



Court: Divorce Law in Kenya has failed to keep pace with changes in contemporary society. There is need for legislation to widen menu for grounds of divorce.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
DIVORCE CAUSE NO. 9 OF 2009

BETWEEN

R.C.....

**PETITIONER
VERSUS**

D.K.M.....

RESPONDENT

JUDGMENT

R.C. (the Petitioner) filed the Petition in this cause on 10th August, 2009 against her husband, **the Respondent**, seeking dissolution of their marriage and custody of the only issue of the marriage namely **G. C**, then aged 7 years. The marriage between the parties was a Christian one having been ceremonised under the **African Christian Marriage and Divorce Act** at D Centre Church (DCC) at Bomet Township in the Republic of Kenya. In the Divorce Petition dated 6th August, 2009, the Petitioner alleged that the Respondent deserted her in December, 2001 and was in adulterous relationship with his step-sister, one **E.I.**, and that the marriage had irretrievably broken down.

When the Divorce Petition came up for hearing on 29th July, 2010, the Respondent who had been served with a hearing notice by one Stephen Chebochok, a Process Server, on 16th July, 2010 at Isebania Township did not appear. He had however filed an answer to the Petition on 23rd September, 2009 in which he had denied the allegations of desertion and adultery made against him in the Divorce Petition. He had countered that it was the Petitioner who deserted him in 2003.

Both the Petitioner and the Respondent had no counsel. The hearing opened before me on July, 29th, 2010. In her evidence, the Petitioner who was affirmed produced the Marriage Certificate as exhibit No. 1 and stated that she got married to the Respondent on 17th November, 2001. The Marriage Certificate shows that the Petitioner, then aged 25 years, was a Spinster at the time of the marriage and the Respondent, then aged 28 years, was a Bachelor. The Petitioner was a Tailor while the Respondent was a Pastor.

In her evidence, the Petitioner stated that after the marriage the parties cohabited in Bomet Township within Rift Valley Province and in the year 2001, the Respondent left the matrimonial home and went away and married his own sister, one E.I. He returned to the matrimonial home in March of 2002 and the parties resumed cohabitation. The Petitioner told the court in evidence that when the Respondent returned in March, 2002, she was expectant with his child and that she gave birth in August, 2002 to a baby girl, **G.C.** It was her evidence that they lived together up to the year 2007 but the Respondent was not continually in the matrimonial home as he came and went. It was in the year 2007, she said, when the Respondent brought elders to officiate in a meeting in which the Respondent stated that he wanted to leave the Petitioner. At that meeting, said the Petitioner, the Respondent prepared a letter dated 20th

January, 2007 which the Petitioner produced as exhibit No.2. It was titled “**LOVE AGREEMENT**” and it contained terms on which the marriage was terminated by the Respondent. Paragraphs 1, 3, 4, 11 and 12 of the said agreement interestingly stipulated;-

1. I D.K.M ID.NO. [.....] have today decided to permanently break my marriage relationship with R. C. I declare that R is completely innocent and is not guilty in this matter in any way if any thing I am guilty of this myself.

3. I have decided that child will remain with R throughout until the child decides otherwise when she is of age. Since I am handing over the child myself. I will assist the child willingly or when asked to assist. No obligation whatsoever.

4. Neither R nor me will ever claim anything from each other.

11. I D.K.M ID.NO.[.....] have fully made this decision to terminate our marriage

Signed.

Date: 20th January, 2007

12. R. Cr ID.NO. [.....] have accepted what K have decided because she cannot force herself to him.

Signed.

Date: 20th January, 2007

It was the Petitioner’s evidence that the Church elders advised the Respondent to divorce her as he had married his sister.

This was the evidence the Petitioner tendered in support of her Petition. Is the Petitioner entitled to dissolution of the marriage on the basis of this evidence? Has she complied with the law? The law in relation to divorce law in Kenya is archaic and antiquated and no effort seems to have been made yet to modernize it so as to bring it in consonance and to keep it in step with present day realities of living. The law still requires that dissolution of marriage must follow proof of either adultery, desertion or cruelty. These grounds of divorce are as few as they are not varied. **Section 8(1)** of the matrimonial Cases Act stipulates;-

8(1) 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; or

(c) has since the celebration of the marriage treated the Petitioner with cruelty: or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

What emerges from the Petitioner’s evidence? First, that there was a valid Christian marriage between the parties. That after the Respondent left the matrimonial home in 2001, the parties resumed cohabitation in March, 2002 and as a result, the desertion between 2001 and 2002 was condoned. In any case, it fell short of the requisite period of three years stipulated by the law. Moreover, it seems that even though the Respondent had left the matrimonial home, he kept coming back and the birth of the only child of the marriage in March 2002 shows that in July, 2001 the parties were having sexual relationship and they stabilized in March, 2002 when the Respondent returned home and normal cohabitation resumed and continued all through to 2007.

Normal relations however ceased in July, 2007 when the Petitioner said the Respondent brought elders to officiate in a ceremony to bring the marriage relationship to an end. This aspect of the evidence does not accord or harmonise with exhibit No. 2 which shows that the meeting to terminate the marriage was on 20th January, 2007.

The Petitioner filed the Petition for divorce on 10th August, 2009, barely three years after cohabitation came to an end. For desertion to constitute a ground for divorce, it must have run for three continuous years immediately preceding the presentation of the Petition. The Petition in this cause was prematurely presented. This ground for divorce fails.

As regards adultery, there was no evidence adduced to establish it. Courts of law, as this court has stated before, determine disputes on the basis of facts proved by evidence to which the law is applied. Even where it is rightly or generally believed that a party has engaged in adulterous activities, the party at fault cannot be condemned without evidence to prove it. The Petitioner in this cause generally believes that the Respondent was in an adulterous association with his step-sister, one EI, but the Petitioner did not adduce solid evidence from which the court could infer that adultery had taken place. Normally, it is not always necessary or possible in cases of adultery for a spouse to catch the offending spouse *in flagrante delicto* or red-handed so as to prove adultery. After all, sexual encounters and sexual escapades are done so clandestinely. It is my finding that the Petitioner has not adduced sufficient evidence to prove adultery on the balance of probabilities.

The upshot of this is that the Petition lacks evidence to prove any of the alleged matrimonial offences. I cannot but dismiss it, which I hereby do. I make no orders as to costs.

I hope that the relevant institutions charged with the review of the country's laws will take steps to modernize the divorce law in Kenya so that Kenyans can have a wider spectrum or menu of grounds for dissolution of failed marriages and annulment of such marriages. We are lagging behind in this area of our law and it behoves us to ensure that the divorce law keeps pace with contemporary changes and developments in our society.

DATED at KERICHO this 10th day of November, 2010

G.B.M. KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING

No appearance for the Petitioner

No appearance for the Respondent