

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 171 OF 2011

D Y A.....PETITIONER

VERSUS

R I L.....RESPONDENT

J U D G M E N T

The Petitioner and the Respondent were married under customary law in the year 2000. They converted their marriage into a statutory one on 9th January 2009 when they were married at the Registrar's Office in Nairobi. The marriage was celebrated under the **Marriage Act**. After the celebration of the said marriage, the Petitioner and the Respondent cohabited together as husband and wife in Nairobi. The marriage has been blessed with three issues. The Petitioner also has two children from a previous relationship. The Petitioner avers that since the celebration of the said marriage, the Respondent has treated him with cruelty. In particular, he deponed that the Respondent had been verbally abusive towards him. He further accused the Respondent of physically abusing him, being rude and denying him access to the children of the marriage. He deponed that the Respondent had denied him his conjugal rights. The Petitioner complained that the Respondent had treated his relatives with disrespect. He further accused the Respondent of practicing witchcraft and being cruel to his children from a previous relationship. He stated that he had been separated from the Respondent since October 2010. For these reasons, the Petitioner averred that the marriage between him and the Respondent had irretrievably broken down. The Petitioner therefore urged the court to grant his petition for divorce, grant him custody of the children and also award him costs of the petition.

When the Respondent was served, she did enter appearance and filed an answer to the petition. She also cross-petitioned to be divorced from the Petitioner. In the answer to the petition, the Respondent denied the allegations made in the petition for divorce by the Petitioner. In particular, she denied that she had treated the Petitioner with cruelty. The Respondent particularly denied the particulars of cruelty put forward by the Petitioner and put the Petitioner to strict proof thereof.

In her cross-petition for divorce, the Respondent averred that since the celebration of the said marriage, it was the Petitioner who had treated her with cruelty. She sets out the particulars of cruelty in the cross petition for divorce. The said instances of cruelty include physical and verbal assault; failure to provide for the Respondent and the children; neglect of his responsibility as both husband and father; denial of conjugal rights to the Respondent and engagement in extra marital affairs. The Respondent also accused the Petitioner of practicing witchcraft. She further accuses the Respondent of committing adultery with one E N. She finally stated that the Petitioner was guilty of desertion. She stated that since early 2011, the Petitioner had deserted the matrimonial home and had since not returned to the said matrimonial home. It is on account of these matrimonial offences and other grounds in the cross petition for divorce that the Respondent was of the view that her marriage to the Petitioner had irretrievably broken down. She therefore urged the court to grant her cross petition for divorce. She further prayed to be granted custody of the children of the marriage. She also prayed for the court to compel the Respondent to provide maintenance for the children of the marriage.

At the hearing of the petition, this court heard oral evidence adduced by both the Petitioner and the

Respondent. The Petitioner essentially reiterated the contents of his petition for divorce. He testified that the Respondent became cruel from the onset of their marriage. He testified that the Respondent had disregarded his advice on how to run the family. The Petitioner complained that the Respondent did not involve him when she delivered their last born child in hospital. He told the court that the Respondent had made false allegations against him to the police; was practicing witchcraft and had discriminated against her step children by physically and verbally assaulting them. The Respondent was also rude, disrespectful and selfish. He denied the allegations of adultery made by the Respondent and maintained that he has continued to provide for his children. The Petitioner was of the view that the marriage was no longer sustainable. He told the court that all attempts to salvage the marriage has not borne any fruits. He therefore urged the court to grant his petition for divorce.

On her part, the Respondent also reiterated the contents of her answer to the petition and cross petition for divorce. She told the court that during the subsistence of the marriage, the Petitioner subjected her to physical abuse. She told the court that the Petitioner was a difficult person. She testified that challenges in the marriage arose after the Petitioner secured a job in Sudan in 2008. She told the court that early in 2011, the Petitioner deserted the matrimonial home and neglected his family. She testified that the Petitioner was now living with the said E N whom he is constructing a house for in his rural home.

This court has carefully considered the facts of this divorce cause. It was clear from the pleadings filed by both parties and also him, the evidence adduced by both the Petitioner and the Respondent in court that indeed the marriage of the Petitioner and the Respondent had irretrievably broken down. It was apparent that since 2010, the marriage between the Petitioner and the Respondent has been in doldrums resulting in complete termination of intimacy between the Petitioner and the Respondent. The accusation and counter-accusation of cruelty and infidelity are sufficient proof that the marital relationship between the Petitioner and the Respondent has deteriorated to such an extent that it cannot be salvaged. The Petitioner and the Respondent do not trust each other to sustain the marriage. Further, the fact that the Respondent deserted the matrimonial home since October 2010 is sufficient proof that he is no longer interested in the marriage. This court formed the view that that the matrimonial offence of desertion has been proved to the required standard of proof on a balance of probabilities. This court will grant the petition for divorce.

In the premises therefore, the marriage solemnized on 9th January 2009 at the Registrar's Office, Nairobi between the Petitioner and the Respondent is hereby dissolved. Decree nisi dissolving the said marriage is hereby issued. The said decree nisi shall be made absolute thirty (30) days from the date of this judgment. As to the issue of the custody and maintenance of the children of the marriage, the same shall be dealt with in the first instance by the Children's court. This is because the Children's Court has jurisdiction in the first instance to deal with such issues. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF APRIL, 2014

L. KIMARU

JUDGE