



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 26 of 2007

W.O.Y.....PETITIONER

VERSUS

T.A.W.....RESPONDENT

JUDGMENT

W.O.Y (hereinafter “the husband”) and T.A.W (hereinafter “the wife”) were married on 29th August 1998 under the African Christian Marriage and Divorce Act. The couple is not blessed with any child. They lived and cohabited in Mombasa until 5th January 2004 when the wife left the matrimonial home.

On 28th June 2007 the husband filed this petition for divorce on the ground of his wife’s desertion stating that the wife had deserted the husband and the matrimonial home on 5th January 2004 without cause or reasonable excuse and had since not cohabited with the husband for a period of at least 3 years immediately preceding he presentation of the husband’s petition.

On being served with the petition, the wife on 27th July 2007 filed an answer denying the desertion alleged by her husband. She also cross-petitioned for divorce on the ground of her husband’s cruelty. She also sought property she had left in the matrimonial home. The husband filed his Reply and Answer to the cross-petition. He reiterates the desertion allegation and denies the cruelty alleged by his wife.

I heard the petition and the cross-petition on 6th March 2008. At the hearing, the husband was brief and to the point. He testified that his marriage with the wife was not a happy one and on 5th January 2004 his wife walked out of the matrimonial house and left him. He made several attempts to reconcile with his wife using his best man, parents and friends without success. His wife did not give any reasons why she left him and at the time of hearing they were not even on talking terms at all and they could now not live as husband and wife any more.

The husband denied that he had chased away the petitioner at night as alleged in the cross-petition. He further denied frustrating the wife for her failure to give birth. He also denied sending the wife abusive SMS. With regard to the items claimed in the cross-petition, the husband stated that the same were jointly owned and save for the freezer he had no objection to the wife collecting the same from the matrimonial house. He prayed that his marriage to his wife be dissolved with no order as to costs.

On cross-examination, the husband denied being under pressure to get a child although he would have

been happy to have one with his wife as normally expected. He admitted that they had quarrels but the same were normal quarrels between married couples and were not related to his wife's inability to have a child. He further testified that on the day his wife left the matrimonial home there had been no quarrel or disagreement and he did not ask her to leave. In fact, the husband added, the wife left when he was at his office at 11.00 a.m. in the morning and not at night.

The wife then took the witness stand. She denied that she had deserted her husband. She narrated that they had a happy life with her husband for the first two years of the marriage. She then got concerned when she did not conceive. Investigations were carried on her by Dr. Vijay Dave who determined that she could not give birth. Tension then developed between them and there were frequent quarrels. She then asked her husband to marry a second wife if he wanted to have a child. She also suggested adoption which her husband disapproved of.

On the day the wife left the matrimonial home, she visited her aunt in the early evening and went home between 8.30 p.m. and 9.00 p.m. Her husband did not even greet her and her cousin who had accompanied her. He quarrelled her upto midnight and asked her to leave. The wife refused to live at night and informed him that she would leave in the morning. She packed her bags and when she was leaving she was stopped by the watchman who stated that the husband had instructed him to leave with nothing save for the clothes she wore. The watchman searched her. She then called her husband from his office who came at about 11.00 a.m. She then left. She denied leaving on her own. She told the court that her husband made her leave. She, like her husband, stated that their marriage had broken down completely and should be dissolved on her cross-petition whilst the husband's petition should be dismissed with no order as to costs.

On cross-examination, the wife testified that although her husband chased her at midnight she left in the morning. She admitted that her husband several times asked her through relatives to return to the matrimonial home but she did not agree. She could only go back to her husband upon conditions which her husband did not meet.

It is appropriate for me to consider the wife's cross-petition first. Her ground for seeking dissolution of her marriage to her husband is that of cruelty. Cruelty as a matrimonial offence has been defined by case Law which case law has also settled that each case of cruelty is to be decided on its own facts. In **Russell – v – Russell [1895]P. 315, 322 and Horton – v – Horton [1940]P.187** it was held *inter alia* that for cruelty to found a decree for dissolution of marriage it would have to be willful and unjustified conduct of such a character as to cause danger to life limb or health bodily or mentally or give rise to a reasonable apprehension of such danger. That definition of matrimonial cruelty is however not exhaustive and in my view, facts and circumstances that constitute cruelty will continue to expand. However, the test will remain, to wit, the conduct complained of must be grave and weighty and must have caused injury to health or a reasonable apprehension of such injury. The wife has testified that on the eve of the date she left the matrimonial home she arrived between 8.30 p.m. and 9.00 p.m. with her cousin and was not greeted by her husband. He instead quarrelled her until midnight and asked her to leave. She declined and informed her husband that she would leave in the morning. When she was leaving in the morning, the watchman prevented her from leaving with anything other than what she was wearing. The wife stated further that her husband quarrelled her frequently when it was found that she could not give birth. He even resorted to sending her abusive short messages on her cell phone. Is the conduct as described by the wife grave and weighty amounting to a matrimonial offence?

I have perused the particulars of cruelty given in her cross-petition, and find that the particulars given at paragraph 4 (a) and (b) relate to a single transaction. At paragraph 4 (a) the wife says that she was in the 1st week of January 2004 violently chased by her husband from the matrimonial home at night without being afforded any means of transport. The wife's testimony in court did not quite agree with that statement. She testified that her husband quarrelled her upto midnight and asked her to leave. She declined to leave stating that she would do so in the morning. She did not allude to any violent ejection from the matrimonial home. Indeed the husband, on the wife's own evidence, seems to have accepted her decision to leave in the morning and indeed left her in the house as he went on duty. She left as she had wished. The husband did not use violence to force her leave.

As she left in the morning she was prevented from leaving with anything other than what she wore by the watchman. She called her husband who according to the wife came accompanied by his cousin. She did not attest to any violence even at that stage. She then left. With regard to her being frustrated by her husband on the ground that she was unable to give birth. The allegation has remained just that: an allegation. The wife alleged that there were frequent quarrels on account of her inability to give birth but the quarrels were not particularized. She gave vague testimony of the alleged quarrels. Specific statements made by the husband were not given nor were the occasions when they were made given. The husband freely admitted to there having been quarrels which quarrels were normal to any married couple. He regretted not having had a child with his wife but according to him he did not frustrate her on that account.

With regard to the allegation that he sent abusive sms, the husband denied the same. In any event there was no proof of the sms. I believed the husband. I watched him in the witness box and formed the opinion that he was candid unlike his wife who seemed to exaggerate her inability to give birth. I am not therefore satisfied that the conduct of the husband is grave and weighty. The wife had no basis to apprehend grave injury to her. The wife has therefore not proved on a balance of probabilities that the husband is guilty of willful and unjustified conduct of such a character as to cause danger to her life, limb or health, bodily or mentally or to give rise to a reasonable apprehension of such danger. Accordingly the cross petition fails.

With regard to the prayer for possession of the items listed in the cross-petition, the parties are of the same mind. I therefore order that all the items save for the freezer be released to the wife forthwith failing which the wife is at liberty to move the court for appropriate orders.

I turn now to the husband's petition. He has sought dissolution of his marriage to his wife on the single ground of desertion. It is common ground that the wife left the matrimonial home in January 2004. On the wife's own evidence the husband has made several attempts to reconcile and bring her back to the matrimonial home without success. She set unspecified conditions for her return which according to her were not met by the husband. I do not think he can be blamed because even after taking her testimony, I was at a loss as to the conditions that the husband was to meet. She has since January 2004 not resumed cohabitation with the husband. This petition was filed on 28th June 2007 a period of more than three years since the wife left the matrimonial home. I find and hold that the wife has deserted the petitioner and the matrimonial home and has been in such desertion since January 2004 a period of more than three years immediately preceding the presentation of this petition. The marriage between W.O.Y and T.A.W is hereby dissolved. Decree nisi to issue and same to be made absolute after the statutory period. Each party to pay his/her own costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Ali H/B for Hamza for respondent and Obura H/B for Oloo for the petitioner.

JUDGE

9TH APRIL 2008