



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

DIVORCE CAUSE NO. 1 OF 2016

T M M.....PETITIONER

VERSUS

S K M.....RESPONDENT

J U D G M E N T

1. **T M M**, the Petitioner, by a Petition dated **21st June, 2010** seeks the dissolution of a marriage solemnized between him and the Respondent, **S K M** on the **16th June, 2004** in **Mwingi District Commissioner** under the **Marriage Act, Cap 150 (k)**. They cohabited at **[Particulars withheld], Kenya** and were blessed with three issues:

- (1) **G K M** – Born on **27th September, 1996**.
- (2) **F K M** – Born on **5th February, 1998**.
- (3) **E M M** – Born on **15th April, 2002**.

2. It is pleaded that since **2002** the Respondent has treated the Petitioner with indifference, cruelty and neglect in particular, that she has on various occasions threatened the Petitioner with death; she has quarreled and shouted at him in public; she has neglected to wash his clothes and cook for him; she has been unkind to him and the children; and that she has committed adultery with persons known and unknown to the Petitioner. He prayed for divorce and custody of the children.

3. The Respondent filed an answer to the Petition and Cross Petition where she denied allegations of cruelty, adultery and desertion. She contended that she was faithful to their marriage and it was the Petitioner who was adulterous and was cohabiting with one **R W**. Due to their differences they lived separately. The Petitioner works and resides in **Nairobi** while she lives at their matrimonial home in **[Particulars withheld]** with two (2) of the children of the marriage as she is unemployed. She denied having failed to make effort to reconcile with the Petitioner as the Petitioner ignored and failed to attend a meeting arranged by elders on **31st December, 2009**.

4. In the Cross Petition she stated that the Petitioner has been cruel to her since the celebration of their marriage. He has ignored and humiliated her in public and in the presence of family members. He has threatened to evict her from the matrimonial home knowing that she has nowhere to go to. He has locked her out of their **Nairobi Matrimonial Home** for no apparent reason. He has failed to provide for the family thereby putting her and their children in hardship and financial constraint. He failed to pay tuition and medical fee for their children. The Petitioner has deserted his family and is cohabiting with another woman. He has caused their eldest child to hate and disparage her and caused her mental anguish and psychological torture. He has an extra-marital affair with **R W**. Consequently he prayed for dissolution of marriage, legal custody of the three (3) children, maintenance of herself (the Respondent) and the children of the marriage, plus costs of the suit.

5. At the hearing, the Petitioner testified that their marriage was problematic as the Respondent is disrespectful. She insults him in the presence of people, does not wash his clothes or cook for him and she has threatened to kill him. That she has neglected children. He asked for custody of the child **E** who is below the age of **18 years**. He denied having married another wife. He denied having paid dowry for one **R**. He denied the allegation that he was not supporting their children but admitted having been sued before the **Kyuso Children's Court**. He denied having deserted the matrimonial home and stated that he was not ready to support the other two (2) children because they refused to go to school.

6. On being questioned further he stated that he went home in **2009** and having not found the Respondent at home he believed she was adulterous. He admitted that he was not providing for his children because they do not communicate with him and stated that he is jobless.

7. The Respondent on her part stated that they lived well until **2009** when the Petitioner became cruel. That the Petitioner was accused of having taken her cousin's wife and the matter was reported to the police. He married a woman **R W**. They reported to the **Allsops Police Station** that she had threatened **R W** when he visited him in **Nairobi**. **R** assaulted her and she went back home. He has threatened to kill her unless she leaves their matrimonial home.

8. Further, she stated that she constructed a shop at **Kakongo Market** which the Petitioner closed down and gave keys to his father. She adduced in evidence a bundle of documents to prove that she was the one paying fees for her children. Her daughter is in **[Particulars withheld] Girls High School**.

9. She denied what was asserted in the pleadings by the Advocate that she had retained. She stated that she believes in the sanctity of marriage, she is saved(committed Christian) therefore did not want to divorce the Respondent.

10. On cross examination she denied having specifically instructed the Lawyer to seek divorce. She stated that **R** has been given her portion of land to reside on and **R's** eldest son has visited her.

11. Submissions were filed by both the Petitioner and Respondent that I have duly considered.

12. Both the Petitioner and Respondent have relied on cruelty as a ground of divorce. In the case of **DM vs. TM (2008) 1KLR, 5**, it was stated that:

“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 word.”

13. In the case of **Kamweru vs. Kamweru (2000) KLR** the Court of Appeal stated 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 question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves, therefore if it is not very helpful to rely on facts of previously decided cases as precedent.”

This is a case where the Petitioner alleged that the Respondent has quarreled him in public, threatened him with death and neglected to wash his clothes and cook for him. The Respondent on the other hand accused him of humiliating her in public and in the presence of family members, threatening to evict her from their matrimonial home knowing very well that she has no place to go. He has locked her out of the matrimonial home and the **Nairobi** home for no reason.

14. These were allegations made by either of the parties. What was established was the fact that the Petitioner failed to tolerate the Respondent and deserted their matrimonial home such that he has not lived in their matrimonial house since **2009**. However, there is no proof of real injury caused to the health of either party.

15. The Respondent was accused of having committed adultery with persons that are known and unknown to the Petitioner. The allegation that she committed adultery with persons that are unknown without calling evidence to support the allegation was mere speculation. The alleged known people were not mentioned. These were therefore baseless allegations.

16. In the case of **N vs. N (2008) 1KLR 17** the Court stated that:

“Adultery is that physical act of sexual union between two married persons of 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.”

17. Evidence adduced that the Petitioner caused the Respondent to be arrested and detained following a Complaint of assault of the woman the Petitioner was cohabiting with is not challenged. The evidence adduced does not leave this Court to believe that it was mere suspicion. Circumstantial evidence points at the Petitioner as having been adulterous.

18. Failure to provide for children of the marriage and generally neglecting the Respondent is not in doubt. The Petitioner had no idea that their daughter was a student at **[Particulars withheld] Girls Secondary School**. The Respondent has continued to pay fees for the children. Her inability to cope made her file a suit in the **Children Cause No. 3 of 2011** at **Kyuso Law Courts** where the Petitioner was given a Notice to Show Cause why he should not be committed to Civil Jail for failure to pay the balance of the decretal sum.

19. The Respondent herein has argued that she believes in the sanctity of marriage and she does not want to divorce the Appellant. In her

pleadings however, she sought dissolution of their marriage. In the case of **Adetoon Oladeji (NIG) LTD vs. Nigeria Breweries PLC SC 91/2002** it was stated that:

“.....It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put it in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Her evidence of not wishing to divorce the Petitioner which is a deviation from her pleadings is disregarded.

20. What is however notable is the fact that the relationship between them has broken down irretrievably. In **NMM vs. JC Divorce Cause No. 1 of 2013** it was stated that:

“..... It has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives.....”

21. In a case where either party accuses the other of having threatened to kill them, it would be in the interest of justice for them to stay apart.

22. The Respondent seeks to be paid reasonable maintenance. For the children there is a matter in the Lower Court at **Kyuso** dealing with the issue. This is a case where the Respondent does not know where to go if evicted from the only house she knows and resides in that was constructed by the Petitioner. She stated that she constructed a shop after the Petitioner deserted her but the keys to the shop were taken and handed over to her father-in-law. The evidence implied that she depends on the Petitioner who has however deserted her and failed to provide for her. It is envisaged that parties to a marriage should contribute equally. They should support each other. The Court has the discretion to order payment of maintenance of a party to a spouse.

23. Looking at this Cause it is stated that the Petitioner is a driver. He is not in gainful employment currently. However, it is argued by the Respondent that he drives a personal vehicle therefore he is capable of maintaining her. It is difficult to ascertain what exactly he earns for the Court to peg on what he should offer as maintenance.

24. The Petitioner has asked for custody of the youngest child who is a minor. Evidence adduced however proves that he is negligent. He may not be the right person to have custody of any child.

25. From the foregoing, judgment is entered as follows:

(i) The marriage solemnized between the Petitioner and Respondent be and is hereby dissolved. A decree nisi is hereby issued and a decree absolute shall issue sixty (60) days from the date hereof.

(ii) The Respondent and the children of the marriage shall continue to occupy the only matrimonial house they have ever known.

(iii) The Respondent shall have custody of **E M M** until he attains the age of majority.

26. The Petitioner shall pay costs of the Petition.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of June, 2017.

L. N. MUTENDE

JUDGE