



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 46 OF 2013

W E L.....PETITIONER

VERSUS

J M H.....RESPONDENT

JUDGMENT

The petitioner **W E L** has filed this petition dated 11th June, 2013 seeking the dissolution of his marriage to the respondent **J M H**. On her part the respondent did enter appearance in the matter. She filed an Answer to Petition and Cross-Petition dated 15th August, 2013 in which she seeks the dissolution of the marriage and also seeks to be awarded maintenance at the rate of Kshs. 60,000/= per month. Both parties did appear in court and each testified on their own behalf. **MS. CHALLA** Advocate acted for the petitioner whilst **MRS. KIPSANG** acted for the respondent.

The undisputed facts of this case are as follows. The petitioner a German national met the respondent a Kenyan widow who was the mother of two young children sometime in the year 2010. The two met at the Sun 'N' Sand Resort where the respondent ran a business. The two became friends and would live together whenever the petitioner came in to the country from Germany. On 20th October, 2011 they solemnized their union at the Registrar's office in Mombasa. The marriage certificate serial number [Particulars Withheld] provides proof of the fact of the marriage. After the marriage the two cohabited as man and wife in a flat in Mtwapa. However this wedded bliss did not last for too long. Hardly three months later in January, 2012 the petitioner left the matrimonial home and moved to a different residence. The couple have not lived together since that time. The petitioner then filed this petition seeking a divorce.

The marriage Act, 2014 at section 66(2) provides for the grounds upon which a civil marriage may be dissolved. These include

- “(a) adultery by the other spouse**
- (b) cruelty by the other spouse**
- (c) exceptional depravity by the other spouse**

(d) desertion by the other spouse for at least three years

(e) the irretrievable breakdown of the marriage”

In his petition and in his evidence the petitioner alleges that the respondent had affairs with other men, would come home late and drunk and was cruel to him. On the allegation of adultery the petitioner has failed to name even one man with whom the respondent was committing adultery. It is not enough to simply throw about allegations of adultery. The petitioner must adduce evidence to prove beyond a preponderance of doubt that indeed the respondent was committing adultery. He should give names, times and occasions. The mere fact that he suspected his wife of adultery cannot amount to proof of the fact.

The petitioner claims that the respondent was cruel and failed in her duties as a wife because she would often come home late at 10.00 p.m. and she would come home drunk. However, under cross-examination by Ms. Kipsang the petitioner states

“The respondent would take one beer. The respondent would not drink often. She was not a drinker.”

Thus he concedes that the respondent was at best a social or light drinker. The petitioner controverts his own allegation that the respondent often came home drunk. On the issue of coming home late the respondent stated that when he first met the respondent she was running a salon and a massage parlour at the Sun ‘N’ Sand Resort. This is the business she was doing. It is to be expected that such businesses especially in a tourist hotel would not have fixed hours. One would have to be available to render services as and when required. If clients turn up late then one would have to stay late. It could well have been that the respondent came home late at times but this could well have been due to the nature of the work which she was engaged in.

The petitioner talks of one specific incident during the Christmas holiday of 2011. He states that whereas he expected that he and the respondent would spend Christmas together, the respondent announced that she would be going to her rural home in Kikambala to spend the holiday with her mother and her children. As expected the petitioner was offended by this. The couple got into an argument which led to a struggle in which the respondent was injured. She called police who came to the house and almost arrested the petitioner. Although it may have been odd for his wife to wish to spend Christmas away from the petitioner, I feel that this was a matter that cannot be said to amount to evidence of cruelty. The couple could have discussed the matter and come up with an amicable solution. It was unfortunate that they got into a fight but the scuffle appears to have been precipitated by the petitioner himself who admits that he pushed the respondent onto a chair thus injuring her. I find that the allegation of cruelty remains unproven. All in all I find that the petitioner has failed to prove any of the grounds which he raised in support of his petition for divorce. I therefore dismiss his petition.

I will move now to consider the respondent’s cross-petition. In her cross-petition dated 15th August, 2014 the respondent has sought a divorce on the grounds that the petitioner committed adultery. In her evidence the respondent told the court that she once caught the petitioner in the very act of committing adultery on their marital bed with their househelp called B who was also her cousin. The petitioner did in his evidence concede that this was true. He stated clearly under cross-examination that

“I had a relationship with only one woman who is a cousin to J [the respondent herein]. I do not recall her name. It was only once. When J found out she sent her cousin away.....”

The respondent told court that after the incident she decided to forgive the petitioner and the two continued to live together. Therefore by his own admission the petitioner did commit the act of adultery during the subsistence of the marriage – even if as he insists it happened only once. The ground of adultery has therefore been proved.

The respondent also claimed that the petitioner has been cruel and has assaulted her. Here again by his own admission the petitioner did engage in a physical altercation with the respondent. The matter was reported to police. Finally the respondent accuses the petitioner of desertion. Once again the petitioner concedes that due to a disagreement which he had with the respondent he left their matrimonial home on 4th February, 2012 and went to live elsewhere. From the evidence available the respondent has proved all the grounds of cruelty, adultery and desertion. All these are grounds upon which a divorce may be granted. The parties had a short-lived marital union of about three (3) months. They thereafter separated and the petition for divorce was even filed before three years had elapsed. It is clear that this was a union which was troubled from the get go. It is evident from the fact that both parties are seeking a divorce that the marriage has irretrievably broken down. I do allow the respondent's cross-petition. Decree nisi to issue to be made absolute within three (3) months of today's date.

The respondent has in addition prayed to be awarded maintenance of Kshs. 60,000/= per month. She states that the petitioner took in her two children from a previous union and that he assumed parental responsibility over them by providing for their school fees and all other needs. The question of whether or not the petitioner did acquire parental responsibility for the two children is one which ought to have been placed before the Children Court as the proper forum to make such a determination at the first instance. I will therefore make no pronouncement on this aspect.

The respondent claims that the petitioner provided fully for their expenses like rent, food, utilities, etc. whilst they were married. She therefore seeks an award maintenance to enable her continue with her life. The respondent tenders before court a bundle of receipts as proof that the petitioner was paying all these expenses. However none of the receipts is issued in the petitioner's name. They all bear the name of the landlord or the respondent herself. The petitioner stated that he did give out monies to the respondent as and when she asked for it but he has no details on how this money was spent. No receipts were ever given back to him. He stated that the respondent made all payments and kept all the receipts. The couple separated only three (3) months after their marriage in February, 2012. From that time to date the respondent has been living on her own and providing for herself and her children without any financial help from the petitioner. The petitioner told the court that when he first met the respondent and moved to Kenya from Germany he sold his home in Germany and realized about 5000 Euros. He states that he spent all this money on the respondent, her children and in improving her mother's rural home. When the couple met the respondent was running a salon and massage parlour at Sun 'N' Sand hotel. Although the respondent claims that the petitioner persuaded her to close down her business, annexures to the petitioner's reply dated 20th August, 2013 show photographs of a '*Peacock Beauty Salon Massage Parlour and Kinyozi*' which appears open for business and operational. The respondent has not effectively controverted this evidence. Thus clearly the respondent must be deriving some income from this business. This was a business which ordinarily would have provided sufficient income to enable the respondent cater for herself and her children. Article 45(3) of the Constitution guarantees parties to a marriage (both man and wife) "**equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.**" If as the respondent alleges the business no longer exists or was sold of then she cannot blame the petitioner for this. The petitioner has told the court that he is a pensioner. It was evident to court from observation that the petitioner was elderly. His only source of income is his monthly pension. A letter from the German Pension Authority dated 1st July, 2011 shows that the monthly pension due to the petitioner is about 720 Euros. By current exchange rates this amounts to about Kshs. 85,000/=. This is barely enough for the petitioner to rent a home, buy his food and given his old age cater for any medical needs. There is certainly not enough to warrant and amount of Kshs. 60,000/= to be awarded to the respondent. The petitioner would remain with only 20,000/= for himself. There is no evidence that the petitioner receives income from any other source. The purpose of a maintenance order is not to punish or unfairly condemn a party to penury.

On the other hand the respondent told the court that she engages in various businesses which provide her with a good income. She sells charcoal, has a vegetable kiosk and sells firewood. From all her businesses the respondent estimates that she earns roughly Kshs. 50,000/= a month. This in my view is sufficient to enable her live comfortably and to meet all her needs. No doubt this is why she had sought no financial help from the petitioner for the past two (2) years. It is clear from the material before me that the respondent is quite capable of [and indeed has been] supporting herself and her children. A spouse

who is capable of supporting himself ought not to be allowed to shirk this responsibility and turn the other spouse into a money machine or an ATM. Maintenance will only be ordered where it is warranted e.g. where a spouse is incapable of supporting herself and/or is deserved e.g. where one spouse cannot meet all needs. Thus no spouse has an inherent right to be maintained at the detriment of the other. I find no basis exists upon which an award of maintenance ought to be made to the respondent by the petitioner and I therefore dismiss this prayer for maintenance. This being a family matter I direct that each party bear its own costs.

Dated and delivered in Mombasa this 1st day of August, 2014.

M. ODERO

JUDGE

In the presence of:

Mrs. Kipsang for Respondent

Mr. Kamame for Petitioner

Court Clerk Mutisya