



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
DIVORCE CAUSE NO. 25 OF 2011

R. A. F. PETITIONER

VERSUS

S. M. L. RESPONDENT

JUDGMENT

Introduction

1. The Petitioner who married the respondent on 18th December 2008 under the Marriage Act, Cap 150 of the Laws of Kenya filed a petition dated 8th June 2011 for the dissolution of his marriage to the Respondent, upon leave issued by the court on 18th May 2011 to file a Petition before expiry of three years since celebration of the marriage.
2. The Petitioner is a British Citizen on a Class K Residence Visa to Kenya which does not permit him to work for gain in Kenya. The Respondent is an Italian Citizen running a curio shop in Nyali, Mombasa. There are no issues of the marriage, but the Respondent had at the time of the marriage a child aged 9 years from her earlier marriage and who now lives with the Respondent. Both parties are domiciled in Kenya and reside in Mombasa.

The Petitions

3. The Petitioner seeks divorce on the grounds of cruelty and constructive desertion. The petition claims that the parties' cohabitation spanned approximately 2 months during which time the Respondent was the bread winner providing for the Petitioner who had no job or car and was surviving from his meager savings. It was alleged that the Respondent locked the Petitioner out of the matrimonial home, leveled baseless accusations of adultery on him, threatened to kill and attempted to injure the Petitioner, lodged criminal complaints against the Petitioner at Bamburi Police Station accusing him of stealing the Respondent's log book to motor vehicle KAS 419 N, insulting the Petitioner in public, attempting to force the Petitioner to assume parental responsibility for the Respondent's child vide Tononoka Children's Cause No. 354 of 2009, and withdrawing financial, moral and psychological support from the Petitioner thereby failing to provide a loving and caring atmosphere in the matrimonial home through constant nagging and quarreling the petitioner. The Respondent is alleged to have obtained court orders for interim maintenance in Mombasa High Court Judicial Separation Cause No. 61 of 2009 and then proceeded to Tononoka Children's Case No. 354 of 2009 to obtain maintenance orders as well. The Respondent was accused of constructively deserting the Petitioner by obtaining a restraining order against him, thereby restricting his access to the matrimonial home.
4. The Petition was defended and the Respondent filed an Answer to the Petition and Cross-Petition dated 25th October 2011. The Respondent claimed that the couple had begun living together in the

matrimonial home in October 2008 prior to their marriage in December 2008 up until August 2009 while sharing responsibilities. It was further claimed that the Petitioner has investments in Kenya and abroad and could obtain a work permit if he so wished. The particulars of cruelty were denied. The Cross-Petition blamed the Petitioner for the break-down of the marriage due to his cruelty and brutality. The Respondent maintained that the Petitioner had assumed parental responsibility for the Respondent's child upon their marriage and denied the notion that she was imposing it on him. The Respondent further stated that she never gave any financial support to the Petitioner but did her best to offer moral and psychological support by helping him seek professional assistance over his alcohol addiction. Particulars of the Petitioner's cruelty were set out in the Cross Petition and included denying the Respondent conjugal rights, drinking excessively, insulting the Respondent in public, destroying household items, embarrassing the Respondent in public and physically/emotionally assaulting the Respondent. The Respondent admits that the marriage had irretrievably broken down. The Cross-Petition prays for custody of the minor, dismissal of the Petition with costs and nullification of the marriage.

Issues

5. The issue for determination is whether the Petitioner or the Respondent or both have with respect to the petition and the cross-Petition adduced sufficient evidence pursuant to section 10 (2) of the Matrimonial Causes Act to enable this court grant the divorce.

The Evidence

6. The parties gave oral evidence before the court in support of their respective cases in the petition and the cross-petition. The petitioner testified that –

“We discussed getting married and we agreed on 18.12.2008. The marriage was celebrated at a Restaurant in Mtwapa. When I moved in November 2008, the Respondent lived with a 6 year old boy named J.S. I was informed that the child's father was M.A.S, a Kenya born man. The child was half Luo, half Italian. After the marriage, we went to Malawi for 8 days. Upon return we started fighting a lot and I started drinking a lot. I am a drinker and when I get stressed I tend to drink. I was stressed because I felt that I did not get to express an opinion. I always heard the Respondent say “this is my house”. The Respondent had three sources of income, a house at Watamu, a boutique at Nakumatt Mall at Nyali and an endowment for her father in Italy. I do not know the amount. The Respondent informed me that her father was a 78 year old retired banker with his own advisory company. We did not have any children. I also do not have any children with any other person. I was stressed. The Respondent used to take the boy to bed with her every night and I ended up living in the guest room. I had only about 5 or 6 times of conjugal times and almost never at night. The Respondent would sleep with her son in the bed room and I could sleep in the guest room alone. The Respondent referred to the house as my house because she paid all the rent, electricity and water and security. I never got the key to the house, unless I was using the Respondent's vehicle and have the key attached. She was extremely self-willed and did not take any comment that did not agree with her on views. She was contributing. I felt I did not get any conjugal rights. Once at dinner with friends, I said that “we did not need contraceptives; he is six years old.” We used to fight a lot. The Respondent often resulted to physical violence. Mostly it was verbal shouting and cursing. On a few occasions, it was physical. Once I was in the guest room and the Respondent came in and started fighting and kicked out one of my teeth and stormed out. I later left the tooth on her pillow to show her what she had done. This was about January or February 2009. Another time, she decided that I was not listening to her or she did not want to listen to me and she bit me on my right hand and I still have a scar one year later. This was during the same period January/February 2009. A third example I heard her screaming from her room and then I closed the guest room door and the next thing I saw was a point of a Maasai spear as the Respondent had probably thrust a spear through the door. This was again during the same period. All these made me question the relevance of the marriage. Towards the middle of February 2009, I felt I was not welcome at all and I had to leave the house and most times being an alcoholic I would go to drink and stay in a lodging. I went out to a lodging in Mtwapa about the

end of February 2009. Towards the end of 2009, she had left the house in June, 2009 and went back to Italy. I went back to the house and picked my things. In March 2009, I moved to Nairobi to a rehabilitation centre from alcoholics. I booked myself in after a discussion with our mutual friend who had found the rehabilitation centre after Google Search. I stayed there for eight weeks. While at the Rehabilitation centre, I had pains on my left arm inside and the Rehabilitation doctor recommended physiotherapist who send me for an MRI scan. On the basis for Report for the MRI she recommended that I undergo a surgery at South Africa. I left the Rehabilitation on 1st June 2009 and came to Mombasa when I went to Respondent but it was clear that even though at the time I was not drinking, the relationship was not going to be successful.”

7. In defence of the petition and support of her own cross-petition, the Respondent testified that -

“After marriage, we lived at my house in Bamburi. I also lived with my son, now aged 10 years. At the beginning things were well. I knew he was drinking but I did not know that he had a big problem. He was having drinks but it appeared under control. We would meet only occasionally. He came to live with me. I did not note the problem. I thought for a while that it was just social drinks. After sometime, I started noting heavy drinking. When he started living as my son was small and he was living with me. After sometime, I moved my son from the bedroom. We shared the bedroom for a while before the Petitioner moved himself to a guest room. He stayed in the guest room alone. He used excuses about the fan and not wishing to disturb me. I understood that he was only staying alone to drink. I found him drunk and many bottles of spirits such as Gin and Vodka – Kenya Cane. The other reason for moving out of bed room was to have freedom to drink. He was looking for fight so that he could be left alone free to drinking. After we came from honey moon I discovered that the drinking was deeper. I tried to talk to him but he denied the problem. He left after a fight. I insisted that he went for treatment. He was in strong denial. He went to the Rehabilitation centre about March 2009 towards the end. I see the collateral Form. It was part of the process of the rehabilitation. I also see the email of 29.4.2012 at 11.45 am sent out to me. I also see the one of 30.4.2009. I confirm I received the emails. I also see the emails PEx. No. 1. I recall the correspondence.

When I met petitioner, I did not know what he was doing. He said he wanted to become a writer. He said he had savings and investments. While he was sober, he was making contributions for rent, food, repairs and other expenses. He also paid for the wedding and honeymoon. The Petitioner presented to me as a person who could live without working because he had savings and investment. He appeared to have such wealth: he kept three dogs, living at Watamu in a rented house, paid for the wedding and honeymoon; he was living a good life. Our relationship started going bad because of his drinking. I did not want to give up without trying... I left for Italy and the Petitioner was supposed to join me in Italy. I stayed for 1 ½ months. He sent me a driver to the airport but he had moved out of the home. I did not know where he went to. He packed all his belongings and left. I did not see him again until the matter came to court. I found that I was missing many things in the kitchen, the log book to the car among other things. I asked him about the items and he wrote back to say that I ask the staff at our house. I reported the loss of the log book to the police. I never found the log book and the key. The key was at home because the car was with Robert. The log book was in the house when I left. I sought separation because divorce was impossible as I was advised by a lawyer. It was Judicial Separation Cause No. 61 of 2009 at Mombasa. I also filed a children case which ended in my favour. The court ordered maintenance for the child. The Petitioner has never paid any maintenance as ordered. The separation case never proceeded. I would have asked for divorce if it had been possible but I was advised that it was not possible. I would have sought divorce because the Petitioner in this case was a liar, and a drunkard. I blame him for the breakdown of the marriage. He was abusive. He called me bitch in front of people, my son, [and] friends. He used the insult against me not against everybody. He insulted my father and my family to make feel bad. He wanted to hit me where it hurt using words.”

The law

8. The fact that the respondent had sought judicial separation in Mombasa High Court Judicial Separation No. 61 of 2009 is no bar to her cross-petition for divorce. Under Section 7 of the Matrimonial Causes Act:

“7: (1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a decree of judicial separation under this Act, under any Act repealed by this Act or an order under the Subordinate Courts (Separation and Maintenance) Act upon the or substantially the same facts as those proved in support of the petition for divorce.

2. On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the Petitioner.

3. For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Act having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.”

There was no evidence of any order of separation made under the Judicial Separation Cause save the order for maintenance of the respondent.

9. The respondent sought to rely on computer print-outs of mobile phone short text messages (SMSes) from the petitioner and emails from an administrator of a Rehabilitation Centre where the petitioner had sought help with his alcoholism. However, on account of failure to comply with section 106 B of the Evidence Act with regard to production of electronic record, the probative value of SMSes and the emails did not crystallize. However, with regard to the SMSes, the petitioner admitted on cross-examination that majority of them may have been written by him. These SMSes show an acrimonious relationship between the two with the petitioner sometimes communicating in cruel language.
10. The test for cruelty in matrimonial causes is both objective and subjective. A petitioner is required to prove conduct on the part of the respondent that may be construed to be cruel in an objective sense and to a standard of 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; and *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”.

11. Indeed, section 10 (2) of the Matrimonial Causes Act is in clear terms as follows:

(2) If the court is satisfied on the evidence that -

(a) the case for the petitioner has been proved; and

(b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters it shall dismiss the

petition:

Provided that the court shall not be bound to pronounce a decree of divorce, and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty -

(i) of unreasonable delay in presenting or prosecuting the petition; or

(ii) of cruelty towards the other party to the marriage; or

(iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

12. See also *Elexander Kamweru v. Anne Wanjiru Kamweru*, Civil Appeal No. NAI. 31 of 2000, where the Court of Appeal 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.”

13. There are also circumstances as held by Madan, J (as he then was) in *N v. N* [2008] 1 KLR [G & F] 16, conduct between the parties may to the parties be perceived as so cruel that they cannot be expected to live up with it. In Madan. J’s formulation:

“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.”

Determination

14. On the petitioner’s petition dated 8th June 2011, the respondent’s conduct as established from evidence before the court in entertaining her child from a previous relationship into their matrimonial bed so that she deprived the petitioner of conjugal rights; her frequent and close liaison with a male friend at the expense of marital consortium with the petitioner; and the allegations of theft made against the petitioner in relation to her personal property and log book, which were not established by criminal prosecution are factors from which it may be reasonably determined that the respondent was cruel to the petitioner. The judicial proceedings for separation and maintenance and for child support cannot be held to be cruelty as it within the respondent’s right to seek judicial remedy where appropriate. However, to recover in the same day the same relief for the same items of maintenance for herself and for the child in both suits is an act of harassment that must, in the circumstances of the case, be held to be cruelty. The respondent ought to have obtained maintenance only once and not twice over for the same items under the two different proceedings.

15. The contention of constructive desertion against the respondent was not well founded because desertion as a ground of divorce under section 8 (1) (b) of the Matrimonial Causes Act requires that the desertion be for a period of at least three years preceding the presentation of the petition

for divorce. This petition having been presented even before the marriage had lasted three years does not support a ground of desertion that could be construed against the respondent as the cause thereof.

16. As regards the Cross-petition by the Respondent, it was proved that the petitioner's alcoholism which the respondent was not aware of at the time of the marriage was cause of extreme cruelty on the part of the petitioner arising from his abusive conduct while drunk and his inability to give marital attention to the respondent. The petitioner admitted to using foul language. The petitioner admitted his alcoholic status on cross-examination stating that he could be drunk 'for some days and sometimes all week' culminating in seeking help from a rehabilitation centre. The petitioner also admitted that his alcoholism affected their relationship adversely; that he had destroyed the respondent's property; and that he had regularly used bad language –

"I damaged her phone because she threw my phone against the wall. It could be regarded as retaliation. I am not able to confirm that these are the messages that I sent. I swear naturally - I use words 'bitch'. I may have used bad language. I cannot confirm what I used to call her. In most cases, I used bad language. I agree that the marriage has irretrievably broken down."

17. It is clear from analysis of the evidence presented before the court that both parties have by their individual conduct contributed to the deterioration their relationship in the marriage. Allegations of physical violence by both parties were not proved by medical evidence and or police reports or other independent evidence and, in the face of mutual denials, the court is not able find such allegations as established.

18. While it is not possible to apportion the respective percentages of blameworthiness or to ascertain with exactitude chronology of cruelty between the parties, it was clear that the test for cruelty under Madan's formulation in *N v. N* has been met by both sides of the matrimonial disagreement. Each party would be entitled to feel that he or she cannot be expected to put up with the treatment by the other. Each has been cruel to the other. The cruelty is also clear to the objective observer and the court feels sure that the parties in this suit were cruel to each other causing injury in terms both of their mental and physical health, and to their respective property. I, therefore, find that cruelty has been proved against the Respondent and the Petitioner, respectively, in the petition and the cross-petition.

19. Both parties contended that the marriage had irretrievably broken down and sought its dissolution. [Although the cross-petition prayed that the marriage be nullified, no grounds for *nullification* within the meaning of section 14 of the Matrimonial Causes Act were urged and the respondent was clear in her testimony before the court that she sought *dissolution* of the marriage]. It was admitted by both parties that they had not resumed cohabitation since 2009 when the petitioner left the matrimonial home. Efforts at reconciliation through the Rehabilitation Centre official did not bear fruit. The subsequent court proceedings for judicial separation and maintenance and custody and maintenance of the child did further alienate the parties.

20. In terms of section 10 (2) of the Matrimonial Causes Act, I am satisfied that the parties substantially proved their cases against each other for the grant of their respective petitions for dissolution of the marriage. There was no evidence that the cruelty the subject of the petitions was condoned by the offended party and there could not have been any collusion in presenting and prosecuting the petitions. It appeared to me that the union between the parties was a sham marriage contracted after the two met while the petitioner was looking for a rental house which the respondent owned and their relationship developing following long drinking bouts; the marriage lasted only two not-so-happy months with only 6 times of conjugal intercourse, with the petitioner husband lacking means to provide for his family and the respondent wife expecting him so to do; and each party unwittingly harboured great expectations of the other resulting in mutual resentment when the expectations were disappointed, the petitioner considering the respondent as controlling and the respondent seeing the petitioner as a liar.

21. The Marriage Act of 2014, (commencing 20th May 2014) which repealed the Matrimonial Causes Act under which this Cause was lodged, provides under its section 98 (2) that pending proceedings be, so far as practicable, continued in accordance with the provisions of the new Act. The new Act makes irretrievability of breakdown of marriage as a ground for divorce. A marriage has irretrievably broken down in the circumstances set out in subsection 6 of s. 66 of the Act as

follows:

“(6) A marriage has irretrievably broken down if—

(a) a spouse commits adultery;

(b) a spouse is cruel to the other spouse or to any child of the marriage;

(c) a spouse wilfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;

(d) the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;

(e) a spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition;

(f) a spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;

(g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or

(h) any other ground as the court may deem appropriate.”

22. The parties have been separated for over 5 years and their marriage has therefore irretrievably broken down within the meaning of section 66 (6) (d) of the Marriage Act 2014. I, therefore, find that the marriage is broken down irretrievably.
23. The parties did not seek an order of maintenance, and no affidavit of means or property was filed. The Petitioner claimed to be unemployed and living on his savings. He has claimed that the Respondent who is a business woman, had during the marriage, been the sole bread winner. The Respondent alleged that the Petitioner has investments within the country and abroad and denied being the sole provider. No evidence was produced by either party to support their own or disprove the other's claims. Therefore, any order for maintenance subsisting in the Judicial Separation Cause may be varied or discharged upon application that behalf in the said Cause.
24. The Respondent cross-petitioned for the custody of the child, the court was informed that the matter the subject of the Tononoka Children's Court Cause No. 354 of 2009. The proceedings and judgment, if any, of the Court was not availed. The petitioner did not lay any claim to custody of the child of the Respondent from a previous relationship. No evidence was adduced on any agreement for assumption of parental responsibility over the child as contemplated under section 26 of the Children Act. The custody of the child should therefore lie with the respondent mother.
25. The parties are jointly responsible for the breakdown of the marriage and in consideration of the matrimonial nature of the proceedings, I do not make any order as to costs.
26. Accordingly, *Decree Nisi* for dissolution of the marriage between the petitioner and the respondent of 18th December 2008 is granted, with the custody of the child being vested in the respondent and with no order as to costs of the proceedings.

Dated signed and delivered on the 28th day of November 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Sichangi for Mr. Mboya for Petitioner

No appearance for the Respondent

Ms. Linda - Court Assistant