



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 22 OF 2014

K K A.....Petitioner

Versus

M F N.....RESPONDENT

JUDGMENT

The petitioner **K K A** has filed this petition seeking the dissolution of his marriage to the respondent **M F N**. The respondent on her part did file an Answer to the Petition in which she denied the allegations made against her by the petitioner. The parties both appeared in court on 9th June, 2014 and gave oral evidence.

The undisputed facts of this case are as follows. The petitioner and the respondent got married to each other on 23rd September, 2001 at Kibarani Baptist Church in Mombasa. The copy of their marriage certificate serial number {*particulars withheld*} is sufficient proof of the fact of the marriage. After their marriage the couple began to reside as man and wife in Kazandani in Bamburi. The petitioner ran a boda boda taxi business whilst the respondent operated a food stall. Their union was blessed with two children namely

G K 1 – 6 years old

G K 2– 3 years old

In his evidence the petitioner accuses the respondent of having been an unfaithful wife. He names one 'G' as the man with whom she was committing adultery. The petitioner also claims that the respondent tried to stab him one night while they were in bed. This matter was reported to the village elder. The petitioner further alleges that the respondent spread false rumours about him claiming that he was engaging in witchcraft which lowered his standing with fellow church members. On 29th November, 2012 the respondent left the matrimonial home with the children and rented another house nearby.

On her part the respondent denies the allegations of adultery. She tells the court that they have had a troubled marriage. She would often leave and go back to her parents home. The respondent told the court that the petitioner demolished her food kiosk. On another occasion he took the children to his rural home in Busia without her knowledge and/or consent. The respondent had to travel to Busia in order to get her children back. The respondent tells the court that their marriage has broken down and she has no objection to a divorce being granted.

Section 65 of the Marriage Act 2014 provides for the grounds upon which a Christian marriage may be dissolved. These include

- Adultery
- Cruelty
- Desertion
- Exceptional depravity
- Irretrievable breakdown of marriage

The petitioner herein accuses the respondent of committing adultery with a man whom he simply refers to as 'G'. This 'G' has not been named as a co-respondent in this petition. No evidence has been tendered of this alleged adultery. It is not enough to merely allege adultery. A court must be persuaded upon a preponderance of evidence that adultery has actually occurred. This has not happened here. I therefore dismiss the allegation of adultery against the petitioner.

The petitioner has also claimed that the respondent went about maligning his name to fellow church members by claiming that he practiced witchcraft. Once again absolutely no proof of this allegation has been proffered. There is no witness called to confirm that he/she heard the respondent utter such false claims. Here again this claim must fail.

Lastly, the petitioner alleges that the respondent attempted to stab him whilst they were in bed. He appears to have made no report to police despite attempted assault being a criminal offence. There is however evidence by way of a letter from a village elder who did refer to such an incident when adjudicating on the couple. The said village elder decided that in the circumstances the couple should live apart.

On the respondent's side she alleges that the petitioner has treated her with cruelty. He demolished her food kiosk from which she earned a meager living. Proof that such an incident did occur is provided by the proceedings of **CMCC 875 of 2013** at Shanzu Law Courts in which the petitioner was charged with malicious damage to property. He pleaded guilty to the offence and was fined Kshs. 30,000/= in default to serve six (6) months in prison. The act of demolishing the premises which was the respondent's only source of livelihood did amount to cruelty. No doubt the petitioner wanted to render the respondent totally destitute.

The respondent also claimed that the petitioner took away her children without her knowledge and/or consent and took them to his rural home in Busia. Here again there is proof that such an incident did occur. The respondent produced proceedings from **Children Case No. 228 of 2013** at Tononoka Children Court by which the court ordered that the petitioner return the children to Mombasa to enable them continue with their education. Why would the petitioner pull his children out of school and transport them across the country to Busia without telling his wife. This was clearly an action intended to hit at and to hurt the respondent by depriving her of her precious children. This was an act of cruelty. I am satisfied that the respondent has proved the grounds of cruelty as against the petitioner. The respondent has indicated that she too seeks a dissolution of the marriage. The couple separated in November, 2012 after a troubled marriage. The fact that the respondent had to approach the Children Court to obtain orders for maintenance and education of the children is further proof of the petitioner's irresponsibility as a husband/father in failing to provide for his family. From the narrative of both parties this has been a troubled marriage. Both desire to be set free from the marital bond. I therefore direct that this marriage be and is hereby dissolved. Decree nisi to issue to be made absolute within three (3) months of today's date.

Dated and delivered in Mombasa this 23rd day of July, 2014.

M. ODERO

JUDGE

In the presence of:

Both Petitioner and Respondent in person

Court Clerk Mutisya