



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Divorce Case 15 of 2007
R F B.....PETITIONER
VERSUS
E K.....RESPONDENT
JUDGMENT

The petitioner and the respondent celebrated their marriage under the **Marriage Act Cap 150** on 15th September, 1995 and have been blessed with two issues. The respondent had a son before the marriage. The marriage began to experience turbulence in 2003 culminating with the couple living separately and eventually the filing of this petition. The petitioner seeks the dissolution of the marriage on the grounds of cruelty, adultery and desertion. The respondent has in her answer to the petition also cross-petitioned on the grounds of cruelty and adultery.

The facts in this matter are largely undisputed. For example, it is the petitioner's case that apart from his two children with the respondent, he has been taking care of respondent's son, although there is no formal adoption. That the two children go to B School in Nairobi and live in his rented house in M[PARTICULARS WITHHELD] Estate while he partly lives in Naivasha, where he works; that he visits the children every Monday, Wednesday and weekends. The children live with the petitioner's girlfriend (C N), while

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the respondent's son is a university student and lives on his own and his college fees as well as his rent and maintenance are paid for by the petitioner. The petitioner gave his monthly salary as Kshs.400,000.00 although there was no documentary evidence to back it up. Both the respondent and the petitioner jointly own some property in Naivasha which they have mutually agreed to sell and share the proceeds.

On her part, the respondent contends that after she left her matrimonial home, she lived with her mother in Limuru before she left for Mombasa where she is training in the art of L furniture-making. The children lived in Limuru until they were taken by the petitioner. Prior to moving to Limuru, the petitioner lived with a man friend, P C (C), (P) who has since passed away. She however, denied having any adulterous relationship with him. The respondent currently has no source of income. She further averred that although she had alcohol dependency problem, she has reduced on her consumption.

I have considered the petition, the amended answer and cross petition, written submissions by both counsel as well as authorities cited. The question to be considered is whether the petitioner and the respondent have proved their respective grounds of the petition for divorce against each other. The court will also consider who between them is entitled to the custody of the children and finally whether an order of maintenance ought to be made.

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Both the petitioner and the respondent accuse each other of committing adultery during their marriage. It was therefore upon each of them to adduce evidence to prove adultery. The standard of proof in matrimonial "offences" is now settled. The court must be "satisfied as to be sure." This was explained in the case of **Elexander Kamweru Vs. Anne Wanjiru Kamweru**, Civil Appeal No. NAI. 31 of 2000, as follows:

“.....we would say that the feeling of some certainty by court, that is, “being satisfied as to be sure”, means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the court ought to be satisfied as to feel sure that cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”

Indeed that is the standard of proof envisaged in **section 10** of the **Matrimonial Causes Act - (Cap 152**

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According to the petitioner, the respondent has committed adultery with P. Apart from that general statement, there is no averment of how the respondent did this. However, from the oral evidence, it is clear that the respondent lived with P for two years

at Kileleshwa in Nairobi and moved to Limuru briefly before his death. The respondent however, maintained that P was only a good friend who was helping her in developing her land in Limuru

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and also purchased a car for her. In turn she was there for him as he battled with cancer. She denied an adulterous relationship with P due to his ill health, which affected his sex life. That he could suffer serious pain if he had an erection, she added. Can it be said that there was adultery between the respondent and P?

Adultery is defined in Concise Oxford English Dictionary 11th Edition as:

“.....voluntary sexual intercourse between a married person and a person who is not their husband or wife.”

In view of this definition, the standard of proof set out earlier and the evidence presented, living with a person *per se* may or may not provide circumstantial evidence or opportunity and inclination to commit adultery depending on the circumstances of the case.

Considering the explanation offered by the respondent of P's inability to have sex due to his health condition, I am satisfied that adultery against the respondent has not been proved to the required standard. Secondly under **section 9(1)** of the **Matrimonial Causes Act**, the petitioner ought to have joined P as a co-respondent. It is

clear from the record that P died after this cause was instituted and therefore there was no good reason why he was not so joined.

Turning to the allegation of adultery pleaded against the petitioner in the respondent's cross-petition, it is alleged that the petitioner has, during his marriage to the respondent, committed

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adultery with a lady named only as G and another one called C N. While the alleged adultery with G has no basis or evidence, that with C N has been proved to my satisfaction. First, the petitioner has by his own explicit admission confirmed that he does not only cohabit with C N at his house in M, Nairobi but also has an adulterous union with her. With that admission, it was not necessary to require C N to be joined in these proceedings.

I come to the conclusion on this issue that adultery has been proved against the petitioner. On that ground alone and to that extend, the respondent's cross petition succeeds.

However, for what it is worth, I will consider the other grounds. Desertion was pleaded by the petitioner but no evidence adduced in support. What is in evidence is that in 2004, when the marriage became really turbulent, the couple mutually agreed to live apart. It is as a result of that agreement that the respondent moved to a separate house in Naivasha. Two years later in 2006, she moved to Nairobi where she lived with P as explained earlier and lately to Mombasa. It would be desertion if the respondent left the petitioner without cause for a period of at least three years immediately preceding the presentation of the

petition. In this case, the petitioner and the respondent agreed that in the interest of their well being, they would live separately from each other. That is not desertion.

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Both the petitioner and the respondent have accused each other of cruelty. Proof of cruelty as a matrimonial offence is a question of fact depending in the circumstances of each case. As Madan, J (as he then was) said in **N Vs. N & Another** Divorce Cause No.9 of 1973, that if a couple has

“reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable or unreasonable to continue to bear then they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences. There is no limit to variations of cruelty. Each case must have its own measure.”

Each party in this cause has given various circumstances which in their view constitute cruelty. Some of the instances took place several years before the filing of this cause, others are not supported by evidence while there are those that do not amount to cruelty.

I am only interested in evidence constituting cruelty. The petitioner related an incident where the respondent found him at the club with business associates, grabbed his drink (a glass and a bottle) and hurled them against the wall. That was clearly an act of cruelty and it is admitted by the respondent. That is the only incident of cruelty that was pleaded and proved by the petitioner.

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The respondent on the other hand has given sixteen particulars of cruelty which fall within some of the category I have identified in the previous paragraph. Out of all of them, only one was proved by evidence. The incident relates to one occasion when the respondent's motor vehicle broke down with her and the children on Nakuru-Naivasha Highway around 5p.m. The petitioner ignored her plea for rescue arguing that he was busy. When the respondent eventually caught up with him, he was in a bar in the company of C "Chairmania". Again on that score, the petitioner's conduct which exposed the respondent and the children to danger constitutes cruelty. Both have, therefore, proved cruelty against each other, and a case for the dissolution of their marriage has been made out.

I turn now to consider the final issue in this cause - the maintenance and custody of the children. I start with the latter. After the parties herein parted company, it would appear the respondent had custody of the children. It is in evidence that the petitioner only took the children into his care and custody when the respondent went to Mombasa, leaving them with her mother at Limuru. There are two children to this marriage. The boy is fifteen (15) years and the girl thirteen (13) years old. It is not in dispute that presently the children live with the petitioner's girl friend, C N in his rented accommodation in M, Nairobi. It is also not in dispute that the petitioner works in Naivasha and spends

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most of his time at work, except when he visits the children and C N over the weekends, Monday and Wednesday.

The respondent, of course, has been attending a course in Mombasa but confirmed at the hearing of this cause that she would be back in December, 2009. However, from the written submission, it is apparent that she may have returned in November, 2009. It is also noted that the respondent is not employed and has no income as her tour business collapsed. Both children being minors require parental care. So that, although it was the petitioner's evidence that C N does not have children and is an expert in matters of children, she does not qualify to take care of another woman's children as long as the respondent is alive and capable as a mother.

The respondent will be precluded from the custody of the children only if there are exceptional circumstances such as being of loose moral turpitude, drunken habit, bad company and so on. The general principle in matters of custody of children being that the court must be guided by the welfare of the child.

In view of the circumstances herein, namely, that the petitioner is not with the children on a full time

basis, that they are left with a stranger; that the respondent has cut down on her drinking and indeed there has not been any allegation that she had failed to take care of the children, I am persuaded that it will be in the interest of the children to be with the respondent and so I grant custody to her.

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The petitioner will have unlimited access to the children subject to arrangement with the respondent.

Regarding maintenance, the respondent is categorical that the maintenance sought is by and large for the children. Earlier negotiations between the petitioner and the respondent on the level of maintenance fell through after they failed to agree. The respondent sought and is still seeking on all inclusive maintenance in the sum of Kshs.100,000.00 per month which the petitioner has rejected. There is evidence that when the respondent was living alone with the children, the petitioner supported them fully for their upkeep and also secured a medical cover for the children.

As a matter of fact, the petitioner has been extremely magnanimous to the respondent as he has been taking full care of her 21 years old son who is a second year university student. He has been paying college fees in the sum of Kshs.90,000.00, providing transport, pocket money and other upkeep. He has indeed expressed willingness to continue with this gesture.

In deciding the level of maintenance, the court must consider, among other things, the lifestyle the children have been exposed to, as well as the incomes and expenditure of the petitioner and the respondent. The respondent is presently unemployed but is planning to start a furniture business. She does not have accommodation in Nairobi and lives with her mother in Limuru. If the children are to

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maintain the school they go to (B) and their present lifestyle, then the petitioner must provide accommodation. I want to borrow the words of Justices of the Court of Appeal in **S.O.** Vs. **L.A.M.**, in which they stated as follows:

“It is our considered view that an order awarding actual custody to an unemployed mother of the child who has no means of getting reasonable accommodation for the child, will not be in the best interest of that child unless provisions is made for accommodation, more so if the father of the child, as the appellant herein, is able to provide such accommodation for him.”

I make the order that the petitioner shall provide maintenance to the children as he has always done when they are under his care. Bearing in mind his income and expenditure and the fact that he may wish to start a new life, I make the following orders in respect of the two children:

- i) House rent (in Nairobi) - Kshs.25,000.00 per month. (This is what he is paying in Mountain View).
- ii) For food, utilities and general maintenance - Kshs.50,000.00 per month.
- iii) Continue paying school fees.
- iv) Maintain a medical cover.

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In conclusion and on the basis of the matters earlier considered in this matter, the marriage between the petitioner and the respondent is hereby dissolved and a decree *nisi* to issue. The same shall be made absolute after the expiration of six (6) months from the date of this order.

Ordinarily, courts sparingly award costs. In view of the findings in this matter, I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 12th day of February, 2010.

**W. OUKO
JUDGE**