



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 211 OF 2013
CONSOLIDATED WITH HIGH COURT SEPARATION CAUSE NO. 33 OF 2013)

R A W.....PETITIONER

VERSUS

R T.....RESPONDENT

JUDGEMENT

1. Marriage was celebrated between the parties herein on 15th November 1986 at All Saints Cathedral, Nairobi. There is on record a certified copy of an entry of marriage serial number [Particulars withheld] of 23rd August 2013 confirming registration of the said marriage. Thereafter the parties cohabited within Nairobi as husband and wife. The couple was blessed with issue – A T (born 1987), Y T (born 1987) and M T (born 1982).

2. This matter commenced by way of a petition dated 26th September 2013 and filed herein on the same date by the petitioner herein. The said petition is based on grounds of cruelty and domestic violence. The petitioner prays for dissolution of the marriage, injunctions, alimony and access to the matrimonial home.

3. Upon being served, the respondent filed an answer to petition and a cross-petition on 31st October 2013 dated 30th October 2013. He acknowledges the marriage. He denies the allegations of cruelty and domestic violence, and accuses the petitioner of authoring the marital problems that bedevilled their marriage. He pleads that the marriage has irretrievably broken down as all efforts at reconciliation have failed.

4. In the cross-petition, the respondent prays for the dissolution of the marriage on grounds of cruelty and adultery. On cruelty, he particularises that the petitioner has failed to display love towards him during the course of the marriage, has directed verbal insults at him, had physically assaulted the respondent and the children of the marriage (even when the children were adults), as a person who is violent and of ungovernable temper, has threatened harm him, has on occasions invaded his place of work and insulted him verbally in front of staff customers and their children, has neglected the children emotionally, as an alcoholic who spent most her time in bars and would sometimes stay overnight away from home, has refused to go for medical attention so as to control her drinking, has had extra-marital affairs, as a habitual liar, as a spent thrift and of being emotionally unavailable to the respondent. On adultery, the respondent repeats that the petitioner has had extra-marital affairs with men, both known and unknown to him. He zeroes in on what he alleges was an affair with A O, who is said to be now deceased. He pleads that the court allows him to refer to that incident without joining eth latter as a co-respondent following

his death.

5. It is pleaded that there has been no connivance or condonation with respect to the matrimonial offences, and that the respondent has not been accessory to the offences pleaded. Apart from the dissolution of the marriage, the respondent also prays for the dismissal of the petition with costs, orders to restrain the respondent from harassing or intimidating or distressing or annoying the respondent or the children of the marriage, an order to restrain her from entering into or upon any of the properties of the respondent listed in the pray, and costs of the suit.

6. The divorce cause was on 2nd July 2013 consolidated with High Court Separation Cause No. 33 of 2013, where the respondent herein had sought to be separated from the petitioner herein on account of the alleged adulterous relationship that she alleged kept with A O.

7. The hearing commenced on 2nd July 2015. The petitioner testified. She gave vent to the allegations made in her petition with regard to the incidences of the cruelty and domestic violence pleaded therein. She detailed accounts of the various problems that were there in the marriage and the attempts made to resolve them. She closed her case thereafter.

8. It transpired on 2nd June 2016, when the matter came up next for hearing, that the petitioner had filed, on 25th May 2016, an undated notice withdrawing the suit. The notice indicates that the petitioner was no longer interested in pursuing the petition.

9. The respondent opened his case on the same date. His testimony largely gave vent to the averments made in his answer to petition and the cross-petition. He explained that the problems in the marriage began in 2011, when the petitioner began to change behaviour. She took to coming home late, and keeping company of young men that he named. One of them was A O, who is named in the separation cause as a respondent. He went into details of how he got to learn of the affair that A O was having with the petitioner, and the efforts he made to resolve the matter quietly given his position in society, but to no avail, for the petitioner began to make extravagant financial demands ostensibly to finance her life with A O. He produced photographs that showed the petitioner and the said A O in compromising positions. He also produced a copy of the *Weekly Citizen* of 3rd to 9th June 2013, which had a lead headline reading 'My love affair with R T's wife,' with his photograph dominating the front page, alongside those of the petitioner and the late A O. The flip page detailed the affair as allegedly narrated by A O He testified as to how the whole episode caused him anxiety, pain and stress.

10. He called two witnesses. The first to take the stand was E O D, the widow of the late A O. She testified to how her late husband's conduct began to change shortly before she discovered that he had been having an affair with the petitioner. When their child fell ill, and her husband dithered in having her attended to, she escalated the matter to the media, and eventually ended up getting into contact with the respondent. At a meeting at the respondent's home, the petitioner and the late A O were said to have had admitted to having an affair.

11. The other witness was C G . He testified that he was a friend of both A O and his wife, E O D. He stepped into the matter when E O D was having problems getting her child treated. When he learned of the affair between the late A O and the petitioner, and tried to call the late A O without success, He referred E O D to a media personality in an effort to get the late A O's attention. Eventually, he got into contact with both the petitioner and the respondent. He attested to the fact that there was an affair as he met the petitioner with the late A O at Buru Buru, where the petitioner accused him of taking her boyfriend away. He described how the petitioner joined hands with the late A O to assault him.

12. The case before me turns on two principal accusations, that the petitioner has been cruel to the respondent and that she has committed the matrimonial offence of adultery. The evidence led by the respondent and his witnesses dwelt principally on the adultery, and to a lesser extent on the cruelty. I shall therefore address the adultery aspect of the case first.

13. The law on adultery 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* (1976) KLR 17.

14. I am conscious of the fact that the law establishes a fairly high standard of proof in cases where adultery is alleged in matrimonial cases. I have carefully scrutinised the testimony of the respondent and of his two witnesses, and noted that the three gave accounts that were consistent and persuasive. The testimonies were not controverted for the petitioner had withdrawn from the proceedings, and the witnesses were therefore not cross-examined. It emerged that the petitioner was in close relationship with the late A O, from which a reasonable person could draw the conclusion that adultery was committed both at the respondent's house and the apartment where the petitioner allegedly resided with the latter, and probably at various other addresses.

15. Chesoni J in *Meme vs. Meme* (supra) stated the law on establishing cruelty in cases of this nature when he said, citing *Russell vs. Russell* (1895) P. 315 and *Horton vs. Horton* (1940) P. 187, 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. He stated that for cruelty to be established two tests must be satisfied. First, it must be established whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel. Secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury.

16. I have applied the principles set out above to the facts and circumstances of the case before me, I am satisfied that the petitioner has been cruel to the respondent. The conduct of the petitioner with the late A O must have caused a lot of stress and pain to the respondent given his fairly high standing in society as a political leader. That was especially so after the affair was splashed in the print media. The respondent's demeanour at the trial told it. It no doubt had a toll on him mentally, physically and spiritually. I feel that that is a conclusion I can draw without having a medical report placed before me.

17. From the material 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 for some time since 2013. The marriage no doubt has practically come to an end. The evidence points to the petitioner as the cause of the marital woes that killed the marriage.

18. The respondent has prayed for injunctive relief with respect to harassment by the petitioner and with regard to her accessing the matrimonial property. When he gave oral evidence, he did not advert to those matters, and did not lead any evidence to warrant grant of the orders sought

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

(a) That I hereby allow the cross-petition dated 30th October 2013, and decree that the marriage between the respondent herein, R T, and the petitioner, R A W, celebrated on 15th November 1986, is hereby dissolved;

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

(c) That the respondent herein shall have costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF DECEMBER, 2016.

W. MUSYOKA

JUDGE