



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Matrimonial Case 78 of 2008

P O O.....PETITIONER

VERSUS

H A O.....RESPONDENT

JUDGMENT

In his petition filed on 12th November, 2008, P O O, (hereinafter “the petitioner”) seeks dissolution of his marriage to his wife H A O, (hereinafter “the respondent”) on the grounds of adultery and cruelty. In the particulars of adultery, the petitioner stated that the respondent had since the year 1990 to the date of the petition had numerous adulterous liaisons with various individuals and that on numerous occasions had flagrantly displayed open love affairs with the petitioner’s friends and workmates. With regard to cruelty, the petitioner stated that the respondent had denied him conjugal rights on various occasions; that she used abusive and vulgar language when addressing the petitioner and that she displayed disrespect for the petitioner. In those premises the petitioner contended that his marriage to the respondent had irretrievably broken down and should be dissolved.

When the respondent was served with the petition, she filed an answer denying all the allegations made by the petitioner against her. In further answer to the petition, the respondent pleaded that, it is the petitioner who has lived an adulterous life thereby causing her mental anguish and torture. In the particulars of adultery, she stated that the petitioner had on several occasions had sexual relationships with various married and unmarried women including E K and F K and their house helps; and that on several occasions he spent nights away from the matrimonial home and on many other days he would arrive at night without communicating with the respondent. The respondent further averred that the petitioner had treated her with cruelty: insulting and speaking to her harshly which conduct had caused her extreme mental anguish and torture. Notwithstanding those averments, the respondent denied that the marriage had irretrievably and irrevocably broken down.

The pleadings were in that state when the hearing of the petition commenced before me on 25th March, 2010 and continued on 10th May, 2010 and on 16th June, 2010. On the conclusion of the evidence parties agreed to file written submissions which were in place by 8th July, 2010.

In his oral testimony in court, the petitioner stated that he started cohabiting with the respondent in 1983 but had the marriage registered on 13th January, 1989, under the Marriage Act (Cap 150 Laws of Kenya). The marriage was happy at the beginning and they had two issues but became strained three years later when the respondent committed adultery. The adultery continued and by 2002, he could not take it any more and asked the respondent to leave the matrimonial home. He tried reconciliation but did not succeed. He became emotionally unbalanced and psychologically affected. He concluded that the

marriage had irretrievably broken down and should be dissolved.

In cross-examination, the petitioner admitted having an affair with a married woman named P K and that he was staying with F K with whom they have one child.

The respondent's case was as follows: - She was married to the petitioner under Customary Law in 1983 and were blessed with two issues. The marriage was subsequently registered on 13th January, 1989. The marriage was happy until the year 1994 when the petitioner commenced committing adultery with house helps and her relatives. She consequently stopped employing house girls. That however did not help matters. She cohabited with the petitioner until the year 2002 when the petitioner chased her away from the matrimonial home when she complained about his conduct. She was now staying with the children of the marriage who are now adults and engage themselves in short-time contracts. She denied being unfaithful to the petitioner but testified that the petitioner on his part had numerous extra marital affairs with many women including R and F. The latter has two children with the petitioner. She further testified that despite the conduct of the petitioner, she still loved him and wished that the petitioner puts up a home for her and their children. She therefore urged that the petition be dismissed and that if the marriage is dissolved provision be made for where she will live with the children of the union. She also pleaded that provision be made for her maintenance and for the college education of the said children. On cross-examination, the respondent maintained that the petitioner had committed adultery and that he had chased her when she complained about his conduct. She further testified that the petitioner had refused to change his conduct which conduct she had tolerated throughout the marriage.

In his written submissions, the petitioner reiterated his averments in the petition and recited his evidence. He concluded that it is the respondent who had made their marriage unworkable and further that she is employed and has no responsibilities. There is therefore no basis for an order for her maintenance. With regard to the children of the union the petitioner submitted that he will continue to assist them where he could.

In response to those submissions, counsel for the respondent submitted that the petitioner had not established any of the grounds of divorce alleged in his petition. On the contrary the respondent had demonstrated that she was driven out of the matrimonial home by the petitioner's adulterous life. Indeed, the petitioner had admitted committing adultery with E and F and further that he lived with the latter as a married couple and now had two children together. Counsel argued that it was wrong for the petitioner to have his way when he is the one responsible for the breakdown of the marriage.

Having considered the evidence adduced before me, I am now in a position to answer the various issues canvassed before me. The petitioner's petition is founded on the grounds of adultery and cruelty. Adultery as a matrimonial offence is a grave matter and the standard of proof is above proof on a balance of probabilities but below proof beyond reasonable doubt. Proof of adultery must therefore be clear. Mere say so is not sufficient. The respondent denied the adultery. The petitioner merely alleged that the respondent had had numerous adulterous liaisons with various individuals known and unknown to him. Save the mere allegation in the petition and his statement in court, the petitioner produced no evidence at all of the alleged adultery. In the premises, I find and hold that the ground of adultery has not been proved at all.

With regard to cruelty, the petitioner alleged that the respondent had denied him conjugal rights on various occasions; that she constantly used abusive and vulgar language when addressing him and that she displayed no respect for him. I agree with counsel for the respondent that for cruelty to amount to a matrimonial offence, the conduct of the respondent had to be grave and weighty and must have caused real injury to the petitioner's health or a reasonable apprehension of such injury. The conduct of the respondent had in any event to amount to cruelty in the ordinary sense of the word (see *Meme – v – Meme* [1976] KLR 13).

Proof of cruelty as already stated is not however beyond reasonable doubt. The petitioner did not adduce evidence that the respondent used abusive and vulgar language when addressing him and that she displayed no respect for him. He however testified that the respondent denied him conjugal rights on

various occasions during their stay together. That allegation was not denied by the respondent. The respondent may have felt justified to deny the petitioner the conjugal rights given her contention that the petitioner had numerous sexual relationships with many women including her house helps, her relatives, E and F K. The respondent maintained that she still loved the petitioner despite his conduct. But in my judgment, cohabitation with the petitioner even if it is resumed will exclude intimate sexual relations in view of the deep suspicion and admitted extra marital relations the petitioner has with F K. Absence of conjugal rights in my view strikes at the root of any marriage without exception. The respondent herself testified that she tried reconciliation using the petitioner's parents and the church without success and that their marriage was broken by the petitioner. The petitioner on his part concluded that the conduct of the respondent had affected him emotionally and psychologically. There is therefore deep mutual suspicion and complete absence of trust in this marriage. It was common ground that the petitioner and the respondent had had no conjugal relations since 2002 and it is unlikely that they would. The policy of the Law is not to allow limping unions to exist in the name of marriage.

In the premises, I find and hold that the marriage, the subject matter of this petition has irretrievably broken down. It is hereby dissolved. Decree Nisi shall issue forthwith and the same shall be made absolute after the statutory period.

With regard to maintenance, I have found no basis to order the same. The issues of the union are adults and are at liberty to seek relief against the petitioner in separate proceedings if they so wish. The petitioner himself has stated his willingness to contribute to their advancement in life and I hope proceedings to seek his contribution will not be necessary.

With regard to costs, the petitioner bears the greater responsibility for the breakdown of this marriage. He should therefore bear the respondent's costs of the petition.

Orders accordingly. **DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF SEPTEMBER 2010.**

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Oguk for the Respondent and the Petitioner in person.

F. AZAGALALA

JUDGE

8TH SEPTEMBER 2010