



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Divorce Cause 1 of 2004

G.K.M PETITIONER

VERSUS

P.S.M..... RESPONDENT

JUDGMENT

1. G.K.M , a certified Public Accountant, initially got married to P.S.M under Kamba Customary Law but on 5/7/1997, their union was solemnized under the Marriage Act, Cap 150 Laws of Kenya at the District Commissioner's office at Kitui. They set up their matrimonial home at Matiliku Location, Kitui District together with their son, R.M born in June 1995.
2. In the Petition dated 17/11/2004, Muanzi contends that sometime in 1999, the Respondent deserted their matrimonial home, abandoned her child and went on drinking sprees in places and with people known and unknown to him. Further, that since then she has committed adultery with men of questionable character inspite of her marital status. That she was also cruel to him by assaulting him verbally and physically. She also allegedly caused him mental torture by associating herself with criminal suspects and which associations led to her arrest after which she was charged in court and he, as a result, he was interrogated by police officers over matters he had no knowledge of.
3. The Petitioner now prays that his marriage be dissolved and custody of R.M should be granted to him.
4. The Respondent although properly served did not respond to the Petition and in his evidence the Petitioner produced his Certificate of Marriage (**P. Exh.1**) and stated that his marital problems started when he retired as the Chief Accountant, Nairobi Club and was then forced to cut down on his family expenses. The Respondent was uncomfortable with those austerity measures and became agitated and quarrelsome. She left the matrimonial home in January 1999 and then returned only to physically assault the Petitioner in October 1999 before leaving for good. On that day, 4/10/1999, she bit him on the hand and he reported the incident to Ruai Police Station and a P3 form (**P. Exh.2**) was issued to him. The Respondent apparently returned in 2001 and left again after 1½ months and he discovered that she was having an affair with one F.K of Kenya Airways and she admitted the fact but stated that she intended to put an end to it. She never did and she never returned, he added.
5. Regarding the allegation that she was interacting with criminally suspect persons, the Petitioner stated that sometime in the year 2000, the Respondent was arrested and was alleged to have stolen Kshs.4,000/= from a matatu driver in Kafoca Bar in Kitui and the Petitioner had to pay back the money to secure the Respondent's release. Thereafter, the marriage broke down irretrievably and the child, R.M, has lived with him since his mother's alleged act of desertion.
6. PW2, Kibelenge Kimando, related to the Petitioner's father by marriage recalled that he had been called on 3 occasions together with other elders to reconcile the parties and in one such meeting the Respondent admitted that she was "**misbehaving**" and sought forgiveness but her behaviour never changed and she was allowed to move in and the marriage broke down.
7. On my part, there is no evidence to challenge the Petitioner's assertions. Firstly, on cruelty, as Chesoni J (as he then was) stated in **Meme vs Meme (1976) KLR 13**, "**cruelty was a matter of degree and fact to be decided on all the circumstances of the particular case**" and that there must be evidence of "**real injury to the complainant's health or reasonable apprehension of such injury**".

8. In the present case, the Petitioner produced evidence that the Respondent injured him on 4/10/1999 and a report was made to Ruai Police Station after which a P3 form was issued and the Petitioner was treated. I have no doubt that the Respondent viciously bit her husband's finger and that act amounted to cruelty. It is telling that she left soon thereafter and lived away from him for close to 2 years.

9. On the issue of adultery, in **Mathai vs Mathai (1980) KLR 154** it was held that the charge of adultery is a serious matrimonial offence and the circumstantial evidence in proof thereof must be carefully and cautiously considered and the court ought thereby to move with great caution. That the charge must be proved clearly, beyond establishing a mere balance of probability or a preponderance of probability or a mere suspicion and opportunity to commit adultery.

10. In this case, adultery was pleaded in general terms and no particulars thereof were given and evidence in court was also inconclusive and I cannot on the basis of what is before me, rule that the Respondent was or was not adulterous. She may well be and may well have admitted it to the Petitioner or even that she was engaged in undisclosed misbehaviour according to PW2. It matters not because I see no sustainable evidence before me.

11. On the issue of desertion, there is no doubt that the Respondent no longer lives in her matrimonial home. She has declined to respond to the Petition and the minor, R.M has been with the Petitioner. That issue is uncontested and the evidence of the Petitioner and PW2 is conclusive in that regard.

12. In the end therefore, the marriage between the parties cannot be redeemed, it having clearly broken down beyond repair.

13. The divorce is allowed as prayed. The Petitioner shall have custody of the minor, R.M

14. Costs of the Petition shall be in the cause as it was undefended.

15. Orders accordingly.

Dated and delivered at Machakos this 16th day of July 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Petitioner**

ISAAC LENAOLA

JUDGE