



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 15 OF 2006

A.S.M.....PETITIONER

VERSUS

**S.R.K.M.....
.....RESPONDENT**

JUDGMENT

The Petitioner one A.S.M. filed the Petition herein dated 2nd March 2006, seeking for orders that:

1. **That** her marriage with the Respondent be dissolved.
2. **That** the Petitioner may have custody of her child of the marriage.
3. **That** the Respondent do return to the Petitioner all the jewellery, ornaments and her other belongings

4. **That** such other or further orders as the Court may deem appropriate.

In reply to the Petition, the Respondent one S.R.K.M. filed an Answer to the Petition and cross petition dated 28th April, 2006. He prayed for orders that:

1. **That** the marriage between the Petitioner and Respondent be dissolved.
2. **That** a decree for dissolution be granted.
3. **That** the custody, care and protection of the child of the marriage be granted to the Respondent or in the alternative to be accorded unrestrained and free access to the child of the marriage.
4. **That** the Petitioner be condemned to pay Costs of the Answer to the Petition and Cross Petition
5. **That** the Honourable Court be pleased to make or grant such other or further relief or order as it may deem fair, just and expedient.

The background facts of the case are that on the 29th day of August 1993, the Petitioner lawfully married the Respondent at Traveller's Beach Hotel, Mombasa mainland North, in the Republic of Kenya by a marriage ceremony performed in accordance with the Hindu Marriage Rites and conducted by a Hindu Priest. The Couple, thereafter cohabitated at T[...] in Mombasa until 1st March, 1994. In that year, the couple was blessed with an issue of marriage one "K". According to the Petitioner the Respondents behavior changed, as he treated her with habitual insults, neglect, and cruelty; used foul abusive and threatening language and frequently assaulted and struck her. That he maintained that the marriage would not work as she was not acceptable by his parents. Subsequently, the couple that was staying at the Respondents parents home at T[...] moved out to try and settle their differences and rescue their marriage for the sake of their child; but the marriage did not work. However, according to the Petitioner, the situation did not improve, the Respondent continued spending most of his time at his parents home, and only returning home in the wee hours and drunk. That, the Respondent continued to assault her, and on one occasion, she had to seek treatment from Dr. K.S Dang for an injury she sustained to her ear after the Respondent assaulted her. That, she could not take the ill treatment anymore and she returned to her parents. Subsequently, the Respondent made a solemn promise to change. The Petitioner returned to her in-laws home. But the Respondent family cruelty continued. That, the petitioner was isolated from her in-laws family matters, and that, as a result, she and her child suffered psychological stress. She complained to the Respondent about it, **but** the Respondent, did not intervene. Instead, he allegedly hit her before his parents and servants. She fell on the glass that broke her finger. That on the 8th February, 2000, she left, and she has never gone back. That no efforts have been by the Respondent ever since to set up a home for himself and/or the Petitioner and their child. As a result, he is deemed to have deserted the Petitioner without a lawful or reasonable cause.

On his part, the Respondent denied all the allegations of cruelty and desertion leveled against him. He told the Court that on the contrary he went out of his way and bent backwards to accommodate the Petitioner, including abandoning his parents home and putting up a separate residence for himself, the Petitioner and their child, which was against the Hindu cultural traditions. That the Petitioner treated his parents with utmost contempt claiming that they were of relatively lower class to that of her parents, to an extent that, she replaced the furniture bought by the Respondent for their house, with expensive pieces from her parents' residents at N[...]. That, it's the Petitioner who frequented her parents home and whenever the Respondent went for her, the Petitioner's parents would treat him with contempt in front of the child of the marriage. That in deed, it's the Petitioner who after instigating a quarrel packed all her personal belongings into her parents motor vehicle and left home, and since has remained there. Therefore, she is the one who is guilty of desertion. That, her parents have become attached to the child of marriage and have refused to let go as they refer to the child as their tonic in old age.

I have now considered the Petition, the Answer to the Petition and the Cross Petition, and the Reply to the Answer to Petition and the Cross petition dated 4th May 2006. I have also considered the oral evidence adduced by the parties and the supporting exhibits. Finally I have considered the submissions filed by the parties at the close of the entire case, and I find as follows.

That Both parties are seeking for the dissolution of their marriage solemnized on the 29th August 1993. A marriage cannot be dissolved by the consent of the parties. **But** taking into account the facts detailed above I have no doubt in my mind that for the period the parties herein stayed together, they were very **“unhappy”**. Their marriage did not work at all. It seems as though several factors contributed to the same: ranging from interference or unacceptability by in-laws, personal character, total lack of respect for each other, and or just an **“I don't care attitude”**. Be it as it may, eventually they separated. It's been twelve years down the line. In deed no serious effects have been made by either to **“reconstruct”** their marriage. It's not therefore surprising that, they seek to be allowed legally to have **“their way”**. I find no good reasons to deny them that chance in life. Their marriage has irretrievably broken down. I allow prayers (a) respectively in the Petition and the Answer to Petition and Cross petition.

The 2nd issue relates to the custody of the issue of marriage. The parties submits that the child is now 18 years having turned 18 years on 1st March 2012; and I therefore find that, that prayer has been overtaken by events and time. No orders shall be made on the same.

Thirdly the costs of the Petition and of the Answer to the Petition and Cross petition. Each party has decided in their oral evidence and submissions, not to pursue that prayer. I respect their position. I order that each party do meet their own costs.

Finally, the only contested issue is the issue of the Petitioner's Jewellery and ornaments which allegedly went missing after the Respondent withdrew the same from the vault at the Bank of Baroda. The Respondent testified that, they were unfortunately stolen alongside other important documents all valued at Kshs. 1,250,000,000/= (not sure the figure is correct as indicated in the Respondent's submissions). The Respondent submits that he reported the matter to the police vide OB report (D exh 3). That having been an unfortunate incident, the loss cannot be blamed on him. That it's the police who failed to take any steps to trace the thieves, though the Respondent told them he could identify them. That, in fact the petitioner has not proved the value of the stolen ornaments and the existence of the other personal assets

to warrant an order for return of the same. However, this evidence is resisted by the Petitioner. They submit that the Respondent removed the jewellery from the bank without the consent of the Petitioner, and that he is therefore responsible for its return or its market value. That the exhibit 3, (OB extract) produced does not indicate jewellery was stolen. That the Respondent has not made, any attempt to record his statement with the police for investigation to be carried out and all he did was to merely to report the matter.

I have considered the issue of the jewellery and/or the ornaments. I find that, the claim by its nature is Criminal. The allegation of theft, are a foundation of a crime that needs be investigated, evidence adduced and a finding made on the same. That is why I find that, it is criminal as opposed to civil in nature. Each party has a different reason regarding the loss of the jewellery that is why investigation has to be carried out. Again this matter herein is civil in nature. I appreciate the fact that, the loss of the jewellery is closely related to the issues herein, but it is not safe to try and prove that claim herein. I say so, because, unlike in criminal matters, the burden of proof in civil matters is on a balance of probabilities and in Criminal beyond reasonable doubt. All the same, I find that all is not lost for the petitioner. She still has a right of claim for her jewellery through the criminal branch of law.

In conclusion I allow the petition in respect to prayer in respect of prayer (a). Prayer (b) has been overtaken by effluxion of time. Prayer (c) is not allowed.

As for the Respondent their cross petition is allowed in respect to prayers (a) and (b). However, the Decree to issue will be Decree Nisi. In this regard the Petitioner sought that the Decree Nisi to be made absolute within a shortened period of one month. That will require a formal application. Prayer (c) of the Cross petition has (as already stated in relation to the Petition) been overtaken by effluxion of time. Prayer (d) thereof is, compromised by the election of each party to meet their own costs.

Those, then, are the orders of the Court and I order accordingly.

G.L. NZIOKA

JUDGE

22ND MARCH, 2012

Dated and delivered in an open Court at Mombasa.

G.L. NZIOKA

JUDGE

22ND MARCH, 2012

In the presence of:-

Counsels for both parties