



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE NO. 91 OF 2014

F. W. M.....PETITIONER

VERSUS

F. K. M.....RESPONDENT

JUDGMENT

By this action brought before this Court by way of a petition filed on 29th April 2014, F.W.M., hereafter “the Petitioner”, seeks to have the marriage between him and F.K.M., hereafter “the Respondent”, dissolved on the ground of cruelty. It is common ground that the parties solemnized their marriage on 14th January 2011. A copy of the Certificate of Marriage between the parties to this case is on the court record. Immediately after their marriage, the parties stayed together in Huruma for only four (4) days then the Petitioner travelled to the United States of America. There are no children of the marriage.

In her petition, the Petitioner stated that immediately after the wedding on 14th January 2011 the Respondent refused to communicate with her causing her to feel lonely, rejected and confused. Months later, in December 2011, after she had gone to the United States of America, the Petitioner stated that the Respondent confessed to be in another relationship and was expecting a child. She specified that the Respondent was cruel by proceeding to marry her while in the knowledge or having reason to believe that he was in a relationship with another lady who was expecting his child. This caused her much shame, rejection, anxiety, and mental and emotional anguish. Having been separated since January 2014, the Petitioner averred that she saw little chance of their marriage surviving. The Petitioner also stated that she had neither colluded with the Respondent in bringing her petition nor had she condoned the Respondent’s cruelty to her. She concluded that due to the Respondent’s cruelty as specified in her petition, the marriage had irretrievably broken down. Hence, she sought to have the marriage between her and the Respondent dissolved and to have the costs of suit provided.

The Respondent filed an answer to the petition and cross-petition on 8th July 2014 in which he partially admitted the contents of the petition. He categorically denied the allegation that he confessed to another relationship and child. He also denied that he willfully refused to talk to the Petitioner immediately after their marriage, thereby causing her to feel lonely, rejected and confused or that he knowingly proceeded to marry the Petitioner while contemporaneously engaged in another relationship in which they were expecting a child. The Respondent put the Petitioner to strict proof regarding the above allegations and counterclaimed that the Petitioner was cruel to him and also deserted the matrimonial home for the United States of America.

In his cross-petition, the Respondent accused the Petitioner of persistently treating him with cruelty and

deserting the matrimonial home for the United States of America for a period of more than three (3) years. He specified in the particulars of cruelty that the Petitioner relocated to the United States of America in 2011 ostensibly to search for better opportunities in complete disregard of the fact that their marriage would suffer irreparable damage due to lack of consortium. He also specified in the particulars of desertion that the Petitioner left for the United States of America immediately after the celebration of the marriage and has never returned to the matrimonial home for over three years. He further stated that he had not in any way connived at, condoned or been an accessory to the Petitioner's cruelty and desertion. He concluded that the marriage had irretrievably broken down as a result of the Petitioner's cruelty and desertion and sought to have the marriage dissolved and the costs of the proceedings provided.

The matter was heard before this Court on 18th June, 2015 and the Petitioner gave oral evidence reiterating the averments made in her petition. She testified that she was lawfully married to the Respondent in January 2011, and that there were no children of the marriage. It was her testimony that after celebrating the marriage, the parties stayed together for 4 days before she left for the United States where she was studying. According to her, the parties had agreed prior to their marriage that they would relocate to the United States, and the plan entailed the Petitioner travelling there first in order to make arrangements for the Respondent to join her later. The Petitioner was supposed to facilitate the Respondent's travel by way of filing the relevant documents and buying him an air ticket. However, there was a disagreement between the parties immediately before the Petitioner's departure to the United States resulting in cessation of communication.

The Petitioner testified that while she was in the United States the Respondent did not call her and when they finally spoke the Respondent confessed to being in another relationship in which he and the other lady was expecting a child. This was subsequently confirmed when the Petitioner returned to Kenya in April 2011. She testified that the lady with whom the Respondent was expecting a child called her and disclosed that the Respondent had told her that he and the Petitioner were not married. According to the Petitioner, the reason for this was the Respondent's anxiety that he may be taken to court for child support. The Respondent's mother apologized to the Petitioner that her son was in an extramarital relationship with another lady with whom he had a child. The Petitioner stated that she tried to resolve the matter and convince the Respondent to come with her to the United States as earlier agreed but he was adamant that he did not want leave Kenya. The Petitioner stated that his decision to renege on the agreement to go and live together in the United States caused her to suffer shame, rejection, anxiety, and mental and emotional anguish.

The Petitioner was cross-examined by counsel for the Respondent at the hearing. She clarified that she only returned to Kenya in April 2011 to attend a graduation but that the parties had planned to relocate together to the United States. She also explained that she did not make any further arrangements to facilitate the Respondent's travel to the United States because he explicitly said that he did not want to accompany the Petitioner. She further stated that both the Respondent and his mother confirmed that there was another lady who had borne a baby girl by the Respondent.

The pleadings of the parties in this case and the oral evidence of the Petitioner discloses the following as the central 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 or the Respondent or none of the parties should bear the costs of the suit.

The Petitioner and the Respondent contracted a civil marriage within the meaning of **Section 6(b)** of the **Marriage Act 2014**. It is not in dispute that the marriage was solemnized in January 2011. Accordingly, the substantive law that applies to proceedings to dissolve it is to be found in **Section 66** of the **Marriage Act 2014** which 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.*

The Petitioner has founded her action for the dissolution of the marriage between her and the Respondent on the ground of cruelty. Her central allegation in that regard is that the Petitioner knowingly married her while he was maintaining an intimate relationship with another woman who was expecting his child. When the Petitioner came to know of this, the shock of the Respondent's betrayal no doubt caused her mental and emotional anguish. The **Black's Law Dictionary** defines mental cruelty as: **“one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”** It is not difficult to see that the discovery that her husband was expecting a child with another woman, which information was carefully concealed prior to the marriage, could have affected the Petitioner. It must also have been quite painful for the Petitioner to receive confirmation of the same from the said lady as well as from the Respondent's mother. The refusal by the Respondent to reconsider travelling to the United States where the couple had agreed to settle after the marriage must also have been another blow to her; she was rejected despite her efforts at reconciliation. These facts easily establish the ground of cruelty on the part of the Respondent's conduct.

The Respondent also claimed that the Petitioner was cruel to him by leaving for the United States in 2011 while knowing that the marriage will likely break down due to lack of consortium. However, the evidence on record would suggest otherwise. There are reasonable grounds on which to deduce that the Petitioner and Respondent had agreed to relocate to the United States after getting married. The Respondent, however, knew that the other woman was expecting his child and he chose to abandon his plans to join the Petitioner in the United States. It would therefore be difficult for this Court to accept his claim that the Petitioner's decision to travel abroad, a decision that he had accepted or acquiesced to, was an instance of cruelty on the part of the Petitioner.

In his cross-petition, the Respondent further claimed that the Petitioner deserted the matrimonial home immediately after their marriage by leaving for the United States 4 days after the marriage and never returning for a period exceeding three (3) years. But the evidence on record shows that the decision to relocate to the United States was one which the parties had mutually consented to. Upon getting to the United States the Petitioner was supposed to facilitate the Respondent's travel to join her. The Respondent however had other plans; he was unwilling to leave. By the time the Petitioner returned to Kenya in April 2011 things had so changed that it became impossible for the relationship to continue. The Respondent had clearly moved on with his life. He cannot now be heard to say that the Petitioner deserted him.

As a general rule, there has to be proof that the party alleged to have deserted the other is voluntarily left the matrimonial home for no justifiable cause and the spouse who was left behind neither provoked nor condoned the desertion. There is no evidence to suggest that the Petitioner left for the United States so that she could live with or engage in an illicit affair with another person. In the case of **SCC v MKC [2014] eKLR**, 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 circumstantial evidence in that regard is insufficient to support a finding of desertion. This Court

therefore finds that the Respondent's allegation that the Petitioner deserted him has not been convincingly proved on a balance of probabilities.

In the premises therefore, this Court finds it just and equitable to order that the marriage between the Petitioner and the Respondent that was solemnized on 14th January 2011 is hereby dissolved:

- a. The petition is upheld;
- b. The marriage between the Petitioner and the Respondent has irretrievably broken down due to the Respondent's cruelty towards the Petitioner;
- c. Decree nisi to issue forthwith;
- d. Decree absolute to issue thereafter within 60 days;
- e. The Respondent shall bear the costs of the suit.

It is so ordered.

READ, SIGNED AND DATED AT NAIROBI THIS 28TH DAY OF JULY 2015

M. MUIGAI

JUDGE

In the absence of:

Parties and counsel.