

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

DIVORCE CAUSE NO.2 OF 2009

JMM..... PETITIONER
V E R S U S
JPW RESPONDENT

J U D G M E N T

The petitioner and the respondent started cohabiting together as husband and wife in 2001. Their relationship then was what is commonly known as come-we-stay relationship. On 20th July 2007, the petitioner and the respondent formalised their marriage when they got married under the **Marriage Act** at the District Commissioner's office at Nandi Hills in Nandi South District. The marriage was blessed with one issue, a girl born in 2002. From the petition for divorce filed by the petitioner, it appears that the marriage was not a happy one. The petitioner complained that since the celebration of the said marriage, the respondent had treated her with cruelty. In particular, he accused the petitioner of verbally and physically assaulting her. She stated that the respondent subjected her to physical and mental torture. She averred that the respondent publicly humiliated her by verbally abusing her by use of unprintable words. She complained that the respondent had severally threatened to kill her and had in fact finally forcefully evicted her from the matrimonial home. The petitioner accused the respondent of constructively deserting from the matrimonial home when he evicted the petitioner from the matrimonial home in April 2009. In the premises therefore, the petitioner formed the opinion that her marriage to the respondent had irretrievably broken down with no chance of salvage. She asked the court to grant her petition for divorce. She further asked to be granted custody of the child of marriage. She finally pleaded with the court to compel the respondent to provide maintenance for the support of the child of the marriage.

When the respondent was served with the petition, he duly entered appearance and filed answer to the petition. The respondent further cross-petitioned to be divorced from the petitioner. The respondent admitted that he had cohabited with the petitioner from 2001 before their marriage was formalised in 2007. He denied the allegation by the petitioner that he had ever treated her with cruelty. In particular, he denied the particulars of cruelty pleaded by the petitioner. He denied the averment that he had evicted the petitioner from the matrimonial home or that he had deserted the petitioner. In his cross-petition, the respondent averred that it was the petitioner who had deserted the matrimonial home in April 2009 when she left the matrimonial home and decided to rent a house in Kakamega town. The respondent accused the petitioner of engaging in adulterous affairs with men unknown to him. The respondent complained that prior to the petitioner deserting from the matrimonial home, she had, for extended periods, denied him his conjugal rights. In the circumstances, the respondent was of the view that the marriage had irretrievably broken down. He urged the court to dismiss the petition for divorce and instead grant his cross-petition for divorce. He pleaded to be granted custody of the child of the marriage.

At the hearing of the petition, this court heard the oral evidence adduced by the petitioner and the respondent. It was clear from the said testimony that the marriage between the petitioner and the respondent had indeed irretrievably broken down. It was apparent to the court that the petitioner and the respondent were temperamentally incompatible compatible in temperament. It appears that any small difference between the petitioner and the respondent would be magnified and would escalate to either verbal abuse or physical assault. The respondent came out as a person of short temper who invariably tried to resolve any disagreement with the petitioner by either by physically assaulting her or by damaging her personal property. A case in point is when the respondent visited the petitioner on 5th July 2009, three months after they had separated. The respondent saw a man's shoes in the house of the petitioner. Instead of asking the petitioner the identity of the owner of the shoes, the respondent became apoplectic and started damaging the property of the petitioner in the house. If the petitioner was not conversant with the respondent's behaviour, and thus tactically made her escape, she would have been seriously injured.

It appeared to this court that the respondent was suspicious that the petitioner was engaging in extra marital affairs with several men. The respondent did not, however, have proof that the petitioner had affairs with other men. On her part, it was evident that once the petitioner got a steady job she started losing respect for the respondent, especially in his capacity as her husband. The respondent complained that the petitioner used to come home late without having the courtesy to inform him in the event of such eventuality. Although the petitioner explained that she arrived late at her matrimonial home due to exigencies of work, it was clear that the petitioner did not bother to keep the respondent in the picture. The totality of the evidence adduced clearly shows that there no longer exists any trust between the petitioner and the respondent. Their marital relationship was poisoned by their irreconcilable difference in temperament.

This court therefore holds that the matrimonial offence of cruelty was proved by the petitioner to the required standard of proof on a balance of probabilities. As regards the matrimonial offence of desertion, it was clear that since the petitioner and the respondent separated in April 2009, no effort has been made by either party to be reconciled. In fact, it is apparent that the respondent has moved on with his life since he is now in another relationship where a child has been born. That ground too is proved to the required standard of proof on a balance of probabilities.

The upshot of the above reasons is that the marriage between the petitioner and the respondent has irretrievably broken down. The petition for divorce is hereby granted. The marriage solemnised on 20th July 2007 at the District Commissioner's office in Nandi Hills is hereby annulled. Decree Nisi dissolving the said marriage is hereby issued. The decree nisi shall be made absolute within thirty (30) days of the date of this judgment. Since this is a matrimonial dispute, there shall be no orders as to costs i.e. each party shall bear his/her costs. As regards the issue of custody of the child and her maintenance thereof, the same shall be determined by the Children's Court which has jurisdiction in the first instance to deal with the two issues. This court was informed that there are proceedings pending before the children's court. The parties should ventilate the said proceedings to its logical conclusion.

It is so ordered.

DATED AT KAKAMEGA THIS 27TH DAY OF JULY 2011

L. KIMARU
JUDGE