



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO. 133 OF 2006

F.O.N.....PETITIONER

VERSUS

C.W.N.....RESPONDENT

JUDGEMENT

The petitioner moved to the seat of justice by way of a petition dated 19th day of September 2005 and filed on the 21st day of September 2006. It is accompanied by a verifying affidavit verifying the correctness of the content of the petition. The salient features of the same are as follows:-

- The disputants married at the Nairobi Baptist Church on the 4th day of May 1991.
- They had two issues between them namely A.N. born on the 24th day of April 1994 and O.N born on the 9th day of December 1997.
- Since the celebration of the marriage, the couple resided in India, Golf course estate Nairobi, N[...] estate Nairobi and K[...] Nairobi respectively between 1991 to the date of the presentation of the petition.
- Both are domiciled in Kenya though the Respondent was resident in Botswana as at the time of the presentation of the petition.
- The petitioner had presented separation cause No. [...] which was withdrawn on the 21st day of November 2002.
- The reason for moving to court by way of petition are stated in paragraph 8 of the petition namely that the Respondent has been cruel to the petitioner because:-

(a) She has absented herself from the matrimonial home and gone to Tanzania and South Africa without justifiable cause on the one hand and on the other hand without consulting the petitioner.

(b) The Respondent while knowing that the Petitioner is a pastor, she involved herself in night clubbing and alcohol consumption in the company of male persons and returning home in the early hours of the morning inebriated much to the mental anguish of the petitioner and the children of the marriage.

(c) Admitted to the petitioner in 2001 that she had committed adultery.

(d) The Respondent showed open hostility to the petitioner in the presence of the children and 3rd parties.

(e) The Respondent is also guilty of verbally abusing the petitioner, displaying on erratic conduct towards the petitioner, teachers at the children's school and the children and thereby prompting the filing of children's custody proceedings in children cause No. 2059 of 2003.

- Vide paragraph 9 that the Respondent left the matrimonial home on 18th day of March 2003 and has never returned ever since.

- That the petitioner was in custody of the children of the marriage.

- That there is no hope of reconciliation as the Respondent has lost interest in the marriage which has irretrievably broken down.

In consequence thereof the petitioner prayed for the following reliefs:-

(a) That the marriage between your petitioner and Respondent be dissolved.

(b) Costs

(c) That such other or further relief be granted as this Honourable court deems, met and just to grant.

The petition was served on to the Respondent accompanied by a notice to appear and a memorandum of appearance was duly dated 29th day of September 2008 and filed on the 9th day of October 2008 followed by the filing of another one dated 16th day of June 2009 and filed on the 17th day of July 2009.

There is on record traced an answer to petition and cross petition dated 16th day of July 2009 and filed on the 17th day of July 2009. The salient features of the same are as follows:-

- Confirmed the date of marriage to be on the 4th day of May 1991.

- Confirmed the places of cohabitation and the number of issues of children.
- Denied the contents of paragraphs 6, 7, and 8 of the petition and put the petitioner to strict proof.

The Respondent put in a cross-petition and averred that it is the petitioner who has been cruel to the Respondent. The particulars of cruelty are stated in paragraph 6 of the Answer to petition and cross petition as being hostile to the Respondent, and failing to discuss issues affecting the family, being rude and abusive to the Respondent even in the presence of other persons thereby causing the Respondent shame, ridicule, anxiety, depression and embarrassment, acting in an open defiant and indifferent manner even in the presence of the issues of the marriage, relatives and friends thereby causing extreme anguish to the Respondent, talking ill of the Respondent to the family members, relatives and friends with the sole purposes of lowering the Respondents esteem and reputation, being emotionally cruel and verbally abusive to the Respondent and maliciously using unprintable words against the Respondent, rejecting all attempts to reconcile the marriage and deliberately failing to attend meetings which had been organized by the Respondent in conjunction with parents relatives and friends, being away from the matrimonial home for long periods of time and absenting himself from home to attend “**Ministry**” without spending time at home first.

By reason of the afore going averments the petitioners conduct had resulted in an atmosphere of tension, mistrust and animosity within the relationship which has created a lot of anguish to the Respondent.

In consequence thereof the Respondent sought the following reliefs:-

- (a) That the Respondent be no longer bound to cohabit with the petitioner.**
- (b) That the marriage between the Respondent and the petitioner be dissolved.**
- (c) That the petitioner do meet the costs of this suit.**

The Registrars certificate was issued on the 22/10/2009. At the trial only petitioner gave evidence adopting the content of the petition and added the following:-

- They last resided together in the year 2003.
- The issue of children has been resolved in the children court and he now has custody.
- He engaged several people to reconcile them to no avail.
- Even church efforts were fruitless.
- It is his stand that he tried his best to save the marriage to no avail and for this reason he prayed for the dissolution of the marriage.

When cross-examined he stated that he is not perfect but he tried his best to save the marriage but it cannot be salvaged and it has irretrievably broken down, agreed that indeed he responded to summons by Fida to go and try to reconcile. Denied allegations of cruelty leveled against him in the cross petition.

Parties filed written submissions dated the 30th day of September 2010 and filed the same date. A perusal of those of the petition reveals that it is a reiteration of the content of the petition, reiterated the content of his oral confirmation of the petition in court.

- The court was invited to believe the acts of cruelty suffered by the petitioner.

- The court to believe the content of the exhibits that indeed the petitioner made efforts to save the marriage but it is the Respondent who resisted the move a fact confirmed by the proceedings in the children's court when dealing with custody of the children issues.

The submission of the Respondents' are dated 29th day of September 2010 and filed on the 30th day of September 2010 and the following have been stressed:-

- Existence of the marriage, its having broken down irretrievably and the desire to have it dissolved has been admitted by both sides.

- That both parties have relied on cruelty both in the petition and the cross-petition.

- That since the Respondent was forced out of the matrimonial home due to the cruelty of the petitioners, the court should make a finding that it is the petitioner who is guilty of constructive desertion in favour of the Respondent.

- The court is invited to make a finding that since the Respondent made the first move to go to Fida to seek its intervention, this court to make a finding that this is proof that she is the one who was the victim. The court is invited to be guided by the legal texts and case law cited to it by the Respondents counsels.

At page 3 of the Respondents counsel submissions there is reference to the definition of cruelty whose text extract has not been exhibited. There is reference to the case of **EDWARD WAGENI VERSUS AGNES WANGARI MWAURA NAIROBI HCCC D.C. NO. 126 OF 2003** decided by P.J. Kamau K as he then was on the 14th day of July 2005, wherein divorce was sought on grounds of adultery which was dismissed. The responded had pleaded a constructive desertion and without praying in a cross petition for the dissolution of the marriage but for any other relief that the court may deem fit to grant, the learned judge dissolved the marriage on the ground of constructive desertion.

The case of **NAOMI NYAMBURA NDONGA VERSUS EDWIN MUCHUGIA KARANJA AND JANE BOND NAIROBI HCCC D.C. NO. 106 OF 2006** decided by B.P. Kubo J on the 14th day of December 2006. The grounds for divorce were cruelty, adultery and desertion. The Respondent pleaded that it is the petitioner who haD been cruel to him. Upon assessing the evidence adduced by both sides apportioned cruelty at 30% as against the Petitioner and 70% as against the first/Respondent.

The case of **M. VERSUS M. (2000) 2KLR 511** decided by Nambuye J in August 2002 where in divorce had been sought on the grounds of adultery and cruelty and the court held inter alia that;-

- (1) In order for divorcee proceedings to hold, there must be a marriage capable of being dissolved.

(2) The law requires that the matrimonial offences relied upon be proved.

(3) That divorce upon cruelty will be granted upon proof that the acts of cruelty were not mere trivialities but were such that were likely to cause harm not only to the physical health but also to mental health. The situation of unhappiness and incompatibility does not amount to cruelty.

The case of **MEME VERSUS MEME (1975) KLR 13** decided by Chesoni J as he then was. At page 18-19 the learned judge as he then was explored in extensor the definition and meaning of “cruelty” starting at paragraph B on page 18 thus:-

“ Cruelty as a matrimonial offence upon which a petition for dissolution of a marriage may be grounded is defined is willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such danger (see- Russel versus Russel (1895) P 315,322...

Paragraph D For, cruelty to be established, two tests must be satisfied these are “first” whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel and secondly whether the conduct has caused injury to health or reasonable apprehension of such injury (See Gollins versus Gollins (1964) A.C. 644 and Williams versus Williams (1964) AC 698)

Paragraph E. The question in all such cases is whether acts or conduct of the party charged were cruel according to the ordinary sense of that word rather than whether the party charged was himself or herself a cruel man or woman. Thus the court looks at the conduct of the Respondent and not at his or her person. The Respondent's conduct must be grave and weighty to such an extent that it can be described as cruel in the ordinary sense of that word. The burden of proof lies on the petitioner to establish apprehension of injury to life, limb or health to herself or himself before the Respondent's conduct can be described as cruel.

Paragraph G. In Mulhouse versus Mulhouse (1966) P.39 Sir Jocelyn Simon P. said at page 49,50.

Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt. BATER VERSUS BATER (1951) P35: That means that each of the ingredients of the offence must be proved beyond reasonable doubt. First misconduct must be proved of grave and weighty nature. It must be more than mere triviality. In many marriages there are occasional outbursts of temper, occasional use of a strong language, occasional offending silence. These cases are not sufficient to amount to cruelty in ordinary circumstances though if carried to a point which threatens the health of the other spouse, the law will not hesitate to give relief. Secondly it must be proved that there is a real injury to health of the complainant or a reasonable apprehension of such injury. Of course if there is violence between the parties the court will not stop to inquire whether there is a general injury to health but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it. Thirdly it must be proved that it is the misconduct of the respondent which was caused injury to the health of the complainant. As a final test, reviewing the whole of the evidence taking into account on the one hand, the repercussions of the conduct complained of on the health of the complainant on the other hand the extent to which the complainant may have brought trouble to himself or herself the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of that term”

On the basis of the afore set out reasoning the court held inter alia that:-

1. That the question whether cruelty had been established was a matter of degree and fact to be

decided in all the circumstances of the particular case. To establish cruelty the complainant must show to the satisfaction of the court.

(i) Misconduct of a grave and weighty nature.

(ii) Real injury to the complainant's health or reasonable apprehension of such injury.

(iii) That the injury was caused by misconduct on the part of the respondent and

(iv) That in the whole of the evidence the conduct amounted to cruelty in the ordinary sense of that word”

This court has given due consideration of the rival pleadings on the record, the sole testimony of the petitioner as well as responses in his cross examination, the rival submissions filed by either side, the principles of case law cited to court for guidance and the court proceeds to make the following findings on the same:-

1. This court is procedurally seized of the proceedings herein as there is the Registrars' certificate on record issued by the Deputy Registrar on the 22/10/2009 that the proceedings were in order.
2. It is undisputed that there are two issues of the marriage herein but though disclosed, this court will not proceed to make any pronouncement on the same because the issues relating to them were dealt with and fully determined by the children's court.
3. It is to be noted that the petitioner filed a petition, and followed that up by giving oral testimony in court and being cross-examined on the same. This court's assessment of the Petitioner's testimony is that he reiterated the content of the petition, stood firm and supported his assertion in the petition in his cross examination.
4. That the Respondent upon being served filed an Answer to petition and a cross petition. She did not give oral testimony in court. Neither did she offer herself for cross-examination. For this reason, her Answer to petition and cross-petition still remain a pleading and not evidence. This court has judicial notice of the fact that it is now trite law that a pleading is not evidence until testified upon, and tested in cross-examination. This being the case, it cannot be used to oust the petitioners' petition, oral testimony and its having been tested in cross-examination.
5. It is undisputed that there exists a valid statutory marriage between the disputants capable of being dissolved demonstrated by the existence of an admission by both disputants that indeed there was such a statutory marriage on the one hand, and on the other hand the existence of a valid marriage certificate annexed to the petition whose authenticity has not been disputed.
6. Having discounted the Respondents Answer to petition and cross-petition as not being evidence, the court is left with the petitioner's petition, oral testimony, responses in cross-examination and the examination as the evidence on the basis of which the court is to determine the dispute.

7. The matrimonial offence relied upon by the petitioner is one of cruelty. Case law assessed, though one of this court's own decision and others by courts of concurrent jurisdiction and not binding on this court, are in agreement that the general and correct position in law is that, in order for such a proceeding to succeed, there must be reliance on a matrimonial offence known to law which matrimonial offence must be shown to exist.

8. The matrimonial offence relied upon by the petitioner is one of cruelty. This is provided for in section 8 of the matrimonial causes Act cap 152 of the laws of Kenya. It reads:- a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent (a) has since the celebration of the marriage committed adultery; or

(b) Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition.

(c) Has since the celebration of the marriage treated the petitioner with cruelty; or

(d) Is incurably of injured mind and has been continuously under case and treatment for a period of at least five years immediately preceding the presentation of the petition...

9. A reading of this provision reveals that it is not mandatory that all the ingredients be present before one can earn such a relief. It is material if only one or a combination of the same is proved. This is signified by the use of the word "or" after citation of each ingredient.

10. The standard of proof required to be established is the one set out in section 10 of the said Act. It reads in part:-

Section 10(1) on a petition for divorce it shall be the duty of the court to inquire so far as preferably can into the facts alleged and whether there has been any convenience or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any counter-charge which is made against the petition.

11. When the test in number 10 above is applied to the facts herein the court finds that the petitioner has proved his petition on a balance of probability for the following reasons:-

(i) There is a demonstration that party's parted ways in 2003, reconciliation failed, and neither party is interested in rebuilding the marriage. They have lost interest in each other and the marriage. It has irretrievably broken down.

(ii) His assertion of cruelty pleaded in the petition, reiterated in both his examination in chief and cross examination and re affirmed in Re examination stands un ousted by the un confirmed and untested pleadings of the Respondent cross-petitioner. It therefore stands unchallenged.

(iii) Narration of the acts specified in the petition amount to cruelty because in their persistence nature amount to cruelty not only to the issues of the marriage but the disputants themselves as they rob themselves of:-

(a) Right of consortium to one another.

(b) Right to a harmonious family.

(c) Right to both mental and physical well being of the family.

12. The ingredients afore said in number 11 above satisfied the standards set by case law assessed herein and for this reason the petitioner is entitled to the relief being sought in the petition.

13. As for costs Article 45 (3) of the current Kenyan constitution makes provisos that “ **parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage**” For this reason each party will bear own costs of the proceedings.

For the reasons given in the assessment the marriage celebrated between the petitioner and the Respondent at Nairobi Baptist church on 4/5/1991 vide marriage certificate No. 24931 be and is hereby ordered dissolved.

2. The respondent’s cross petition is dismissed for reasons given in the assessment.

3. Decree nisi to issue forthwith.

4. Decree absolute to issue 6 months after the issuance of the decree nisi or for such a shorter time upon application by either party.

5. Each party will bear own costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2011

**R.N. NAMBUYE
JUDGE**