



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 91 OF 2007

M L MPETITIONER

-VERSUS-

M M NRESPONDENT

JUDGMENT

1. By a divorce petition dated 23rd April 2007, and filed on 17th July 2007, the petitioner prays for the dissolution of the marriage contracted between him and the respondent.
2. The main ground upon which the petition is predicated is cruelty, whose particulars are contained in paragraph 4 of the petition. They are that the respondent has been persistently disobedient to the petitioner, failed to live up to the expectation of a reasonable wife, refused to attend the petitioner's mother's burial despite the fact that her death was accelerated by the respondent's indifference, failed and refused to attend any family function resulting in the petitioner being ridiculed and held in contempt by the other family members, failed to attend to and nurse the petitioner after he was involved in a serious life threatening accident which situation delayed the petitioner's recovery, treated the petitioner's mother badly when the latter was critically sick, causing the petitioner to develop blood pressure due to emotional and psychological stress, being hostile to the petitioner's close family members and friends leading to the petitioner being isolated and living a life of solitude, and, picking fights with anyone she suspected of having close ties with the petitioner.
3. The other ground is desertion. It is alleged that the respondent has since the early months of 2004 deserted the petitioner and that attempts to persuade her to come back failed. It is further alleged that the respondent has on several occasions committed adultery with men known and unknown to the Petitioner, some of them being his workmates. It is the petitioner's position that the said marriage has irretrievably broken down.
4. Upon being served with the petition, the respondent filed an answer to the petition and a cross – petition on 5th December, 2007. In the answer to the petition, she has denied the particulars of cruelty, desertion and adultery as alleged in paragraphs 5 and 6 of the petition. The respondent prays in her cross-petition for the dissolution of the marriage, monthly maintenance or alimony, and costs of the suit.
5. In her cross petition, she has accused the petitioner of adultery and cruelty. The particulars of adultery are contained in paragraph 7 of the cross-petition. She avers that the petitioner has had an adulterous relationship with her two cousins, Flora and Syokau on numerous occasions during the subsistence of the marriage which actions the petitioner did not deny when asked by the

respondent. She also alleged that on many occasions during the subsistence of the marriage she found condoms in petitioner's trousers pockets of which, when asked, he could be sarcastic and tell her what they are used for. She also accused him of having adulterous relationships with their house-helps on many occasions during the subsistence of the marriage.

6. The allegations of cruelty particularized in the cross-petition are that; the petitioner on 7th February 2005 threw the respondent out of the matrimonial home together with the issues of the marriage which action caused the Respondent and the issues a lot of psychological anguish, that on June 2004 the respondent found the petitioner watching pornographic movies with their house help; that the petitioner on many occasions after recovery from the accident slept out of the matrimonial home and whenever she asked him about it he would say that he had been in the safe hands of another woman who was taking care of him, and that during the subsistence of the marriage the petitioner brought his girl-friends to their matrimonial home. She argues that as a result of the petitioner sleeping out of the matrimonial home on numerous occasions she was denied conjugal rights.
7. Both parties testified; the petitioner on 15th January 2015 and the respondent on 16th April 2015. Their sworn oral testimonies gave vent to the allegations that they had made in their respective pleadings.
8. I have considered the petition, the answer to the petition and the cross-petition and the sworn testimonies. The issue that I am called upon to determine is whether a case for the dissolution of the marriage between the parties has been made out on the grounds cited herein.
9. Regarding cruelty, I have to consider whether the particulars of cruelty set out in the petition and stated at the oral hearing bring the alleged acts of cruelty within the definition of cruelty as a matrimonial offence. In *Meme vs. Meme* [1976-80] KLR 17, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court that there was misconduct of a grave and weighty nature, that there was real injury to the complainant's health or reasonable apprehension of such injury, that the injury was caused by misconduct on the part of the respondent, and that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word. Further, in *Mulhouse vs. Mulhouse* [1964] 2 All ER 50, which was cited with approval in *Meme vs. Meme* (supra), while considering the gravity and weight of the misconduct that would constitute cruelty, the court stated as that:

“Misconduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief.”

10. Has the Petitioner in his petition proved cruelty as a matrimonial offence? The Court of Appeal in *JSM vs. ENB* (2015) eKLR stated that:

“The last point, which has been made time and again by various courts, and which is worthy reiterating here, is that there is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves.”

11. By failing to attend the burial for the petitioner's mother, the respondent to my mind acted cruelly and this in my view occasioned reasonable apprehension on the part of the petitioner. The petitioner testified that the respondent has psychologically tortured him to the extent that he has developed high blood pressure. In the circumstances, I do hold that the petitioner's evidence for the charges he has made against the respondent are of such a nature as to convince the court that to compel the litigants to remain together as husband and wife would result in a most undesirable

marital status.

12. On desertion, petitioner alleged that the respondent had since the early months of 2004 deserted him and attempts to persuade her to come back had failed. It should be noted that for desertion to constitute matrimonial offence for divorce, it must run for a period of at least three years immediately preceding the presentation of the petition for divorce. The petition was presented to court in April 2007. This court has not been told exactly when the respondent deserted the matrimonial home. She was said to have left in the early months of 2004, which in my view is vague and I am unable to ascertain whether the period of three years from 2004 had expired. In the circumstances, I cannot rule that the ingredients of desertion have been satisfied and I find the matrimonial offence of desertion was not duly proved.

13. On the allegation of adultery, I find that the petitioner's allegations were not supported by evidence. In the absence of such evidence, I cannot condemn the respondent on mere and bare allegations.

14. It was said by GBM Kariuki J. in *Peter Kimutai Katam vs. Vicky Chebet Kones* [2010] eKLR that:

“Normally, it is not always necessary in cases of adultery that a spouse be caught in flagrante delicto or red-handed. After all, sexual encounters and sexual escapades are done so clandestinely... It is my finding that the Petitioner did not prove the allegation of adultery. It is unlikely that it has not taken place but there is no evidence to prove it. Mere suspicion is not sufficient to justify a finding of adultery (see Beer vs. Beer (1948) P. 10, 13.”

15. The respondent alleged in her evidence that the petitioner committed adultery during the subsistence of the said marriage. She contended that he had an adulterous relationship with her cousins, whom she named. She also said that on many occasions during the subsistence of the marriage she found condoms in the pockets of his trousers. I have noted from both the pleadings and the oral evidence that the petitioner did not satisfactorily respond to those allegations.

16. In *N vs. N and another (2008) 1 KLR 17* Madan J. said that:

“Adultery is that physical act of sexual union between two married persons of the opposite sex not lawfully wedded to each other. 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.”

17. In view of the foregoing, it is my finding that the respondent has proved that the petitioner committed adultery during the subsistence of the said marriage.

18. It is also the petitioner's case that the marriage has irretrievably broken down, and from the record it would appear that the respondent is in agreement with that position

19. It is my final conclusion that both the petitioner and the respondent are responsible for the collapse of the marital union. As stated above the petitioner proved that the respondent was cruel to him, while the respondent also proved to my satisfaction that the petitioner committed adultery during the subsistence of the said marriage.

20. On the respondent's prayer for maintenance, I find that no plausible explanation has been proffered as to why the Respondent should be granted maintenance orders. In the case of *WMM vs. BML* [2012] eKLR Justice G.B.M. Kariuki (as he then was) stated that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45 (3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage”. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

21. The respondent did not establish at all that she deserved to be paid maintenance.

22. Considering that both the petitioner and respondent have conceded that the said marriage has irretrievably broken down and in view of the fact that the matrimonial offences of cruelty and adultery have been established to the satisfaction of the court, it is my opinion that the continued existence of the marriage is not in the best interests of either party.

23. Consequently, I am moved to make the following orders:

- a. **That the marriage solemnized at Nairobi between Michael Lau Mwandu and Margaret Mueni Nzuki on 2nd November 2001 is hereby dissolved;**
- b. **That decree nisi shall issue forthwith, the same to be made absolute after expiry of a period of 30 (thirty) days from the date hereof; and**
- c. **That there shall be no orders as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE