



***Divorce: if consent to marry is obtained by fraud, trick, duress or force, the marriage is void. The test to be applied is whether there is real consent as defined at pg6 of this judgment.***

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**HC DIVORCE NO. 11 OF 2006**

**A.C.K.....PETITIONER**

**VERSUS**

**B.K.....RESPONDENT**

**JUDGMENT**

**A.C.K**, (the Petitioner) graduated from Egerton University in November 2009. On 7<sup>th</sup> July 2006, long before she was admitted to Egerton University, she got married to **B.K**, (the Respondent) who is an *A[particulars withheld]*Police Officer (). She was aged 17 years and the Respondent was aged 23 years. The marriage was solemnized in the District Commissioner's office at Kericho. The marriage turned out to be a bubble. This is what emerged from the evidence given by the parties.

The Petitioner was pressured into the marriage by the Respondent and the latter's siblings as well as his parents. The Petitioner kept from her parents the fact that she had gone through a ceremony of marriage.

At no time did the Petitioner cohabit with the Respondent even for a single day after the marriage. Instead, she went to Egerton University to pursue her studies. In her testimony she told the Court that she felt awful after the marriage ceremony and that she did not want to throw away her life. That is why, instead, she said, she threw away into the tea bushes on her way home the wedding ring the Respondent had given to her in the DC's office at Kericho during the marriage ceremony. She severed all links with the Respondent after the marriage. Prior to her giving evidence in Court on 19/1/2011 in this cause, she had only once talked to the Respondent after the marriage and that was on the phone when she told him to forget her and what had happened in the DC's office. This was confirmed by the Respondent in his evidence.

On 15/11/2006, the Petitioner filed the Petition in this cause. In it, she alleged that she was hoodwinked

into marrying the Respondent. She averred in the Petition that she was only 17 years at the time of the marriage and that the Respondent used money and gifts to entice her and delude her into agreeing to marry him. It was her averment in the Petition that she kept the fact of the marriage secret and away from her parents because she feared that they would be badly hurt and disappointed in her.

In her evidence, the Petitioner stated that the Respondent manipulated her and took advantage of her inexperience and naivety to get her to agree to marry her. It was her testimony that the Respondent never had sexual intercourse with her after the marriage and that even before the marriage, there was no intimacy. The Respondent conceded in his evidence that since his marriage to the Petitioner, he has never heard sexual intercourse with the Petitioner. In short, the marriage has never been consummated, nor have the parties ever lived together or cohabited as man and wife even for a single day. It is for this reason that the Petitioner seeks nullification of her marriage to the Respondent. She told the Court in her evidence that the Respondent had moved on with his life and that he was married to another woman. It was her evidence that the marriage was the worst mistake she made and that she viewed it as quite grotesque and a blot in her life. She broke down to tears several times in the witness box and sobbed with ostensible bitterness and regret. She was seemingly pained by the fact that the Respondent who was older had cunningly induced her to agree to go through the marriage ceremony. She said that from very early in her life, she was focused on pursuing education. Her dream was fulfilled when she graduated from Egerton University in [.....]. She loathed as a blot in her life the marriage she wants nullified. But she should take comfort in the fact that she had realized her dream and overcome what she sees as a blunder she had committed. She had corrected the error, she said, by seeking further education instead of settling down in the marriage to get babies after leaving K Girls Secondary School where she sat for her 'O' level examinations.

The Respondent conceded in his evidence that the marriage was irretrievably broken. He did not have any illusions that there was nothing in the marriage.

It is the law that a husband or wife may petition the Court for nullification of marriage. The grounds on which the Court may make a decree of nullity of marriage include the willful refusal of the Respondent to consummate the marriage and the fact that consent of the Petitioner to the marriage was obtained by force or fraud. It is clear that the marriage between the parties was voidable because it exists until the court pronounces a decree of nullity at the instigation of the Petitioner. Where in a voidable marriage, the Petitioner's conduct amounts to approbation of the marriage, this fact precludes the Petitioner from obtaining relief unlike in void marriages where the conduct of the Petitioner is immaterial. Under the **Matrimonial Causes Act, Chapter 152** of the laws of Kenya, the Petitioner must prove that the marriage has not been consummated owing to the Respondent's willful refusal (**see Baxter vs. Baxter (1948) A.C. 274**). Refusal must imply a conscious act of volition (**see S vs. S (1956) P.I**). The refusal must have persisted up to the date of presentation of the Petition. It is settled that there can be no refusal to consummate where the Petitioner has acquiesced in the Respondent's failure to consummate. But more importantly, a Petitioner cannot present a petition on the ground of his own willful refusal to consummate.

In the present case, it emerges from the evidence given by the parties that the Respondent was willing to consummate the marriage but the Petitioner willfully refused. The Petitioner cannot now seek nullification of the marriage on the basis of her own act. That ground must fail. I so find.

**Under Section 14 (1) (e) of the Matrimonial Causes Act**, a decree of nullity of marriage can be made if it is proved that consent of the Petitioner was obtained by force or fraud. In paragraph 7 of the Petition, the Petitioner averred that the Respondent enticed her with money at the age of 17 years after she had just completed high school. He gave her gifts and bought her a mobile phone and topped her credit without her request and deluded her into thinking that the marriage could be kept secret while she studied at the University. The Petitioner alleged in her Petition and testified in Court that the Respondent manipulated her mind and confused her with a view to getting her to agree to go through with the ceremony of marriage.

The conduct of the Petitioner after the ceremony of marriage in the DC's office at Kericho on 7/7/2006

shows that she had gone into the ceremony reluctantly. She threw into the bush the wedding ring given to her. She also walked away leaving the Respondent and his brother and sister who were witnesses. She headed to her home. Neither her parents nor her siblings knew of the ceremony. If they did, they would have graced the occasion by their presence. She told nobody about what had happened to her. When she next talked to the Respondent on mobile, she told him that she would never want to see him and asked him to forget the marriage. The Respondent confirmed this but told the Court in his evidence that the parents of the Petitioner knew about the marriage as did the siblings of the Petitioner. He said that the Petitioner's parents had consented to it. But he was not able to explain why none of them attended the ceremony or why he did not go to them to raise and/or discuss the conduct of the Petitioner after the marriage.

I watched both the Petitioner and the Respondent as they testified. I was impressed by the Petitioner as a witness of truth. Her evidence was in consonance with her actions and behaviour. It was also logical and credible. On the other hand, the Respondent did not impress me as a witness of truth. He could have called his siblings or parents or the Petitioner's parents to buttress what he told the Court but he did not. Nor could he explain the behaviour of the Petitioner if indeed the latter had willingly consented to get married to him. In normal circumstances, before the parties go their separate ways one would expect a dialogue even if it be unsavoury if there was consent in the first place.

The law requires that parties to a marriage must freely consent to marry. The marriage is void if the consent is lacking or if it is obtained by fraud or force, or by threats or duress. It was in **Sullivan vs. Sullivan (1818) 2 Hag. Con 238 at 246** where a party was induced to marry while intoxicated and had no intention of going through the ceremony of marriage. The marriage was declared void. The test to be applied in a case such as the one before the Court is whether there was real consent to marry. Real consent to marry connotes that consent is given freely and knowingly by a person with capacity to contract who is alive to the implications of his or her actions. It seems to me that the Petitioner took advantage of the age and naivety of the Petitioner. It is my finding that there was no real consent to marry the Respondent. It is also my finding that the Petitioner has proved under **Section 14 (1) (e)** that her consent to go through the ceremony of the marriage was obtained by fraud by the Respondent. I so find. In the result I am satisfied that the marriage was void on account of lack of real consent by the Petitioner.

I declare the marriage between the Petitioner and the Respondent solemnized on 7/7/2006 at the District Commissioner's office at Kericho null and void. Pursuant to **Section 15 (1) of the Matrimonial Causes Act**, in the first instance, a decree nisi shall issue and it shall be made absolute after the expiry of three months after its issuance. It is so ordered. The Respondent shall meet half the costs of the Petitioner in this Petition.

**DATED at KERICHO** this 27<sup>th</sup> day of December 2010

**G.B.M KARIUKI, SC**

**RESIDENT JUDGE**

**COUNSEL APPEARING**

Mr. J.K. Kirui, Advocate, for the Petitioner

Mr. J.M. Motanya, Advocate, for the Respondent

Mr. N. Bett, Court clerk