



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 201 OF 2001

J N C.....PETITIONER

VERSUS

W C GRESPONDENT

M.....CO-RESPONDENT

JUDGEMENT

1. Marriage was celebrated between the parties herein on 31st December 1981 at Murang'a. Thereafter the parties cohabited at Kirinyaga, Taita Taveta, Isiolo and Nairobi. The couple was blessed with issue – E G C, J G C and G W C.

2. In the petition dated 27th November 2001, and amended on 8th January 2002, the petitioner seeks dissolution of the marriage on the grounds of cruelty, desertion and adultery. There are also prayers for custody of the minor children, maintenance and costs of the suit. It is pleaded that the marriage has for all practicable purposes broken down irretrievably. Particulars of the alleged cruelty, desertion and adultery are itemised in paragraph 5 of the amended petition.

3. Regarding cruelty, it is alleged that the respondent has been harsh and cruel to the petitioner, verbally abusive towards her, neglected to discharge his duties to the family, falsely accusing her of adultery, had an affair with another woman, accused her falsely of infecting him with HIV, frequently quarrelsome, and called her and her mother prostitutes. The petitioner avers that she developed depression as a result of the cruelty meted out to her by the respondent, which has exposed her to heavy financial expenses on medical care.

4. On desertion, it is pleaded that the respondent deserted her and the children since November 1998, and has exposed them as a result to grief, loneliness and distress. She also complains that she has been denied conjugal rights since April 1998 on the alleged ground that she had HIV. She avers that the respondent had told her that they could live in the same residence but not as husband and wife, upon which she was compelled by circumstances to move out. She alleges that the respondent had an adulterous relationship with a woman named M, whom she has introduced into the petition as a co-respondent. It is alleged that the respondent lives together with the said woman at what was the parties' matrimonial home, and they have since had a child together called M.

5. Upon being served, the respondent filed an answer to petition. He acknowledges the marriage. He avers that only one of the children is below sixteen, and states that in any event the children are residing with

the petitioner. He denies the allegations of cruelty, adultery and desertion, and accuses the petitioner of being the author of the marital problems and of deserting the matrimonial home without provocation. He prays that the petition be dismissed and that divorce be granted to him.

6. On 26th March 2009, the Deputy Registrar cleared the petition to proceed as a defended cause.

7. The hearing commenced on 15th January 2015. The petitioner testified first. She gave vent to the allegations made in her petition with regard to the incidences of the cruelty, adultery and desertion pleaded therein. She detailed accounts of the various problems that were there in the marriage and the attempts made to resolve them. She concluded by saying that it appeared to her that it was her higher educational qualifications and her employment by an international agency that appeared to fuel the problems.

8. The next witness for the petitioner was her uncle, J M K. He testified to have been involved in trying to settle the disputes between the parties when the couple lived in Nairobi. He stated that the respondent accused the petitioner of having HIV/AIDS, and of having spread it to the children. She was further accused of sleeping around with other men. He was said to have been complaining that she was attending evening and night meetings at church, with the implicit suggestion that she was engaged in illicit affairs. He stated that he and the other elders recommended that the two go for a HIV test, but the respondent declined. On cross-examination, he stated that in the two sessions he held with them, it was the respondent who had complaints against the petitioner.

9. Dr. Johnson Kilonzo Mutiso was the next on the stand on the petitioner's side. He is a psychiatrist. He testified to have been consulted by the petitioner in 1998. She had approached him with a history of situations in the family which were causing her distress. His assessment of her was that she was very depressed, had a low mood, having difficulties with sleep, had negative thoughts and was unable to cope well with her normal chores at work. He also found that she was entertaining suicidal ideas. He concluded that she had clinical depression, also known as severe reactive depression. He attributed its cause to the problems that she was having in her marriage. He stated that during the course of the depression she developed high blood pressure and many recurrent illnesses such as headaches, chest pains and other that are related to stress. He produced a medical report dated 27th January 2009. He denied that it was the pressure of her having to work abroad that was causing her blood pressure.

10. The respondent took the stand on 21st January 2016. He denied the allegations of cruelty. He testified that the problems in the marriage really began after the petitioner graduated with a PhD and got a job with an international organisation which paid her well. According to him, the petitioner's attitude towards him changed and it appeared as if she wanted to enjoy her enhanced status and thought that he would be a stumbling block. He complained that her relatives also contributed to the family problems, for they too began to influence her in an effort to benefit from her new status. He conceded that he was living with another woman, called M W N, and that they had had a child together, called M. He stated that he had cohabited with the said woman since 2000. He conceded to being intimate with her, but denied ever having had any adulterous relationship with N C. He asserted that he was not adulterous prior to his separation from the petitioner. He stated that the marriage ought to be dissolved.

11. Chesoni J in *Meme vs. Meme* (1976) KLR 17 started the law on establishing cruelty in cases of this nature when he said that –

‘Cruelty as a matrimonial offence upon which a petition for dissolution of a marriage may be grounded is defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger (see Russell vs. Russell (1895) P. 315 and Horton vs. Horton (1940) P. 187...

For cruelty to be established two tests must be satisfied. These are; first, whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel; and, secondly whether the conduct has caused injury to health or

reasonable apprehension of such injury. These are tests laid down in Gollins vs. Gollins (1964) AC 644 and Williams vs. Williams (1964) AC 698.'

12. On the burden and standard of proof required for cruelty, the court in *Meme vs. Meme* (supra) cited *Mulhouse vs. Mulhouse* (1966) P. 39 with approval, where Sir Jocelyn Simon P. had said:-

'Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt: Bater vs. Bater (1951) P. 51. That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct 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. secondly, it must be proved that there is a real injury to the health of the complainant or a 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 or health; but 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. Thirdly, it must be proved that it is the misconduct of the respondent which has caused injury to (the) health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought trouble on himself or herself, the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of the word.'

13. Applying the principles that have been set out above, I am satisfied that the petitioner has been cruel to the respondent. The impression that I get from the evidence is that the petitioner's more superior education and her stronger financial position spurred insecurity, which, in my view, culminated in the cruelty proved by the petitioner. The respondent himself conceded as much to the extent that he admitted that the problems began with the acquisition of the PhD and the well-paying job that followed. The persons that the petitioner was accused of befriending were all working with her in the new employment. The medical evidence gives critical credence to her testimony, and so does the testimony of her uncle. The accusations made against her, concerning infecting the respondent with a life threatening virus, must have caused her to suffer gravely mentally and emotionally leading to a downturn in her health status, which necessitated consulting a doctor.

14. On adultery, the law was laid down in *Wangari Mathai vs. Mwangi Mathai* (1976-80) KLR 1689 by the Court of Appeal. It was stated that a charge of adultery is a serious one, and the standard of proof required for it is very high. It must be proved clearly, beyond establishing a mere balance of probabilities or a preponderance of probability or a mere suspicion and opportunity to commit adultery. See also *Meme vs. Meme* (supra).

15. It is my finding that it has not been proved that the respondent committed adultery prior to the separation. I note however that the respondent has conceded to living with another woman after the separation. The cohabitation started in 2000, and has produced a child. That happened before the dissolution of the marriage, and it amounts to adultery. There is therefore proof of adultery as between the respondents.

16. From the material placed before me it is plain that the marital relationship between the petitioner and the respondent has totally broken down. I have noted that cohabitation has been broken, and parties have been apart since November 1998. The marriage no doubt has practically come to an end. The evidence points to the respondent as the cause of the marital woes that killed the marriage.

17. The petitioner had pleaded for custody of the children and maintenance. I note that the children of the marriage have all reached adulthood. On maintenance, I note too that the petitioner did not lead any

evidence thereon.

18. In the circumstances, I am moved to make the following final orders:-

(a) That I allow the petition dated 27th November 2001, and as amended on 8th January 2002, and decree that the marriage between the petitioner and the respondent, celebrated on 31st December 1981, is hereby dissolved;

(b) That the answer to petition on record dated 24th June 2002 is hereby dismissed;

(c) That decree *nisi* shall issue forthwith, to be made absolute after thirty (30) days; and

(d) That the petitioner shall have costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE