



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 54 OF 2007 'A'**

**S B S.....APPELLANT**

***VERSUS***

**J M N.....RESPONDENT**

**JUDGMENT**

**PLEADINGS**

The Appellant filed a memorandum of appeal on 20<sup>th</sup> November 2007. This is an appeal against the judgment of the Senior Resident Magistrate dated 27<sup>th</sup> October 2007 in Divorce Cause No. 61 of 2007.

The appeal was based on several grounds. They are as follows;

- a. The learned trial Magistrate erred in law and in fact by failing to grant the parties divorce despite marriage having irretrievably broken down.
- b. The learned trial Magistrate erred in law and in fact by disregarding the evidence of the Petitioner and the Respondent.
- c. The learned trial Magistrate erred in law and in fact by disregarding the previous court order that denied the Respondent custody of the child.
- d. The judgment was inconsistent with the principles envisaged under the Matrimonial Causes Act and the Marriage Act.

The orders of the Children Court Case No. 61 of 2006 are as follows;

- a. The Petitioner and the Respondent to have joint custody and equal access to the child.
- b. The petition and the cross-petition are hereby dismissed

The Respondent was served with the record of appeal and the affidavit of service was filed in this court. The hearing of the appeal was scheduled on 5<sup>th</sup> of March 2015. The Respondent was served with the same and she acknowledged receipt according to the affidavit of service filed on 4<sup>th</sup> March 2015.

**HEARING**

At the hearing, the Respondent did not appear in court. The court ordered that written submissions should

be filed and exchanged between the parties within a period of 14 days.

The Appellant filed his written submissions on 24<sup>th</sup> of March 2015. The Respondent did not file submissions nor did she serve the Appellant with the said submissions.

The Appellant deponed in his written submissions that he was lawfully married to the Respondent on 5<sup>th</sup> of December 1998 under the African Christian Marriage and Divorce Act (repealed). The Appellant and the Respondent cohabited as husband and wife from 1998 to September 2003. The Respondent deserted the matrimonial home and never returned. The Appellant was prompted to file a petition for divorce on ground of desertion in the Senior Resident Magistrate's Court on 10<sup>th</sup> March 2006. The Respondent filed an answer to the petition and a cross-petition on 28<sup>th</sup> of September 2006. The learned trial Magistrate refused to grant divorce on the basis of the grounds for granting divorce were not proved.

The Appellant reiterated the grounds stated in the memorandum of appeal. The Appellant submitted that the marriage between him and the Respondent had irretrievably broken down with no possibility of reconciliation. They have lived separate lives for more than 12 years. The Appellant was denied full custody of child despite the fact that he was in full control and custody of the child of the marriage. The Respondent abandoned the child with the Appellant thereafter as deponed in paragraph 11 of the Appellant's submissions. The Appellant urged court to accept his appeal given that it is uncontested.

### **ISSUES FOR DETERMINATION**

1. Whether the Appellant and the Respondent should be granted divorce?
2. Whether the Appellant should be granted full custody of the child of the marriage?

### **LAW APPLICABLE**

1. ***Sections 65(a), (b), (c),(e) of the marriage act of 2014 provides that a party to a marriage celebrated under this act may petition the court for a decree for the dissolution of the marriage on ground of;***
  - a. ***one or more acts of adultery committed by the other party;***
  - b. ***cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or***
  - c. ***desertion by either party for at least three years immediately preceding the date of presentation of the petition;***
  - d. ***exceptional depravity by either party;***
  - e. ***The irretrievable breakdown of the marriage.***
2. ***66(6) of the Marriage Act of 2014 provides that 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 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 or at least three years immediately preceding the date of presentation of the petition;***
  - f. ***a spouse has been sentenced to a term of imprisonment of the/ for life or for a term of seven years.***
  - 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 or the respondent in the light of existing medical knowledge; or***
  - h. ***any other ground as the court may deem appropriate***

## **ANALYSIS/ DETERMINATION**

The grounds of divorce are that the Respondent deserted the matrimonial home in 2003 and the Respondent reiterated that she went to Eregi Teachers College for training.

**Section 65(c)** of the **Marriage Act** prescribes desertion by the other spouse for at least 3 years as one of the grounds of divorce.

To amount to desertion, there must be actual separation, for no good reason and without the consent of the Petitioner and no just cause to the desertion. The other aspect to desertion is separation where at least one of the parties must have reached a conclusion that the marriage is at the end. This does not include where the spouse is away due to work commitments, holiday or imprisonment.

In the instant case from the record of the Children's Court file, the issue of desertion is presumed on the following grounds;

The Respondent left the matrimonial home in 2003. She claims it was in agreement with the Petitioner and she left the child of the marriage aged 3 ½ (three and a half) years at the time with him. This court is satisfied that the Respondent left the matrimonial home on her own volition without the agreement with the petitioner. The evidence shows she did not come home during the training breaks and after she completed the teacher's training course, she did not come back their home. The logical and reasonable conclusion is that she had given up on any reconciliation and survival of the marriage. The fact of leaving the home amounted to desertion.

On the ground of cruelty, it amounts to any act or omission by the other party that causes physical or emotional and mental anguish. In the case of **DM v TM (2008)1KLR 5**, Hon. Justice Chesoni (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.”***

In the instant case, the Petitioner/Applicant demonstrated cruelty by physical assault by the Respondent on 23<sup>rd</sup> April 2007. The medical record and police reports documents were produced in court.

The Respondent did not controvert the issue except state that the marriage deteriorated and due to irreconcilable differences they should dissolve the said marriage.

With regard to adultery there have been accusations and counter accusations by both parties against each other. A petition based on adultery must establish that the Respondent committed adultery and/ or vice versa. In the case of **In N V N (2008) 1 KLR 17** Hon Justice Madan(then was) stated that;

***“To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, elicit affect undue familiarity and guilt attachment are some of the instances that create an inference upon which court can act. Circumstantial evidence can prove and establish adultery provided that the circumstances are relevant, cognate and compellable”.***

Further to prove adultery, the offended spouse finds living with the offending spouse intolerable. In light of the aspersions cast by and against each other the Petitioner and the Respondent have no will and likelihood to reconcile and salvage their marriage.

**Article 45 of the Constitution** provides that;

***“A family is a natural and fundamental unit of the society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.”***

Although the family unit must be safeguarded as provided by the above provision, the court cannot force parties to live together in a marriage that clearly has irretrievably broken down due to desertion, cruelty and adultery. Further under **Section 65(e) of the Marriage Act 2014**, the parties have separated for more than at least 2(two) years. In **NVN (2008)1 KLR 16**, Hon. Justice Madan (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 them, they are entitled to be released from their matrimonial union.....”***

**FINAL ORDERS.**

From the above reasons, the court dissolves the marriage solemnized between the Petitioner and the Respondent on the 5<sup>th</sup> of December 1998.

With regard to the legal custody of the child of the marriage, the Children’s Court orders are hereby upheld. The child should remain in custody of the Appellant until the Respondent stabilizes financially. The Respondent shall have access and visitation rights of the child as shall be agreed by the parties.

The Appellant shall provide maintenance and upkeep for the child of the marriage.

**SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2015.**

**M. MUIGAI**

**JUGDE**