



**REPUBLIC OF KENYA**

**THE HIGH COURT OF KENYA**

**FAMILY DIVISION**

**DIVORCE CAUSE NO. 120 OF 2015**

**SM.....PETITIONER**

**VERSUS**

**AM.....RESPONDENT**

**JUDGMENT**

1. SM, the petitioner in this matter filed a petition against the respondent AM dated 25<sup>th</sup> August 2015. In her petition, she states that on 3<sup>rd</sup> May 2003, she and the respondent got married under the Ismaili customs and practices in Nairobi and that all requisite rites consequent and subsequent to the marriage were adhered to including the execution of a marriage contract dated 3<sup>rd</sup> May 2003.

2. The petitioner states that she and the respondent are both domiciled in Kenya and that during the duration of their marriage, they cohabited in [Particulars Withheld], Nairobi. They do not have any issues from the marriage. She states that since the celebration of the marriage the respondent has subjected her to extreme cruelty and hardship. She states that the respondent on diverse dates during the continuance of the marriage, subjected her to physical abuse, been rude, uncaring and has failed to provide for her basic needs. The respondent has also shown non-commitment towards the marriage, lack of affection and responsibility which in turn has caused the petitioner unbearable mental anguish and depression. She therefore seeks the marriage between her and the respondent be dissolved and that the respondent pays “Maher” in the sum of Kshs. 50000/- and returns all the jewelry or its equivalent value as well as the costs of the petition. That she be awarded maintenance and costs of the suit.

3. The Respondent filed an answer to the petition and a cross petition on 28<sup>th</sup> October 2015 where he states that he and the petitioner were married on 3<sup>rd</sup> May 2003 and that they both executed a contract of marriage as required under the Ismaili customs. They both cohabited in [Particulars Withheld], Nairobi and are not blessed with any issues. They are both domiciled in Kenya. He denies being cruel to the petitioner and avers that on the contrary, the petitioner exhibited acts of cruelty and unfaithfulness to him. He deposed the particulars of cruelty as failure by the petitioner to inform him of her residency when she left their matrimonial home, belittling him, rushing to apply for divorce at the Ismailia Reconciliation and arbitration Board, writing to the respondents Managing Director informing her that the respondent was malicious to her and mismanaging family funds. The Respondent also deposed particulars of the petitioner’s infidelity as engagement of other romantic relationships by the petitioner outside their marriage and that the petitioner was often dropped home by her partner which act amounted to disrespecting the respondent and their marriage.

4. The respondent denied failing to provide for the petitioner’s basic needs and avers that the petitioner is

the one who has been non-committed to their marriage. He points out that the petitioner's request for maintenance is untenable as the petitioner has a full time job and is capable of taking care of herself. He further states that he has to take care of his aged parents and that the marriage between the petitioner and respondent had no issues who would require the respondent's contribution and maintenance. He however, agreed to pay the "Maher" as per the Ismaili customs and averred he had offered the same to the petitioner during the reconciliation meetings organized by the Reconciliation and arbitration Board but she rejected the same. He avers that divorce is necessary and prays that the court dismisses the petition and allows the cross petition with costs.

5. The petitioner filed a reply to the respondent's answer and cross petition on 24<sup>th</sup> November 2015. She states that the respondent did not attend all the meetings at the reconciliation and arbitration board and this led to the matter being not being settled and precipitated the instant divorce proceedings. She further states that although she has a job, she is currently providing for her ailing mother and as such she is barely left with anything while the respondent, although caring for his parents is able to effortlessly for her and his parents. She pointed out that according to Ismailia customs and traditions, the respondent is vested with the obligation to take care of his wife. She concedes that a divorce is necessary but affirms that the same should be granted in her favour. The two testified in court their evidence was per their pleadings.

6. The petitioner in her petition reiterates the evidence and submits further that she has proved her grounds for divorce as provided under Section 66 of The Marriage Act. She relied on the case of **K A S vs. M M K [2016] eKLR** to define what is cruelty. The Court relied the case of **Colarossi v Colarossi [1965] E.A 129** where it was held that:

*"no comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the 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, 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 a result in injury, then the court will grant the decree.*

7. She submitted that the marriage has irretrievably broken down and they are living separate lives. On the issue of maintenance she claimed that she is entitled to maintenance as provided under Section 77 of the Marriage Act and relied on the case of **SCC v MKC [2014]e KLR** where the court held that alimony or maintenance can be paid even if the party is earning, is disadvantaged or fully needs family needs placed on her. According to her she earns a net income of Kshs 70000/- and has the responsibility of taking care of her mother and her rent. She however recognized that the court has the discretion in determining the maintenance to be paid and asked the court to consider the reasons she has given. She stated further that she contributed to their joint bank account which had Kshs.8,000,000/- which monies were liquidated by the respondent and she did not get a dime. She submitted that she is entitled to the "Maher" of Kshs, 50,000/- and her jewelry. On costs she submitted that the Respondent should pay costs as he was responsible for breakdown of the marriage. On the issue of the dissolution of marriage being handled by the Kadhi's court she submitted that the wording of Section 5 of the Kadhi's Court Act does not limit the jurisdiction of the High Court and therefore this Court has jurisdiction. It was further submitted that both of them are Ismailis who are Muslims, however their divorce matters are not handled by the Kadhi Court but by their Aga Khan Shia Imami Ismaili Conciliation and Arbitration Board (CABS).

8. The Respondent too reiterated the evidence adduced and submitted as follows and the law applicable in resolving this matter are the Constitution of Kenya, The Marriage Act 2014 and The Personal Law, tradition and customs/practices of Shia Imami Ismaili Muslims to which both parties subscribe to being followers of His Highness the Agakhan Shah Karim Al-Husseini. On the issue of dissolution of the marriage it was submitted that the plaintiff had not proved a case of cruelty neither did she prove that the marriage had irretrievably broken down. That under Section 71 of the Marriage Act dissolution of marriage celebrated under Islamic Law shall be governed by Islamic Law. That under Islamic law it is the husband who granted the power to divorce the wife as was held in the case of **RWK v AMA [2016]**

**eKLR.** The Respondent submitted that it is the Petitioner whose conduct amounted to cruelty as she was withdrawn and five years after their marriage their life become unbearable and their marriage cannot be salvaged. That she deserted the home in February 2015 and did not fulfill her obligations as per clause 7 of the Marriage Contract. That since the Respondent never gave her a “Talaka” his counter claim should be granted. The Respondent agreed to pay a Maher of Kshs.50, 000/- being the Petitioner’s entitlement. On the issue of return of jewelry the Respondent urged the court to refuse the prayer as the Petitioner conceded that she left the jewelry on the table and walked away. It was further submitted that the petitioner has not proved that she was arbitrarily divorced by the respondent to lay claim to the gifts which are given on discretionary basis to alleviate the harshness of the divorce and to compensate the divorced women for loss. On the issue of maintenance it was submitted that the petitioner is not entitled to maintenance as she did not invoke the provision of the Marriage Act in her request for maintenance. Reliance was made in the case of **RWK v AMA [2016] JeKLR** where it was held that under the Quran 2: 228 and 2:241, an Islamic wife is only entitled to maintenance during the Edda period i.e for the three months after divorce. The same should be reasonable. During this period, after pronouncement of the talak, their husbands have the right to take them back. It was further submitted that the parties herein did not have any children to maintain hence the petitioner is not entitled to maintenance. The Respondent relied on Article 45 (3) of the Constitution which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and dissolution of the marriage. It was submitted further that Section 78 (c) of the Marriage Act provides that an order for maintenance shall lapse where the person being maintained is subsequently able to support him or herself. On costs the Respondent urged the court to punish the petitioner to pay costs due to her conduct arguing that the petitioner filed an application for divorce at the Isamilia Conciliation and Arbitration Board but she unilaterally abandoned the same after the Respondent had committed himself to the same in terms of time and expense.

## **Determination**

9. The petitioner’s ground for dissolving their marriage is cruelty . The respondent’s grounds for dissolution of the marriage are cruelty and infidelity. In the case of **Colarossi v Colarossi (Supra)** Sir Charles Newton stated that a party seeking relief on grounds of cruelty must prove actual or probable injury to life, limb or health that the act must be serious enough to result in injury. The evidence adduced by the Petitioner was that she was subjected to physical abuse, the respondent was rude and did not commit towards the marriage. There was no evidence of physical abuse as alleged. Being rude and uncaring to and failing to provide her basic needs were not sufficiently proved. In my view the parties seem to have had some disagreements in their marriage that led to a breakdown of their marriage. The grounds of cruelty as alleged by the Petitioner has not been sufficiently proved. The Respondent on the other hand stated that the petitioner was withdrawn and rushed to apply for divorce at the Isamilia Board and that she would send messages that she wanted nothing to do with him. That she was rude to him and his parents and that he underwent mental torture. There was no evidence of messages or letters written by the petitioner was alleged I find that the grounds of cruelty as narrated by the respondent have not been sufficiently proved. Further there was no evidence of infidelity adduced on the part of the petitioner.

10. The petitioner in her petition states that they got married according to Islamic customs and practices. Section 71 of the Marriage Act states that the dissolution of a marriage celebrated under Islamic Law shall be governed by Islamic Law and it refers to part 5 which deals with marriage under Islamic Law. Section 48 provides that the application of Islamic Law shall only apply to person who professes the Islamic faith. Section 49 provides for the officiating of Islamic marriage which is done by a Kadhi, Sheikh or Imam. The said provisions do not take away the jurisdiction of this court to handle a petition of parties who are married under Ismaili customs and practices. The Parties did not adduce evidence on how one married under Ismaili customs can dissolve their marriage. The marriage contract attached to the petition refers to the Constitution of the Shia Imami Ismaili Muslims and Personal Law. The said Constitution was not produced in Court by any of the parties during their evidence. This court cannot base its decision on a document that was not produced . I however take note that the two have not cohabited since February 2015. They have not lived together as husband and wife for over two years now. Attempts to reconcile them have not been fruitful. Their marriage has irretrievably broken down. On the issue of maintenance the petitioner has failed to persuade this court that she is entitled to maintenance. She is employed and earns an income. They did not have children. Section 77 of the Marriage Act gives this

court discretion in determining maintenance to be paid for spouse. The court in exercising the said discretionary power examines the circumstances of each case. In this case the Petitioner's claim that they had Kshs. 8 million in a joint account was not supported by any evidence. She also failed to convince this court that she is not able to take care of herself and that it is the Respondent duty to maintain her. I find that the evidence adduced to support her claim for maintenance is insufficient and dismiss her claim for maintenance. The petitioner is however entitled to "Maher" of Kshs.50,000/-. The Respondent does not dispute this , the said sum shall be paid within 30 days hereof. On her jewelry the petitioner is entitled to the same as they were her gifts and the mere fact that she left them on the table does not take away her entitlement to the said jewelry. The Respondent shall arrange to hand over the same to her at an agreed time. On costs each party shall bear its own costs.

11. These are the final orders of the court :-

- (a) The marriage between the petitioner and the respondent is hereby dissolved.**
- (b) The respondent is to pay the petitioner 'Maher' of Kshs. 50,000/- within 30 days as prayed in the petition.**
- (c) With regard to maintenance, the petitioner has not shown cause as to warrant such orders.**
- (d) That decree nisi shall issue forthwith, to be made absolute after thirty (30) days; and**
- (e) Each party to bear their own cost.**

Dated, signed and delivered this 29<sup>th</sup> day of September 2017

**R. E. OUGO**

**JUDGE**

In the Presence of:

Miss Marai	For the Petitioner
Mr. Mugo h/b for Mr. Atonga	For the Respondent
Charity	Court Clerk