



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO.43 OF 2015

J M M.....PETITIONER

VERSUS

J M N.....RESPONDENT

JUDGMENT

1. **J M M** hereinafter referred to as the petitioner has filed a petition dated 17th February 2015 seeking the dissolution of his marriage to **J M N** hereinafter referred to as the respondent. He avers that on the 10th day of August, 1990 he married the respondent under customary law, and later formalized their union and at the Superintendent Registrar's office at Nakuru under the Marriage Act (Cap 150).
2. It is averred that after the said marriage they lived and cohabited as husband and wife and were blessed with two children namely; **J M M** born on 18th April 1990 and **J M M** born on 9th September 1993.
3. That in or about the month of November, 2013 the respondent left the petitioner and the matrimonial home following irreconcilable differences between them and has ever lived separate apart from him and deserted him without reasonable excuse. That they have not since the date of the said desertion resumed cohabitation and the said desertion persists. That there is no hope or possibility of reconciliation or compromise of whatsoever nature or kind between the respondent and the petitioner as the respondent has not shown any or any prospect of reconciling or ever returning despite numerous requests from the petitioner, friends and relatives.
4. The petitioners grounds for dissolution of the marriage are cruelty particularized as follows that ;
 - a) *The respondent has failed to show love and affection to the petitioner.*
 - b) *The respondent is and has been insensitive to the petitioner's needs as a husband.*
 - c) *The respondent has miserably failed to be a companion to the petitioner.*
 - d) *The respondent has completely failed to communicate with the petitioner.*
 - e) *The respondent has failed to provide as a wife for the petitioner.*

- f) The respondent has failed to keep her promise as a wife to the petitioner.***
- g) The respondent has failed to keep her promise as a wife to the petitioner.***
- h) The respondent has been abrasive and abusive to the petitioner.***
5. It's averred that by reason of the respondent's conduct aforesaid the petitioner has suffered extreme mental agony, torment and embarrassment. He contends their marriage has irretrievably broken down. That this petition is not presented and/or prosecuted in collusion with the respondent and that the petitioner has not in any way been accessory to or connived at or condoned the desertion
6. The respondent filed an answer to the petition and a cross-petition. Her response is that though they have been having irreconcilable differences she has never moved out of her matrimonial home to-date and has been living with the petitioner all along since they got married save that since the year 2007 the petitioner has been juggling between the matrimonial and elsewhere where he married to another woman called D A and therefore the issue of desertion as alleged is a mere fabrication. The respondent avers that it is the respondent who upon filing of the petition herein on 28th May, 2015 carried away all the household goods and his personal belongings and left the matrimonial leaving the children behind in a desperate situation with no one to look after them while the respondent is away on duty.
7. That on several occasions the families of both parties have tried to reconcile them but the petitioner has completely declined to heed to anyone's advice and/or attend to any of the meetings arranged by both families for reconciliation. She denied being cruel as enumerated and put the petitioner in strict proof. She avers that blame is squarely on the petitioner as he has since the onset of the marriage treated the respondent and the children of the marriage with cruelty, physical assault and neglect. That contrary to the allegations that the petitioner has suffered extreme mental agony, torment and embarrassment she has known suffering in the said marriage due to lack of love, affection, provision and being physically assaulted.

The Respondent avers that the marriage between the petitioner and the respondent has irretrievably broken down. She has particularized the grounds of divorce as follows;

Particulars of cruelty/desertion

- a) That during the subsistence of the marriage the petitioner has continued to neglect the respondent and their two children.***
- b) That the petitioner time and again goes home at late hours of the night and or fails to show up for a number of days.***
- c) The petitioner has never bought and vowed never to buy food for the respondent and her children.***
- d) The respondent petitioner is a person of uncontrolled temper.***
- e) The respondent petitioner becomes hostile every time the petitioner respondent demands to know why he was late or why he is involving himself in conduct that is unbecoming.***
- f) The respondent petitioner has lost all family values and has transferred his love and affection from the petitioner to another woman called D A.***
- g) The petitioner on 28th May 2015 moved out of the matrimonial home with all household goods leaving the children of the marriage in a desperate situation.***

h) The petitioner has moved out of the matrimonial home and resolved to reside elsewhere.

i) That the petitioner has been adulterous during the subsistence of the marriage

Particulars of adultery

a) The petitioner had an adulterous relationship with a woman known as D A and known to the respondent.

b) The petitioner has since the year 2007 communicating with another woman on social media and discussing the respondent.

c) The petitioner while pursuing his studies dedicated his project to ‘the love of his life D A’.

8. She seeks that the marriage between her and the petitioner be dissolved. That the custody, care and control of the issues of the marriage J M M born on 18th April 1990 and J M M be granted to the respondent. That a decree nisi do issue forthwith and thereafter a decree absolute. That costs of the petition be borne by the petitioner.
9. At the hearing of this cause the petitioner testified they got married on the 10/8/1990 and have 2 children who are now 26 and 23 years respectively. The respondent was a psychiatrist nurse working with the Kenya Defense Forces. That in 2012 the respondent went to Afghanistan and on returning home she went to stay in hotel and did not return to their matrimonial home. That on asking her to return home she refused to do so despite all attempts he has made through family and friends. That at one time when going on duty on an emergency she accused him of having a wife and children outside the marriage, that she frequently asked him if he had filed for the divorce and that there reached a time he had to wash his clothes. He explained that D A is his sister in law whom he found he could talk to when his wife became hostile. That he found a shoulder to lean on as they became mutual friends. He asked the court to dissolve his marriage as it had irretrievably broken down. During cross-examination he petitioner insisted that the respondent deserted their matrimonial home. He admitted the correspondence on email from D, which he alleges the respondent hacked and stated that he had found a shoulder to lean on when depressed. He denied living with D.
10. The respondent testified that the petitioner was her husband and that whilst in Afghanistan in May 2015 he asked her to come and get the divorce papers. She arrived on the 3rd of June and the email dated the 5th of May 2002 was copied to their children, a brother and a recruiting agent in Kenya. That she did not desert her matrimonial home as alleged as she working in Afghanistan she used to take leave and come home. That she was away serving from 12/10/2012 to 12/10/2015. That she has not been cruel to the petitioner, that it's the petitioner who used to be busy with D whom he had a relationship with. That she hacked his email after he stopped providing for her and the children. That the petitioner left their matrimonial home and went to live with another woman in South B. That in May 2013 when she came home he asked her when she would take her clothes and she told him that she would look for a house and do so. That in December 2014 she took the children for a holiday in Mombasa and its then that he sent her an email to go get the divorce papers. That thereafter he moved out with some of their things and she had to buy others to make herself and the children comfortable. That she is seeking a divorce but is no longer seeking custody of the children as they are over 18 years old she is also asking for costs. During cross-examination she maintained her statement that she did not desert their matrimonial home. She testified that many times they slept hungry and that most of the time he was not talking to them. That the petitioner paid rent and fees for just one child and she paid for the other child. That when he left he told her that he was removing his things as he did not want to create any more problems.
11. There were no submissions Counsel left it to this court to decide the matter. This cause was filed in March 2015 after the Marriage Act 2014 came into force. The petitioner seeks dissolution of

his marriage with the respondent on grounds of cruelty and that the marriage has irretrievably broken down. Section 66 of the Marriage Act provides for the dissolution of a civil marriage. The marriage between the petitioner and the respondent was civil marriage as it was celebrated at the Superintendent Registrar's office in Nakuru. Section 66 (2) (c) (d) and (e) provide that a party whose marriage is a civil marriage may petition to the court for separation of the parties or the dissolution of the marriage on grounds of cruelty by the other spouse, desertion by the other spouse for at least three years or that irretrievable breakdown of the marriage. Section 66 (6) provides what constitutes a marriage that has broken down. It states that 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 willfully neglects the other spouse for at least two years immediately preceding the date of the 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 or at least three years immediately preceding the date of presentation of the petition;

f) A spouse has been sentenced to a term of imprisonment of the 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 exonerated in psychiatry , have certified that the insanity is incurable or that the recovery is improbable during the life time of the respondent in light of existing medical knowledge; or

h) Any other ground as the court may deem appropriate.

12. The respondent's grounds in her cross appeal are cruelty desertion and adultery. In **Civil Appeal No. 5 of 2015 J.S.M vs. E.N.B MAKHANDIA, OUKO & M'INOTI, J.J.A.**, in defining what cruelty and on a marriage that has irretrievably broken down held as follows;

“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 the 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] it 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) E KLR, 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 a 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 Court of Appeal went further to hold that

“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 it is not very helpful to rely on facts of previously decided cases as precedent.

As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.

.....It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage.....

What factors may a court take into account in determining whether a marriage has

irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down.”

13. In this case the petitioner alleges that the respondent was cruel to her he narrated incidences of what he termed cruelty, for instance the respondent accusing him of having another wife , that he had to wash his clothes, she went to Mombasa alone with the children and hacking into his email. He testified that he became distressed with the treatment and found consolation in one D A. Bearing in mind that each petition founded on cruelty must be decided on its own facts and that the conduct complained of must be looked at holistically and in light of the parties themselves in my view the incidents as narrated don't amount to cruelty I would say that they amount to misunderstanding between parties who did not live together continually due to work constraints. The petitioner admitted that the respondent worked out of the country in Afghanistan he even allowed her to be out there, he therefore cannot allege she deserted him. The respondent main grounds are adultery and desertion. She has proved that there was some kind of relationship between the petitioner and one D from the mail extracts which the respondent didn't deny. He justified the relationship by stating that he found a shoulder to lean on. However from the evidence adduced the respondent has failed to prove adultery on the part of the petitioner. I find further that she did not adduce evidence to support her allegations of cruelty by the petitioner. It is apparent that she was unhappy with the petitioner and want to the extent of hacking his email to get the evidence she adduced in court.

14. However there is evidence from both parties that they are unable to reconcile and that their marriage has irretrievably broken down. From the evidence on record the parties have been separated from late 2013. The petition was filed in March 2015. Section 66 (6) of the Marriage Act is clear on what constitutes a marriage that has irretrievably broken down. Before the petition was filed the parties had been separated close to two years, they were not in the same house, thus were physically separated, there is mistrust between them and their commitment to each is no longer there and it is apparent that they have no chances of resuming their spousal duties and there is a very slim chance of the marriage ever working again. Thus in my view the marriage between the petitioner and the respondent has irretrievably broken down.

15. This court therefore dissolves the marriage between the Petitioner and the Respondent celebrated 10th August 1999. A *decree nisi* to issue forthwith and to be made absolute within 30 days. Each party to bear its own costs. It is so ordered.

Dated, signed and delivered this 22nd day of June 2016.

R. E. OUGO

JUDGE

In the presence of:

.....**For the Petitioner**

..... **For the Respondent**

Ms. Charity Court Clerk