



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

DIVORCE CAUSE NO.5 OF 2012

B.M.N.....PETITIONER

VERSUS

T.O.N.....RESPONDENT

JUDGMENT

1. The Petitioner has filed a petition dated **25th May 2012** seeking the dissolution of her marriage to the Respondent, she got married to the Respondent pursuant to the **Marriage Act Chapter 150 Laws of Kenya** on **9th October 2008** and was issued with a marriage certificate. Upon the solemnization of their said marriage the Petitioner and the Respondent cohabited in various places before finally establishing a matrimonial home at Kisumu Town within Kisumu County, wherein the Respondent resides.

2. The said marriage was not blessed with any issue.

The Petitioner stated that during the subsistence of the said marriage and more particularly commencing in 2009, the Respondent persistently treated her with cruelty which she particularized as follows:

- a) Constantly assaulting the Petitioner and the Petitioner and thus occasioning her actual bodily harm.**
- b) Using abusive and/or derogatory words against the Petitioner.**
- c) Denying the Petitioner her conjugal rights.**
- d) Locking the Petitioner out of the Matrimonial Home.**
- e) Being Quarrelsome and violent.**
- f) Being disrespectful to the relatives of the Petitioner and thus embarrassing the Petitioner.**

3. The Petitioner also accused the Respondent of leading an adulterous life and having numerous sexual partners during the subsistence of their said marriage the particulars of which she enumerated as follows:

- i. Committing Adultery with known and unknown women**
- ii. Currently courting and residing with a concubine/mistress**
- iii. Violating the vow undertaken by the two parties**

iv. Being guilty of infidelity.

4. It was the Petitioner's case that she separated from the Respondent in late 2009 and that they have not lived together as husband and wife from 2009 to the time of filing the suit and the hearing of the case.

According to the Petitioner their marriage had irretrievably broken down as all the efforts by the relatives, friends and well-wishers to reconcile them had failed to bear any fruits. The Petitioner therefore seeks the dissolution of the said marriage.

5. The Respondent did not file any answer to the petition despite being duly served with the petition together with summons to enter appearance.

6. On **30th May 2013**, the Deputy Registrar issued a certificate in favour of the Petitioner to enable the petition be listed for hearing before me.

When the petition came up for hearing on **1st February 2016**, the Petitioner gave her testimony and did not call any witnesses. She reiterated the grounds of divorce that she had set out in the petition and added that the Respondent's cruelty to her reached such a critical point that she at one time even risked losing her job as she was always reporting late for work after being repeatedly assaulted by the Respondent.

7. The Petitioner added that the Respondent had adulterous relationships with various women known and unknown to her with whom he even cohabited during the subsistence of their marriage namely **W.O** and **T.A.**

The Petitioner concluded her testimony by stating that she moved out of their matrimonial home in 2010 when the situation became unbearable and that she has never gone back to the Respondent as at the time of her testimony.

8. The Petitioner was categorical that she had no intentions of going back to stay with the Respondent as she was certain that their marriage had irretrievably broken down.

She therefore prayed for the dissolution of their said marriage.

9. The Petitioner has raised two grounds of divorce; cruelty and adultery. The Respondent did not file any appearance or answer to the petition. From the pleadings and the compelling testimony of the Petitioner, it is evident that the marriage has irretrievably broken down.

10. **Section 8 of Matrimonial Causes Act (now repealed)** outlines the grounds of divorce. The **Marriage Act 2014** at **Section 66** similarly outlines the grounds for dissolution of a marriage as being inter alia, cruelty, desertion and adultery.

11. The Petitioner gave a detailed account of the cruelty meted out on her by the Respondent. Chesoni J, as he then was, stated as follows in the case of **DM -vs- TM [2008] IKLR 5**;

“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) 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.”

12. I find that the Petitioner has given testimony on instances of cruelty during the subsistence of their

marriage that led her to leave the matrimonial home after all attempts at reconciliation had flopped.

13. The Petitioner also accused the Respondent of engaging in adultery during the currency of their marriage. She went further to state that the Respondent has cohabited with some of his lovers, namely W.O and T.M during the subsistence of their marriage.

14. In N –vs- N [2008] 1KLR 17, Madan J, said:

“Adultery is the 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 prove and establish adultery provided the circumstances are relevant, cogent and compelling.”

15. In the instant case, I find that the Petitioner gave cogent and compelling evidence to prove the two grounds of adultery and cruelty.

16. I find that the marriage between the Respondent and the Petitioner has irretrievably broken down on the said grounds of cruelty and adultery.

I therefore dissolve the marriage celebrated on 19th October 2008 between the Respondent and the Petitioner.

17. A decree nisi is hereby issued forthwith which shall be made absolute within 30 days from the date of this judgment. There shall be no orders as to costs.

18. It is so ordered.

Dated, signed and delivered in open court this 17th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Nyambati holding brief for Oguttu for the Petitioner
- N/A for the Respondent
- Omwoyo: court clerk