



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
DIVORCE CAUSE NO. 8 OF 2011

W O O PETITIONER

VERSUS

E R O RESPONDENT

JUDGMENT

INTRODUCTION

The Petitioner who **married the respondent on 11th March 2014 under the Marriage Act, Cap 150 of the Laws of Kenya** at Registrar of Marriage's Office at Mombasa filed a petition dated 18th February 2011 for the dissolution of his marriage to the Respondent, on grounds of desertion and cruelty. Their marriage had one issue namely A K O born on 30th April 2007.

THE PLEADINGS

The particulars of desertion and cruelty were pleaded that the respondent had had left the matrimonial home in 2007 and rented her own apartment in [Particulars withheld] denying the petitioner his conjugal rights and access to the child of the marriage while making demands on the petitioner and refusing to return to the matrimonial home despite the petitioner's fulfillment of the demands.

The Respondent cross petitioned for divorce on the grounds of cruelty, desertion and adultery. The Petitioner made counter accusation of adultery against the respondent but the alleged adulterer was not named as a co-respondent as required by section 9 of the Matrimonial Causes Act.

THE EVIDENCE

The evidence presented by the parties in support of their respective contentions was as follows:

“PW1 ADULT MALE CHRISTIAN SWORN AND STATES IN ENGLISH

My name is W O O I work as a businessman. I live [Particulars withheld] Mombasa Kisauni. E R is my wife. We got married in 2004. I have the certificate. We married at the Attorney General's Chambers, Mombasa. I produce the marriage certificate. The original is with my wife. I produce a photocopy. After the marriage we rented a house at Bombolulu. Thereafter, we moved to [Particulars withheld] Kisauni, Mombasa. We have one child A K O She was born in April 2007. I produce a copy of birth certificate. The original birth certificate is with the mother.

After the birth of child, the respondent changed. We lived with 3 of my nieces who were cripples. My wife was very rough to them and she kept fighting with them. She would take off from house and travel upcountry without telling me. When I asked her, she said I should not ask her as she would do whatever she liked as she was employed and earning her own money. I tried to reconcile but it did not work. I was not working and I did not have money. She refused to support my nieces saying that she would not run an orphanage. She insisted that the nieces should leave or she leaves. At one point she went and hired a pickup and packed everything in the house and left. I tried to restrain her without success. She switched off all her mobile phones. I tried to follow and give provisions for the child. She asked me to live whatever I had at a certain shop where she would pick it. She left in October, 2007. It took me 4 months to trace her and get the baby. I tried to contact her. When I got her contact I tried calling her to bring her back. We met every weekend and she had a demand every time for paying back some money that I had taken from her. She even referred me to the parents. I met the parents who tried to reconcile us. We even tried with colleagues. She finally said that she was not ready to come back. We agreed that the child be taken to a school where I have been paying school fees. Everything is broken down. She even refused to come help me in the burial plans for my father. Even her parents did not attend. There is no marriage now between us. We have no property acquired during the marriage. I have been supporting the child of the marriage although the child lives with the mother. I did not mistreat the respondent. I did not have money and I had three nieces living with us. She also insisted that I take her younger sister to school. There was quarrel in the house about my staying with my nieces but I never instructed her. It is not true that I beat her to an extent that she miscarried. My wife miscarried twice. She had a weak womb. At the instance she almost lost the child that we successfully got. I have not remarried. I pray that the court grants the divorce so that I can proceed with my life and get another family. That is all.

Cross-examined by Mr. Odhiambo

We stayed together with the respondent before we married at the Attorney General's Office. We lived as husband and wife for about 2 years between 2003 - 2004. We were living as man and wife at the time we went to the Attorney General's office. In December 2005, it is probably correct, my wife miscarried twice. I do not remember the exact times. It is true that I took her to Marie Stopes after the miscarriage but I did not beat her up. I took her for treatment at Marie Stopes. The respondent left after we got the baby in 2007. The petition at paragraph 7, is incorrect if it states that the respondent left immediately after the celebration of the marriage.

We stayed together until 2007 when we got a baby girl in 2007. She decided that my nieces leave or she would leave. I told my wife to make a decision. I told her that the orphans were our kids. I quarreled her at one time before the nieces when I had a family meeting at night. I used sharp words at one time. I am married to E R A I complained several times that she was negligent and cruel. I involved the friends who were close to me and to the respondent. One was late J N who was an elderly man. Both our parents are upcountry. I did not involve the best-man or best-maid. I went to the mother and father. I have no evidence before the court that I pay all the school fees and transport. I do not pay for any other maintenance. She agreed to pay for such expenses. Paragraph 11 of the Petition. I do not have evidence that I have sent any money to the respondent. I operate a shop at [Particulars withheld] I opened it 2004. The respondent did not contribute Kshs.280,000/= for the shop. The business is still in operation. I have never purchased land at a place called Miami. We have never built house together with the respondent anywhere in Mombasa. I did not sell any house last year for Kshs.2million. The respondent never gave me Kshs.80,000/= to buy land. I bought a piece of land in 2008 at Ziwa La Ngombe scheme and I sold it in 2011 at 750,000/=. The marriage is broken. It is not true that I chose to stay with my nieces. I tried to reconcile by sending the nieces to boarding schools. It was after she had left.

Re-examination by Miss Sudi

I only quarreled my wife one time when I found that they had quarreled. It was a family meeting. I never beat up the respondent. I went to the mother and the father of the respondent. I went with

my brothers. I get the child every weekend and I shop for her to take back home. The petition gives the particulars of desertion. It shows when the respondent left matrimonial home.

DW1 ADULT FEMALE CHRISTIAN SWORN AND STATES IN ENGLISH

I am E R A O I Live at Kisauni, Mombasa. I work for Kenya Navy. W O has filed a divorce case against me and I have filed a cross-petition for divorce. I seek divorce because we stayed together for some time. We married at the Registrar of Marriages in Mombasa in 2005. I pray to refer exhibit No. 1. We were blessed with a daughter aged 7 years on 30.4.2014. I see the birth certificate issued on 14.7.2007. Pex. No. 2. The daughter is A K O.

The marriage was full of violence. He is temperamental. Every time we had an issue, he would only resolve it by beating me up. The petitioner is a violent person. We did not stay long after marriage. He beat me and I had a miscarriage in 2005. The beating was every time he came home drunk and we had an argument. It was on several occasions. When I miscarried I got bed rest at Marie Stopes. I reported it verbally at central police station the police did not take action. The family members came in and we resumed staying together. The petitioner paid 7,000/= for treatment for the miscarriage. The petitioner was unfaithful.

We had a meeting with the family. The brother is the Town Clerk T O and we had several meetings and the meeting bore fruit for some weeks and the petitioner resumed his cruelty.

The petitioner insulted me in front of workers and relatives. We were staying with 3 girls who are his relatives 2 nieces and one sister. He could insult me in front of the relatives.

Any time I came back from night duty he was insecure and he wanted me to resign. He thought I was not on duty. I have custody of the child. The petitioner is married. He married immediately I left. As a mother I should stay with the kids. We have lived separately since 29.9.2007 to date. I have lived with the child all along. He has only taken the child on weekends and return her in the evening. We bought a plot and built a house at Uchumi. I took a loan to start the business that the petitioner is running now. I was not in court when O gave evidence.

I left in 2007. I had a small baby and he wanted to beat me up. I could not wait for him to beat me up. He married in 2008 May. I was never cruel to him. How could I be humble to person who wants to beat you? I have not denied him right to see the child.

I have not made any insulting remarks to him.

I am not interested in the marriage. He pays school fees for the child. I want a divorce but he takes care of the child. He should continue supporting the child. I also pray for the costs of the suit. I have to come to court from duty.

I pray for the custody of the child.

Cross-examined by Ms. Umara

I want to divorce W I left the home in 2007. I ran away as he was always beating me. He went to my home and we could not resume cohabitation. He married. He has been paying school fees. He has never failed to pay school fees. The marriage has broken down. There is no chance for resumption of cohabitation. We should support the child.”

THE ISSUES FOR DETERMINATION

The issues for determination are whether the matrimonial offences of cruelty, adultery and desertion were proved by any party against the other, and whether the marriage had irretrievably broken down as to justify, **in the absence of proof of the matrimonial offences, an order for dissolution of the marriage.**

DETERMINATION

In accordance with section 10 (2) of the Matrimonial Causes Act, the court is required to be satisfied that the matrimonial offences have been committed therefore calling for a degree of proof beyond the standard in civil litigation of balance of probabilities. See **Maathai v. Maathai** (1980) KLR 154, (1976-80) KLR 1689, where Law JA set the standard of proof as follows:

“[W]hen considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the court must feel satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved”.

However, **Madan J.A. in N v. N** [2008] 1 KLR [G & F] 16 held that there are instances where **although the objective standard of cruelty is not achieved, the parties may on account of what appear otherwise trivial subjectively feel justified to be released for their matrimonial obligations, and 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, the guilty spouse bearing the consequences.”

In this case, **the petitioner admitted that the respondent had miscarried twice but denied that he had beaten her causing her to miscarry. No medical evidence was given on the miscarriages to enable the court determine whether they were caused by ‘a weak womb’, as alleged by the petitioner, or by the petitioner’s cruelty, as asserted by the respondent. Neither was any police reports and abstract from police records were produced to prove the alleged beatings of the respondent by the petitioner. As the respondent had continued in cohabitation even after the alleged beatings and miscarriages, she is taken to have condoned the cruelty in terms of section 10 (2) of the Matrimonial Causes Act, which is in terms 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 conducted to the adultery or unsoundness of mind or desertion.”

Nor was evidence given with regard to the adultery alleged by the spouses against each other. Both parties claimed that the other had married and had child with other parties, but no proof in that regard was presented by either party. In the circumstances, I do not find that the cruelty on the ground of denial of conjugal rights and beatings, and adultery alleged by the parties against each is proved to the required standard for proof of the matrimonial offences. Only allegations were made by each spouse against the other, which the other denied.

However, although the issue of staying with the petitioner’s nieces may appear trivial to third parties, it would appear that the issue really affected the respondent and although the petitioner attempted to redress it, by taking the nieces to boarding schools, the same came too late after the separation had already taken place. The petitioner however, admitted that the issue of his nieces had become a problem between him and the respondent and that at one family meeting in the presence of his said relatives he had quarreled the respondent.

In terms of Justice Madan’s standard in *N v. N* [2008] 1 KLR (G & F) 16, I find that the respondent could have been affected by the matter of the nieces living with them and the petitioner’s quarreling her in the presence of his said relatives as to conclude that she could not be expected to live in such circumstances and, therefore, the charge of desertion against the respondent fails. On the other hand, the petitioner felt an obligation to stay with and provide for his handicapped orphan nieces, and when asked to choose between the respondent and his nieces he was unable to disentangle from his nieces until it was too late to stop the separation. It may be that both parties thought that the other was being unreasonable and felt justified in considering themselves consequently discharged from considering themselves bound to the marriage.

In the circumstances of the Court’s finding on the lack of proof of allegations and counter-allegations of adultery and cruelty, there remains only the issue whether the marriage has otherwise irretrievably broken down. Both parties considered the marriage to have broken down and efforts at reconciliation by family and friends had borne no fruit. In accordance with the new Marriage Act, 2014, the marriage must be taken to have irretrievably broken down as the spouses have lived separately for a period of 8 years when the respondent moved out of the matrimonial home.

Section 66 (6) (d) of the Marriage Act 2014 requires only that the spouses be separated for a period of 2 years. The provisions of the Marriage Act are applicable by virtue of section 98 (2) of the Act which is in the following terms:

“98. (1) A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.

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

ORDERS

Accordingly, **Decree Nisi for dissolution of the marriage between the petitioner and the respondent of 11th March 2004 is granted with no order as to costs of the proceedings.**

The custody of A K O , the girl child of the marriage who is 8 years at the date of this judgment is

granted to the Respondent. The petitioner will have reasonable access to the child of the Marriage, with liberty to move the Children's Court should it become necessary for the enforcement of the right of access.

DATED SIGNED AND DELIVERED ON THE 30TH APRIL 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mrs. Umara for Petitioner

No appearance for the Respondent

Ms. Linda - Court Assistant