



REPUBLIC OF KENYA

High Court at Mombasa

Divorce Cause 4 of 2012

M. K.....PETITIONER

VERSUS

S. O.....RESPONDENT

JUDGMENT

The petitioner **M. K.** filed in court this petition dated 18th January, 2012 in which she made the following prayers:-

- “(a) The marriage between the petitioner and the respondent be dissolved.**
- (b) Custody to the issues of the marriage – H. O. and N.O. with visitation rights granted to the respondent.**
- (c) The petitioner be awarded costs.**
- (d) Any further relief that the Honourable court may deem fit to grant.”**

The respondent **S. O.** filed an Answer to petition as well as a cross petition on 7th March, 2012. The matter came up for hearing before me by way of *vive voce* evidence on 18th September, 2012.

The undisputed facts of the case are that the petitioner and the respondent who were both at the time working with S[...] Bank met and got married on 5th August, 2000 at {*particulars withheld*} in Nairobi. Their marriage certificate serial No. {*particulars withheld*} **Pexb1** provides ample proof of the fact of the marriage. After their wedding the two continued to cohabit as man and wife in Nairobi. Their union bore two children namely – H.D.A born on 14th June, 2001 and N.Z.A born on 14th November, 2007.

In 2001 the respondent was charged with Fraud and lost his job at the bank. He underwent a trial and was eventually acquitted of the charge in 2007. In 2006 the respondent secured a job as a lecturer with the Government Training Institute in M[...]. As such he had to move to his work station in Kwale leaving the petitioner and their children in Nairobi. Later in July, 2009 the petitioner also was promoted and was transferred to S[...] Bank, {*particulars withheld*} in Mombasa. The couple again began to cohabit as man and wife in a house in {*particulars withheld*}. However, around June, 2010 problems began to emerge in

the marriage. In January, 2011 the respondent moved out of the matrimonial home and went to live in his work station in Kwale. Subsequently the petitioner filed this petition for divorce. In this case section 6(1) of the Matrimonial Causes Act, Cap 152, Laws of Kenya provides as follows:

“6(1) No petition for divorce shall be presented to the court unless at the date of the presentation three years have passed since the date of marriage.”

The couple got married in August, 2000 and the petition for divorce was filed in court in January, 2012 - a period of twelve (12) years after the celebration of the marriage. As such this petition complies with section 6(1) of Cap 152 and is properly before this court. This petition raises three key questions for determination:

- (1) Has the petitioner proved her petition for divorce?
- (2) Has the respondent proved his cross-petition seeking a divorce?
- (3) Custody of the children.
- (4) Costs.

I will now proceed to deal with each aspect individually.

(1) **Has the Petitioner proved any of the known grounds for divorce?**

Currently in this country the grounds upon which a divorce may be granted are to be found in section 8(1) of the Matrimonial Causes Act. These include grounds such as

- Adultery
- Desertion
- Cruelty
- Mental incapacity

From her testimony the petitioner makes no allegation of adultery against the respondent. She appears to rely on the grounds of cruelty and desertion as the basis for her petition. The petitioner told the court that following their marriage in the year 2000, the respondent in the year 2001 lost his job when he was charged with fraud. The fact of facing a criminal charge or the fact of losing his employment cannot be said to amount to a deliberate act of cruelty on the part of the respondent. I have no doubt that he too was distressed by the turn of events. The petitioner goes on to claim that after the loss of his job she had to take up full financial responsibility for the family. She states that the respondent declined to make any effort to assist her leaving her emotionally stressed leading to depression. The petitioner has not adduced any medical records or doctors report that she suffered any kind of depression.

However, under cross examination the petitioner admits that during the period of his unemployment the respondent did undertake a Masters course in an attempt to better himself and improve his job prospects. In his own testimony the respondent states that during the period he did take up part-time research jobs which enabled him to make a small financial contribution towards family expenses. It goes without saying that when one spouse is rendered jobless by the vicissitudes of life – it fall upon the spouse who is in employment to take up the greater responsibility for providing for family finances – this is what marriage is all about. In any event there is no evidence (nor is it suggested) that the respondent deliberately lost his job so as to reduce his financial contribution to the family. I find no evidence of cruelty here.

The petitioner further claims that the respondent denied her conjugal rights and later deserted the

matrimonial home. The fact that the couple bore their last child in November, 2007 (which child was fathered by the respondent) means that upto this time conjugal relations were ongoing. It is only after they moved to Mombasa that problems arose. In his testimony the respondent told the court that in 2010 he travelled to India on official duties. Upon his return, he told the court that the petitioner decided to move out of their bed-room and began to occupy the guest-room. This was not denied by petitioner at all. Thus it was actually the petitioner herself who by leaving the marital bed put a stop to conjugal relations between the two. In view of this the respondent later moved out of the house back to his work station in Kwale. This was not a deliberate or malicious act on the part of the respondent. Rather it was a reaction to the petitioner's decision to move out of their bed-room – thus the respondent cannot be said to have deserted. As such I find no convincing evidence of cruelty and/or desertion on the part of the respondent towards the petitioner. The petition has no basis and is hereby dismissed in its entirety.

(2) Has the respondent's cross-petition been proved?

In his cross-petition filed in court on 7th March, 2012 the respondent alleges that the petitioner has been guilty of adultery and of exposing the children of the marriage to her '*amorous expeditions*'. The respondent in his evidence names one '**P**' as the man with whom the petitioner has been having an extra-marital affair. The petitioner admits that this P is a man known to her as a colleague at her place of work and denies exposing the children to her extra-marital affair. Although the petitioner denies having had any intimate relationship with this man she does concede under cross-examination that P did send her flowers on her birthday. This is not the action of a man who is a mere colleague. The sending of flowers implies a relationship which is far deeper.

From the evidence it is evident that the petitioner's relationship with this P commenced long before the marriage ended and not merely upon the couples separation as she alleges. When shown a photograph under cross-examination the petitioner concedes that the photograph is of herself and P taken in the house in Mkomani. This was the matrimonial home where the petitioner lived with the respondent and their two children. For this P to have felt confident enough to visit the home and to have his photograph taken with the petitioner provides proof that they had a relationship that went far beyond mere friendship. The presence of this man in the matrimonial home where the children lived is clear proof that the children were exposed to P who was not their father.

Finally, the petitioner did concede in her evidence she is now involved in a love affair with P. She admits this even though the couple is not yet divorced. As such she is engaging in a love affair **before** the dissolution of her marriage to the respondent - therefore she is committing adultery. It is because of this adulterous relationship that the petitioner decided to turn against the respondent and move out of their bed-room and into the guest-room. In so doing she denied the respondent his conjugal rights. This amounted to cruelty on her part towards the respondent which eventually forced him out of the matrimonial home.

The respondent told the court that he tried to involve the petitioner's sister and a pastor from his church to mediate between them but the petitioner was unwilling to reconcile. It is clear that he made great efforts to try and save the marriage but the petitioner was unwilling as she had already made up her mind to have a new life with this P. I am satisfied that the respondent has proved adultery and cruelty on the part of the petitioner both of which are valid grounds for divorce.

I therefore allow the respondent's cross-petition for divorce. Decree nisi to issue to be made absolute within four (4) months of today's date.

(3) Custody

The couple has minor children – both daughters. Both the petitioner and the respondent pray to be awarded custody of the children. The issue of custody was not comprehensively canvassed before me. This is a matter which ought to be determined by the Children Court at the first instance. In the meantime, I direct that the status quo remain in force – that is custody remain vested in the petitioner with reasonable access to the respondent.

(4) Costs

This being a family matter, I find it prudent to direct that each party bear its own costs.

Dated and delivered in Mombasa this 29th day of April, 2013.

**M. ODERO
JUDGE**

In the presence of:

Mr. Onjoro h/b Mr. Ojode for Petitioner

No appearance by Respondent

Court Clerk Mutisya