



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

DIVORCE CAUSE NO. 33 OF 2008

R B M.....PETITIONER

-VERSUS-

G A M.....RESPONDENT

JUDGMENT

The petitioner stated in his petition, dated and filed on 27th June, 2008 that he had, on 24th April, 2004 married the respondent at Holy Ghost Cathedral, Mombasa, the marriage being solemnised under the African Christian Marriage and Divorce Act (Cap.151, Laws of Kenya). This marriage, it was stated, was celebrated after a five-year period of cohabitation between the parties. During the subsistence of the union, the parties had begotten two children, a daughter and a son.

The petition was seeking the termination of the said marriage on the ground of cruelty on the part of the respondent.

The particulars of cruelty were stated as –

- (i) refusal and/or neglect to prepare meals for the petitioner and the children of the marriage;
- (ii) refusal to care for the children, by keeping them clean and availing them to medical institutions for treatment;
- (iii) being “violent/hysterical/emotional/hostile/ungovernable/intolerable and irreconcilable”;
- (iv) being in the habit of “sneaking out of” the matrimonial home at odd hours;
- (v) deserting the matrimonial home, thus “denying the petitioner consortium and conjugal rights”, and causing him thereby to “suffer psychological torture and anguish.”

The petitioner contends that he has not “in any manner been an accessory to, or connived at, or condoned the act of cruelty and desertion complained of.” He states that his marriage to the respondent has irretrievably broken down.

On the foregoing grounds, the petitioner prays for orders that –

- (a) the marriage be dissolved;
- (b) the costs of the petition be provided for.

Even as the respondent failed to turn up on the occasion of hearing, the petitioner after being sworn, on 14th December, 2009 gave testimony substantiating the claims set out in the petition. The petitioner started cohabiting with the respondent in 1999, at Ganjoni in Mombasa, and subsequently the marriage between them was solemnised, and they shifted their matrimonial home to Mama Ngina Drive, still in Mombasa. A daughter was born to the parties in 2000, and a son in 2005.

The burden of his case was that the respondent deserted the matrimonial home on 18th January, 2008 and has not returned, to-date.

The petitioner testified that he had been the bread-winner of the family and had been responsible for the provision of shelter, education for the children, food and clothing; and it was his expectation that the respondent would provide counselling for the children, give parental guidance, oversee the family budgetary arrangements, and prepare food. She could not perform these tasks, the petitioner testified, mainly on account of her mode of use of time: she would depart from home at 8.00 a.m., and not return until well after midnight; and such odd hours of arrival exposed both the respondent and the family to insecurity. It was the petitioner's evidence that the respondent had fallen into the habit of substance-abuse, and she was smoking and taking alcohol. The petitioner did discuss with the respondent the dangers attendant on the respondent's habits, but she would not listen. On 10th February, 2008 the petitioner had called a family meeting which was attended by the respondent's father, for the purpose of discussing the misunderstandings; but the respondent refused to attend.

The petitioner testified that he had endeavoured in vain to trace the respondent, and he has had to file Case No.9/2008 at the Children's Court, to provide for the custody of the children; and for this purpose substituted service through the press had to be ordered, in respect of the respondent who was unreachable. Though the respondent did on that occasion appear in Court, the Children's Court, on 13th March, 2008 found her to be irresponsible and awarded custody to the petitioner.

The petitioner said that the marriage had irretrievably broken down, and he was praying for dissolution.

By the evidence given by the petitioner, the respondent is well, and stays at some unknown place in Mombasa; she has no more interest in the matrimonial home, and she is keeping away from the husband. Clearly, such conduct has severely undermined the relationships and activities that keep alive the institution of matrimony. The respondent plays no further role in the upkeep of the children of the marriage, and she has denied her husband the conjugal right, which is a fundamental aspect of the matrimonial set-up; she is in desertion from the matrimonial home. The act of desertion by itself would be a good ground to support the petition for divorce; but the situation is still more grave, as the act of desertion has brought in its train a multiplicity of censurable acts which clearly qualify as cruelty to the petitioner.

Taking into account these facts and circumstances, I have come to the conclusion that acts of desertion and cruelty exist which fully justify the grant of divorce orders as prayed. I have found no evidence that the petitioner has condoned or connived at the acts of desertion and cruelty aforesaid; and similarly, there is no evidence that the petitioner has acted in collusion with the respondent to beguile this Court to grant orders of divorce.

Accordingly, I hereby grant the decree *nisi* of divorce as prayed by the petitioner; the same may be made absolute upon a suitable application. Parties to bear their own respective costs.

Orders accordingly.

SIGNED:

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J.B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 5th day of March, 2010.

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JUDGE