



No. 79

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
DIVORCE CAUSE NO. 4 OF 2003

D.M.....PETITIONER

-VERSUS-

B.P.M.....RESPONDENT

JUDGMENT

D.M., herein after, the petitioner on or about 30th April, 1999 married **B.P.M** pursuant to the Provisions of the Marriage Act. At the time of the celebration of the said marriage, the petitioner was a spinster whereas the respondent was a bachelor. Following the marriage they resided and cohabited as man and wife in Keroka and were blessed with one issue, **A.M.** As at the time of presentation of this petition in this court, the issue was then aged 3 years.

The marriage was however not blissful as the respondent persistently tormented and treated the petitioner with unmitigated cruelty. On various occasions he would beat the Petitioner threatening to kill her both in private and public places. When the beatings became interolerable, the petitioner was forced to retreat and seek refuge at her maiden home in Nyansiongo. Occasionally and without any provocation or any apparent reason, the respondent would elect to remain mute even when the petitioner was talking to him. However when he opened up he would resort to abusive languages. As a result of all the foregoing, the petitioner felt that the marriage had irretrievably broken down as various attempts at reconciliation had failed since the respondent had adamantly refused to meet the petitioner's parents with a view to reconciliation despite repeated requests. It is for this reason that the petitioner filed the petition the subject of this judgment.

On 4th August, 2003 seeking that marriage be dissolved on grounds of cruelty. She also prayed for the custody of the only issue of the marriage, **A.M** with visitation rights by the respondent. She also asked for costs of the petition.

She pleased further she had not connind nor condoned the acts of cruelty, abuse and neglect perpetrated on her by the respondent as aforesaid.

The petitioner was in the fullness of time duly served on the respondent. He reacted to the same by filing a memorandum of appearance. However he did not as expected to follow it up with an Answer to the petition. On 11th June, 2007, the petitioner through her lawyers, **Messers Oguttu-Mboya & Company Advocates**, filed an application for the Registrar's Certificate pursuant to section 3 rules 29,54 & 55 of the Matrimonial Causes Act and section 39 of the same Act. The application was heard on 16th July, 2007 and allowed by the Deputy Registrar.

On 17th May, 2010 the hearing of the petition commenced before me as uncontested. Only the Petitioner testified. Her testimony was along the lines already outlined above. Suffice to add that the petitioner was now a teacher. She tendered in Evidence the marriage certificate. The respondent was too possessive of her and would even stop her from getting out of Keroka town without his permission. He always monitored her movements. In 2003 he threatened to kill after he had assaulted her thoroughly. It is then that she left the matrimonial home for her parent's. Previously she had lodged a complaint with Nyamira police station after another bout of assault on her by him, however the police waved her away claiming that her complaint was a simple domestic problem and refused to act on the same. As far as she was concerned she wanted out of marriage as soon as yesterday.

The evidence of the petitioner as regards the goings on in their marriage is unchallenged, uncontested and uncontroverted. It must therefore be taken to be true under section 8(1) of the Matrimonial Causes Act, a petition for Divorce may be presented to the court either by the husband or the wife on grounds that the respondent:-

(a)

(b)

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

(d)

However it should be noted that such proceedings cannot only be initiated after the marriage has survived the 3 years threshold. In the circumstances of this case, the marriage was celebrated on 30th April, 1999. These divorce proceedings were however initiated on 4th August, 2003, roughly 4 months after the marriage had attained the threshold. Thus the petition as filed cannot be impugned on that ground.

Cruelty as a ground for divorce requires a high standard proof which is neither on balance of probabilities or beyond reasonable doubt. The prove must be above balance of probabilities but below beyond reasonable doubt. In this case, the evidence of the petitioner with regard to the respondent's cruelty is uncontroverted. Indeed as a result of the cruelty, the petitioner and respondent no longer reside or cohabit together. This has been the state of affairs since 2003. This is a period in excess of seven years. Clearly this is evidence of the marriage having irretrievably broken down. If the respondent was keen on the marriage, he would have been in the forefront of trying to resurrect and save it. He was spared no such efforts. I do not think that any useful purpose would be served in maintaining this shell of a marriage.

In the result, I allow the petition. Henceforth a decree Nisi shall issue to be made absolute within the statutory period. I also grant prayer (b) in the petition. However there is no need to grant visitation rights to the respondent since he did not express such desire. Why should a court of law impose an obligation on a person who is not desirous or deserving of the same. I make no order as to costs.

Judgment dated, signed and delivered at Kisii this 17th June, 2010.

ASIKE-MAKHANDIA

JUDGE