



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

DIVORCE CAUSE NO.116 OF 2009

C W W.....PETITIONER

VERSUS

G M N.....RESPONDENT

JUDGMENT

1. The Petitioner and the Respondent, both Kenyan citizens got married under the now repealed Marriage Act (Cap 150) at a ceremony conducted at the Registrar of Marriages Office in Nairobi on 12th November 2004.
2. The petitioner is an employee of [particulars withheld] while the respondent is self- employed. After the celebration of the marriage, the couple cohabited at [particulars withheld] in Nairobi and got two issues to the marriage **D W M & E K M** 9 and 7 years respectively.
3. The petitioner filed this petition dated 28th July 2009 seeking the dissolution of the marriage on the grounds of cruelty and adultery. She listed the particulars of cruelty as follows; that since the celebration of their marriage, the Respondent overindulged in alcohol and was away from home on many occasions thus causing the petitioner mental torture. The Respondent despite having an income has failed to provide for the daily needs of his family thus leaving the entire burden on the Petitioner.
4. On 14th July 2009, the Petitioner caught the Respondent with unknown woman in a neighbour's house. She further stated that the marriage has irretrievably broken down and that efforts to reconcile them have been futile.
5. The Petitioner prayed that the marriage be dissolved, costs of the petition be borne by the Respondent, custody of the children be granted to her with the Respondent allowed limited access and any other orders the court deems fit to grant.
6. The Respondent, despite being served with the petition, did not enter appearance nor file an answer to the petition. The Registrar issued certificate for the matter to proceed as undefended cause. The petitioner in her oral testimony reiterated what was stated in her petition. She further stated that she lives in the matrimonial home with the children and does not know where the Respondent lives since 2009.
7. The Marriage Act is now repealed and the relevant statute that deals with grounds of divorce is **Section 66 of the Marriage Act 2014**. Cruelty and adultery as some of the grounds that warrant divorce between the parties. **A K V A W K 2000 eKLR** the Court stated that; “ cruelty maybe proved by a preponderance of probability. The Court ought to be satisfied as to feel sure that the cruelty was has been established.” The particulars of cruelty outlined by the Petitioner in the Petition and testimony in the absence of any other evidence to controvert it, is to the Court proof

of the Petitioner's claim on a balance of probability.

8. ***In the case of N vs N 2008 1KLR 17*** the Court stated; "that adultery can be proved without evidence of the same. Circumstantial evidence can prove adultery provided the circumstances are relevant, cogent and compelling". In the instant case, the Petitioner had direct evidence of the Respondent's adulterous conduct. The respondent did not tender any evidence for the Court to consider.
9. The Petitioner and Respondent separated in 2009, the Respondent left the matrimonial home and she remained with the children of the marriage and lives in the matrimonial home to date. The Petitioner does not know the Respondent's whereabouts. There is clearly no chance of reconciliation or salvage of the marriage.

FINAL ORDERS

The Court finds that the marriage between the Petitioner and Respondent has irretrievably broken down and orders as follows;

1. The marriage between the Petitioner and Respondent solemnized on 12th November 2004 is dissolved on the grounds of cruelty and adultery.
2. A decree *nisi* shall issue forthwith and shall become absolute after sixty (60) days.
3. The Petitioner shall have legal and physical custody of the children of the marriage. Further orders shall be upon application by either party
4. The petitioner shall have the costs of the suit.

DATED DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF OCTOBER 2015

M.W.MUIGAI

JUDGE

In the presence of;

Mr. Kamenju holding brief for Mr. Gatumuta for the Applicants