



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

DIVORCE CAUSE NO. 1 OF 2015

F L M PETITIONER

V E R S U S

D M O RESPONDENT

JUDGMENT

The petitioner filed a petition on 12th February, 2015 against the respondent. It was averred in the petition that the petitioner and the respondent converted their marriage to a statutory marriage under the Marriage Act (cap. 150) on 30th August 2005. By that time, the two had already cohabited and got two issues of the marriage a daughter S K M born on 5th January 1999, and a son B M M born on 17th February 2002.

It was averred in the petition, that the respondent was guilty of adultery and cruelty. Particulars of adultery and cruelty of the respondent were given in the petition. The petitioner sought orders that the marriage between her and the respondent be dissolved. Secondly, she asked that custody of the children of the marriage be granted to her. Thirdly, she asked that the respondent be ordered to bear the costs of the case. Lastly, that the court grants any relief that it deems fit.

In response to the petition, the respondent on 21st July, 2015 filed an answer to the petition. He denied the allegations of adultery and cruelty made against him by the petitioner. He also averred that the petitioner had treated him with cruelty and committed adultery. He listed particulars of cruelty and adultery against the petitioner.

The respondent asked that the marriage between him and the petitioner be dissolved, and that he be granted the custody of the children. He also asked that the parties contribute equally towards the maintenance of the children, and that the petitioner be ordered to bear the costs of the proceedings. Lastly, he asked that the court do grant any other order as it deemed fit to grant.

During the hearing of the case, evidence was tendered on both sides. The petitioner testified as PWI.

It was her evidence that they had problems with the respondent in their marriage and that she feared for her life and security. She testified that they cohabited as husband and wife with the respondent for sometime, before converting the marriage to a statute marriage. She however later realized that the respondent had another wife (M) and that when at one time the petitioner's brother visited them at Kisii, the respondent threatened her with a knife. She thus decided to come back to Garissa from where she intended to take care of her children.

According to her, the respondent threatened to kill her in 2012. She stated that the respondent did not

allow her to visit the children. She asked for dissolution of the marriage as well as custody of the children.

In cross examination, by the respondent, she stated that the respondent joined College in 2011 and not 2010. She stated that she did not seek medical treatment when he assaulted her. She maintained that they disagreed with the respondent in 2010 and not 2008. She stated that the respondent's parents had come and tried to reconcile them in 2010 and again in 2012, in vain. She stated that the respondent brought up the issue of loans, after she filed the present proceedings for divorce. She stated that the respondent chased her away in 2012.

That was the evidence on the side of the petitioner.

The respondent testified as DWI. He admitted having differences with the petitioner in their marriage but stated that the same started in 2010 when he went back to college. According to him, the petitioner said that the family would suffer if he went back to school. He stated that he left the petitioner at Kisii but noticed later that she had formed the habit of coming home late, sometimes at 11.00 Pm claiming to have been doing business. He however learnt that she was actually running away from debtors.

He stated that the petitioner was always harsh to him and had the habit of switching off her phone. According to him when asked about her conduct, the petitioner started fights. According to him this was cruelty.

With regard to his allegation of adultery, it was his evidence that the petitioner informed him that she had started a new life and that he should leave her alone. It was his evidence also that the petitioner refused his attempts to involve the parents in addressing and resolving the marital challenges between them. According to him, the whole problem arose due to finances, as the petitioner was extravagant and incurred a lot of debts.

With regard to his request for the custody of the children, it was his evidence that he had been acting as father and mother to the children, and had taken the children to school and were comfortable. He stated that the first born girl was in form 2, in a boarding school, while the second born son was in class 7 in a day school.

In cross examination, he stated that at one time he brought his parents who discussed their marital issues and advised them to reconcile. He stated that the petitioner agreed then to reconcile in three months' time. He denied that the salon opened up to 11.00 Pm. He complained that the petitioner had formed the habit of leaving the house at 5.00 am in the morning, and instructing the children to cook.

This is a case in which the petitioner seeks dissolution of marriage. The respondent has filed an answer to the petition also seeking dissolution of the marriage. Thus the request for dissolution of the marriage by the petitioner is not opposed by the respondent.

From the evidence on record, the petitioner and the respondent have had problems in the marriage for sometime. They are currently living apart. Though the evidence on both sides is scanty, it is apparent that the petitioner lives in Garissa and the respondent resides in Kisii.

The grounds for dissolution of the marriage relied upon by the petitioner against the respondent are adultery and cruelty. The respondent relies on the same grounds against the petitioner. Under Section 8(1)(a) and (c) of the Matrimonial Causes Act (cap 152), either is a ground for dissolution of a marriage. The relevant part of the section provides as follows:-

8(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent –

- a. ***Has since the celebration of the marriage committed adultery.***
- b.

c. Has since the celebration of the marriage treated the petitioner with cruelty.

Considering the evidence on record, I am of the view that the

evidence of the petitioner with regard to adultery of the respondent is more believable. She even gave the name of the other woman M, though she did not join her as a co-respondent.

The respondent, on the other hand, made general allegations of adultery against the petitioner, by merely stating that the petitioner had been coming home late, and had also said that she had started a new life and should be left alone.

In my view, the petitioner has established commission of adultery against the respondent with one M. The respondent did not establish or prove adultery against the petitioner. He merely established strong suspicion, which was not adequate to prove adultery against the petitioner. As the petitioner has established adultery against the respondent, the marriage herein may be dissolved.

With regard to cruelty, both the petitioner and the respondent made allegations against each other. The petitioner said that the respondent smoked bhang, threatened her with a knife and chased her away. The respondent, on the other hand, stated that the petitioner was rude and did not perform her wifely duties. The respondent again did not elaborate on the rudeness, and the failure of the petitioner to perform wifely duties. He however said that to the petitioner incurred huge debts and left the house very early in the mornings and did not cook for the children.

In my view, neither of the parties tendered evidence which would establish cruelty. None gave particulars, such as dates or months when the alleged cruelty was committed by the other. Cruelty was thus not proved by either the petitioner or respondent.

Both parties have asked for dissolution of the marriage. In my view, adultery against the respondent was proved, and the marriage has broken down irretrievably as both are living separate, and none of them wants to reconcile. I will thus grant dissolution of the marriage.

With regard to the custody of the children, the petitioner has asked for the children's custody. The respondent has also asked for custody.

From the evidence before me, the children are at Kisii with the respondent. They are schooling. The petitioner is now at Garissa. The respondent has been taking care of the children at Kisii and paying school fees for them. In matters of children, the Constitution of Kenya 2010, Articles 50(2) and the Children's Act, 2001 section 4(2), provide that the best interests of the child or children have to be given primary consideration by the courts. In the present case, in my view, the best interests of the two children of the marriage will be served by not disturbing them from where they currently are. They are at Kisii in the custody of the respondent. He pays school fees for them. I have not been told that he has had any default or bad record with regard to taking care of the children and educating them. I will thus grant custody of the children to the respondent, with a right of access to them by the petitioner.

Though the respondent has asked that both parents bear the cost of maintaining the children, since I have not been given figures regarding the incomes of any of the parties, I am not able to make a decision on the same. I must emphasize however that parents have equal responsibility towards the children, but also taking into account their respective income.

As for costs, the parties will bear their respective costs.

In conclusion, I allow the petition herein and order as follows:-

1. The marriage between the petitioner and the respondent herein be and is hereby dissolved. A decree nisi for divorce to issue which will be made absolute after the lapse of six (6) months.
2. The custody of the two children is granted to the respondent. The petitioner will have full rights of

- access to the children and either party may apply for contribution to towards maintenance and education of the children by the other.
3. Parties will bear their respective costs of these proceedings.

Dated and delivered at Garissa this 11th November 2015.

GEORGE DULU

JUDGE