satisfaction of the court, amongst others, that on the whole the conduct of the other party amounted to cruelty in the ordinary sense. The court had this to say:

”There is consistent case law on what constitutes cruelty as a matrimonial offence. In MEME V MEME [1976-80] KLR 17, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court:

i. Misconduct of a grave and weighty nature;

ii. *Real injury to the complainant's health or 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.*

In **MULHOUSE –V- MULHOUSE,[1964] 2 All ER 50** which Chesoni, J as he then was) cited with approval in **MEME- V- MEME** (supra), Sir Jocelyn Simon P. while considering the gravity and weight of the misconduct that would constitute cruelty stated as follows:

” [M] is conduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of that other spouse, the law will not hesitate to give relief.”

Thus conduct, which is part of the “reasonable wear and tear” of a marriage, does not constitute cruelty. Regarding the nature of injury to the petitioner's health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:

“[I] t must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it.”

And in NUNZIO COLAROSSO. V MICHELINA COLAROSSO [1965] E.A. 129, NEWBOLD, JA., speaking for the former Court of Appeal for Eastern Africa stated thus;

“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.”

Chesoni J. Further stated in MEME V. MEME,(supra),that the burden lies on the petitioner to establish injury or reasonable apprehension of injury to life, limb or health to herself, or himself before the respondent's conduct can be described as cruel as regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, this Court, in Kamweru V Kamweru [2000] eKLR, stated as follows:

“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 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.”

“The last point, which has been made time and again by various courts, and which is worthy reiterating here, is that there is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a questioned of fact and degree. The Conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore it is not very helpful to rely on facts of previously decided cases as precedent.”

7. On proof of adultery **Madan J. in the case N V N [2008] 1KLR** stated:

“Adultery is that physical act of sexual union between two married persons of the opposite sex not lawfully wedded to each other. To prove adultery, it is not necessary to have direct evidence of the same. Association coupled with opportunity illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling.”

CHESONI J in the case D M V TM (supra) on the ground of adultery stated.

“.....that the evidence required to establish adultery must be more than the mere suspicion and opportunity; evidence for guilty inclination or passion was necessary, nevertheless the evidence of a single witness might suffice to establish adultery, unless that evidence aroused the suspicion of the court when corroboration would be required. The husband in the present case, having raised no more than a state of facts consistent with adultery beyond reasonable doubt.”

8. E N N did not establish the ground of adultery against C A K. On the required standard. However E N N proved that the marriage had irretrievably broken down on the ground of cruelty. Based on the evidence she adduced E N N proved the ground of cruelty on a balance of probability.

9. Accordingly the following are the orders of this court:

- a. The marriage solemnized between the petitioner and the respondent on 16th April, 2010 is hereby dissolved. Decree Nisi shall hereby issue which shall be made absolute within 30 days.**
- b. Custody of the child of the marriage is hereby granted to E N N**
- c. The respondent shall pay the costs of the suit**

Dated and Delivered at Nanyuki this 25th May, 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Maria Stella

Petitioner

Respondent

For petitioner

For Respondent

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE