



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE NO 84 OF 2013

A. O. O.PETITIONER

VERSUS

P. N. T.RESPONDENT

JUDGMENT

Before me is the petition of A.O.O., hereafter “the Petitioner”, which was filed on 29th April 2013 seeking to have the marriage between him and P.N.T., hereafter “the Respondent”, dissolved on the ground of cruelty and to have the custody of the child of the marriage awarded jointly between the parties. The Petitioner and the Respondent lawfully married each other on 19th May 2009, and their marriage was solemnized at the Office of the Registrar of Marriages in Nairobi. A Certificate of Marriage Registration is annexed to the petition as proof of his marriage to the Respondent. The parties cohabited variously in Umoja 2, Gachie and Buruburu areas of Nairobi until November 2011. The marriage has been blessed with one issue, B.G.O., a minor son who was born on 13th March 2011. 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 an account manager while the Respondent is an accountant.

In his petition of 29th April 2013, the Petitioner stated that since the celebration of the marriage and during their cohabitation, the Respondent has treated him with a lot of cruelty as a result of which the marriage has irretrievably broken down. He specified that the Respondent took to heavy and habitual consumption of strong drink with the consequence that she endangered the Petitioner’s health by conducting herself in an uncontrollable, brutal and obsessive manner. He also stated that as a result of the respondent’s drinking, her resources dwindled and she became utterly contemptuous of her marital commitment by withholding affection from the Petitioner, thereby neglecting her matrimonial obligations. The Petitioner detailed instances of emotional abuse he suffered at the hands of the Respondent including, among others: i) unkind, cruel and vulgar verbal insults that were calculated to undermine his self-esteem; ii) taking advantage of the age difference between them to treat the Petitioner like a child yet they were equal partners in the marriage; iii) expecting disproportionately more financial provision from the Petitioner and requiring him to pay dowry and monthly stipends to the Respondent’s mother despite being aware of his severe financial constraints; iv) comparing the Petitioner to other men in her previous relationships with a view to belittling him; and v) forcing the Petitioner to move out of the matrimonial home by removing all his belongings from the bedroom and putting them in the living room in full view of their son and the house-help.

The Petitioner stated that he did not condone the cruelty meted towards her by the Respondent, and that this was the main reason why he left the matrimonial home. Given that all his efforts at reconciliation

have proved fruitless during the period of the marriage and the fact that the parties have lived separately since 31st March 2012, it is the Petitioner's conclusion in his petition that the marriage has irretrievably broken down.

The Respondent filed an answer to the petition and cross-petition on 1st August 2013. She categorically denied each and every allegation raised by the Petitioner regarding her alleged cruel, spiteful, indulgent, rude, disrespectful, indolent, extortionist and neglectful conduct towards the Petitioner. She specifically denied the particulars of cruelty that are outlined in the Petitioner's petition, and put the Petitioner to strict proof in this regard. In particular, she took umbrage at the core allegation that it was her addiction to alcohol that formed the basis of all the problems in the marriage; holding, instead, that she was a responsible, dutiful and diligent wife and mother of the child of the marriage. She counterclaimed that the Petitioner's withholding of her conjugal rights was the genesis of their marital woes that led to their initial separation, and that it persisted until the Petitioner's desertion on 30th May 2012. Allegations concerning the Respondent's indolence were rebutted by her deposition that she had worked for 13 years to provide for the household expenses, while the Petitioner only started to shop when their child was born. She challenged the issue that she used their age difference to demean, belittle and disrespect her husband, stating that it was the Petitioner who insulted her claiming that she had a small brain.

The Respondent's cross-petition states that it is the Petitioner rather than the Respondent who is guilty of cruelty. Certain instances of the Petitioner's alleged cruelty are specified in the particulars of cruelty, including: i) denying her love and affection by cultivating a harsh environment in the home; ii) denying her conjugal rights causing their first separation and continuing the same even after having moved back together and him promising to change; iii) insulting and physically assaulting the Respondent; iv) refusing to include the Respondent and the child in his medical cover; v) squandering money even after they agreed to use the money to pay the maternity bill; and vi) embarrassing her by telling the watchman that the Petitioner had thrown her out.

At the hearing of the matter, on 12th February 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, but they produced evidence to support or controvert the allegations made by the other party.

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 Respondent has made a convincing case for this Court to give her sole custody and care of the child;
- c. Whether the Petitioner should be ordered to continue contributing to the welfare of the child, and if so how much.

The Petitioner and the Respondent were married under the **Marriage Act Cap 150** and thus the issue 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; ...*

The Petitioner in this case seeks to have the marriage dissolved on the ground of cruelty. The Respondent denies certain allegations of cruelty made against him by the Petitioner and counterclaims that the Petitioner is guilty of cruelty and adultery. The matrimonial offences of cruelty and adultery are questions of fact which require the court to assess them based on the evidence provided by the parties. The standard of proof in establishing the above matrimonial offences and grounds for dissolution of marriage is a preponderance of probability. This point was elaborated by the Court of Appeal in the case of **ALEXANDER KAMWERU v ANNE WANJIRU KAMWERU (2000) EKLR**, where it was stated:

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.

The Petitioner's allegation of cruelty requires proof to convince this Court that the factual circumstances would suggest that the Respondent's conduct caused or threatened to cause actual danger to the Petitioner's life or limb. In the case of **DM v TM (2008) 1 KLR 5** 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 evidence before this Court concerning the allegations of cruelty has been found not to be sufficient to support such a finding on either of the parties' conduct. It seems to this Court that there certainly were some differences that arose during the marriage but it remains unclear what they were. The reason for this conclusion is that no actual evidence was adduced by either of the parties to demonstrate either physical or emotional cruelty on the part of the other. Neither was any independent witness enlisted to support either party's claims. While both parties maintained their positions during their hearing, this Court formed the opinion that as far as the counter-allegations of cruelty is concerned, the evidence adduced before it is at best speculative.

The Petitioner pleaded that the Respondent's comparison of the date of birth of their child with the date of death of the Respondent's former lover caused him much mental anguish. However, upon examination of the context in which that comparison was made this Court finds that it was not intended towards that end. If there was any evidence to show physical or mental violence, say a report to the police or medical attention sought, then this would assist the Court in reaching that conclusion; there was none. There is however on the Court record summons to the Petitioner from the District Children's Officer in Westlands concerning his alleged neglect of his child. While this is indicative of cruelty towards the child and the Respondent, it is by no means conclusive evidence because it was made at the request of the Respondent. Moreover, there was no real injury or threat of injury to the Respondent caused by the alleged misconduct of the Petitioner.

In the absence of actual evidence reliance may be had on circumstantial evidence as a basis on which to infer cruelty on the part of either party. In the present case, there is little circumstantial evidence of cruelty. For instance, the allegation that the Petitioner left the matrimonial home supposedly due to the Respondent's cruelty or the suggestion by the Respondent that the Petitioner denied her conjugal rights provides insufficient circumstantial evidence for cruelty. If such circumstances were proved by either of the parties 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 by the parties and on the basis of the above authorities, this Court finds that the allegations of cruelty made by either party against the other have not been established to its satisfaction. In particular, the Court finds that the rival accusations of cruelty have not been proved by either party to the required standard of proof.

Regarding the allegation of adultery, the pleadings make clear that it is only the Respondent who has accused the Petitioner of committing this matrimonial offence. The Petitioner categorically denied this accusation at the hearing. It is therefore necessary, as a matter of initial course, to establish the standard of proof for adultery before proceeding to analyze the facts of the case. In the case of **N v N (2008) 1 KLR 17**, Madan J, as he then was, stated that:

To prove adultery, it is not necessary to have 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.

The determination of whether the above-shown standard of proof has been met depends on whether certain factual and circumstantial factors are present. In the present case, the only allegation raised by the Respondent is that the Petitioner was having extra-marital affairs, and despite admitting the same and

promising to change in 2011, he soon resumed his old ways. But there is no actual evidence that the Petitioner ever confessed to adulterous behavior, promised to abandon the same, and subsequently reneged on that promise. The allegation raised by the Respondent that the Petitioner denied her conjugal rights might seem to suggest circumstantial evidence of adultery; but the requisite threshold in law is that such circumstances need be relevant, cogent and compelling. In this regard, the Court finds that the circumstances in question do not meet these requirements. Other elements that may be pertinent to prove adultery such as illicit affection or association coupled with opportunity have also not been proved.

Having considered the evidence adduced by the parties and on the basis of the above authorities, this Court has not satisfied itself that the allegation of adultery made by the Respondent against the Petitioner has been proved to the required standard of proof. Accordingly, like cruelty, the ground of adultery cannot be relied on as a satisfactory basis on which to dissolve the marriage between the parties.

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 this case, the parties have been living separately and apart from each other since 31st May 2012, a period of more than two (2) years. In the absence of any court decree, it can be reasonably assumed that this separation is voluntary. The evidence adduced by both parties indicates that they can no longer and/or are no longer willing live together as husband or wife. Both parties have stated that they have made numerous efforts to salvage the marriage but none of these have been successful. They have also indicated a wish to move on with their lives.

While it is difficult to tell why the marital bond between the parties diminished, it is evident that between them there is no longer a marriage to speak of. They strongly desire to break this bond and the acrimony between them is almost palpable. It is thus clear that the marriage is beyond salvage, 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. It would be needless and of little use to enforce upon them the obligation to continue a relationship that has since lost meaning to its central participants. Such a cause of action would only cause them intolerable anguish and drive even deeper the chasm between them. This position is supported by the case of **N v N [2008] 1 KLR 16** where 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 ...

It is therefore the considered finding of this Court that the marriage between the parties has irretrievably broken down, and that it is in both their interest and the interests of justice to dissolve the marriage.

It is now to the matter of the custody and maintenance of the child of the marriage between the Petitioner and the Respondent that this Court now turns its attention. The joint parental responsibility agreement of 4th June 2012 concluded between the Petitioner and the Respondent indicates that both parties agreed that the Respondent would have custody of the child and the father must have access to the child as well as visitation rights. They also agreed that the Petitioner would contribute Kshs. 10, 000 per month for food expenses while the Respondent would contribute Kshs. 6, 000 per month for shelter and food expenses. It is therefore relevant that the Respondent has had the continuous custody of the child since that time and this has not been disputed. It is also relevant that the Petitioner consented that the custody of the child be given to the Respondent. This Court is duly guided by the principle that the child's best interests are of paramount importance in every matter concerning the child. **Section 4(2)** of the **Children Act** provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Guided thus, 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 Respondent's custody and care. Since the child has been living with the

Petitioner, it would serve no purpose to remove him from that environment, thereby disrupting the life to which he is accustomed. However, the child requires parental care from both parents and thus this Court finds it necessary that the Petitioner should provide the Petitioner reasonable and sufficient access to the child. This entails full visitation rights for the Petitioner that should be agreed to by both parties in order to ensure the full enjoyment by the child of equal parental love, care, guidance and support.

Most matters concerning custody, access and maintenance of children are often contentious and fraught with much animosity between the contending parties. It is for this, among other reasons, that our law has clear provisions that must guide courts and other relevant institutions when dealing with such matters. One of the key provisions is **Article 53(1)(e)** of the **Constitution** which 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;

Another important provision is **Article 45(3)** of the **Constitution** which 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, the issue of custody of the child is interlinked with the issue of child maintenance. This Court is required to determine whether the Petitioner should continue to contribute to the maintenance of the child and if so how much. Rival pleadings of both parties suggest that there is disagreement over the nature and extent of the contribution of the parties during the subsistence of the marriage and the support to the child of the marriage. The evidence makes clear that the Respondent has for the better part of the subsistence of the marriage been the higher earning capacity. This would inevitably cause her to bear a greater burden towards contributing to the welfare of the family, although this has been disputed by the Petitioner. Nonetheless, it is evident that there was some disparity in the level of contribution.

It is helpful to shed some light on the meaning of notion of “equal responsibility” in the context of a child’s right to parental care and support after the dissolution of marriage. It is often the case that one party fares better than the other in financial terms, and this raises the question of how both parties are expected to bear equal responsibility. As a matter of fact, parties can never be equal but it is possible for them to shoulder responsibility in an equitable manner that takes due account of their disparate earning capacities. The Respondent has prayed that the Petitioner be ordered to continue contributing accordingly to the child’s upkeep and welfare but she has not quoted a specific sum. Hence, the Court does not have an actual sum on which to peg its order. Nonetheless, the joint parental agreement provides a reasonable estimate, and it is also relevant that the parties agreed to those estimates. In that regard, it will be fair and equitable to commit the parties to what they had earlier bounded themselves to, but with the option that they are able, upon application, to have them revised.

In the premises therefore, this Court orders that the marriage between the Petitioner and the Respondent that was solemnized on 19th May 2009 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 Respondent, but with access rights to the Petitioner to be agreed on by the parties;
- d. The parties to continue contributing to the upkeep of the child as earlier agreed in the joint parental responsibility agreement of 4th June 2012, wherein the parties agreed that
 - i. The Respondent will have custody of the child, but the Petitioner will visit the child and must have access to the child
 - ii. The Petitioner will pay medical expenses and Kshs 10, 000 for food expenses per month

iii. The Respondent will cater for shelter of the child and pay Kshs 6, 000 per month;

e. Each party is at liberty to apply;

f. No orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2015

M. MUIGAI

JUDGE