



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE NO 85 OF 2013

S N RPETITIONER

VERSUS

M M MRESPONDENT

JUDGMENT

Before me is the petition of S.N.R., hereafter “the Petitioner”, which was filed on 30th April 2013 seeking to have the marriage between her and M. M. M., hereafter “the Respondent”, dissolved on the ground of cruelty and to have the custody, care and control of the child of the marriage granted to her. The Petitioner and the Respondent lawfully married each other on 18th April 2007, and their marriage was solemnized at the Office of the Registrar of Marriages. The Petitioner has annexed the Certificate of Marriage Registration to the petition as proof of her marriage to the Respondent. The parties cohabited in Ongata Rongai, Nairobi before the Petitioner moved out of the matrimonial home in June 2011. The marriage has been blessed with one issue, C. M., a minor son who was born on 2nd January 2008. The Petitioner has produced as evidence of this a certified copy of the Certificate of Birth of the child and the same is in the Court’s record. The Petitioner is presently employed as a banker while the Respondent is a shop assistant.

In her petition of 30th April 2013, the Petitioner stated that since the celebration of the marriage, the Respondent has treated her with cruelty, engaged in acts of violence against her, and abandoned his matrimonial obligations. She averred that the Respondent is a violent man of ungovernable temper who has assaulted her repeatedly. The Petitioner further elaborated that the Respondent would come home very late and very drunk, and proceed to violently wake up the Petitioner and the child from their sleep before assaulting the Petitioner. She also stated that the Respondent continuously engaged in acts of disrespect, neglect and spite toward the Petitioner, the child and members of the Petitioner’s family. The Petitioner also stated that on every weekend the Respondent would willfully and deliberately desert the matrimonial home to engage in uncontrolled drinking of alcohol to the extent of neglecting his matrimonial duties and parental responsibilities. She specified that the Respondent failed to adequately provide maintenance for the Petitioner and the child.

The Petitioner stated that she did not condone the acts of violence and cruelty meted towards her by the Respondent, and that this was the main reason why she left the matrimonial home. She deposed that she has not been an accessory to, condoned or connived with the Respondent in any acts of violence, cruelty or abandonment, and also that there was no connivance between her and the Respondent in the prosecution of her petition. She stated that her decision to move out of the matrimonial home in June 2011 was driven by necessity; to save herself and the child from the dangers associated with the

Respondent's violent and cruel conduct. The Petitioner contends that although the parties have attempted to reconcile their differences with the help of their respective family members, these efforts have been unsuccessful. Thus, the Petitioner concluded that the marriage between her and the Respondent has irretrievably broken down.

The Respondent filed an answer to the petition on 2nd July 2013. He categorically denied each and every allegation raised by the Petitioner concerning his alleged cruel, violent and neglectful conduct towards the Petitioner and the child of the marriage. He specifically denied the particulars of cruelty and abandonment that are outlined in the Petitioner's petition, and put the Petitioner to strict proof in this regard. He also dismissed as "vexatious, misplaced and totally fictitious" the Petitioner's allegations of cruelty and abandonment, and stated that it was the Petitioner's desertion of the matrimonial home with the child after securing employment that caused the current irreconcilable differences in the marriage.

The Respondent further counterclaimed that the Petitioner has treated him with such cruelty since the celebration of their marriage as to cause him psychological torture and mental anguish. He elaborated this in his particulars of cruelty, where he alleged that the Petitioner has: used foul and threatening language against him; subjected him to inhuman treatment, emotional harm and psychological trauma; been disrespectful and emotionally unavailable to the Respondent; been contemptuous and disrespectful towards the Respondent's family members; and moved out with the child from the matrimonial home in complete disregard of the health and safety of the child and the Respondent. Moreover, the Respondent counterclaimed that the Respondent deserted the matrimonial home in June 2011, took the child with her, and never returned. In this regard, the Respondent put the Petitioner to strict proof in respect of her allegations that she was forced to leave the matrimonial home because of the Respondent's violence and cruelty. In sum, the Respondent stated that owing to the Petitioner's conduct and neglect, the marriage between them had irretrievably broken down.

At the hearing of the matter, on 29th January 2015, the parties were heard before this Court and they presented their oral and documentary evidence in person and through their respective Counsel. The parties testified and each reiterated the contents of their written applications. None of them called an independent witness to support their rival claims, nor did they produce any evidence to support or controvert any of the allegations made by the other party.

The Petitioner testified that the parties separated in 2011 after four (4) years of marriage and that she currently lives in Kahawa Wendani with the child of the marriage. It was her testimony that the Respondent's violent and cruel conduct began immediately she got a job, when the Respondent began coming home late, drinking and beating her up. She stated that the Respondent has neither been supporting her nor the child, and that despite knowing where she lives he does not visit the child. She further elaborated the since early 2013, the Respondent has not visited the child and only asks to see his photographs. She however stated that should the custody and care of the child be granted her, she would not be opposed to the Respondent having unlimited access to child.

The Respondent also testified at the hearing and stated that the marriage was very peaceful at the beginning when the Petitioner was still a housewife and he provided for the family, but things changed when the Petitioner got a job. At the material time the couple lived in Ongata Rongai and the Respondent was working as a shop assistant at **[particulars withheld]** in Nairobi City, and he would commute home after work at 10 p.m. on a daily basis. He denied being abusive or violent towards the Petitioner, and stated that the Petitioner never reported any incident of violence caused by him to the Police Station, nor did she seek medical attention due to any injuries. The Respondent also stated that he once tried to participate in the child's life by picking the child from school and doing shopping for the child and the Respondent, but he found another man in her house. The Respondent testified that the Petitioner subsequently said that she did not want his support. He also testified that the Petitioner had changed the name of the child from C. M. to C. R., thereby substituting her surname (R) for his (M). On cross-examination, the Respondent explained that he has been unable to visit the child as often as he would like since he currently works as a shop assistant at **[particulars withheld]** in Meru. He also admitted that he was not ready for the divorce but since the matter was now in Court he had resigned himself to that possibility, and he further expressed his willingness to provide for the child.

From the pleadings and oral evidence of the parties in this case, this Court finds that the following are the issues for determination to which the Court will focus its legal analysis:

- a. Whether the Petitioner or the Respondent or both have adduced sufficient evidence in their respective presentations to warrant the grant by this Court of a divorce;
- b. Whether the Petitioner has made a convincing case for this Court to give her the custody and care of the child;
- c. Whether the Respondent should have access to the child and contribute to the welfare of the child.

The Petitioner and the Respondent were married under the **Marriage Act Cap 150** and thus the issues of divorce would ordinarily fall under the provisions of the **Matrimonial Causes Act Cap 152**. However, the **Marriage Act 2014** amended and consolidated into one statute all the various existing laws relating to marriage and divorce. While **Section 8(1)** of the **Matrimonial Causes Act Cap 152** outlines the grounds for divorce, the analogous provisions of the **Marriage Act 2014** are more pertinent to the present case because the **Marriage Act 2014** is the latter law that governs matters of marriage and divorce. **Section 98(2)** of the **Marriage Act 2014** further supports the priority of the provisions of the **Marriage Act 2014** over the provisions of any other earlier written law in respect of ongoing matrimonial suits that were commenced under any such earlier law. **Section 98(2)** of the **Marriage Act 2014** provides:

Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.

The above approach is accepted in our case law. For instance, in the case of **RAF v SML [2014] e KLR Muriithi J** confirmed the view that:

The Marriage Act of 2014 (commencing 20th May 2014) ... provides under its section 98 (2) that pending proceedings be, so far as practicable, continued in accordance with the provisions of the new Act.

Accordingly, the relevant provisions of the **Marriage Act 2014** will be instructive in disposing of the matter before this Court. **Section 66** of the **Marriage Act 2014** provides:

1. *A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.*
2. *A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds –*
 - a. *adultery by the other spouse;*
 - b. *cruelty by the other spouse;*
 - c. *exceptional depravity by the other spouse;*
 - d. *desertion by the other spouse for at least three years; or*
 - e. *the irretrievable breakdown of the marriage.*

...

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 children of the marriage;*
 - c. *a spouse willfully 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; ...*

On the one hand, the Petitioner in this case seeks to have the marriage dissolved on the ground of cruelty. On the other hand, the Respondent denies all the allegations made against him by the Petitioner and has counterclaimed that the Petitioner deserted the matrimonial home taking away their child. Nonetheless, the parties concur that the marriage has irretrievably broken down. The grounds of cruelty and desertion are all questions of fact which require this Court to assess them based on the evidence adduced by the parties. The standard of proof in establishing the above grounds of divorce is a preponderance of probability. This view is supported by the Court of Appeal judgment in the case of **ALEXANDER KAMWERU V. ANNE WANJIRU KAMWERU (2000) eKLR**, where it was observed that:

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.

Cruelty is a question of fact and the establishment by a court of law of the fact of cruelty depends on the circumstances of each case. In the present case, in order to prove the Petitioner's allegation of cruelty on the part of the Respondent, this Court must satisfy itself that there is evidence indicating that the Respondent, without any justifiable cause, deliberately conducted himself in such a manner as to endanger the Petitioner's physical or mental health, or cause her anxiety over the imminence of such danger. The standard of proof for cruelty was elaborated in the case of **DM v TM (2008) 1 KLR 5**, where Chesoni J (as he then was) stated that:

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 complainants health and 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.***

The allegations made by the Petitioner concerning the Respondents cruelty have not satisfied this Court of their gravity. In particular, the allegations of verbal and physical abuse have not been supported by any evidence. While it may not be easy to prove verbal insults occurring in the home, proof of physical assault is not difficult to produce. However, the Petitioner adduced no evidence that she had sought medical attention for injuries sustained at the Respondent's hands or that she had reported the matter to the Police Station. Even if she might have been conscious of her privacy and thus unwilling to publicize her predicament, if the alleged violence and cruelty was as grave as the Petitioner suggests, she could not have failed to whisper the same to a close friend or relative. But there was no independent evidence by any other person that could satisfactorily support the Petitioner's allegations. The same can be said about the Respondents allegation that the Petitioner was emotionally cruel to him by removing their child from the matrimonial home without any caring about the child's or Respondent's health.

There is also little circumstantial evidence from which an inference of cruelty on the part of either party can be drawn. If such circumstances were proved then the Court would have assessed the objective and subjective aspects of such evidence in order to determine whether they establish the allegation of cruelty. In the case of **RAF V SML [2014] e KLR Divorce Cause No 25 of 2011**, Muriithi J observed that:

The test for cruelty in matrimonial causes is both objective and subjective. 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 ...

Having considered the evidence adduced before by the parties and on the basis of the above authorities, this Court finds that the allegations of cruelty made by the Petitioner against the Respondent have not been established to its satisfaction. Similarly, the Court finds that the Respondent's counter-allegation of emotional cruelty on the part of the Petitioner has not been proved to the required standard of proof.

As regards the Respondent's allegation that the Petitioner is guilty of desertion, it is important for the Court to satisfy itself that certain factual and circumstantial factors are present to support that claim. As a general rule, there has to be proof that the party at whom the allegation of desertion is leveled voluntarily left the matrimonial home and the party left behind neither provoked nor condoned the desertion. In the present case, it is common ground that the Petitioner left the matrimonial home in June 2011, but the reason for her departure is disputed. The Respondent maintained that the Petitioner without notice or any justifiable cause left the matrimonial home after getting employed and took the child with her. For her part, the Petitioner alleged that she left the matrimonial home so as to escape from the Respondent's violence towards her and the child. It is crucial to establish that the party who left the home (the Petitioner in this case) left with an intention not to return. While it is not easy to establish such intention from the facts before this Court, the Petitioner's subsequent conduct indicates that she did not intend to return. The Petitioner left in June 2011 and never returned. However, this may not by itself constitute evidence of desertion. It may be necessary to prove other factors.

However, in the case of **SCC V MKC [2014] e KLR Divorce Cause No 16 of 2012** Justice Ngenye-Macharia observed that no more evidence than that the other spouse has already gone to live with another man or woman, as the case may be, is required to prove desertion. The Respondent gave oral evidence that, since leaving the matrimonial home, the Petitioner has been living with another man and that he found the said man in the Respondent's house. This evidence was not challenged by the Petitioner. It may thus be safe to assume that the Petitioner has the wish to move on with her life. But this hardly constitutes sufficient evidence that, as a matter of fact, the Petitioner is living with another man as husband and wife. This Court finds it difficult to rely on the Respondent's evidence and the Petitioner's failure to controvert such evidence as a conclusive basis on which to make a finding that the Petitioner deserted the matrimonial home.

Nonetheless, **Section 66(6)(d) of the Marriage Act 2014** provides that a marriage has irretrievably broken down if the spouses have been separated for at least two years, irrespective of whether such separation is voluntary or by dint of a court decree. In the present case, it is common ground that the parties have been living separately and apart from each other since June 2011, a period of more than three (3) years. This separation is voluntary since there is no evidence of a court decree to that effect, and this fact is admitted in the parties' respective pleadings. It is also common ground that the parties sought, with the help of their relatives, reconciliation of their differences but these efforts were unsuccessful. It is thus clear that the marriage is beyond salvage. In light of the rival submissions and the evidence adduced by the parties, it is difficult to tell with a degree of certainty why the real reason for the breakdown of the marriage. However, the evidence makes clear that the parties can no longer live together, and this is a valid basis on which to conclude that the marriage has irretrievably broken down and to release the parties from the bonds of matrimony. In the case of **N V N [2008] 1 KLR 16**, Madan J (as he then was) observed that:

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 ...

This Court therefore finds that the marriage between the Respondent has irretrievably broken down, and that it is in both their interest and the interests of justice to dissolve the marriage.

As regards the custody of the child, it is relevant that the Petitioner has had the custody and care of the child since June 2011. It is also relevant that the Respondent has not opposed the Petitioner's application for the custody and care of the child to be given to her. This Court is guided by the principle that the child's best interests are of paramount importance in every matter concerning the child. In this regard, it is the considered opinion of this Court that it would be in the best interests of the child in this matter to remain in the Petitioner's custody and care. This is because the child has been living with the Petitioner and it would serve no purpose to remove him from that environment, thereby disrupting the life that he is accustomed to. The Court is also mindful of the child's need for parental care from the Respondent, and therefore finds that the Petitioner should provide the Respondent with access to the child. However, this

Court wishes to draw to the parties' attention two important provisions of our law that are applicable and particularly pertinent to the circumstances of this case as regards the custody and maintenance of the child. **Article 53(1)(e)** of the **Constitution** provides:

Every child has the right –

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;

Article 45(3) of the **Constitution** provides:

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

In the present case, this Court finds that the marriage between the Petitioner and Respondent has irretrievably broken down and has given the custody of the child to the Petitioner with access rights to the Respondents. However, the Court finds it necessary to impress upon the parties that their legal obligations concerning the provision and maintenance of the child continues even after the marriage is dissolved. The Petitioner testified that the respondent does not visit or contribute to the child's maintenance. The Respondent admitted that since he now works in Meru, it is difficult for him to visit the child as often as he would wish. However, he did not dispute the Petitioner's testimony that he has not visited nor provided for the child since early 2013. In this regard, the Court finds it necessary to remind the Respondent that no distance is too far for a parent who wants to visit his/her child. The Petitioner is also urged to ensure that the Respondent has reasonable access to the child.

Another important point that was raised by the Respondent at the hearing is the alleged changing by the Petitioner of the child's name from C.M. to C.R. in a bid to delete the Respondent's surname. While this allegation was disproved by a certified copy of the child's birth certificate in which the child's name is entered as C.M., the Court finds it necessary to state that regardless of the differences between the parties, the child's name shall remain C.M. This is because C.M. is the name that is entered in the child's birth certificate and constitutes a formal document of registration that proves that the child is a Kenyan citizen by birth in accordance with **Article 12(1)(b)** of the **Constitution**.

Upon a careful consideration of the petition, the answer to the petition and the evidence tendered by the parties in this case, this Court finds that the marriage has irretrievably broken down and this is a valid ground for dissolution of the marriage. The only reasonable conclusion to which this Court can arrive is that both parties are partly responsible for the breakdown of the marriage. In view of the fact that this is a matrimonial issue in which there has been no clear establishment of the party at fault, this Court only considers it fair not to make any orders as to costs.

In the premises therefore, this Court orders that the marriage between the Petitioner and the Respondent that was solemnized on 18th April 2007 is hereby dissolved:

- a. Decree nisi to issue forthwith;
- b. Decree absolute to issue thereafter within 30 days;
- c. The custody of the child to remain with the Petitioner, but with access rights to the Respondent to be agreed on by the parties;
- d. Each party is at liberty to apply;
- e. No orders as to costs.

It is so ordered.

DATED AT NAIROBI THIS 24th DAY OF MARCH 2015

M. MUIGAI

JUDGE