



D.S.C. PETITIONER

VERSUS

S.A.K. RESPONDENT

JUDGMENT

(1) On the 24th October 2008, the Petitioner wife filed a suit against the Respondent husband for dissolution of marriage which was contracted under the Marriage Act Cap. 150 Laws of Kenya on the 3rd January 2004. The Petitioner alleged that the Respondent had since the celebration of the marriage treated her with cruelty in that he had had extra marital affairs and kept the company of other women spending nights out of their house without explanation thereby embarrassing the Petitioner and adversely affecting her health through mental torture and suffering.

(2) The Respondent denied the allegations of cruelty in his Answer to the Petition and Cross-Petition dated 22nd April 2010 in which he accused the Petitioner of desertion and prayed for dissolution of the marriage on the ground of the Petitioner's alleged desertion.

(3) The issues that arise are (a) whether the marriage between the Petitioner and the Respondent has irretrievably broken down and (b) whether the breakdown of the marriage has been occasioned by the Petitioner's alleged desertion or the Respondent's alleged cruelty. Both parties testified before the court and were cross-examined by counsel for the opposing party, respectively. I am satisfied that the Petition and Cross-Petition were not presented or prosecuted with collusion of the parties. The parties' counsel filed respective submissions.

(4) In proving the allegations contained in the Petition, the Petitioner testified that: -

“I have filed for divorce because we were not living together as a couple. The Respondent was not coming home after work. This was 2 years after marriage in 2006. He would go to work in the morning and return in the early hours of the following day at 2.00 and 3.00 am. He said he had meetings at work. I checked his cell phone and discovered that he had a relationship with another lady. He denied when I asked him about it. Our relationship got worse. He would spend whole nights out. This was in 2007. He would sleep out and come back during the day. Our relationship was not good. We did not talk. In 2008, I decided to leave our home. I took up an apartment in April 2008. This is in Switzerland. Since then we have not come back to each other. I do not think that we can reconcile.”

On cross-examination, the Petitioner named the Respondent's alleged female friend as Josephine and confirmed that she did not tell the Respondent where she was going when she left the matrimonial home but maintained that she left because she was unhappy.

(5) I have evaluated the evidence in the light of the precedent of the Court of Appeal for Eastern Africa in **Munzio Colarossi v. Michelina Colarossi (1965) E.A 129** that cruelty is a serious matrimonial offence which must be proved beyond reasonable doubt on the principles set out herein.

I agree that a husband's extra marital affairs [I suppose not amounting to adultery as this was not charged] and his keeping the company of other women and spending whole night outs or staying away from home until late may affect the wife's mental health and amount to cruelty within the meaning of the matrimonial offence. However, in view of the Respondent's denial of the relationship with another lady, it was incumbent on the Petitioner to adduce evidence to prove the extra marital affairs beyond reasonable doubt. An allegation that she had **"checked the Respondent's cell phone and discovered that he had a relationship with another lady"**, without more is insufficient to prove the extra marital affair. Moreover, the alleged adverse effect on the Petitioner's mental health was not proved. Furthermore, while the Petitioner charged in the Petition that **"the Respondent has admitted to the Petitioner that he has been involved in extra marital affairs with other women"**, the testimony of the Petitioner before the court was that the Respondent had denied such relationship. No details were offered of the alleged relationship with one Josephine whose name was given in cross-examination only.

(6) Accordingly, I find that the Petitioner has not proved the matrimonial offence of cruelty alleged in her Petition dated 24th October 2008 which I consequently dismiss with no order as to costs.

(7) The Respondent's case was that the Petitioner had deserted the matrimonial home and he testified that: -

"After 2006, the [parties'] love started to fade. We tried to reconcile without success. There was no marriage after 2006. I am not a cruel person. I was not cruel to the Applicant. She did not tell me when she was leaving. I did not seek to have her come back. I have never attempted reconciliation. Since 2008 each of us lives our own lives. I pray that the marriage be dissolved so that each of us can go their own way."

(8) There is evidence that the Petitioner left the matrimonial home in April 2008 and that the parties have not lived together since then, and the Petitioner agreed that there was no possibility on reconciliation. Having failed to prove the cruelty against the Respondent, the Petitioner cannot justify her leaving the matrimonial home which she has conceded. Applying the test in **Patel v. Patel (1965) E.A. 560**, I find that the Respondent has proved that the Petitioner left the home in 2008; that she left without his consent or information; that she left with the intention of permanently ending the cohabitation as she took her own apartment; and that she left without cause because although she alleged to have been unhappy she did not prove cruelty to justify her leaving the matrimonial home.

(9) Accordingly, I find that the Respondent has proved desertion without cause against the Petitioner who did not prove to the required standard any misconduct on the part of the Respondent to excuse the desertion. I also find that the marriage between the Petitioner and the respondent has irretrievably broken down following the Petitioner's desertion in April 2008. I therefore make an order of the dissolution of the marriage between the Petitioner and the Respondent on the ground of the Petitioner's desertion in accordance with the Respondent's Cross-Petition which is hereby allowed. There will be no orders as to costs.

Dated and delivered this 18th day of July 2012.

EDWARD M. MURIITHI
JUDGE

In the presence of: -

Miss. Obura for the Petitioner

Mr.Ouma for the Respondent

Miss Linda - Court Clerk