



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

DIVORCE CAUSE NO. 1 OF 2000

M. E. K. M.....PETITIONER

VERSUS

G. L. M.....RESPONDENT

DR. B. W.....1ST CO-RESPONDENT

PROF. R. M.....2ND CO-RESPONDENT

JUDGMENT

1. The petitioner prays that her marriage to the respondent be dissolved. Their union was celebrated on 25th August 1989 at the Attorney General's Chambers, Nairobi. The marriage was registered under the Marriage Act. A copy of the certificate of marriage number (*particulars withheld*) was produced as evidence. The petitioner also prayed for maintenance and a secured provision.
2. The petition is based on the grounds of adultery and cruelty. The respondent has filed an answer and cross petition. His riposte is that the petitioner was cruel; that she deserted the marriage and committed adultery with the two co-respondents. The respondent also prays for divorce and maintenance from the petitioner. The two co-respondents did not lead any evidence in the matter. Their learned counsel submitted that the co-respondents are innocent bystanders caught in the cross fire between the principal disputants.
3. The petitioner now lives in the Republic of South Africa. She is a professor in South Africa. She went to South Africa in 2002 to pursue a PhD degree at the University of Zululand. She earned the doctorate in 2004. For the last *eighteen* years she has neither *seen* nor *communicated* in any manner with the respondent. When this trial opened, the respondent said he could not *recognize* her; and that for all purposes, she was as good as *dead*.
4. The petitioner testified that their differences were irreconcilable; though no efforts had been made to reconcile the parties. The petitioner pleaded that the respondent was uncaring and miserly. He also made persistent and unreasonable sexual demands on the petitioner. She accused him of making wild allegations that she was unfaithful. She claimed that the respondent committed adultery with one P. N. The petitioner only met P once at the matrimonial house at Kakamega. She alleged that the respondent and P are cohabiting together. P has *not* been enjoined as a co-respondent. The respondent denies the allegations made by the petitioner.
5. The petitioner conceded that her sojourn to South Africa was motivated by her desire to be "*as far as possible*" from the respondent. She testified that after one year of the marriage, the couple had serious misunderstandings; she felt unsupported emotionally; and, as a result she was antagonistic to the respondent. She said she was not sure whether she was cruel to the respondent. She denied

- having illicit liaisons with the two co-respondents. Regarding the cross-claim for maintenance, she said that she has not supported the respondent since they separated 1997 and there is no reason to do so now. On the claim by the respondent for a refund of the dowry, she retorted that the dowry was not paid to her. She was also unwilling to stop using the name *Majanja* as proposed by the respondent. She said she has built a career on it.
6. When cross-examined by counsel for the co-respondents, the petitioner answered that between 1993 and 1998, she was a lecturer at [particulars withheld] University. Dr. B. W., the 1st co-respondent, was working for the university as [office withheld] of Department of [particulars withheld], Campus. Prof. M., the other co-respondent, was the [office withheld]. She denied having an intimate relationship with the two co-respondents. She said their relationship was purely professional. She denied that Prof. M. helped her in any special manner in her application for PhD; that all he did was to approve her studies.
 7. The respondent filed an answer and cross-petition dated 7th July 2000. The respondent is now 68 years old. He lives in Kakamega. He has had no stable employment or income for nearly eighteen years. Just a year ago, and through what he said were “some political connections”, he was appointed a member of Athi Water Services Board. The term ends in two years.
 8. The respondent was a widower when he met the petitioner. He had known her as a young girl through her brothers who were his good friends. They became romantic in 1988. The petitioner had four children from the first marriage; the petitioner had a daughter that she also brought into the marriage. Their marriage was not blessed with children. At the time the couple met, the petitioner was a librarian at [particulars withheld] Nairobi. She had a degree and postgraduate diploma from [particulars withheld] University. The respondent, also a degree holder, had a well-paying job as the Regional Operational Chief at Texaco through a local company, Caltex. He had a house under mortgage in Lavington, Nairobi. Things were looking up. However, the respondent made the mistake of challenging the process of renewal of his contract. His employer saw it as insubordination. Texaco terminated his contract; he was deported to Kenya. As fate would have it, the Kenyan affiliate also fired him.
 9. At the time he met the petitioner, the respondent had just got a new job at Price Waterhouse Coopers (PWC). He had been there for a year. When PWC learnt that the respondent had sued Caltex-Texaco, they fired him ostensibly because Caltex was their client. Earlier at PWC, the petitioner got an opportunity to apply for an MBA in USA. He encouraged the petitioner to also apply. The respondent was then fired and the opportunity for a scholarship evaporated. The petitioner on the other hand won a public scholarship. The couple agreed the petitioner would travel to Pittsburg, USA while the respondent would be left to take care of the children. That was July 1991; and it marked the first wrong turn for the young marriage. The respondent was left in the staff quarters at [particulars withheld] College. The petitioner then started alleging that the respondent had housed a girlfriend in the servant quarters; a fact he denied.
 10. The respondent testified that the petitioner supported the family with some money from the US. The respondent said he had banked US \$5000 in a US bank. He used it to support the petitioner to settle down. The respondent said he took good care of the children. He did not discriminate against the petitioner’s daughter. The only exception was when the petitioner asked him to procure a passport for her child. Of course he was not her blood father. Her father's name appeared on her birth certificate. The petitioner claimed that the respondent had put the other man's name on the certificate.
 11. The respondent had no regular job or income. He would get some odd jobs. It was difficult financially. He said it stressed him. The petitioner then returned to Kenya after getting her master’s degree. She was appointed a lecturer at [particulars withheld] University. The respondent testified he was not aware of it or asked for an opinion. The petitioner organized for their relocation to [particulars withheld], Eldoret. The respondent said this was insensitive as his youngest daughter was a day student at [name withheld] School, Nairobi. He was forced to make urgent plans for her accommodation with relatives. He said the petitioner was indifferent. His mortgage was recalled. He got a purchaser by private treaty. He used the little balance to build a house in [particulars withheld] Kakamega and to start a business. The petitioner was unimpressed by the rural house at Muraka. The business venture came a cropper.
 12. The respondent claimed the petitioner had an affair with Dr. B. W. He found out that the petitioner had a contract at Kenya Wildlife Services (KWS) where Dr. B. W. worked. The

- petitioner would just leave him and go. As they did not have children in the house, he asked her whether he could accompany her. She declined. Then the respondent came across the petitioner's private diary. The petitioner had an entry casting doubt on the respondent's sexual abilities. The last time they had sex was in March 1996. The petitioner used to buy foodstuff and manage the running of the house.
13. The respondent testified that he felt unwanted. One day, he picked a few things and left for [particulars withheld] village. The Muraka house had one complete room. The petitioner was least bothered about his whereabouts. The respondent testified that he received an anonymous letter that the petitioner had a relationship with the 2nd co-respondent. He knew the Prof. M. had assisted her to go to South Africa. The respondent got more information from the internet. He was worried about the secrecy of the PhD undertaking. Then one day, as the respondent was walking in Kakamega town, he spotted the family car [registration number withheld] being driven by Dr. B. W. with the petitioner by his side. The petitioner denies that version of events. She said she travelled to Egerton on the university bus with her choir members. The respondent then traced Dr. W's house number, called and left a nasty message. As it will emerge shortly, the respondent must have been the source of a cruel rumour that the petitioner and Dr. W. had perished in a road accident.
 14. The respondent alleged that the petitioner changed her name long before she left for South Africa. Her official name is *Prof. M. K – M*. The respondent said the copy of identity card she presented to Court is false. The respondent's view was that she should not benefit from his name. The rejoinder by the petitioner is that the name does *not* belong to the respondent.
 15. Lastly, the respondent claims for maintenance. He says he came out of the marriage penniless. He claims he provided for the petitioner at the beginning of her career. He took care of the children. He lost his job and property. He has no fixed income. His business in Muraka never flourished. The petitioner refused to assist him with any capital. Since the petitioner has a good job, the respondent submitted that it is only fair that she supports him. He prayed for divorce because his wife has "metamorphosed into a complete stranger" and she was to blame for bringing down the marriage.
 16. The parties filed detailed written submissions. Those by the petitioner are dated 25th February 2015; those by the respondent are dated 9th March 2015. The co-respondents did not file any submissions. I have considered the petition and the cross-petition; the oral evidence; and, rival submissions. From the evidence, I have reached the conclusion that the marriage has irretrievably broken down.
 17. I am however not satisfied that *either* party *proved* adultery. The petitioner did not present any *tangible* evidence to demonstrate that the respondent had an *illicit* affair with P. N. Finding P. N. on one occasion in [particulars withheld] village was not proof of adultery. In any event, she was *not* enjoined as a co-respondent. The petitioner did not lead any evidence to support her *belief* that there was infidelity or that they were cohabiting. Belief is *not* synonymous with proof. The same can also be said of the allegations by the respondent. He had his suspicions; strong suspicions, but nothing more. There was of course that flitting moment in Kakamega town when he *believes* he saw the petitioner and Dr. W., a fact denied by the petitioner. The respondent conceded that the private diary had no incriminating details of adultery.
 18. I am satisfied that the petitioner had a professional consultancy at KWS. Never mind that it may have been through the connections of Dr. W. But I have *no* evidence that the petitioner was cohabiting with her colleague at Naivasha. It remains *suspicious* because she never invited the respondent to the place, even when they drove together through Naivasha. The petitioner said she stayed at a Guest House at the Institute. I am also unable to find any evidence that the [office withheld] Prof. M, was having an affair with the petitioner. They were all academic colleagues. Assisting the petitioner with her PhD application is not *proof* of adultery. What is clear is that by that time, the petitioner wanted to go "*as far as possible*" from the respondent.
 19. The threshold of proof for adultery is very high. The culprits do not have to be caught red-handed. Illicit affairs are generally not transacted in public. See *Wangari Maathai v Mwangi Maathai* [1980] KLR 154, *N v N and another* (2008) 1 KLR (G&F) 16. But there has to be *very strong* circumstantial evidence that points to an adulterous relationship. In *N v N and another* (supra) the court held-

“To prove adultery, it is not necessary to have direct evidence of the same. Association coupled with opportunity, illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling.”

20. The grounds of adultery in the petition and cross-petition thus fail. It follows as a corollary that the claims against both co-respondents are dismissed but with no order on costs.

21. What is evident is that the marriage has irretrievably broken down through cruelty and desertion. The couple has been separated for nearly *eighteen* years now. The petitioner conceded that her sojourn to South Africa was motivated by her desire to be “*as far as possible*” from the respondent. She testified that after one year after the marriage, they had serious misunderstandings; she felt unsupported emotionally; and, as a result she became *antagonistic* to the respondent. On his part, the respondent felt *unwanted*. He picked a few belongings and left for [particulars withheld] village in Kakamega. The petitioner was least bothered. The petitioner testified that she has not *seen* or *communicated* with the respondent for *fifteen* years. They have not had any intimate relations since 1996. I also think it was a very cruel joke for the respondent to originate a false rumour that the petitioner and Dr. W. had *perished* in a road accident. I am satisfied that there was legal cruelty from all sides.

22. In *Nunzio Colarossi v Michelina Colarossi* [1965] E.A. 129, the court held-

“No comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. 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.”

23. I concur with GBM Kariuki J (as he then was) in *Dr. WMM v Prof. BLM* Nairobi High Court Divorce cause 179 of 2009 [2012] eKLR that if the respondent’s conduct injures the complainant’s health or is likely to do so, it will amount to cruelty if it is *grave and weighty and is such that the Petitioner cannot reasonably be expected to put up with it or to tolerate it*. See generally *Russell v. Russell* [1897] AC 395, *Gollins v Gollins* [1963] 2 All E.R.966 H.L. [1964] AC 644, *Williams v Williams* [1963] 2 All ER 944 HC [1964] AC 694. In *Dr. WMM v Prof. BLM*, (supra), Kariuki J (as he then was) delivered himself as follows-

“It is not necessary that the injury is suffered. A reasonable apprehension that injury will result if the conduct persists will suffice for the simple reason that the court will not wait for a spouse to be actually injured before affording such spouse relief. It is the same practice in other litigation where courts grant quia timet injunctions as a relief to prevent probable harm.”

24. The petitioner and respondent deserted the marriage. Desertion is defined in *Halsbury’s Laws of England* 4th Edition Vol. 29 at paragraph 265 as the “*intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent and without reasonable cause*”. The learned authors clarify what does *not* constitute desertion:

“Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of common obligations of the married.”

25. Section 8 (1) (b) of the Matrimonial Causes Act (now repealed but which was the operative statute) provided that a petition for divorce may be presented to the court either by the husband or

- the wife on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. In the present case, the desertion has lasted for nearly *eighteen* years. The parties had separated for four years preceding the presentation of this petition. I am satisfied that the matrimonial offence of desertion has been proved well beyond a balance of probabilities. See Wangari Maathai v Mwangi Maathai [1980] KLR 154.
26. The differences between the parties are clearly irresolvable. I have no evidence that these proceedings were brought by connivance or collusion. In a nutshell this marriage is a dry shell; it has irretrievably broken down. As Madan J (as then was) said in N v N and another (2008) 1 KLR (G&F) 16 at 17, this husband and wife got themselves into a “*real grand-sized matrimonial tangle...there are winds of sorrow where their voice was, silence where their love was...*”
27. That leaves the matter of maintenance. The petitioner now lives in the Republic of South Africa. She is a professor in of South Africa. She has the means. The respondent in contrast has not held a job since *December 1990* or thereabouts when he was fired from PWC. True, he would occasionally get a consultancy contract; but they were wide and far apart. His house in Lavington came under the hammer in the early 90’s. He was forced to sell it by private treaty. He utilized the net sum to put up a rural house in Muraka. After leaving [particulars withheld] University staff quarters, he moved into the incomplete structure. He said one room was complete. I have seen the letter before action by the petitioner to the respondent attached to the respondent’s affidavit of 13th March 2001. The letter is dated 17th November 1999. It is from petitioner’s lawyers. It required the petitioner to vacate the staff quarters at [particulars withheld] University *forthwith* or face legal consequences. The respondent may have been stingy and miserly as alleged by the petitioner; but on this occasion, he had surely fallen into hard times. He tried to do some local business; it came a cropper. The petitioner did not assist with any capital towards what the respondent called “a zero grazing business”.
28. It is common ground that the respondent assisted the petitioner in the foundational years of the marriage particularly towards her master’s degree in Pittsburg, USA. The respondent was left taking care of the children in Kenya. He said he had left some US \$5000 in the US. He used it to support the petitioner to settle down in Pittsburg, USA. For the last *eighteen* years, the petitioner has not assisted him financially. She has not seen or communicated with him for *fifteen* years. The respondent cannot look up to the cattle and Kshs 33,000 he paid for dowry. That money was not paid to the petitioner. I have no basis to order a refund of the dowry. In the context of divorce proceedings, I have *no* jurisdiction to order a refund of the US\$ 5,000 partly spent by the petitioner in Pittsburg. That belongs to a separate forum. The claims against the co-respondents have failed; and with them the source of any damages. In any event, there is no evidential basis for assessment of general, exemplary or special damages as urged by the respondent. I cannot in particular grant damages of Kshs 1,000,000 for use of the name *Majanja* by the petitioner as urged by the respondent.
29. Article 45 (3) of the Constitution provides that *parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage, and dissolution of the marriage*. Equality in marriage must surely relate to support of an impecunious spouse at the time of divorce. The petitioner had sought maintenance. But the husband is not a man of means. The husband seeks maintenance. The petitioner is well placed to support him. The respondent is now 68 years old. Just a year ago, the respondent was appointed a member of Athi Water Services Board. It is not a full time or permanent job. The term ends in two years. I cannot think of a better case where the *wife* should maintain the *husband*. The court has discretion to order the amount of maintenance. I think a sum of Kshs. 20,000 per month is just, reasonable and sufficient. I have taken into consideration that the petitioner has needs abroad. I have also taken into account that the children are all grown up and that the respondent is living in his rural house. I will accordingly order maintenance in the sum of Kshs 20,000 per month to be paid by the petitioner to the respondent.
30. In the result, I will allow the petition and cross-petition for divorce on the grounds of desertion and *legal* cruelty. The marriage celebrated on 25th August 1989 at the Attorney General's Chambers, Nairobi, between the petitioner and the respondent is hereby *dissolved*. A decree *nisi* shall issue forthwith. The decree *nisi* shall be made absolute after *thirty days* of today’s date. The petitioner shall pay maintenance to the respondent of Kshs 20,000 per month effective 30th April 2015 and on each last day of every succeeding month. The sums shall be payable until the

occurrence of *any* of the following events: the respondent becomes capable of supporting himself; or, he remarries; or, he dies whichever is earliest. The claims against both co-respondents are dismissed. In the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 19th day of March 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. A. Andambi for the petitioner instructed by Andambi & Company Advocates.

Respondent (in person)

Ms. U. Kimaru for the two co-respondents instructed by Ngigi Mbugua & Company Advocates.

Mr. J. Kemboi, Court clerk.