



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 30 2013

R A O.....PETITIONER

VERSUS

K O O.....RESPONDENT

JUDGEMENT

1. The divorce petition herein is dated 5th February, 2013. The Petitioner thereby prays for the dissolution of the marriage between her and the Respondent. The grounds upon which the Petition is based are cruelty, desertion and adultery. The particulars of cruelty and desertion are set out in paragraph 6 of the Petition and are that the Respondent abandoned the matrimonial home for the United States of America without any communication to the Petitioner, that the Respondent has denied the Petitioner her conjugal rights, that the respondent has exposed the petitioner to emotional and psychological torture following lack of communication, that the Respondent has developed a non-caring attitude towards providing for the basic needs and requirements of the Petitioner, and that The Respondent has continuously hurled abuse of the most unimaginable language against the petitioner. The particulars of adultery include allegations that the Respondent has habitually since the celebration of their marriage cheated on the Petitioner with other known and unknown women and that he has persistently and since the consummation of their marriage been having an affair with another woman.
2. It is the Petitioner's case that, despite the efforts to have the matter resolved by the extended family, friends and legal mediation, the Respondent has refused and or declined to cooperate leaving the Petitioner with a lot of mental torture. She contends that the marriage has irretrievably broken down due to the aforesaid cruelty, adultery and desertion since 2009, and there is no hope of the parties herein ever reuniting whatsoever. And that the marriage in issue should therefore be dissolved.
3. I have considered the petition as well as the uncontroverted testimony of the Petitioner.
4. I note that the Respondent despite being served with the petition on 25th February, 2013 by Julius Sila Mutava a court process server, failed to file an answer to the petition or cross-petition for that matter. In the circumstances the petition remains unchallenged.

5. A perusal of the court records reveals that the said marriage was solemnized at the Register's office in Nakuru District of the Rift Province of Kenya on 27th August, 2008 as per the annexed marriage certificate.
6. The grounds for dissolution of the marriage are stipulated in Section 8 (1) of the Matrimonial Causes Act thus:

'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; or
 - (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
 - (c) has since the celebration of the marriage treated the petitioner with cruelty; or
 - (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.'
7. The Petitioner has set out the particulars of cruelty as stated above, and the question that begs for an answer in the instant case is whether the Respondent's conduct since the consummation of the said marriage amounts to cruelty? In **A.M.A. vs. G.S.B. HCDC No. 134 of 2010, 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 v. 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, 6th Edn 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 v 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.**"***

8. I hold that denying the petitioner her conjugal rights amount to cruelty, as well as abandoning her without any communication.
9. As regards desertion, the Petitioner states that the Respondent left the matrimonial home on July, 2009 and she has not seen him since then. This petition was filed on 11th February, 2013. For desertion to constitute a ground for divorce, it must run for a period of at least three years immediately preceding the presentation of the petition for divorce. The petition for divorce was thus brought within the right time in so far as the ground of desertion is concerned. I am therefore satisfied that the Respondent deserted the matrimonial home without any reasonable cause.
10. I also find that cruelty has been proved within the parameters considered in the 1977 case of *N vs. N* (2008) 1 KLR (G&F) wherein Madan J (as he then was) held, *inter alia*, that:

“Whether cruelty as a matrimonial offence has 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.”

11. The Petitioner in her evidence was clear that the couple have not had any conjugal relations since 2009 when the Respondent deserted her. I note at paragraph 8 of the Petition that the Petitioner has not condoned, been an accessory to or connived at the Respondent’s cruelty, desertion or adultery.
12. On the ground of adultery, the Petitioner has alleged that since the celebration of their marriage the Respondent has habitually cheated on her with other known and unknown women and that the respondent has been persistently having an affair with another woman. But what I find that the Petitioner has failed to tell this court who the known woman is, neither was the said woman joined as a co-respondent. I particularly observe that no evidence was tendered on the respondent’s alleged adulterous activities. Therefore, I find that the matrimonial offence of adultery alleged against the Respondent has not been proved and that the ground of adultery must fail.
13. However, I am of the same mind with the petitioner that the marriage has broken down irretrievably. There is no denying that in the circumstances the said marriage is indeed dead, and I see no reason why this court should not grant the order sought as it is obvious to the court that the couple herein has lost all love for each other and the likelihood of reunion is remote.
14. Accordingly, I hereby pronounce a decree of divorce and order that the marriage solemnized on 27th August 2008 at Nakuru District between R A O and K O O be and is hereby dissolved. Decree *nisi* shall issue forthwith, the same to be made absolute after expiry of a period of 30 (thirty) days from the date hereof. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25th DAY OF April, 2014.

W. MUSYOKA

JUDGE

In the presence of advocate for the petitioner.