



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 2 OF 2009

M TPETITIONER

VERSUS

T NRESPONDENT

JUDGMENT

1. The petitioner moved the court by a petition dated 6th January 2009, filed herein on 7th January 2009, seeking dissolution of the marriage celebrated between him and the respondent.
2. The cause was premised on grounds of cruelty, particulars of which are contained in paragraph 6 of the petition. They range from claims of physical assault, unreasonable conduct, mental torture, exposure to embarrassment and humiliation, the making of false accusations of adultery, denial of conjugal rights, failure to provide emotional and material support, neglect, display of open contempt for the petitioner, and failure to participate in the running of the matrimonial home.
3. Upon being served with the petition, the respondent filed her answer to petition on 6th April, 2009, in which she denies that she treated the petitioner with cruelty. She further denies that the marriage between her and the petitioner had broken down irretrievably. She denies the particulars of cruelty set out in paragraph 6(i) to (iv) of the petition and puts the petitioner to strict proof. With regard to conjugal rights, she avers that she had not denied the petitioner his conjugal rights rather it was he who denied her conjugal rights by moving out of the matrimonial bed some six years ago prior without any explanation or justification. She avers that the petitioner of his own accord without any act or omission by her chose to leave the matrimonial home with no justification whatsoever. She avers that the marriage had not irretrievably broken down and expresses her belief that there were strong chances of reconciliation. It is her prayer that the petition be dismissed with costs to her.
4. The parties testified on 3rd July, 2014, giving vent to the allegations set out in their respective pleadings. At the conclusion of the oral evidence the parties filed written submissions.
5. The petitioner's case is that the marriage between him and the respondent has irretrievably broken down with no chance of reconciliation. It is submitted that the respondent is a person of ungoverned temper and on various occasions during the course of the marriage, she had physically and verbally assaulted the petitioner. The petitioner relies on the decision in *N vs. N and another* (2008) 1 KLR (G & F) 16 in which the court held that an intention on the part of one spouse to injure the other is not a necessary element of cruelty as a matrimonial offence though the presence of such an intention, if it exists, is material and may be crucial. It was also stated that whether cruelty as a matrimonial offence had been established is a question of fact and degree which

should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard. It was also noted that the law does not require or wait for tangible manifestation of cruelty before granting relief. He also cited the decision in *Gollins vs. Gollins* (1963) 2 All ER 366 at 374, where Lord Reid said that “*if the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what the state of the respondent’s mind.*” It was submitted that the test is not an issue of whether the respondent was a cruel person but rather whether the act complained of was cruel.

6. For the respondent, it was submitted that marriage is a legal contract that must be taken seriously, and one cannot walk into and out of it at will, and that Parliament found it fit to legislate on grounds that a party seeking dissolution of the marriage must prove, before the court can pronounce the decree of divorce. It was further submitted that the burden of proving that the respondent subjected the petitioner to cruelty that warranted pronouncement of a decree of divorce lay with the petitioner. The respondent relied on the decision in *RM vs. HON* (2012) eKLR, where GBM Kariuki J. stated that the burden of proving cruelty is on the party alleging that, and the standard of proof is as high as in criminal cases.
7. The respondent submitted that the petitioner failed to demonstrate the incidents of cruelty allegedly visited upon him by the respondent. Her position is that the petitioner did not prove the ground of cruelty. She cited *ECNG vs. FNN* (2011) eKLR, where the Court of Appeal cited *Mulhouse vs. Mulhouse* (1964) 2 All ER 50 in which the court had said that “*cruelty is a serious charge that requires that it should be proved beyond any reasonable doubt, it must be of a grave and weighty nature...*” It was further submitted that the petitioner had been unable to prove any ground for the divorce, and that it was not enough to merely state that the marriage had irretrievably broken down. She contended that the petitioner should have provided evidence that the marriage had indeed irretrievably broken down, concluding that the petition disclosed no good grounds for divorce and should be dismissed.
8. I have considered the petition, the answer to the petition, the oral testimonies as well as the written submissions by the rival parties. The issue that I am called upon to determine is whether the petitioner has made out a case for divorce on the ground for cruelty, or at any rate whether the marriage has irretrievably broken down.
9. It is not in contention that the petitioner and the respondent are married. The marriage certificate indicates that the said marriage was solemnized at Nairobi on 10th December 1983.
10. The petitioner’s ground for divorce is predicated upon cruelty whose particulars are shown at paragraph 6 of the petition. I have to consider whether cruelty amounting to a matrimonial offence has been established. 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, “*misconduct of a grave and weighty nature, 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.*” In *Mulhouse vs. Mulhouse* [1964] 2 All ER 50, which Chesoni, J. cited with approval in *Meme vs. Meme* (supra), Sir Jocelyn Simon P. while considering the gravity and weight of the misconduct that would constitute cruelty, stated as that:

“*[M]isconduct 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.*”
11. Regarding the nature of injury to the petitioner’s health, real or apprehended, that is necessary to prove cruelty. His Lordship stated that “*[I]t must be proved that there is a real injury to the health*

of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it.” And in *Nunzio Colarossi vs. Michelina Colarossi* [1965] E.A. 129, Newbold JA., speaking for the former Court of Appeal for Eastern Africa stated that “An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.”

12.As regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been established, this court, in *Kamweru vs. Kamweru* (2000) E KLR, stated that “applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. 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.” Recently, the Court of Appeal in *JSM vs. ENB* (2015) eKLR observed 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.” In **AMA vs. GSB HCDC No. 134 of 2010, GBM Kariuki J said –**

“It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner’s health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see **Russell vs. Russell [1895] P. 315, 322. See also D. Tolstoy on The Law and Practice of Divorce, Sixth Edn.** It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see **Gollins vs. Gollins [1964] AC 644; Williams v Williams [1964] AC 698, 760. Tolstoy, 6thEdn states that the question in all cases is whether the Respondent’s conduct was cruel, rather than whether the Respondent was himself or herself a cruel person** (see *Gollins v. Gollins (supra)* at page 670 and *Williams vs. Williams (supra)* at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see **Jamieson vs. Jamieson [1952] A.C. 525, 535. Moreover, a deliberate intention to hurt may turn into “cruelty conduct” which, without such intention, would not constitute cruelty.**”

13.From the above judicial pronouncements it is clear that the petitioner was enjoined to prove the acts of cruelty he has alleged against the respondent herein.

14.The petitioner has averred that the respondent on numerous occasions subjected him to physical assault. Further, that she on various occasions and in different fora falsely and publicly accused him of committing adultery with various persons including family friends and house helps. It is his case that she denied him conjugal rights for a period in excess of five years. The other allegations are failure to give the petitioner emotional and material support and willful neglect of the petitioner’s welfare; showing of utter contempt and failure to show any matrimonial commitment and failure to participate in the running of the material home. Those are the charges the petitioner has leveled against the respondent, which charges the respondent has denied.

15.Of the said cruelty, the petitioner wants this court to free him from the matrimonial relationship. However, as has been stated earlier herein, the petitioner’s evidence for the charges he has made

against the respondent, must be 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.

16. It should be noted that divorce, is a remedy designed solely for the purpose of affording relief to two contracting parties whose marital life has become unbearable. In as much as cruelty is one of the grounds for divorce, this court must consider whether from the evidence before it, it can be said that there is mere want of congeniality, or incompatibility of temperament and the consequent warring of the parties which does not justify a charge of cruelty on the part of either party. Laws are primarily enacted for the protection of humanity, and the individual therefore looks to the law for aid in eliminating or for protection in prohibiting certain conditions as may eventually terminate in physical or mental discomfort, or even death.
17. I hold the view that while occasional fits of ill temper and rudeness resulting in abusive language or ill treatment are not sufficient grounds, continued demonstrations which indicate the futility of prolonging the existence of the union warrant a divorce decree. I find that the respondent's conduct towards the petitioner constitute physical and mental cruelty of a kind that should render intolerable the continued cohabitation of the union. To hold otherwise, by compelling the parties to live together, would lead to nothing but misery where there is mental distress as in this case.
18. The circumstances of this case and the particulars of cruelty complained of by the petitioner have to my mind destroyed the peace of mind and happiness of the petitioner and endangered his health or utterly defeated the legitimate objects of the marriage, and such a marriage cannot harmoniously continue. By holding so, I am cognizant of the fact that divorce is not a punishment to the respondent but a relief to the petitioner.
19. I am of the considered opinion that the differences between the petitioner and the respondent have become aggravated and cruel and cannot be remedied by prudent conciliation, and therefore the parties must not be left to suffer and risk the possibility of allowing this torment to drive them into acts of violence and thereby injure the person or the lives of one of the parties. I will not allow the parties to suffer much injustice and permit much misery.
20. I note that the respondent does not wish the marriage dissolved and has strongly denied the allegations of cruelty as framed by the petitioner. She contends that the petitioner has failed to prove the grounds for cruelty. She therefore holds that the said petition discloses no good grounds for divorce and should be dismissed.
21. In *RJW vs. FMW* (2014) eKLR, Kimaru J, in whose findings I am in total agreement with, stated that -

“This court notes that under Article 45 of the Constitution the family is recognized as the foundation and fundamental unity of the society. It is in that regard that the Constitution specifically provides that the family shall enjoy recognition and protection by the State.

However, where it is established that a spouse in the marriage is living in such condition of misery and unhappiness, the court is under obligation, nay, duty to uphold the aggrieved spouse's right to freedom of association as provided under Article 36(1) of the Constitution. The Respondent cannot therefore compel the Petitioner to associate with her when clearly the Petitioner has no wish or desire to consort with her. It was clear from her statement that the Respondent did not wish, under any circumstances to be divorced from the Petitioner. This court cannot grant the Respondent's wish because to do so would amount to subjecting the Petitioner to a relationship which he is categorical he does not desire or wish to be party to.”

22. In view of the foregoing, I make the following orders:

- a. **That the marriage solemnized on 10th December, 1983 at Nairobi District between M T and T N be and is hereby dissolved.**

b. Decree *nisi* shall issue forthwith, the same to be made absolute after expiry of a period of thirty (30) days from the date hereof.

Orders accordingly.

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

W MUSYOKA

JUDGE

In the presence of.....advocate for the petitioner.

In the presence of advocate for the respondent.