



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Divorce Cause 6 of 2008

ASM.....PETITIONER

VERSUS

JKM.....RESPONDENT

JUDGMENT

In his petition filed on 5th February 2008, ASM, (hereinafter “the petitioner”) seeks dissolution of his marriage to his wife, JKM (hereinafter “the respondent”) on the ground of adultery, desertion and cruelty. In his particulars of adultery, the petitioner states that the respondent has, since the celebration of their marriage, committed adultery with other men and has given birth to two children out of wedlock. With respect to the ground of desertion, the petitioner avers that the respondent has deserted the matrimonial home and is cohabiting with another man, and on the ground of cruelty, the petitioner avers that the respondent has on numerous occasions threatened the petitioner with dire consequences hence occasioning the petitioner psychological cruelty and anguish.

In the petition, the petitioner states that they are blessed with two children namely RAM and SM. The couple lived and cohabited in Nairobi and Kilifi Districts.

When the respondent was served with the petition, she filed an answer to the petition denying all the allegations made by the petitioner in the petition. She also cross-petitioned for divorce on the grounds of the petitioner’s adultery and cruelty. She also admitted the petitioner’s averment in paragraph 2 of the petition in which paragraph it is averred that the couple are blessed with the said two children.

In her particulars of adultery, the respondent avers that the petitioner has been having an affair with another woman and has even brought her to the matrimonial home in the presence of the respondent and her in-laws. In her particulars of cruelty, the respondent avers that the petitioner has severally abused her and neglected her.

The matter was then listed for hearing before me on 4th March 2009. Counsel for respondent informed the court that the respondent would not urge the order for custody of the said children of the marriage. The Petitioner then took the witness stand. He testified that he works with the Kenya Army and had married the respondent on 4th January 1994 in Nairobi. He stated further that since the year 2003, they had not lived happily with the respondent. The main reason for the unhappiness was the unfaithfulness of the respondent which unfaithfulness was reported to him whenever he came home after long spells on duty. He then enlisted the respondent’s parents in an effort to reconcile them but that did not happen. The respondent then threatened to have him sacked.

The petitioner further testified that since the year 2003, he had not stayed with the respondent and did not see how they could live together since he felt psychologically tortured. In the premises, the petitioner concluded that divorce was the only option and he would maintain his children whom he named as (a) RAM, (b) SM, (c) D and (d) C. The petitioner did not explain why the last two children had not been given in his petition. However, as the respondent does not seek their custody nothing much turns on that fact.

In cross examination, the petitioner testified that he did not witness the respondent committing adultery but received reports of the same. He admitted that the respondent still stays in his rural home with the children but he never sends any money for her maintenance. He denied that he lives with another woman in Nairobi.

The petitioner did not call any witness to support his testimony.

When the respondent took the witness stand, she gave the date of their marriage as 23rd January 1990 which marriage, according to her, was registered on 4th January 1994, as testified by the petitioner. She further testified that their first born child, RAM, was born in August 1990 and not 1991 as stated by the petitioner. The rest of the children were born as testified by the petitioner. The respondent further stated

that the marriage did not experience problems until the year 2004 when she visited the petitioner in Nairobi and found two women who had fought the petitioner. In the same night, the petitioner opened his house to a woman whom he took to the bed where the petitioner was and had sex with the woman as the respondent watched. The petitioner could not withstand that behaviour and left Nairobi the following morning for their rural home.

The respondent further testified that the petitioner's said behaviour was not restricted to Nairobi. She stated that the petitioner brought other women to their rural home at his will but she did nothing. At one time she complained to their local District Officer who referred them to their parents. The respondent emphasized that, she had never been unfaithful to the petitioner. She nevertheless also sought divorce and her maintenance since she is not employed.

In cross examination, the respondent stated that she does petty business and borrows to maintain herself and their children. She further testified that she had no intention of marrying again. She then closed her case and did not call any witness.

In a very brief submission counsel for the respondent urged the dissolution of the marriage between the petitioner and the respondent and suggested that the petitioner be ordered to pay Kshs. 5,000.00 for the respondent's maintenance. Counsel further suggested that each party bears his/her own costs.

Responding to the brief submission of counsel for the respondent, counsel for the petitioner opposed the submission regarding the maintenance of the respondent and stated that the respondent is capable of maintaining herself.

Having considered the evidence adduced before me, I am unable to find that the adultery alleged by the petitioner has been proved. The petitioner relied on information received from people whom he did not name or identify. He also did not call any other evidence to prove the allegation of adultery. There was no evidence on the other grounds at all. The respondent on her part was categorical that she has never been unfaithful to the petitioner and that she still lives in the petitioner's rural home. I believed the respondent. She was truthful in her denial of the alleged adultery. It should be remembered that although direct evidence of adultery is not necessary to prove adultery, the standard of proof required in a charge of adultery is high. Mere suspicion is not enough. The petitioner has not established circumstances that would suggest that the respondent committed adultery. I therefore find that the petitioner's petition has not been proved to the required standard and is dismissed.

The Respondent too wishes to have her marriage to the petitioner dissolved. She had sought the dissolution on the grounds of cruelty and adultery. With regard to the ground of adultery, the respondent gave a chilling incident when she visited the petitioner in Nairobi in 2004. On her arrival, she found that two women had fought the petitioner. In the night of the same day, the petitioner had sexual intercourse with another woman as the respondent watched on the same bed. It surprises no one that she left the very next day for their rural home. The respondent further testified that the petitioner did not respect their matrimonial home in the rural area. He brought other women as he felt like it.

The oral testimony of the respondent was not shaken in cross examination. Indeed the respondent was not cross examined on her adultery allegations at all. The respondent did not call any independent supporting evidence. However, the cross examination suggested that she had been truthful on her allegations of adultery. She was an eye witness to the adultery. So, whereas adultery must be proved clearly, I am satisfied that the respondent has done so in this case.

The actions of the petitioner as narrated by the respondent were in my view also cruel and established that indeed the petitioner had since the celebration of their marriage treated the respondent with cruelty. In the premises, I find in favour of the respondent's cross-petition. The marriage, the subject matter of these proceedings, is accordingly hereby dissolved. Decree nisi shall issue and the same shall be made absolute after the statutory period.

Since the respondent abandoned here prayer for the custody of the children, the petitioner shall have custody of the children named in his petition.

With regard to the respondent's maintenance there is evidence that the petitioner is an army officer. He must therefore be entitled to the normal salary, allowances and other benefits that go with that office. His actual entitlement was however, not established. The respondent testified that, she does petty business for her maintenance. Again, no details were given. Her income from that business remains unknown. In cross examination however, she testified that she maintains herself and the children from her petty business and from borrowing. Since custody of the children named in the petition has been given to the petitioner, the respondent's ability to maintain herself is heightened and her petty business should now finance her maintenance more comfortably. The petitioner has the legal obligation to maintain the children having won their custody.

The upshot is that, from the material availed to the court, I am unable to make an order for maintenance of the respondent by the petitioner. I decline to make any.

With regard to costs, both counsel agreed that each party bears his/her own costs. I grant them their wish and order that each party shall bear his/her own costs.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Onjoro for the Petitioner and the Respondent in person.

F. AZANGALALA

JUDGE

2ND APRIL 2009