



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 33 OF 2010

I N K.....PETITIONER

VERSUS

N K N.....RESPONDENT

JUDGMENT

By way of an Amended Petition dated 16th August, 2010 the petitioner I N K sought the following orders:

- “(a) That the petitioner’s marriage to the respondent be dissolved.**
- (b) That the respondent pays the costs of and incidental to this petition.**
- (c) Any other relief the Honourable Court may deem fit to grant.”**

The respondent NKN filed an Answer to the Petition and a Cross-Petition dated 9th August, 2010, in which he also sought for the dissolution of the marriage. The petition was disposed of by way of *vive voce* evidence. Both parties testified in person before the court. The petitioner was represented by **MR. ONSWERE** Advocate whilst **MS. NGUGI** appeared for the respondent.

The undisputed facts of the case are that the couple got married to each other under Kikuyu customary law in October, 1993. They later formalized their union at the [particulars withheld] Church on 10th December, 2005. Their union resulted in four children

- K M born in 1995
- P W born in 1998
- GM born in 2002
- M M born in 2008

The couple cohabited as man and wife at various different locations in Mombasa including Mtongwe, Likoni, Mikindani, Port Reitz and Miritini. They finally moved to their residence in Nyali which is where they had their matrimonial home at the time this petition was filed. Both parties seem to agree that the marriage was quite tumultuous. They had a series of quarrels and disagreements until April, 2010 when they parted ways. They have continued to live separately to date.

The plaintiff made allegations of cruelty, adultery and desertion against the respondent. She told the

court that the respondent was in the habit of having sexual relations with the housemaids whom she employed to work in their home. She names the maids involved as Wangui, Njoki and Ng'endo. The petitioner also made several allegations of instances of cruelty by the respondent. She told the court that the respondent often physically assaulted her and that she made the relevant reports to Nyali police station. However due to intervention from family members the petitioner did not pursue assault charges against the respondent. Finally the petitioner states that the respondent walked out of the matrimonial home on 10th April, 2010 leaving her with the four children. From that time she has had to cater for the needs of the children single handedly. It is for the above reasons that the petitioner seeks a divorce.

On his part the respondent in his evidence denied all the allegations made against him by the petitioner. He claims that it was the respondent who was adulterous with a man he names as '*Pastor Gaitho*'. The respondent also claims that the petitioner often left the matrimonial home after their disagreements leaving him with young children to care for. He accuses the petitioner and her mother of plotting to have him eliminated. The respondent also claims that the petitioner was dishonest by using the family finances to make purchases of land and houses in her own name. He too seeks the dissolution of the marriage. He states that he left the matrimonial home in April, 2010 in order to save his life. The law of Kenya by way of the Marriage Act 2014 provides the various grounds upon which a marriage may be dissolved. These include

– Adultery

- Cruelty
- Desertion

In the case of adultery, which an often secretive activity it is one which is quite difficult to prove. People do not often engage openly in adultery. In order to prove the ground of adultery there must be more than a mere suspicion. There must exist a preponderance of evidence would point to the commission of adultery. The petitioner has alleged that her husband (the respondent) was in the habit of sleeping with the ladies employed as housemaids in their homes. She claims that the respondent would engage in sexual relations with these women in their marital bed and even when she was in the home. The petitioner did name the ladies involved. In each instance the petitioner gives clear and precise dates and descriptions of the instances of which she complains. With respect to '*Wangui*' she states:

“In 1997 we had a house help called Wangui. The respondent brought the girl. I once caught the respondent sleeping with the housemaid in her bedroom. I pretended to be asleep and I caught him when he sneaked into the maid’s room.”

With respect to the lady known as '*Njoki*' the petitioner states:

“My mother brought me a house help called Njoki. The respondent would sleep with her. The respondent locked me in the bedroom. I caught them together. I screamed. The respondent and the maid beat me on the back. I was badly injured and I was taken to Makupa hospital for treatment. I reported to Changamwe police station and I was admitted into hospital. This is the P3 form dated 2nd April, 2007 issued from Changamwe police station.”

Finally the petitioner claims that the respondent engaged in sexual relations with their house help known as '*Ng'endo*'. She states that the said Ng'endo confessed this to her. None of the ladies in question has been called to testify and none was named as a co-respondent in this case. However I find that these were not just fanciful imagining on the part of the petitioner. She had testified with clarity about what happened on each occasion. The petitioner claimed to have been assaulted by the respondent together with the house help known as '*Njoki*'. She was injured as a result and sought treatment. She later reported the matter at Changamwe police station. She produces as an exhibit the P3 form issued to her **Pexb2**. The P3 indicates that the petitioner claimed to have been assaulted. Upon examination she was found to have been injured and was found to have suffered harm. This type of evidence cannot have been manufactured. The police and the doctor who were independent witnesses confirmed her claim. I am

persuaded that these incidences did actually occur. To engage in sexual relations with the ladies employed to work in the home amounted to adultery and cruelty against the petitioner. The petitioner alleged that the respondent currently lives with a woman called 'AK' with whom he has sired a three year old daughter called 'SW'. In his defence the respondent conceded that he is co-habiting with this A and he confirms that he is the father of her three year old daughter. This is clear proof of his adultery during the subsistence of the marriage. I therefore find that the petitioner has proved her allegation of adultery.

The petitioner has alleged that the respondent assaulted her. To physically assault one's spouse does amount to cruelty. She states that in April, 2010 the respondent went to her place of work at Mwembe Tayari. He began to abuse her in the presence of her customers and assaulted her. The petitioner sought treatment at Jocham hospital and reported the assault at central police station. Again she produces the P3 **Pexb3** indicating that she reported having been assaulted by a person known to her. On this occasion upon examination the petitioner was found to have sustained a fractured wrist. The P3 form confirms what the petitioner has told the court. The petitioner told the court that due to the respondent's visits and harassment at her place of business she had to file a suit to seek a restraining order against him. Proof of this is provided by the annexure of the pleadings in **Mombasa SRMCC No. 885 of 2010** where the petitioner trading as N S sued the respondent alleging interference at her place of business. Clearly matters must have been extreme for the petitioner to take this unusual step of suing her own husband. She would not have taken such a drastic step without reason. I am satisfied from the evidence on record that the allegation of cruelty has also been proved by the petitioner.

Finally the petitioner has accused the respondent of desertion. She states that on 10th April, 2010 the couple had a disagreement. The respondent came home from a journey and found the petitioner and the children away. She was at her brother's house in Mtwapa. The respondent called his wife and claimed that he had been attacked by thugs at the house. He left the matrimonial home and has never returned. The petitioner states that the respondent has left her the sole burden of providing for their children. She has annexed receipts to show that she has been paying the school fees for the children.

The respondent on his part while conceding that he moved out of the matrimonial home in April, 2010 states that he did so in order to secure his life. He insists that on the day he arrived home from a trip upcountry he found the door unlocked. It is curious that the respondent did not bother to investigate why the door was open or to call the police. He instead went to join his friends for a drink. He claims that when he returned home later at 5.00 p.m. he saw and heard suspicious movements in the house and noticed that the electric fence had been cut. Why would a man who is the head of the family suspecting that there were intruders in his house chose to move out himself but leave his wife and children in that same house? Did he not care for their safety? Even if as he claims the respondent believed that these 'intruders' may have been sent by his wife to get him, why did he leave his children in the house? Why did he not leave with his children? The respondent made no report to police or to any other authority about these so called 'intruders' or about the fears for his life. I am not persuaded that there was any real threat to the respondent's life. I find that he merely left the home in a huff because he did not find his family at home when he arrived from his trip. The fact that to date the respondent has never returned to his home is clear proof of his intention to desert his wife and family. The respondent by his own admission has now moved on and is cohabiting with another woman with whom he has a 3 year old daughter. He does not dispute the allegations made by the petitioner that she alone has been providing for the needs of the children. All in all I am satisfied that the petitioner has proved the grounds of adultery and cruelty as against the respondent.

I will now consider the cross-petition filed by the respondent. He too relies on the grounds of adultery and cruelty on the part of the petitioner. The respondent claims that the petitioner has been engaged in extra marital relations with one 'Peter Gaitho' aka 'Pastor'. He claims that he saw this man's phone number saved in his wife's phone. This alone does not amount to proof of infidelity. The respondent claims that the said Gaitho lives with the petitioner in the matrimonial home in Nyali. The respondent did not adduce any proof of this allegation. I find that these allegations of adultery remain mere allegations with no tangible evidence to prove the same.

The respondent has claimed cruelty against the petitioner stating that she was involved in a plot to

eliminate him. I have dealt with this allegation earlier. The respondent claimed that he did report the incident to police but he was unable to avail an OB number or even state what action (if any) the police took.

The respondent further claimed that the petitioner was secretive and would invest money behind his back. He refers to an instance where she allegedly purchased a house at Vescon Estate without informing him. However the respondent concedes in cross-examination that when he confronted her the petitioner did admit to purchasing the house and he also concedes that they later sold the house together. On the whole I do not find any merit in the cross-petition and the same is hereby dismissed.

Having analyzed the petition and cross-petition, the fact remains that both parties have told the court that they wish to have their union dissolved legally. Both confirm that there exists no possibility for reconciliation. The bad blood between the two was quite evident during the hearing. The couple have been separated since April, 2010. The Marriage Act 2014 introduces a ground for divorce which did not exist in Statute Law before. This is 'irretrievable breakdown of marriage provided for in section 66(2)(e) of said Act. Section 66(b) (d) goes on to provide that a marriage is deemed to have broken down irretrievably where:

“the spouses have been separated for at least two years whether voluntary or by decree of the court.”

The petitioner and the respondent have now been separated for about four (4) years. They have not reconciled in the intervening period. If anything the respondent has moved on and is now in a new relationship. This is a marriage that has indeed broken down irretrievably. I therefore allow this petition for divorce. Decree nisi to issue to be made absolute after three (3) months. Each party to meet its own costs.

Dated and Delivered in Mombasa this 19th day of November, 2014.

M. ODERO

JUDGE