



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE NO. 56 OF 2010

F N PETITIONER

VERSUS

F M C RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner who married the respondent on 5th November 2005 under the African Christian Marriage and Divorce Act, Cap 151 of the Laws of Kenya filed on the 29th November 2010 in the High Court at Mombasa a petition dated 26th November 2010 for the dissolution of her marriage to the Respondent on the ground of cruelty and for a non-molestation order, maintenance and costs of the petition. The parties had one issue of the marriage, a boy born on 16th March 2006 and aged 4 years at the time of filing the suit. Being a cap. 151 marriage, the divorce proceedings should have been filed in the Resident Magistrate's Court in terms of section 14 of the African Christian Marriage and Divorce Act. No objection as to place of suing was taken by the respondent, and the High Court, of course, has unlimited jurisdiction.
2. The Petition gave particulars of the cruelty as acts of habitual violence with physical injuries and mental anguish to the petitioner, abuses, possessiveness at the petitioner's place of work, business premises and the house to which she moved after she was compelled to leave the matrimonial home; SMS texts and email threats of violence to the petitioner and petitioner's business colleagues, physical violence upon petitioner's business customer with damage to his property; violence towards the petitioner's mother, the child's school teachers and school bus driver; and neglect of marital and financial responsibilities towards the petitioner and the child of the marriage. The petitioner contended that as a result of the cruelty of the respondent, the marriage had irretrievably broken down. In seeking the non molestation order, the petitioner pleaded that "unless restrained by the Court, the respondent will actually ruin the petitioner's life, employment, business and social life by the aforesaid malicious and unreasonable unlawful actions which actions are also essentially unlawful and criminal."
3. The petitioner filed an interlocutory application under section 17 of the Matrimonial Causes Act and Rule 3 (3) of the Matrimonial Causes Rules for interim order of judicial separation and non molestation order, which application, initially granted *ex parte* pending hearing *inter partes* was eventually settled by consent of the parties on 14th September 2011 upon terms that:-
 1. That the parties be and are hereby judicially separated.
 2. That neither party should visit the others home or place or molest the other in any way.
 3. That the consent be and is hereby entered as an order of the court.
4. The Court on 5th March 2012 granted the respondent 7 days to file a cross-petition when his counsel intimated that he wished to cross petition for custody of the child of the marriage. The

cross-petition is not on file but the evidence and submissions of the parties indicated that it was grounded on alleged adultery by the petitioner, but the man associate was not made a co-respondent as required by section 9 of the Matrimonial Causes Act, which provides as follows:

Provision as to making adulterer co-respondent

9. (1) *On the petition for divorce presented by the husband or in the answer of a husband praying for divorce, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.*
2. *On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.*

THE ISSUE BEFORE THE COURT

5. The issue before the Court is principally whether the respondent is guilty of cruelty leading to the breakdown of the marriage between the parties. A related question of access to or custody of the child was taken by the Respondent. Finally a question of grant of a non-molestation order was raised in the Petition although this would appear to have been addressed by the Order entered by the court with the consent of the parties in terms of prayer (b) of the Petition and which remains in force unless discharged by an order of the Court.

Hearing

6. The parties filed copies of documents that they relied on and *viva voce* evidence was taken when the original of those documents were produced. The two parties testified in support of their respective cases during the hearing which commenced on 17th April 2012, through 17-18 July 2012, 9th November 2012, 16th December 2013, 8th January 2014 and closed on 6th February 2014 with submissions being made 17th March 2014, when judgment was reserved.

THE EVIDENCE

7. The Petitioner (PW1) testified that she married the Respondent on the 5th November 2005 and the two had a child, a boy aged 6 years at the time of her testimony, and that during the marriage the Respondent had been violent and she gave instances of violence some which she reported to the police and others that she did not. In January 2011, the respondent beat the petitioner at the Holy Ghost Cathedral Church, where she had been invited by a friend. In December 2010, the respondent went to the petitioner's place of work at [Particulars withheld] next to Urban Police station Mombasa, caused a disruption while the petitioner was serving a bank's client by loudly demanding to see his son and had to be calmed down by the petitioner's colleagues at the Bank. There was another violent incident in June 2011 at another branch of the Bank where the petitioner had been transferred, despite a restraining order issued in these proceedings. Again when the respondent was returning the child after a weekend visit he caused trouble by following the Petitioner into the house. At another incident of violence the respondent forcibly took the child from the school bus.
8. There were other incidents of violence as when he bashed her head against the wall in the house but she did not report these incidents. She only reported the incident at the church giving rise to criminal proceedings against the respondent, and subsequently obtained a restraining order against the respondent. The petitioner said that the respondent had not paid for maintenance after they separated and had only paid for the child's school fees on two occasions since 2009. She said that she had initially moved out of the matrimonial home between January - June 2009 returning after counseling and finally leaving in October 2009. She then took up a house for which she paid Ksh.15.000/- with a house help for Ksh.3500/-. She said that the respondent had upon her leaving complained to the Police that she had stolen from their house and she was summoned severally at the Police station. She faulted the respondent's contention that she had married him for money

- because while she was employed at the time of the marriage the respondent was unemployed and she supported him between 2007 and 2009 by buying food, paying the house rent, and other bills and buying clothing for all the family.
9. The petitioner sought to demonstrate the acquisition of motor vehicle [Particulars withheld] Toyota Vitz by a loan from her employer bank which she was repaying by salary deductions, and a quarter-acre plot at Mtwapa Mombasa which she had solely acquired without contribution by the respondent and had paid for it by installments beginning May 2009. She testified that as an account's clerk the respondent would be able to maintain the child. She said that the parties had entered into an agreement on custody and access of the child dated 28th February 2010 signed before the Children Department, Mombasa.
 10. The petitioner claimed that because of the harassment by the respondent, she had to resign from her job in the bank. She claimed that the marriage could not be salvaged and she consequently prayed for divorce and custody of the child together with a permanent restraining order for non-molestation by the respondent. Testifying that the respondent had sent her an SMS text saying that he had found a lady with whom he can live and who can take care of the child, the petitioner protested that she did not want her child to be brought up by a step-mother.
 11. On cross-examination by Mr. Ratemo advocate for the Respondent, the petitioner stated that she had married the respondent after about one year of dating after meeting in church having been attending the same church, Mombasa Pentecostal Church. Following her pregnancy and as they prepared for the wedding, she had noted that the respondent had become rude and hot-tempered and at one time as they prepared for the wedding had thrown documents on minutes of meetings at her. She said that there was nothing she could do as she was already pregnant and upon counseling in the church she agreed to proceed with the marriage. After the marriage they lived together from November 2005 to January 2009 when she moved out on account of the respondent's violence which despite promises at counseling sessions he had refused to stop. She said that she moved back in June 2009 after reconciliation meetings with parents and friends but the respondent went back to his habit of violence and failing to provide for her family.
 12. She asserted that when she moved out of the house in October 2009, she took some of the items that she had bought and nothing that the respondent had bought, and explained that though she was unemployed in 2005 and only got a job in 2006 she had a chicken business and a private consultancy for reconciliation of accounts for friends and she used the proceeds to buy some items for the house which she took with her when she left the matrimonial house. She said that for fear of the respondent's violence she could not have told him that she was leaving the matrimonial house.
 13. She said that she was pressurized by the family of the respondent to withdraw the criminal charges. She denied any suggestion that the respondent assisted her to get the job at Imperial Bank stating that she sat for an interview as other applicants, denying also the suggestion that the respondent contributed to her business. She asserted that she was on the contrary the one who gave money for the respondent's business. She denied that she had bought any property with the respondent and stated that she had bought her plot of land from her savings. She said the respondent had only recently started to pay fees for the child.
 14. In support of her case the petitioner produced documentary exhibits (Pexb 1-8) being:
 1. Photocopy of the marriage certificate.
 2. Birth Certificate of the Child of the marriage.
 3. Treatment Note dated 17th January 2011 for the petitioner indicating history of assault by person known to her.
 4. Police Form P3 dated 17th January 2011 medical examination of the petitioner following the assault.
 5. Charge sheet in Criminal Case No. 459 of 2011, Mombasa against the respondent for assault causing actual bodily harm contrary to section 251 of the Penal Code.
 6. Affidavit of service of the restraining order against the Respondent sworn by Terrence Omondi on 30th June 2011.
 7. Loan application forms on petitioner loan for Ksh.400,000/- granted to the Petitioner by her employer the [Particulars withheld] for the purchase of a motor vehicle.
 8. Agreement dated 28th December 2010 at the Ministry of Gender, Children and Social Development where the parties agreed that the petitioner has custody of the child and the

respondent has custody [access] on alternate weekends and half of the school holidays.

15. By a supplementary list of documents filed on 15th May 2012, produced as (Pexb 9), the Petitioner attached copies of receipts for the payment of rent, school fees at [Particulars withheld] Academy and electricity bills for the period 2010 – 2012 after the parties separated.
16. The Respondent's (DW1) testimony was a general denial of the charge and particulars of cruelty in the Petition. He testified that he was an accountant and he denied that he had physically abused the petitioner and that the criminal case no. 459 of 2011 had been withdrawn on the ground that the Petitioner complainant in the case had forgiven him and did not intend to pursue the matter. He said that for the time that he had been with the petitioner he had provided for the family, and he produced receipts as proof. He also produced other documents as follows:
 1. School fees between 2009 - 2012 at [Particulars withheld] Academy and Kingdom Heritage Model School (Dexb 1).
 2. Receipts of payment of insurance education Policy (Dexb.2) and statement of account showing payment of premium for the child between 18/2/2007 – 7/11/2012 (Dexb.3).
 3. He claimed to have sent vegetables to the petitioner from Nyeri after they separated.
 4. Receipts for payment of rent of the house between October 2005 – November 2005 (Dexb. 4)
 5. Receipts for the payment of rent for various months in 2007 and 2009 in respect of the business premises and letter for increase of rent dated 7/4/2010 addressed to the respondent and the petitioner. (Dexb. 5)
 6. Deposit slips from Giro Bank in respect of commission from Brookside dairy for the milk business (Dex.6)
 7. List of items taken by the petitioner when she left the house. (Dexb. 7)
 8. Guidance and Counseling report in which the respondent said the petitioner had indicated that her father was not alive, yet he later learnt that the petitioner's father was alive.
 9. Policy and statements of account showing payment for the period 25/12/2008 – 8/1/14. (Dexb. (a) and (b))
 10. Bundle of receipts 24 in number for payment of fees for the child from Baby class to Std II 2009 -2013
 11. Letter dated 24/12/2010 from the Nyeri office of Children's Department when the respondent complained about denial of access to the child after divorce proceedings had been filed. (DExb 11)
 12. Letter of 28/12/2010 confirming receipt of the Nyeri letter (DExb11) and containing an agreement as to the respondent's access. (DExb.12)
 13. Letter of 24/12/2010 from the children office Mombasa summoning the petitioner to a meeting of 28/12/2010 (DExb.13) at which the agreement on access of 28/12/2010 was signed.
 14. Letter dated 4/2/2011 from Children Officer Mombasa addressed to Makupa Police station advising that the police should accompany the respondent whenever he went to see the child. (DExb. 14)
17. The respondent testified that he had agreed with the petitioner to buy a plot in 2009. The plot was registered in the name of the petitioner as they had agreed they pay for one plot in her name and another in his name. The part payment for the plot was made from the milk business which he operated. The copy of certificate of title CR [Particulars withheld] for a plot of land measuring 0.0987 ha subdivision No. [Particulars withheld] (Orig. No. [Particulars withheld]) Section III Mainland North registered in the petitioner's name dated 6/8/2010 and 10 bank slips allegedly showing withdrawals of Ksh.339.400/- from the respondent's accounts towards the payment of the plot were produced and marked (DExb. 15 (a) and (b)). As DExb 16 (a) and (b) the respondent produced receipts for payment of house rent for 2008-2009 together with original tenancy agreement dated 7/1/2008.
18. The respondent produced a certified copy of the proceedings in Criminal Case No. 459 of 2011, which was withdrawn by the petitioner as DExb. 17. He also produced in a bundle DExb. 18 receipts showing his expenditure on the family including water, bills, foodstuffs, maternity fees, power bills and treatment bills for the child after an accident. He further produced cheque-book counter-foils for payment of rent and power bills for the period 2006-2007 (DExb.19) and contended that the documents produced showed that he was responsible for his family. He

lamented that he had difficulties in getting the petitioner to comply with his right of access in accordance with the agreement of 28th December 2010.

19. On cross-examination by Mr. Ndegwa for the petitioner, the respondent sought to avoid questions relating to the criminal charges for assaulting the petitioner that he faced in Criminal Case NO. 459 of 2011. He said:

“I do not wish to discuss the case because it was withdrawn. On 16/1/2011 I was at the cathedral with my son and my niece. I saw F N there. She was inside the church. I was also inside the church. I do not recall whether she was seated. I was standing holding my son. I was not near her. I was far behind. I did not hit anyone near her. When I was standing with my son, my son said he did not want to go to his mother because she was with a man. My son was 5 years. Somebody came running past me and my son said it was the man who was with mummy. He drove off. I attend different churches. We celebrated marriage at Pentecostal Church. [Proceedings in Criminal case NO. 459 of 2011]

The charges were about the incident at the Cathedral. At p.3 of the proceedings the prosecutor said that the complainant and myself had reconciled. At p.3 the petitioner states she was withdrawing on condition that I do not harass her. I have never harassed her. I do not recall my brother going to persuade F to withdraw the case.”

20. He confirmed that he had reported to the Makupa Police station and the area chief that the petitioner had stolen the items from the house as he considered it theft for she had taken them without his consent. It was when the police advised him that it was a family matter that he reported to the chief. He conceded that his son would require the items taken by the mother when she left the house, being a TV, Fridge, Gas cooker and a bed.
21. He said he had a girlfriend; that he worked as an accountant at a hotel where he worked late at night until 11.00pm when he was a duty manager and up to 6.00pm when he was not on duty; and that he attended evening classes under distance learning programme. He confirmed visiting the petitioner at her place of work but denied having been removed for being violent at the Bank. He also denied beating the petitioner at a Petrol station or beating the process server who served the restraining order on him.
22. Despite advice from the court, the parties tended to drift into evidence relating their respective contributions to the acquisition and development of what the respondent apparently contended, and the petitioner contested, was matrimonial property and family businesses. The Court cautioned that these were not proceedings in the nature of property dispute between spouses under the English Married Women Property Act, 1882 (replaced by Kenya's Matrimonial Property Act, No. 49 of 2013) and it, consequently, has no jurisdiction in these divorce proceedings to determine the property disputes. The parties may, if so advised, file a matrimonial property suit in that behalf.

SUBMISSIONS

23. Brief submissions were made by counsel for the petitioner and the respondent in person as follows:-

“Mr. Ndegwa for the Petitioner

The petitioner has proved the facts alleged in the petition. The Petition was based on cruelty under section 8 (1) (c). The Petitioner explained that she had been severely beaten up by the defendant and a charge sheet was produced and proceedings were produced in support.

The ground of desertion. The parties agree that they do not live together. Evidence show that they have deserted each other. Section 10 of the Matrimonial Causes Act, the court has to investigate whether the cruelty has been condoned or connived. There is no evidence of that. Section 10 (1) (c) the Court shall pronounce a divorce.

Custody of children. The respondent has demonstrated that he is busy. He operates from Nairobi. Child schools in Mombasa and is a child of 8 years. The best interests of the child lie with the mother. No evidence has been shown that the mother is unfit. The Respondent produced an agreement giving custody to the Petitioner. The respondent seeks access only.

The Respondent should be restricted from harassing the petitioner. The charge sheet and the P3 form demonstrate that the petitioner needs such an order. The respondent should be ordered to keep away from the Petitioner and an order for non molestation.

The Respondent has also sought divorce on the grounds of adultery although there was no evidence. The Respondent's Petition should be dismissed. The respondent did not make the person alleged a party as co-adulterer. I refer to section 9 of the matrimonial Causes Act. I urge the court to reject the allegation. We pray for costs.

F M C, Respondent in Person

I am a good father and husband. I pray for divorce. The letter from Makupa Police showed the name of the person who was following me. The Petitioner was having adultery. I prayed for divorce and custody of the child. The petitioner did not support me in running the affairs of the family, as a partner in the marriage,

I put a lot of my finances to support her business which was in the name of N M, her biological father. The business still runs. It was a milk business supply in [particulars withheld] area. I invested Ksh.80.000/- in 2006. I also put in Office furniture at Ksh.25,000/-.

I reiterate that after agreement to invest on land she went to get the land in her own name. She only wanted to see what she can get from me and she was not interested in the family.

I pray for access for the child. I pray that I be granted access without difficulty.

On cruelty and desertion, it is the petitioner who left me because I did not have money, not because she was beaten. The Petitioner lied as regards the existence of her father. The allegations as to my cruelty are lies. I pray for custody of the child and I also pray for dissolution of the marriage, and each party to pay its costs as each party has filed a petition for divorce. That is my prayer.”

FINDINGS OF FACT

24. At the outset, this court notes that the respondent's demeanour as he testified in court was one of rude obstinacy as to the nature of the issue before the court, the relevant documents and the requirement for production of original documents and his Counsel, Mr. Owino, Advocate from the last of three law firms that represented him in this suit had to withdraw from the proceedings on the ground that he was unable to agree with the respondent as to how to prosecute the case and the respondent had thereafter to proceed with the litigation in person. The Court felt that the petitioner's allegation of hot-temperedness of the respondent was corroborated by the respondent's conduct in court.
25. The court is satisfied on the evidence presented before the court that the respondent was guilty of cruelty against the petitioner by physical assault on the petitioner on the 16th January 2011 while at the Holy Ghost Cathedral, Mombasa, which incident was the subject of criminal proceedings in CMC Criminal Case No. 459 of 2011. Other incidents of assault were not reported and no sufficient proof was adduced on them in the face of the general denial thereof by the Respondent.
26. However, on a preponderance of the evidence before the court, not to mention the applicable standard of proof as discussed below, it is impossible to hold as pleaded in the Petition that the respondent was an irresponsible man who did not provide for his wife and child of the marriage. He might be hot-tempered but he had evidence of support for his family by payment of rent,

electricity and water bills, medical and school fees for the petitioner and the child of the marriage. I am therefore not able to find cruelty on the ground of neglect of the respondent of his duty to maintain his family.

27. The assertion that the petitioner supported the respondent in payment of household expenses of food, clothing and sometimes rent is a concession that the respondent did provide for family, with the petitioner's support, as is appropriate. It is also plausible that the petitioner supported the respondent as she showed receipts for payment for the rent, school fees, electricity and water bills after their separation in 2010, while the respondent did not show any payments for food and purchase of clothes for the family. It appears to me that the respondent had paid for school fees and other requirements for the maintenance of the child within the family while he lived together with the petitioner but had neglected to pay for the maintenance of the petitioner and their child after the separation in October 2009 until after the suit was filed when he resumed the payments for school fees.
28. Apparently, the matrimonial disagreements between the spouses in this suit had their unfortunate genesis in mistrust surrounding management of the family financial affairs, where the petitioner felt that the respondent did not provide for the family as he ought and could have, and the respondent felt that the petitioner did not support him in the payment of the family bills even though she was able. The petitioner was employed and run a business on the side while the respondent at the time of their cohabitation was not employed but was running a business. The respondent in trying to resolve the disputes with his intemperate disposition became violent leading to the separation of the spouses. While living separately, the stressful circumstances of such separation may have led the hot-tempered respondent to violently deal with the situation in enforcing his right of access to the child and with the petitioner's associates he thought were responsible for the breakdown of their marriage.

THE LAW

29. Section 10 (2) of the Matrimonial Causes Act requires the court to be satisfied on the evidence that the matrimonial offences of cruelty or adultery had been committed and the petitioner had not condoned or connived in it. Section 10 (2) provides as follows:

10 (2) *If the court is satisfied on the evidence that -*

(a) the case for the petitioner has been proved; and

(b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition:

Provided that the court shall not be bound to pronounce a decree of divorce, and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty -

(i) of unreasonable delay in presenting or prosecuting the petition; or

(ii) of cruelty towards the other party to the marriage; or

(iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of;

or

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

30. As I held in *R A F v. S M L*, Mombasa Divorce Cause No. 25 of 2011 on 28th day of November 2014, there is an objective as well as a subjective standard for the test of cruelty:

*“A petitioner is required to prove conduct on the part of the respondent that may be construed to be cruel in an objective sense and to a standard of beyond reasonable doubt or, as otherwise put, that the court must feel sure of the commission of the offence as laid down in the decisions of **DM v. TM**, VOL. 1 KLR (Gender and Family Law Reports) at p.3, citing **Mulhouse v. Mulhouse** [1966] P. 39; **Strong v Strong**, [1990] KLR 118; and **Meme v. Meme** (1976) KLR 13. In **Maathai v. Maathai** (1980) KLR 154, (1976-80) KLR 1689. See also **E K v. A W K**, Civil Appeal No. NAI. 31 of 2000. However, in *N v. N* [2008] 1 KLR [G & F] 16, Madan. J. formulated a subjective test that conduct between the parties may, to the parties, be perceived as so cruel that they cannot be expected to live up with it:*

“if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.”

DETERMINATION

31. Both parties prayed for dissolution of the marriage. As recognized in section 98 (2) of the Marriage Act of 2014, (commencing 20th May 2014) which repealed the Matrimonial Causes Act under which this Cause was lodged, irretrievability of breakdown of marriage is a ground for divorce. The new Act provides that pending proceedings be, so far as practicable, continued in accordance with the provisions of the new Act. A marriage is deemed to have irretrievably broken down in the circumstances set out in section 66 (6) of the Act as follows:

“(6) 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 wilfully neglects the other spouse for at least two years immediately preceding the date of 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 for at least three years immediately preceding the date of presentation of the petition;

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

medical knowledge; or

(h) any other ground as the court may deem appropriate.”

32. From the record of proceedings in criminal case Mombasa CMC Cr. C NO. 459 of 2011, **Republic v. Frederick Mwangi Chege**, the charge was on 5th July 2011 withdrawn under section 204 of the Criminal Procedure Code following withdrawal of the complaint by the petitioner who was recorded as informing the court that –

“I wish to withdraw my complaint against the accused who is my husband. I am doing that on condition that he will not harass me. I know I cannot revive the case once withdrawn. I have forgiven him in respect of this case.”

It is clear that the petitioner’s withdrawal of the suit was subject to an undertaking from the respondent that he would not harass her again. While any future harassment of the petitioner will, being criminal, be liable to processing as a criminal charge in the Magistrate’s Court, this court must consider that prospect in determination of the prayer for a non-molestation order under prayer (b) of the Petition as a means of enforcing the respondent’s undertaking for non-harassment in the future.

33. It appears that the respondent is a vengeful person who would not hesitate to make a complaint to the police that his wife had *stolen* household items from the matrimonial house, and therefore seek to commence criminal proceedings for theft against the wife while the items taken were, as he conceded in cross-examination, clearly for the benefit of his child whom the petitioner had taken with her. Moreover, his intransigent demeanor before the Court supports the petitioner’s allegation of hot-temperedness, which provides a compelling basis for the non-molestation order.

34. The Respondent invited the Court to find that having lied about the death of her father, the petitioner could also be lying about the alleged acts of assault by the respondent. I was not able to find that the petitioner had lied about the death of her father in the pre-marital counseling questionnaire because, apart for the statement by the Respondent that he had later learnt that the petitioner’s father was alive, there was no primary evidence by birth certificate extract from the Registrar of Persons or other documentation or testimony of the petitioner’s paternity to show who the father of the petitioner was and whether he was alive or deceased.

35. In terms of section 10 (2) of the Matrimonial Causes Act, I am satisfied that the respondent is guilty of the matrimonial offence of cruelty by physical assault of the petitioner in the circumstances the subject of the criminal case CMC Criminal Case No. 459 of 2011. I do not find that by withdrawing the complaint under section 204 of the Criminal Procedure Code, the petitioner condoned the cruelty. The withdrawal was clearly subject to the respondent not harassing the petitioner again and this might confirm her position that she was pressurized to withdraw the charge by the respondent’s relatives. As the petitioner did not resume cohabitation, I do not find that this withdrawal of the criminal charge amounted to condoning the cruelty within the meaning of section 10 (2) (b) of the Matrimonial Causes Act.

36. The case has an aspect of the test by Madan J. (as he then was) in *N v. N*, supra, in that by leaving the matrimonial home in October 2009 and staying away for the 5 years subsequently, the petitioner must have reached a decision that on account of acts of cruelty by the respondent - some which may be trivial but which nonetheless justified her moving out of the matrimonial home - she could not be expected to live with the respondent. She did not condone any of the incidents of violence as she promptly left the matrimonial house in October 2009 when, upon return in June 2009, the respondent, in her view, failed to change his violent ways.

37. On the evidence, and in terms of the provisions of the Marriage Act, 2014 on breakdown of marriages, the marriage between the petitioner and the respondent has irretrievably broken down. The parties have been separated for over 5 years and their marriage has therefore irretrievably broken down within the meaning of section 66 (6) (d) of the Marriage Act 2014. I, therefore, find that the marriage is broken down irretrievably.

38. On his Cross-Petition, the respondent did not produce evidence of adultery against the petitioner. The closest he came to proving infidelity on the part of the petitioner was a copy of letter dated

- 16th April 2012 a copy whereof was attached to the Respondent's list of documents (but not formally produced as an exhibit) written by the Officer Commanding Police Station (OCS) Makupa Police Station requesting the District Criminal Investigations Officer (DCIO) Mombasa to trace two mobile numbers allegedly belonging to the petitioner and a man associate following a complaint that the man was using his vehicle to trail the respondent, attached in documents for the respondent. No proof of adultery to the required degree as to make the court feel certain that the matrimonial offence had been committed was adduced. See section 10 (2) of the Matrimonial Causes Act. Moreover, even the pleading of the cross-petition for dissolution on the ground of adultery of the petitioner wife was incompetent as the alleged co-adulterer was not, as required by section 9 of the Matrimonial Causes Act, impleaded as a co-respondent.
39. The respondent is responsible for the breakdown of the marriage making these proceedings necessary. In addition, his disorganized conduct of these proceedings – with representation by three different firms of advocates and finally in person - has unduly protracted the litigation, and he shall, therefore, meet the costs of the Petition and Cross-Petition.
40. In view of the respondent's violent and vengeful character, and on account of previous assault of the petitioner, a non-molestation order will issue as prayed under Prayer (b) of the Petition.
41. By her evidence, the petitioner has demonstrated that she was able to maintain herself through her employment salary and private business ventures. The income and means of the respondent was not produced by averment or Affidavit of Means in accordance with the Matrimonial Causes Act, and the court is not able to hold that the respondent should maintain the petitioner.
42. It is trite law that the custody of a child of tender years lies with the mother unless the mother is an unfit person. Section 2 of the Children Act provides that "child of tender years" means a child under the age of ten years. As the child in this case is still in his tender age – 8 years at the time of Judgment - custody should be with the mother. It has not been shown that the mother is not a fit person to have the custody of the child, and there is, therefore, no basis for departing from the general principle that the custody of a child of tender years should be with the mother. Moreover, as a father who works late and attends evening classes, the respondent is not suitable to give the child the care and attention that the child of tender years demands. The petitioner is, however, under a duty also to allow the respondent reasonable access to the child and either party may in the event of default by the other bring proceedings for specific orders in the Children's Court.
43. However, the two parties as parents have equal parental responsibility under section 24 (1) of the Children Act to provide for their child in terms of the duties set out in section 23 (2) of the Act. In practical terms having granted custody of the child to the mother, the respondent must provide for the food, clothes, school fees, medical and other upkeep for the child as the mother contributes by having the care and control of the child, that is to say the physical custody of the child, providing housing for the child together with the duties and responsibilities that come with it.

ORDERS

44. Accordingly, for the reasons set out above, the Court makes the following orders:
1. A *Decree Nisi* for dissolution of the marriage between the petitioner and the respondent of 5th November 2005 is granted.
 2. A non-molestation order will issue as prayed under Prayer (b) of the Petition.
 3. The custody of the child of the marriage shall be vested in the petitioner until further orders of a competent court.
 4. The respondent will provide for the food, clothes, school fees, medical and other upkeep for the child in such sum as may be agreed between the parties or, failing agreement, by an order of the Children's Court in proceedings in that behalf.
 5. The respondent will have reasonable access to child of the marriage in terms of the Agreement between the parties made on 28th December 2010 to the effect that the respondent will have access to the child every alternate weekend and during half the School holidays. The terms of such access may be reviewed from time to time by the Children's Court in proceedings brought in that behalf before that court.
 6. The respondent will pay to the Petitioner the costs of the Petition and the Cross-petition.

JUDGE

DATED AND DELIVERED ON THE 27TH DAY OF FEBRUARY 2015.

M. MUYA

JUDGE

In the presence of: -

Mr. Tole holding brief Mr. Ndegwa for Petitioner

Respondent in person

Mr. Oliver - Court Assistant.