



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Divorce Cause 138 of 2005

RAA..... PETITIONER

FWA RESPONDENT

J U D G M E N T

1. **RAA**, the Petitioner, presented the petition for dissolution of his marriage to **FWA**, the Respondent, on 27.10.2005 on the grounds that the Respondent had

(1)committed adultery after the celebration of the marriage and

(2)deserted him on 2005.

2. The petition was undefended. The Honourable Mr Justice Maraga gave directions on the hearing of the petition to the effect that it would be determined on the basis of affidavit evidence as the Petitioner worked outside the country and had applied to be allowed to give evidence by way of affidavit evidence.

3. I have perused the petition and the petitioner's affidavits including the further affidavit sworn on 12.7.2011 which was filed in court on 13.7.2011.

4. The affidavit evidence and the undefended petition show that the parties solemnized their marriage on 17.12.1993 in Eldoret by special licence before the District Commissioner. They cohabited in Eldoret and in Nairobi, Kenya, and in Kampala, Uganda, as well as in Kinshasa, Congo, between December, 1993 and September, 2003.

5. The marriage was blessed with two issues, a boy and a girl, namely **JW** and **JO** aged 14 years and 9 years respectively.

6. The Petitioner, an Accountant by profession, and the Respondent, a Secretary by profession, ceased cohabiting in January, 2005 when the Respondent is alleged to have left the matrimonial home without just cause.

7. The marriage was a civil marriage under the Marriage Act Cap 150 and the provisions of the Matrimonial Causes Act Cap 152 apply to it.

8. Section 8 (1) (b) of the Matrimonial Causes Act, Cap 152, requires that for desertion to be a ground for divorce, it must be shown that it was without cause and that it run for a period of at least 3 years immediately preceding the presentation of the petition seeking dissolution of the marriage. The grounds on which the marriage can be dissolved are the traditional three, namely adultery, desertion and cruelty, and additionally, on the ground of incurable unsoundness of mind if it has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition for

dissolution of the marriage and by the wife on the ground that her husband has since the celebration of the marriage been guilty of rape, sodomy, or bestiality.

9. In this cause, the Petitioner alleges that the Respondent deserted him in January, 2005.

10. The petition was presented in court on 27th October, 2005. Three years had not elapsed from the date of the alleged desertion in January, 2005 to the date of presentation of the petition on 27th October, 2005. In effect, the Petitioner did not meet the threshold set in section 8(1) (b) of the Matrimonial Causes Act, Chapter 150. This grounds therefore fails.

11. With regard to adultery, the Petitioner pleaded thus in paragraph 5 of the petition:

“5. That at various times during the subsistence of the said marriage, the Respondent committed adultery with a plethora of men”.

Particulars of adultery

a) *“On several occasions during the subsistence of their marriage the Respondent informed the Petitioner about her boyfriends”*

b) *“On several occasions during the subsistence of the marriage the Petitioner received several threatening SMS messages on his phone from the Respondent’s boyfriends”*

12. In his affidavit sworn on 27.10.2005, the Petitioner stated that the averments in his petition are true and that the petition has not been presented with collusion with the Respondent.

13. The Petitioner is a Kenyan and is domiciled in Kenya.

14. Has the Petitioner proved adultery against the Respondent so as to be entitled to a decree of divorce on that ground?

15. In his further affidavit sworn on 12.7.2011 the Petitioner averred that while he was employed in DR Congo the Respondent got pregnant and gave birth to 2 other children sired by her boyfriend who was a Congolese. He averred that he did not condone the adultery. He stated that that is the reason why the Respondent deserted the Matrimonial home. Why did the Petitioner not include this fact in his petition? Was it an afterthought? I have observed that the Petitioner did allege that the Respondent committed adultery with many men during marriage. The omission to state in the petition that this resulted in the Respondent becoming pregnant twice does not render it unbelievable or inadmissible not least because this was an evidential matter. The petitioner seeks custody of the two children of the marriage but he has not made as much as a whimper in his petition or in his affidavits to shed light as to who has been having their custody and taking care of them since the Respondent deserted. I find this strange especially in the light of the fact that the Petitioner is aware that the Respondent has two other children by another man or other men. The first child of the marriage JWA, was aged 14 years in 2005 and is now an adult aged 21 years while the second child of the marriage, JOA who was aged 9 years in 2005 is now aged 16 years or thereabouts.

16. What led the Petitioner to keep mum about who has been having custody of the children? This will remain a mystery!

17. The Respondent failed to contest the petition and there is no evidence forthcoming from either party as to who has been having care and control of the children of the marriage although the 2nd child is still a teenager. The Petitioner pleaded with the court for the petition to be determined on the basis of affidavit evidence. But he failed to include in his affidavits evidence relating to the children of the marriage and in particular who has had their custody since the desertion. For this reason, I would be disinclined to make an order for custody in the Petitioner’s favour.

18. As regards dissolution of the marriage on the ground of adultery, although the Respondent was not caught *in flagrante delicto* or red-handed committing adultery, the fact that Respondent gave birth to two children not sired by him, an averment that is not controverted, is sufficient evidence to raise a presumption that the Respondent committed adultery. After all, unless the Respondent had “artificial insemination” which could give rise to cruelty if not done with the consent of the husband, the natural way in which a woman becomes pregnant is through sexual intercourse.

19. In this case, I hold that there is evidence to raise and support the presumption that the Respondent had sex with a person or persons other than the Petitioner and thus committed adultery leading to pregnancy and birth of two children. I find adultery proved.

Accordingly, I **pronounce a decree of divorce and hereby dissolve the marriage between Petitioner and the Respondent on the ground of cruelty on the part of the Respondent.**

In the first instance, a **decree nisi** shall issue forthwith and subject to the provisions of section 15 of the Matrimonial causes Act, cap 152, **the decree nisi shall be made absolute after the expiry of three months** after this pronouncement. It is so ordered.

Each party to bear its own costs.

Dated at Milimani Law Courts, Nairobi, this 17th day of October 2012

G.B.M. KARIUKI, SC

JUDGE

COUNSEL APPEARING

Mr. A.S Kuloba of A.S. Kuloba & Wanjala Advocates for the Petitioner

Ms Pamela Osodo – Court Clerk