



J MM.....PETITIONER

VERSUS

EKMRESPONDENT

JUDGMENT

1. On 15/11/1988, the parties herein contracted a marriage under the Marriage Act, Cap 150. Previously, they had been married under Kamba Customary Law and there is no contest that the conversion to the statutory marriage was made four (4) years after the Kamba marriage. They had a daughter, K 1 born in 1984 and later, K 2 and M were born in 1991 and 1992 respectively.
2. By his Petition dated 17/11/1999, the Petitioner, J M M sought dissolution of the statutory marriage and custody of the issues of his marriage. At paragraph 13 thereof, the Petitioner states that since the celebration of their union, the Respondent has committed adultery, has generally been unfaithful, disobedient, unruly and cruel to the Petitioner. Further, that she deserted the matrimonial home on a number of occasions and in spite of efforts to retrieve the marriage, it could not be salvaged and in his words, he **“can no longer cohabit and/or live together”** with the Respondent as man and wife.
3. In her answer to the Petition and Cross-Petition dated 20/1/2000, the Respondent claims that she was a hardworking and dedicated wife who treated her husband and children well; who acquired the land on which the matrimonial home stands and who nursed the Petitioner for four years after a motor-vehicle accident in 1986. On the contrary, she pleaded, the Petitioner

was adulterous and deserted the matrimonial home in 1996 and never returned until he filed the Petition for divorce. That he was an irresponsible husband and father and derived pleasure in his family's suffering and refused all attempts at reconciliation. She sought orders similar to the Petitioner save that she also wanted orders that title No. [...] and the matrimonial home thereon be retained by her.

4. It is sad that this matter has taken 10 years to conclude but from the record parties spent an unnecessarily long time pursuing interlocutory reliefs before the hearing commenced on 13/9/2002 and it is interesting that it took three judges including myself to record the rather lengthy evidence led by each party. But I digress.
5. The relevant evidence in support of the Petition can be summarized as follows;-

That the Respondent was a teacher and it was the Petitioner who took her to [K] Teachers College in 1988 but she transferred to [M] Teachers' College having sought the assistance of a local [PARTICULARS WITHHELD] who was her father's friend. Later, he realized that she was having an affair with the [PARTICULARS WITHHELD] but he had no evidence of the fact and he stated that it was his "**own conclusion**" that the two had a sexual relationship.

That the Respondent had a habit of sleeping out of the matrimonial home and in 1991 when the Petitioner moved to Mombasa to sell his curios and wood carvings, he got information that one [N] was having an affair with his wife. On being confronted with the allegations, the Respondent admitted that the man had seduced her and had only kissed her but never got to know her sexually. The Petitioner returned to Mombasa and she followed him there and he verbally forgave her for the alleged act of infidelity. In the meantime, it was his evidence that

her affair with the [PARTICULARS WITHHELD] continued and he also discovered that she had allegedly resumed an affair with an old flame, a medical doctor in Nairobi and she also had another affair with a school teacher where she taught. One day in 1994 he had a quarrel with her and she ran off to the teacher's house. He went there and found both in little dressing and he picked a fight with the school teacher before going away for fear of doing something worse. After this incident, he fled for divorce in the Kitui Magistrate's Court and their relationship worsened as they battled over occupation of their matrimonial home with the result that he was evicted from home and he withdrew the case only to file the present one later. Before that he was charged with the offence of creating a disturbance when he went to the home as he had been informed that his wife and the medical doctor were demolishing it and putting up a separate house.

6. All attempts to reconcile the parties, in the Petitioner's view, failed and he denied the allegations of adultery on his part and denied that one [M.M] was his wife and added that she was only an employee. He admitted that she had a child in 2001 but while admitting helping her and the child, he denied that he was the father of the child.
7. The Petitioner's other evidence was that he had a customary law wife, one [A.K.J] with whom he begot 4 children and that to-date she lives as his wife.
8. The case for the Respondent is that she did not commit adultery with the men named by the Petitioner but she admitted that before her marriage to him she had a sexual relationship with the medical doctor and they got a child, [K], a fact known to the Petitioner but the relationship was never resumed during her marriage.
9. On the other hand, she did not know that the Petitioner had another wife until the other wife's children came to live with the Petitioner and the

Respondent took them in. Later he lived with another woman, [M.M] as a wife. He deserted the home to go and live with M in 1994 and never returned. The marriage has therefore broken down and she too wanted a divorce.

10. I have taken into account the submissions made and I agree with both parties that there is no marriage left as between them. The two lived miserable lives for the period 1988 to 1994 and the Petitioner left the matrimonial home, forcefully and with the aid of a court order obtained by the Respondent. The union has broken down, forever so. Who is to blame for that state of affairs? Each party blames the other for adultery. Is there evidence in that regard? As regards the Respondent, there is no doubt that the father of her first child had a sexual relationship with her before she met the Petitioner but I see no evidence before me to indicate any sexual contact during marriage. That the doctor for example treated the Respondent's mother during her illness is no evidence of adultery. That the Petitioner found his business card in her handbag is no evidence of adultery and that he was suspicious of him is no evidence of adultery. In **Mathai vs Mathai (1976 - 1980) KLR 1689** the learned judges of Appeal discussed the standard of proof in matrimonial offences and concluded that where there is no reasonable doubt at the end of the case, then the burden of proof has not discharged. In the instant case, that burden has not been discharged by the Petitioner and all claims of adultery on the Respondent's part with the men named amount to nothing more than suspicion.
11. Regarding the Respondent's assertion that the Petitioner was adulterous, only one [M] was mentioned and in support of that assertion, a photograph of the two was produced as was a letter from the Petitioner to the Respondent **(D.Exh.10)**. In that letter he admits that he has a third wife, [M] aside from the Respondent and [A], the first wife. Without belabouring the point, once

he admits that [M] is a wife and lives with him as such then as regards the statutory marriage with the Respondent, then he has admitted to the matrimonial offence of adultery.

12. In the end, I find that the Petitioner has failed to prove any act of desertion, cruelty or adultery on the part of the Respondent but the Respondent has proved adultery on his part.
13. As I end, counsel for the Petitioner raised issues of invalidity of the marriage *ab initio* because the Petitioner was married under customary law and that his marriage to the Respondent was invalid by dint of Section 35 (1) of the Marriage Act. The issue was never pleaded and no evidence was led in that regard. It matters not in any event.
14. The Petition for reasons given is dismissed but the Cross-Petition shall be allowed.
15. The divorce orders as sought by the Respondent is granted and each party will bear the costs of the Petition and Cross-Petition. I decline to make any orders as regards the matrimonial home but the Respondent shall have custody of any child who is under 18 years old.
16. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of:

Mrs Nzei for Petitioner
Mr Mulu for Respondent

ISAAC LENAOLA
JUDGE