



No. 27

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Divorce Cause No. 64 Of 2009**

**A M K..... PETITIONER**

**VERSUS**

**J N M ..... RESPONDENT**

**JUDGMENT**

**The Petitions**

1.The Petitioner husband applied for the dissolution of his marriage to the Respondent by a Petition dated 25th August 2009. The Petitioner, an employee of the Armed Forces and the Respondent a businesswoman married on 6th June 2002 under the Marriage Act, Cap150 in Mombasa. There was one issue of the marriage, [VK], born 12<sup>th</sup> December 2004. The couple lived together until September 2005 when they separated. The Respondent subsequently moved out of the matrimonial home at [Particulars withheld] and now lives in [Particulars withheld] Mombasa.

2.The Petitioner's grounds for dissolution are desertion and cruelty as particularized in paragraph 7 of the Petition and the Petitioner therefore prays principally that the marriage solemnized on the 6th day of June, 2002 be dissolved and that custody of the child be vested in the Petitioner.

The Petition is defended by the Respondent who acting in person stated in an Answer to the Petition that she was a hawker at the time, denied the particulars of cruelty instead blaming the Petitioner for denying her conjugal rights, beating her (OB No. 10/114/07), moving out of the matrimonial bed and into the guest room, promiscuity with one S N because of whom the Respondent was forced to vacate the matrimonial home in 2009, and together with the Petitioner's sister exposing the child to irresponsible behavior. For these reasons, the Respondent prays in her answer to the Petition that:

- a. The marriage be dissolved.
- b. The Respondent be entitled to a share in House No. [Particulars withheld] Kiembeni.
- c. The custody of the child be vested with the Respondent.
- d. The Petitioner provide for the maintenance of the child.
- e. The Petitioner be condemned to pay costs of the Petition.
- f. Any such further orders as may be just be granted to the Respondent.

**The Evidence**

3.The Petitioner testified and the respondent testified before the court and judgment was reserved. The verbatim testimony of the parties was recorded as follows:

“PW1 Adult male christian sworn and state in Kiswahili

*I am A.M.K. I work with Kenya Navy at [Particulars withheld]. I reside at [Particulars withheld] Mombasa. J N M is my wife. We lived together up to the time we separated. We married on 6.6.2002 at the Registrar's Office, Mombasa. I have the marriage certificate. PEx. No. [Particulars withheld] after the marriage we lived at the Navy Camp at [Particulars withheld]. We lived up to 2006. About 2003, I went on official duty out of the country and I returned in 2004. We had a child on 12.12.2004. I have the birth certificate. PEx. No. [Particulars withheld]. She is V K After the child was born we had problems between us when the respondent became unco-operative when I asked her not to keep certain company. She would also take up property and sell. She sold my camera without my authority. She also fought with my relatives - my sister and my aunt. She also refused to visit my family home after I instructed her to. The respondent is disrespectful and rude. She would come to my work place and claim that I did not provide for them. I used to give her money for payment of electricity and she would refuse to pay. She refused to give me my conjugal rights. She claimed that I would infect her with HIV/AIDS. Since 2005 we lived in the same house but in separate rooms and had no sexual intercourse. We lived in the same struggle until 2007 when I found it too stressful and I left the house and went back to live in the Navy camp. I however left her in my house. Later I went to Mandela Lamu and in 2008, she was arrested and our child was left with a neighbour. The charge against the respondent was involving fake money and it also involved the same friend, that I had been warning her against. Later in 2009 the respondent left the house and took all my property. We have not attempted any reconciliation after separation The child lives with the respondent. The child attends K. Academy in Meru. I pay the school fees for the child. I also pay for maintenance about 3,000/= - 4000/= per month. I have access to the child. I had payment for custody because I had not been granted access to the child. I have noted that respondent has been providing the child's needs. On the matters between the respondent and I pray the court to dissolve our marriage because I do not see that we can be reconciled. It is not true that I refused the respondent her conjugal rights and it is not true that I watched pornography. It is not true that I have married one S N I left because I could not live with her with her bad manners. There is a house at [Particulars withheld] which belonged to my late father S K It is not true that we contributed towards the house with the respondent in 2007. Our relationship was very bad at the time. I have not received any complaints from the child. I am ready to educate the child up to the age of 18 years as I have always done. I will continue to send the Kshs.3000/= - 4000/= per month. The respondent only complained that the money I was giving was not enough. That is all.*

Cross-examined by J N M

*I left the house after we disagreed. It is not true that I used to bring other women to the house or photographs of other women. It is not true that I slept with my sister in our bedroom. It is not true that one S N is now my wife whom I live with at [Particulars withheld] It is not true that I locked myself in the bedroom. It is not true that I live at Block No. [Particulars withheld]. I was only a custodian of the house. I had a key to the house. I left the house because you stressed me. You have never called for any reconciliation meeting. I never threatened you. It is not true that I lived with one mama N and that that is why I did not want you to associate with them. You never agreed with my sisters. You even fought with them. It is not true that I was the cause of the fight. S N is my work-mate. It is not true that I have taken her as my wife. You went with my beds, mattresses and sold them. You were known at the camp and you could have been allowed to take the property. It is not true that I permitted you to carry the property. I was at work.*

Re-examination

Nil

DW1 Adult Female Christian sworn and states in English

I am J N M I am the respondent in this case. In 2002 on 6th June, we proceeded to the Registrar and solemnized our marriage. I lived at [Particulars withheld] and I worked at EPZ, Mombasa. We lived as husband and wife until he left the country for peace keeping abroad in January, 2003. He came back the same year and I conceived and I delivered a child named V K On 12.12.2004. After I gave birth to the girl, he threatened that he would take me back to my place. The petitioner changed and would spend night outs from home. He would come home with perfumes from ladies and condoms. He said that he would proceed with his life and that I should proceed with mine. We stayed in the house without speaking to each other. Other times, he would leave for as long as one week only to come and see his daughter. In 2005, he changed his sleeping style such that he slept facing my feet so that we did not face each other. He said he did not have any interest in me; but he was getting satisfaction elsewhere. When I tried to get him to have sex with me, he would beat me and finally he left the matrimonial bedroom and went to the guest room. This was about April 2006. We continued living together in the same house. He asked to get a separate life. I asked him for my conjugal rights and he beat me up and I reported to the police. I do not have any document to prove this. We continued living with the same separate lives and he subsequently left and took up residence at Likoni at a place called third world. He lived with a lady called S N and he lives with her to date. While still at [Particulars withheld] he used to come home because he had asked me to move but I declined. In December 2006, his sister named P came to visit the brother. She came to the house. In the evening, the petitioner and the sister left and came back at Midnight. The two slept in the same bedroom. When I asked him he created a lot of problem. I took it that he was doing this to me so that I could leave. During the election violence of 2007/2008 in December 2007, the petitioner did bring the lady S to the camp and said that he was moving to Block [Particulars withheld] which is adjacent to Block [Particulars withheld] where I lived. The petitioner did not come home at all. He lived with the said S I was very bitter when our child asked me why the father was living at Block [Particulars withheld] near her school and not at our house. In whole of 2008-2009, the petitioner lived at Block [Particulars withheld] with the said S N Realizing that I had become a laughing stock at the camp. I decided to call him we move about March 2009. He came to the house. I told him that I thought of leaving the home. He said that he had no problem even if I carried the whole camp. He was happy to see me go so that he could marry. I did not go that day. I waited until May 2009. I did not think he meant what he had said that I should leave. I called him and he said I should not trouble him again as he had already asked me to leave. The following month, I started planning to leave. This was in June 2009. I hired a vehicle to transport my goods. I went to [Particulars withheld]. As the child was still in school, I wanted her to finish the term so that I could take her upcountry. The child went to school at [Particulars withheld] and later in August 2009 I took her upcountry. The petitioner did not go back to Block [Particulars withheld]. He gave out the house and he lives with said S N in Block [Particulars withheld] to date. The two have a baby girl called D. I pray that the court consider that there is an issue of the marriage. Right now she is not staying as she should. I have not sought for any maintenance. I thought the Divorce cause should deal with all the issues. I have prepared for custody and maintenance of the child. I request for. Kshs.9,000/= per month for food; Medical service Kshs.3,000/= per month; Clothing Ksh.3,000/- per year; Rent of Ksh3000/- per month for me and V's School fees. That is all.

Cross-examined by M. Nyabena

The petitioner has been paying school fees and Kshs.3,000/= - 4,000/= for upkeep. He

*has never brought any clothes for the child. I have not complained to any authority on the child. He comes and meets the child. I am aware that the child belongs to the two of us. I am aware that I should also contribute to the child's maintenance. I have not joined S N as a co-petitioner. I have not given the dates of the adultery. It is only the year. The petitioner and I have been separated for 3-4 years today. Reconciliation has not succeeded. My petition is titled Answer to the Petition. I wish that the child's mother be dealt with by the High Court here. I do not have any document for the petitioner's earnings. The Kshs.3,000/= is for medical checkup but it is necessary every month. I am not aware that the petitioner has a medical cover at his place of work. I have even called the petitioner that the child is unwell. He would send money but sometime he would not.*

Respondent in Re-examination

*I seek that the child to have a medical cover for Kshs.3,000/=. That is all.*

**Issues**

4.The Matrimonial Causes Act, Cap. 152, Laws of Kenya provides the various grounds that a spouse can rely on to move the Court for a Divorce. S. 8 of the Matrimonial Causes Act provides that “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).....”.*

5.The issues before the court are therefore whether the grounds of cruelty, desertion and adultery as charged by the parties against each other have been proved to the required standard or whether the marriage has broke down irretrievably to justify the dissolution of the marriage between the parties, and in any event who between the petitioner and the respondent should have the custody of the minor child of the marriage and whether the petitioner will pay, and if so, what amount of maintenance for the child of the marriage.

**Findings**

6.There was evidence that the petitioner’s sister was a cause of strained marital relations between him and the respondent, and that the petitioner, following disagreement during which the parties slept on opposite directions on the same bed without conjugal relationship, initially moved out of the matrimonial house into a guest room and eventually to another house where it was alleged by the respondent he lived with another lady named S.N. The respondent subsequently moved out of the matrimonial home citing neglect by, and allegedly with the knowledge and approval of, the petitioner who had taken up residence with the said S.N. and with whom it was alleged by the respondent he had a female child. The said SN was not sued as a respondent in accordance with rule 5 of the Matrimonial Causes Rules and she was not served with the respondent answer to the petition in which the charge of adultery was made to enable her seek to be joined as an intervener in accordance with rule 15 of the said Rules. The court could therefore properly investigate the allegation of adultery.

7.The allegations by the parties in their respective petitions presented a case of cruelty and desertion against the respondent and one of cruelty and adultery against the petitioner. The standard of proof for the matrimonial offences is beyond reasonable doubt, or as otherwise put that the court must feel sure of the commission of the offence as laid down in the decisions *DM v. TM*, VOL. 1 KLR (Gender and Family

Law Reports) at p.3, citing *Mulhouse v. Mulhouse* [1966] P. 39; *Strong v Strong*, [1990] KLR 118; *Meme v. Meme* (1976) KLR 13. In *Maathai v. Maathai* (1980) KLR 154, (1976-80) KLR 1689, Law JA set the standard of proof as follows:

*“[W]hen considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the court must feel satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved.”*

8. In explaining the standard of proof of matrimonial offences as envisaged in Section 10 of the Matrimonial Causes Act the court in ***E KVs. A W K***, Civil Appeal No. NAI. 31 of 2000, held as follows:

*“[W]e 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 cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”*

9. For the petitioner it was not proved that the respondent’s moving out of the matrimonial house was without any reasonable cause, the respondent having shown that the petitioner had moved out of the house initially into a guest house and later to another house before she moved out of the matrimonial house. For the respondent it was not proved to the required standard that the petitioner had committed acts of cruelty by beatings which were allegedly reported to a police station but no official record thereof was produced, or adultery with the named S N as no independent testimony of the relationship or documentary evidence of the paternity of the alleged child between the petitioner and S.N. was adduced. Accordingly, the grounds of cruelty, desertion and adultery urged by the parties in the petition and the respondent’s cross-petition are rejected for want of proof of the matrimonial offences to the required standard.

10. Although there was no evidence of any attempt at reconciliation recorded in the pleadings herein, it is clear that the marriage between the Petitioner and Respondent has broken down irretrievably. The parties have lived separately for 7 years since 2007 when the petitioner admitted having left the house and they are agreed that there is no possibility of reconciliation between them and they have both sought divorce on different grounds. While there is no evidence of collusion between the parties, the court considers that in the span of time during which the parties have been separated, their marriage has irretrievably broken down and no useful purpose will be served in maintaining their marital relationship. As held by Madan, J (as he then was) in ***N v N and another*** [2008] I KLR [G & F] 16, *“if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.”*

11. The issue of contributory acquisition and or development of the property by the respondent was not proved by any agreement for sale, expenditure on improvement or the land register details indicating the ownership of the property. Moreover, the matter is the province of an application of division of property rights under the Married Women Property Act which the respondent has yet to institute, and no orders for declaration of property rights between the parties may be made in these divorce proceedings.

12. As regards the custody of the child of the marriage, Article 53 (2) of the Constitution requires that the court give paramount consideration to the best interests of the child. It is also a cardinal principle that as a general rule, the custody of children of tender age, as VK at only 10 at the time of the Judgement is, should be given to the mother unless it can be shown that the mother is a wholly unsuitable person which has not been done in this case. In *Midwa vs. Midwa* [2002] 2 EA 453 at page 455 the Court of Appeal said:

*“It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father it is*

*incumbent on it to made sure that there really are sufficient reasons to exclude the prima facie rule, See Re S (an infant) [1958] 1 All ER 783 at 786 and 787 and Karanu vs. Karanu [1975] EA 18.....The learned judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her”.*

13. See also *K v. K* (1975) E.A. 18 where the Court of Appeal held that: “*The substantial question in this appeal is whether or not the Judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother.*”

14. In the circumstances of this suit, the arrangement which has served the parties since separation is that the child is in the physical custody of the respondent mother and the petitioner has access to the child and pays for her school fees and upkeep.

15. The respondent sought maintenance for the child in the sums as follows:

- a) Kshs.9,000/= per month for food;
- b) Medical service Kshs.3,000/= per month
- c) Clothing Ksh.3,000/- per year
- d) Rent of Ksh.3,000/- per month;
- e) School fees.

16. The petitioner and the respondent both have parental responsibilities towards the child of the marriage. She pleaded that she was a hawker and no evidence was lead to disprove her status. The petitioner is a Navy Officer in the employ of the Kenya Defence Forces and as a respondent to the prayer for maintenance, the petitioner failed to file as required by rule 44(2) of the Matrimonial Causes Rules an affidavit of means for the court to be able, for his benefit, assess his ability to pay maintenance. The court, however, finds the sums sought by the respondent as reasonable provisions for the minor child of the parties. As the physical custody of the minor is with the respondent and they may from time to time live in towns apart from the petitioner making it difficult to use the petitioner’s health insurance, the sum requested for the payment of medical services is granted. The provision for rent for the accommodation of the child, her food and clothing are reasonable provisions bearing in mind that the respondent is not in any regular or formal employment.

17. Accordingly, I make a decree nisi for the dissolution of the marriage between the parties and grant the custody of the minor child of the marriage to the respondent with reasonable access to the petitioner. The petitioner will pay the school fees for the child and in addition pay for her upkeep in the sum of **Ksh.15,500/- per month** made up of Kshs.9,000/= per month for food; Medical service Kshs.3,000/= per month; Clothing Ksh.500/- per month; and Rent of Ksh.3,000/- per month;

18. As no party succeeded on the grounds of cruelty, desertion and adultery presented before the court, I do not make any order as to the costs between the parties.

**Dated and delivered this 10<sup>th</sup> day of April, 2014.**

**EDWARD MURIITHI**

**JUDGE**

In the presence of: -

Mr. Nyabena for the Petitioner

No appearance for the Respondent

Mr. Ibrahim - Court Assistant