



REPUBLIC OF KENYA

High Court at Mombasa

Divorce Cause 5 of 2012

J.R.S.....PETITIONER

VERSUS

J.V.S.....RESPONDENT

JUDGMENT

The petitioner **J.R.S** filed before the High Court in Mombasa this petition dated 18th January, 2012 in which she seeks orders in the following terms:

- “(a) The marriage between the petitioner and the respondent be dissolved.**
- (b) The petitioner be granted custody of the two (2) minor children and the respondent be ordered to pay maintenance for the said children.**
- (c) The respondent be ordered to pay alimony to the petitioner.**
- (d) The respondent be ordered to pay the costs of this petition.**
- (e) Any further or other relief that this Honourable court may deem fit or just to grant to the petitioner in the circumstances.”**

On his part the respondent **J.V.S** filed an Answer to Petition and Cross-Petition dated 26th March, 2012 in which he sought the following prayers:

- “(i) THAT petitioner’s prayers for dissolution of the marriage and maintenance on the grounds raised in the petition be dismissed.**
- (ii) THAT the respondent be awarded the actual and legal custody of the children.**
- (iii) THAT the marriage be dissolved on the grounds raised by the respondent in the cross-petition.**
- (iv) THAT each party bear its own costs.**
- (v) Any other order the Honourable court deems fit to grant”**

The pleadings were duly certified by the Deputy Registrar to be in order and the matter came up before me for *vive voce* hearing on 10th July, 2012. The undisputed facts are that the petitioner and the respondent contracted a marriage in accordance with Hindu Law on 1st August, 1993. A copy of their marriage certificate serial No. [particulars withheld] was produced as an exhibit in court

Pexb1. Following their marriage the couple moved to Nairobi where they set up house in Parklands with the parents of the respondent (as is common practice amongst Asian families). Their union was blessed with two children as follows:

- A son 'R' born on 26th September, 1995.
- A daughter 'D' born on 18th August, 2000.

Initially the couple lived contentedly. The petitioner told court that whereas she used to work after the birth of her daughter she left her job in order to concentrate on raising the family.

At the outset I note that this petition does comply with section 6(1) of the Matrimonial Causes Act Cap 152 Laws of Kenya as it was brought about nineteen (19) years **after** the celebration of the marriage. The petitioner in her petition and the respondent in his cross-petition are both seeking dissolution of their marriage citing the cruelty and desertion. The grounds upon which a marriage may be dissolved legally in Kenya are to be found in section 8(1) of Cap 150 which provides *inter alia*, that:

“8(1) A petition for divorce maybe presented to the court either by the husband or the wife on the ground that the respondent –

- (a) has since the celebration of the marriage committed adultery; or**
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or**
- (c) has since the celebration of the marriage treated the petitioner with cruelty; or**
- (d)**

In this petition and cross-petition various issues arise for determination.

(1) HAS THE PETITIONER PROVED ANY GROUND FOR DIVORCE

In her evidence the petitioner told the court that although in the initial years all was well in 2004, the respondent took to habitual heavy drinking and that he would regularly assault her. She told the court that the respondent would even assault her in the presence of their two young children and in the presence of his own parents. The petitioner told the court that the regular beatings caused her to leave the matrimonial home in Nairobi and return to her parents in Mombasa. However, the issue was placed before their community elders who called a meeting in her parents' home. At that meeting the respondent promised to stop drinking and the community elders persuaded the petitioner to return to Nairobi with him. A letter dated 2nd November authored by **MR. BHARET V. SONIGRA** the chairman of **Shree Vanza Gnati Hittechhu Mandal** community **Pexb8** confirming knowledge of the domestic problems between the couple and confirming the intervention of the community in an attempt to resolve these problems. The respondent in his defence also concedes to the fact that there were efforts from community elders to reconcile them.

The petitioner did return to live with the respondent in Nairobi and she told the court that the respondent avoided alcohol for about one year and all was well. However, he soon resumed drinking and regular beatings of the petitioner. The petitioner cites one incident in June, 2008 when the respondent beat her for several hours. She went to report the assault at Parklands Police Station and was issued with a P3 form **Pexb4**. The P3 indicates that the petitioner was examined and found to have bruises on the face and

thighs. The petitioner told court that she was treated at the Social Services league clinic and produces her treatment notes dated 17th June, 2008 **Pexb5**. Once again the treatment notes show bruises on the chest, back, arms and thigh. The P3 form and treatment notes are evidence in support of the petitioner's claim of physical abuse. In both instances the petitioner complained of having been assaulted by her husband. This was not a mere afterthought. There is clear proof that an assault actually occurred. Constant physical abuse certainly amounts to cruelty which no wife ought be expected to tolerate.

As a result of the beatings the petitioner again left the matrimonial home with her children and went to live in Mombasa with her parents. The petitioner told court that she had to leave to save her life and to ensure the well being of her children. I am satisfied that the ground of physical cruelty has been proved.

Aside from physical abuse the petitioner has also alleged that the respondent was an uncaring and negligent husband. Due to his excessive drinking he was unable to spare money for the childrens needs and education. The petitioner had to seek help from the community and relatives to pay their childrens school fees. The petitioner has produced a series of receipts from the childrens schools showing that she paid the school fees. Again a letter dated 5th November, 2012 from the Shree Vanza community confirms a contribution of sums of money towards the education of the couples' children and even towards the medical treatment of the respondent's own mother. The respondent was an adult, able-bodied man. He told the court that he earned about Kshs. 35,000/= per month. Why then did he need to have his community pay for his childrens education and for his mother's treatment? The petitioner's claim that the respondent squandered all his earnings on alcohol leaving her the burden of catering for the needs of the family is given credence. The respondent failed in his duties as a spouse and a father. To waste his money on alcohol leaving his wife to run around looking for ways and means of providing for the family showed irresponsible and uncaring attitude towards his family. The respondent's actions amount to psychological or mental torture. I have no doubt that the petitioner went into the marriage expecting it to be a partnership, only to find that she had to provide for her children single handedly. The fact that by his own admission the respondent has made no effort to see or contact his children after the couple separated in 2008 only reinforces his uncaring and irresponsible attitude. As a father he ought to have made enquiry about the welfare of his children, he ought to have reached out to them or even taken steps to pay for their education. The respondent is clearly a person who is only interested in himself. All in all I find sufficient proof from the evidence on record of cruelty on the part of the respondent to the petitioner and the couples children.

(2) HAS THE RESPONDENT PROVED ANY GROUND TO SUPPORT HIS CROSS-PETITION

The respondent did cross-petition for divorce citing desertion by the petitioner. He states that the petitioner left their home in Nairobi to attend her sister's wedding in Mombasa and has not returned to date. Section 8(1) of the Matrimonial Causes Act does provide for desertion as a ground for divorce. However, this section expressly provides that the desertion must be "*without cause*". The petitioner in her evidence conceded to having left the matrimonial home in Parklands on two occasions. The first time in 2004 she returned after a family meeting and after the respondent promised to change his ways. She left again in 2008 when the beatings resumed. Can the petitioner in the circumstances be said to have deserted the respondent **without cause** – certainly not. The respondent by his alcoholism and cruelty **drove** the petitioner away. It would have been unreasonable to have expected her to stay in the prevailing circumstances. The petitioner told the court that she left to save her own life and to protect the welfare of her two children who no doubt were being adversely affected through witnessing their father battering their mother. The petitioner had sufficient and just cause to leave the matrimonial home. Her action cannot be said to amount to desertion. I dismiss this ground of cross-petition.

The respondent has also in his cross-petition raised the ground of cruelty towards him by the petitioner. He claims that the petitioner has treated him with contempt, cruelty and negligence. No particulars were brought out in his evidence of the aspects of this '*contempt negligence*' and/or '*cruelty*'. The respondent merely makes vague references to mental anguish but has not brought any medical evidence as proof of any such mental problem. The respondent claims that the petitioner has

denied him access to their children yet he admits that he has made no attempt to contact, telephone or even communicate with his children. He did not go to court to seek access. It is clear that the failure of the respondent to see his children is by his own design – he has not bothered in any way to reach out to the children. How can the petitioner be said to have acted to deny the respondent access to children who he has no inclination to see at all. I find no evidence for cruelty on the part of the petitioner. In sum I find no merit at all in this cross-petition and the same is hereby dismissed in its entirety.

Finally, both the petitioner and the respondent concede that their marriage has broken down. They have lived apart since 2008. It is clear that no reconciliation is possible and it is best that the parties have a clean break and go their separate ways. I do therefore allow the petitioner's petition for divorce on the ground of cruelty. Decree nisi to issue to be made absolute within three (3) months of today's date.

With regard to the children it is my view that the present status quo should remain in place. The children to remain in the care and custody of the petitioner in Mombasa. If the respondent desires custody or access he must make the necessary applications before the Childrens Court.

The petitioner made a prayer for alimony and maintenance. With regard to the prayer for alimony this was not fully canvassed before me and I will make no orders on the prayer. With regard to the prayer for maintenance I direct that this be pursued in the Childrens Court at the first instance. With respect to costs – this being a family matter I do direct that each party bear their own costs.

Dated and delivered in Mombasa this 12th day of April, 2013

M. ODERO

JUDGE

In the presence of:
Ms. Okata for Petitioner
Mr. Magiya for Respondent
Court Clerk Mutisya