



M C B PETITIONER

VERSUS

A I B RESPONDENT

JUDGMENT

The Petitioner/wife has filed this Petition dated 15th October 2004 to seek dissolution of her marriage with the Respondent solemnized on 19th December 1992. The Respondent was a divorcee at the time of the said solemnization and the Petitioner was a spinster.

It is not disputed that they had cohabited as a wife and man on several premises situate in Nairobi since the solemnization as well as before the marriage and last being their own house along Loresho since 1995. It is also not in dispute that though they are not cohabiting, they both live in the aforesaid last house even at present.

The marriage was graced by birth of two children namely

- 1) S M (Daughter) born on 27th December 1990.**
- 2) E K (son born on 29th December 1994.**

It is evident from the dates of their birth that the first born daughter has attained the majority and the son is above 14 years. I with consent of both counsel, had an informal talk with the two children and found that both are very close to each other and the son looks upon the daughter.

I shall deal with the said issue further in the latter part of this judgment.

The Petitioner is an Air Hostess with [particulars withheld] Airways corporation and runs side business. Similarly the Respondent has been working with T[particulars withheld] International, Nairobi.

She seeks the dissolution on the grounds of adultery, cruelty and dissolution which are particularized in the petition.

The Respondent in his Answer to the Petition dated 12th May, 2004 has denied those allegations and particulars thereof. He also denied that the marriage has irretrievably broken down.

At this juncture, it may be opportune to deal with the Respondent's application dated 13th November 2008 seeking leave to amend his Answer to include a cross-petition. In his affidavit in support sworn on the same day he averred that he wanted to file cross-petition so as to clearly show the reasons why the marriage has broken down irretrievably.

He thus intended to file a contradictory pleadings. I say so by reiterating that in his answer he denied that the marriage is irretrievably broken down.

Moreover, it is pertinent to note the time and the background in which he sought those prayers.

On 4th October 2007, the Counsel for the Respondent M/S Judy Thongori & Co. Advocates was granted leave to cease from acting for the Respondent. Thereafter on 16th October 2008, the hearing of the petition commenced and the Respondent who was in person was allowed time to get representation by a counsel so that he could cross-examine the Petitioner appropriately.

Thereafter the application to amend was filed on the date which was fixed for hearing on 13th November 2008. It was opposed and I agreed with the contentions raised by the Petitioner that the amendments prayed by the Respondent cannot be granted as it shall be prejudicial to the Petitioner after she had already given her evidence in chief. Moreover, the delay in filing the application has not been explained except to obtain the dissolution of the marriage on the reasons which he wanted to present. I pause to reiterate that these grounds were, in any event, in existence and within the knowledge of the Respondent and despite that he has averred that the marriage is not irretrievably broken down and then having the benefit of hearing the Petitioner's case, he had a change of heart.

In the premises, I did not allow the application and the hearing continued and was completed on 28th May, 2009. Thereafter the submissions were made.

It may be pointed out that, by an earlier Ruling dated 10th June, 2005 the name of the Co-Respondent was struck out from the Petition and similarly the particulars of adultery stipulated in paragraphs 7 (i), (ii) and (iii) were struck out and thus the only ground on which evidence was adduced was that on allegation of cruelty. Moreover the Petitioner abandoned the grounds of desertion also.

It is thus almost agreed that following issues are to be determined, by the court. – namely:-

- (i) *Whether the marriage between the petitioner and the Respondent has irretrievably broken down and ought to be dissolved and if so on what grounds.***
- (ii) *The custody of the son of the marriage.***
- (iii) *Who pays for maintenance of the children.***
- (iv) *Who pays costs of the petition.***

Petitioner's case

The petitioner in her evidence testified that the Respondent has been cruel in that he physically assaulted her and also abused her verbal as well as emotionally. She has particularized the grounds of cruelty in paragraph 8 of the petition.

She testified and elaborated on those particulars by producing documents in support of her allegations. She produced medical report from Nairobi Women's Hospital dated 22nd September 2004 and 24th September 2004 (P. Exhibit 1 and 1A).

These quarrels, physical and verbal abuses have been mentioned by parents of the Petitioner vide a letter dated 27th September 2004 addressed to the parents of the Respondent. The letter mentions deteriorated marital relations between the parties thorough quarrels, assaults and verbal abuses. The verbal abuses were also made against them. (P. Exhibit 7B)

According to her evidence, after the filing of this petition, the abuses have taken form of written abuses, as they do not communicate though living under one roof. She has produced transcript of several S.M.S sent by him through her mobile. Most of them talk about her being overpowered by Devil and necessity for her to pray. They also state that she is a foolish person, and that she is an immoral person, these sms are from 6th October, 2004 to 30th December 2007 some of them are couched in abusive words. Suffice it

shall be to point out that it was sent on 19th December 2002.

These sms were supplemented by long typed letters placed on her bed. They contain similar messages to the estate that she is not an upright person, a liar, looking for money by any means, under the control of Devil, being a bad influence on their children, criticizing all her acts and behavior as shameful, using derogatory words against her parents stating that she has to pray to be cleansed, insinuating that her father is not her biological father. One of the letters was circulated to other persons.

These sms and letters are accepted to have been sent and written by the Respondent. He, however, stated in his evidence that as they were not communicating that was the only way to counsel and advise her. The production thereof also has not been objected by him. She also offered to bring the originals from her mobile.

According to the Petitioner since 2002 their marriage was no more.

As regards her prayer for custody she agreed that the Respondent has been a good father and used to take care of the children when she had to be out of the country for her duties as an Air Hostess. She also agreed that he has been paying for their school fees and other activities as well as providing for their sustenance. On her cross-examination she reiterated that he provides the school fees and food and the costs of clothing they share and further stated: ***“I would have no objection to the joint custody of the children provided the details are spelt out and agreed.”***

In her cross-examination she detailed that as per the service regulations of [particulars withheld] Airways, she was not expected to be out of country for more than three consecutive days and not more than 10 days in a month. The Respondent also accepted in his evidence that when he got married, he knew that she is expected to be out of the country as per her duty rota. But she stated that when she was around she looked after the children.

She agreed that even after the physical assault alleged by her she continued to stay in one house and that she still does so. The reason she gave was to see that the mortgage is duly repaid. She also conceded that the documents in respect of sms and letters are not particularized as they occurred after the Petition was filed and that she did not instruct her counsel to seek leave to amend her petition.

Although she was questioned on their authenticity, the same is overtaken by the fact that the Respondent has not denied to have sent them and stated that she should have also produced her responses, which in any event, he did not produce in his testimony.

She was asked questions about her not looking after the Respondent as wife. She responded that only after the marriage broke down she has not cooked for him and not given any emotional support. She stated She withdrew physical relations due to his involvements with other ladies. The other questions as regards her infidelity are of no importance, in my opinion, as the Respondent has not stated them in his evidence.

She responded that several attempts to reconcile their marital differences did not bear any fruits. She denied that she contributed to the marital differences and reiterated that, in the interest of the children, the dissolution should be granted as it is not good for them to live with non-communicating parents.

Respondent's Evidence:

In his evidence the Respondent denied having assaulted the Petitioner in front of the children and that he had undermined her by telling that she was incapable of thinking by herself. He stated that she would not participate in any conversation and well being of the children. But I do note that he did not state when this refusal to converse happened, as it is in evidence that at least since 2004 the parties are not communicating. He denied having extra marital relations with other ladies and decided not to give evidence on his allegations of the petitioner's adulterous relations. He said it was she who shunned him. He also agreed that he was bit concerned with her closeness with her father because in African tradition,

in his view, a daughter does not go out with her father and have a drink, and as per his (Kikuyu) tradition, the minute a girl marries she does not go back to her father's house to sleep especially when the father lives alone.

I may pause here and do tend to agree with the petitioner's case that the Respondent had made insinuation as regards her immoral relations with her father. He also reiterated that he was not her biological father and immediately thereafter stated that as he is now deceased he did not want to talk about him.

He denied then all the particulars of cruelty specified in the petition and stated that the letter of the doctor (Produced by the Petitioner) is fabricated but stated that the Petitioner started the fight and instigated him by saying that he did agree on assaulting her in my opinion. He also agreed that she reported the matter to the police but he was neither questioned nor charged.

I have already commented on his response to the messages and letters and need not reiterate.

As regards the issues of custody and maintenance of the children, he stated that he has looked after them mainly, as the petitioner was most of the time out of country.

He testified that the children as they are, at the moment, they should be left with him so that they could be disciplined. According to him S is withdrawn and E can be destructive when he wants attention. He further testified that even when the Petitioner is at home, she is not with the children as she is always on phone. She does not create quality time for them. In cross examination he denied that it is the Petitioner who has mostly looked after the children and he stressed that he has looked after S when she was only two months and not when she was nine months.

I have already indicated that he was aware before their marriage that the Petitioner would have to fly out of country on duty. He reiterated his evidence that medical reports are concocted.

As regards the messages and letters, he repeated that he had basis to write them. He also agreed as to their contents and stated that the family referred to therein is her family. In short he agreed that he wrote those letters which do contain abuses against her though according to him with basis. He further said he did not bring messages and letters written by her as his heart is open but then stated that she did not respond to these letters in writing.

He also agreed that he had cautioned her about her association but did not disclose that she was a drug-dealer. He also agreed that he had written as regards their daughter and to pray for her, and that he had accused her of having affairs without naming names.

He denied these letters were harassment to her but simply stated that they are advices to her. He then stated that ***"if any one in our family is respected, is the Petitioner even by me."*** Thus he denied that the letters were meant to show disrespect and that he was cruel to her.

He denied he was the sole cause of the problems in marriage and reiterated that he was a good husband.

In re-examination he stated as regards last message on page 9 of the bundle of Petitioner viz: ***"I did not disrespect her. When Devil takes charge and one does not have will power to fight, one cannot come out. I was asking her to come out."***

He further stated that these letters ***"were expression of humiliation I was going through."***

The above is thus the evidence and facts laid before the court.

The Petition is based on cruelty suffered by the Petitioner from the Respondent.

Cruelty is commonly defined as an act by one spouse to the another which affects physical and mental Health, of that other spouse.

It is also trite law that the matrimonial offences are quasi-criminal in nature and the standard of proof thereof is above balance of probability but below beyond reasonable doubt. It is in short almost shown to be, “must be certain” (see **Mathai Versus Mathai**) 1980 KLR 154.

It is submitted on behalf of the Petitioner that she has proved that the Respondent was cruel to her.

The passage from **Bromley on Family Law** - 2nd Edition Chapter 5 on page 93 reads as under;

“If the Respondent’s acts are intended to injure the Petitioner, They clearly amount to cruelty. Such acts may be acts of physical violence, but this is not necessarily, words may often be wounding than blows and even a deliberate pattern of conduct designed to make the petitioner disgusted with the Respondent has been held to be cruel.

A person is presumed to intend the natural and probable consequence of his actions a presumption that is applicable to cruelty cases as in other cases”

From the evidence as whole, it is shown that the marriage has been on rocks from the year 2002. The letter from parents to parents (P EX 2) clearly mentions that the abuses against the petitioner’s family by the Respondent, quarrels and physical violence had been the constant features in their marriage.

It is also clear, from the evidence of the Respondent that he had been abusing the petitioner as regards her closeness with her father who according to him was not her biological father. That fact, which is accepted, can be more wounding than blows. The Petitioner has also shown the proof of physical violence. (P EX 1A & 1B)

Consequent to the filing of the Petition, a consistent hammering by the Respondent, as regards control of devil on the petitioner by way of passages of messages and letters, repeated onslaught on her morality and inability to understand, has dealt a death blow on their marriage. The reading of these messages and letters (P. Exhibits 3 and 4) can only show a pattern of disrespect as well as high handedness by the Respondent. It showed that nothing that the Petitioner did was right and called for criticism and uncalled for advice from the respondent.

These pieces of evidence definitely corroborates the evidence of the Petitioner, that the Respondent was in a habit of verbally abusing her. Due to non-communication they became verbal abuses. The Respondent has also conceded that the Petitioner did not respond to those written abuses and still its flow did not stop.

The Respondent has not been able to show that this behaviour was as a result of her actions. On the contrary he justified the same by stating that they were the words of wisdom to her from him!!!

I would desist from citing some of very disrespectful and humiliating expressions mentioned in those messages and letters. Suffice it to state that they were, in my considered opinion, meant to humiliate and hurt, the self-esteem of the petitioner. Having found so, I am of considered view, that the Respondent had treated the Petitioner with cruelty which a spouse is not expected to receive from another spouse, and I do find so.

I have relied on these messages and letters, though they are not particularized in the Petition and given in oral evidence, simply because that part of evidence was not objected to, the Petitioner was examined on that evidence and evidence was led by the Respondent in respect of these messages and letters in justification thereof. Thus, it is obvious that the evidence thereon became a part of the Petitioner’s case by consent.

Both counsel agree that this court has jurisdiction to grant orders of custody, care and control of a child and specifically in respect of their son who is 14 years of age. I am also referred to the children Act No. 8 of 2001 specifically provisions of section 81 and 82 and section 4 thereof.

The provisions of the said Act also stipulate that the court can and should ascertain the wishes of the child if relevant.

In any event overriding factor to be considered by the court in the issue of custody of a minor is the best interest of the child considering all the relevant circumstances. (See section 4(2) and 4(3) of the Children Act (Act No. 8 of 2001).

I do not think that the facts before the court present much complex situation. Despite the physical separation of the parties, they have stayed under one roof. That means the children also have been living with both parents. The first child is now an adult and the son also is not of tender years.

Moreover, neither the Petitioner nor the Respondent has made any serious allegations of unsuitability of either as regards being a good parent. Though, I must hasten to state that the Respondent had suggested that for the sake of disciplining the son, he should be given the custody.

The petitioner, on the other hand as stated hereinbefore has conceded that she shall concede to a joint custody if terms are specified.

I have also stated hereinbefore that I had an informal talk with both children. They both stated that they had come to terms with the differences between their parents. When I asked S, that she is adult but with whom she would like to stay on day to day basis, she chose the Petitioner. When the same question was put to E, he said he would go wherever his sister would go and specifically stated that he would not like to stay separate from his sister as she understands him and is his guide.

None of them did say anything against any of their parents. I thus could see that both parties are good parents and so far as the children are concerned, they both love them but , may be because she being a daughter, had shown her wish to be with her mother.

Apart from the wish expressed by E, it is also not in interest of the children to separate them, often they have stayed together all their lives.

Doing best under the circumstances, and looking to the best interest of E, I would grant joint custody, care and control of E to both the parties.

In the premises of what I have observed hereinbefore, physical custody of E shall be with the Petitioner as S would like to stay with her. I would however give unlimited access to the Respondent.

Respondent has agreed to continue paying school fees of both children as well as to look after their relevant needs of education and health.

Other needs like providing shelter and all other requirements of the children shall be the responsibility of the Petitioner. The relevant decisions regarding the children will be taken jointly by the parties considering the interest and welfare of the children.

I have not mentioned some authorities cited in this judgment, but it is not because I did not consider them, but because the circumstances of the case are peculiar. I must otherwise state that the principles enunciated as regards the issue of contrary are well established and are accepted by me.

The upshot of the above mentioned is that I find without much difficulty that the marriage between these parties is irretrievably broken and thus I direct that a decree nisi of dissolution of marriage solemnized between the parties be issued. The decree nisi be made absolute within 90 days from the date hereof.

I grant the orders as regards custody, care and control as specified by me hereinbefore and I reiterate them as orders of the court.

Each party to bear its own costs.

Dated, Signed and Delivered at Nairobi this **24th September, 2009.**

K.H. RAWAL

JUDGE

24.9.09