



JD.....PETITIONER

VERSUS

LM.....RESPONDENT

JUDGMENT

This judgment relates to the Petition of JD (*the Petitioner*) dated 15th July 2009 and filed on the same day, (*the Petition*) and the Cross-Petition of LM dated and filed on 22nd September 2009 (*the Cross-Petition*) for divorce on the grounds of cruelty and desertion (*in respect of the Petitioner*), and cruelty on the part of the Cross-Petitioner-Respondent for dissolution of their marriage.

Both Petitioner and the Respondent gave sworn testimony and were cross-examined by the parties' counsel.

The Petitioner's case is that the Respondent is a naturally violent person. On one occasion, the Respondent attacked her with a sword, and that she reported the incident to the Police, and sought help from her relatives, and that from that time, (2003) their relationship deteriorated and she moved out of the matrimonial home in the year 2007 together with her two sons, E and M. She testified that since that time, there has been no contact or any attempt at reconciliation between them.

The Petitioner also testified that their younger son, M goes to school and stays with her during school holidays. She made no reference to the elder son, M. The Petitioner denied allegations of cruelty stated in the Cross-Petition by the Respondent and asked the court to find that the marriage has irretrievably broken down and irreconcilable and should be dissolved.

The Petitioner denied ever provoking the Respondent. She also denied allegations of running away from the matrimonial home but rather that the Respondent gave her an ultimatum to leave his house, that she had been faithful to her marriage, but if another man came along, she would know how to react. She denied allegations of adultery.

The Petitioner called no witness.

The Respondent's evidence converged with that of the Petitioner with regard to their coming together in 1989, the solemnization of their civil marriage before the District Commissioner in 1995, six years later, the birth of their two sons, and the separation in 2007. The evidence of the Respondent was however different in other material respects.

According to the Respondent's evidence, their marriage started going on the rocks from the year 2000. In that year, he got wind that the Petitioner was in liaison with a lawyer based in Mombasa, as well as another man a work-mate of the Petitioner's sister. The Respondent testified that the lawyer is a known Casanova, and had spent time with the Petitioner both in Mombasa, and one week with the Petitioner in Kisumu where the Petitioner had ostensibly gone to visit their parents, but ended up at Sunset Hotel together with the lawyer, and the two children. The Respondent learnt this information from the two children.

The Respondent described in some detail attempts by his mother as well as his brother-in-law, as well as his sister-in-law, (the Petitioner's sister) at reconciliation but that the Petitioner had spurned all such efforts and insisted upon a separation which she achieved, first, by refusing to make any meals for the Respondent, and if she made any meal in the Respondent's presence, would deny him any share of such meal. The Respondent described such one incident when the Petitioner removed a plate of food from the Respondent, and then ran to family friends for shelter and apparent protection. This, Respondent testified was provocation so that the Petitioner would get evidence of violence on his part. He did not fall into the temptation but resorted to silence hoping that their relationship would improve. It did not.

The Respondent testified that he never wanted a separation from his wife. He has never assaulted the Petitioner, and that on one occasion when the Petitioner laid claim to the Police that he had been cruel to her, the Police sent her away. The Respondent testified that it was not his character to be cruel, he tried to talk to the Petitioner on telephone - but the Petitioner would not take his calls. She would not also answer his SMS's. Consequently they have not, since the separation, tried any reconciliation, and he had no objection to the dissolution of the marriage.

The elder son, E had returned to him out of his volition. The younger son, a minor was still with the Petitioner. He would let the children decide with which parent they would rather be with. They were no longer "*children*" as such.

The Respondent wished that each the Petitioner and the Respondent bear their own costs.

I have reviewed the above evidence with extreme care. What clearly came out from my observation of the Petitioner and the Respondent while each of them testified were two people who initially shared a vision of love between them, but which vision slowly and exonerably faded away.

The Petitioner came out both confident and imperious. The Respondent was well measured and humble. His exact nature of business was not disclosed. But he was an itinerant worker who carried his tools of trade from place to place wherever he found work. He would stay out weeks on end. The Respondent had a steady job with Telkom, with an assured salary of Ksh 29,000/= p.m. and perhaps saw no value in keeping an itinerant worker for a husband. She probably found solace in the warm chest of a prosperous lawyer, coastal based, besides. The allure of salty coastal waters may have proved irresistible and the only way of achieving it was to breakaway from the shackles of a marriage with an itinerant worker. The separation afforded such opportunity for the Respondent and for the Cross-Petitioner it afforded him time to reflect, and he testified that he has had peace of mind since the separation, now over five years. That to me is a case of two former partners in marriage who have reflected and find independently without collusion, that they respect each other's desire to have their marriage dissolved, perhaps not on the grounds of cruelty, but mutual suspicion of adultery by the Petitioner and unproven cruelty, but certainly denial of conjugal rights to the Respondent by the Petitioner. These are situations where a marriage is said to have irretrievably broken down, and there is no chance of reconciliation.

For those reasons, I allow both the Petition and Cross-Petition first referred to above, and there shall issue a decree nisi in respect of both the Petition and Cross-Petition.

I direct that the costs of both the Petition and Cross-Petition be borne by the respective parties.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 8th day of June 2012

M. J. ANYARA EMUKULE
JUDGE