



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS
Divorce Cause 103 OF 2004

JNK..... PETITIONR

VERSUS

JKK.....RESPONDENT

JUDGMENT

On 18.08.04 the petitioner filed petition praying for the following orders:-

- a) That this honourable court be pleased to dissolve the marriage between the petitioner and the respondent.
- b) That the respondent should desist from threatening the petitioner, harassing or interfering with her or her peaceful pursuits in any way.
- c) That the petitioner is given the custody of the child (between her and the respondent).
- d) That the respondent pays the cost of the petition.

The ground upon which the petitioner sought divorce from the respondent is the matrimonial offence of cruelty.

On 21.09.04 the respondent filed answer to the petition and also cross-petitioned for divorce citing against the petitioner the matrimonial offences of cruelty and desertion. The respondent prayed for the following orders:-

- a) That the petitioner's petition filed on 18.08.04 be dismissed.
- b) That the marriage between the respondent and petitioner be dissolved.
- c) That custody, care and control of the child of the marriage, namely, BMK be granted to the respondent.
- d) That the petitioner be ordered to pay the costs of this cause.

The petitioner was initially represented in these divorce proceedings by learned counsel, Mrs F.M. Mwangangi while the respondent was represented throughout by learned counsel, Mr E.J. Mutemi.

Hearing started before me on 23.02.06 with both counsel participating. However, on 05.10.06 the petitioner appeared in person and told the court that she had disagreed with her counsel over fees and sought adjournment, which was opposed. However, the court granted adjournment to 30.11.06. On this later date Mrs Mwangangi appeared and informed the court that she had filed an application to cease acting for the petitioner and sought to be discharged from acting for the petitioner. The court granted the discharge and the petitioner thenceforth assumed the mantle of acting in person. By that time the petitioner had concluded her evidence-in-chief and had been cross-examined in part by respondent's counsel. Thereafter respondent's counsel continued to cross-examine the now unrepresented petitioner to the end.

It is common ground that the petitioner and respondent got married on 14.06.93 at the Kitui District Commissioner's office under the Marriage Act, Cap.150. It is also common ground that the parties started having sexual relationship with each other before marriage and got a child, BMK, born IN 1992. The petitioner was working as a clerk/receptionist with Ukulima SACCO Ltd in Nairobi while the respondent was undergoing specialized training in naval duties in Mombasa and he used to visit the petitioner on week-ends from time to time.

The petitioner's case is basically that the respondent was in the habit of coming home late at night in a drunken state and disappearing when he got his salary at month-end for 2 – 3 days and returning while unkempt without explaining where he had been and that he would be hostile to the petitioner when she questioned him over his conduct. The petitioner said that the respondent urinated in bed on several occasions while in a drunken state, which forced her (petitioner) to go and sleep on the sofa set in the sitting room. The petitioner added that on one night the respondent, while in a drunken state, even defecated in bed. The petitioner could not, however, give dates when the above incidents occurred.

The petitioner said she was the principal provider for the family; that she bought clothes and food for herself, the child and the respondent; that at other times the respondent bought household commodities after a lot of struggle from the petitioner. It was the petitioner's case that she solely maintained the child.

According to the petitioner, sometime around 1997 the respondent came home at night and started a quarrel with her from nowhere; that the respondent took a knife and said he would kill the petitioner and the child; that the petitioner screamed and there was sound of a neighbour's door opening; that the respondent stopped holding the knife and put it down but continued to beat the petitioner; and that following this incident the petitioner did the next morning pack her belongings and left with the child and the two, i.e. petitioner and respondent, have lived separately ever since. The petitioner also complained about the respondent reporting her falsely to Nyayo Police Post, Nairobi that she conspired with some unnamed boy friend to steal the respondent's navy shirt. The petitioner said that following that report by the respondent, she was summoned to Nyayo Police Post to be questioned about the respondent's complaint, which the petitioner denied. Arising therefrom, the petitioner sought legal advice from Nzioka & Co. Advocates who wrote to the respondent on 23.05.97 threatening legal action and that the petitioner never heard about the respondent's complaint of theft of his navy shirt thereafter.

The petitioner said she shouldered responsibility for paying the child's fees single – handedly, which necessitated taking loans from her co-operative society. The petitioner said she took out an education policy with Cannon Assurance for the child. The petitioner accused the respondent of not visiting the child in any of the schools she had attended or in any of the houses the petitioner has occupied since she and the respondent parted ways. It was the petitioner's case that she has been paying for water, electricity, food and medical care and that she got no support from the respondent.

Finally, it was the petitioner's case that as a result of the respondent's cruelty towards her, she developed uncles.

On the other hand, the respondent denied the accusations levelled against him by the petitioner. It was

respondent's case that even while he underwent naval training in Mombasa, he used to send the petitioner money to subsidize for her rent and other expenses as she was working and had a child. Respondent said he wrote to the Armed Forces Memorial Hospital, Nairobi, with copy to the petitioner, for the petitioner and child to be provided with medical care. Respondent said he also got the petitioner and child AFCO permits to enable the petitioner to get goods from AFCO at subsidized rates.

The respondent complained that while he was undergoing naval training in Mombasa, the petitioner kept changing her residence in Nairobi without consulting him. Respondent gave the following examples:-

- a) When the petitioner shifted to Kayole, Nairobi, the respondent found the Kayole residence insecure, so he moved the petitioner and child to Greenfields Estate, Nairobi
- b) After marriage, the respondent secured a house for the petitioner in Huruma Estate, Nairobi but the petitioner shifted to Kayole without consulting the respondent and gave no good explanation for the move.
- c) The respondent took the petitioner and child from Kayole to Greenfields but the petitioner shifted from Greenfields and went back to Huruma without consulting the respondent.

The respondent said that after completing his naval training in Mombasa and getting a posting to Nairobi, he started noticing within about two weeks of settling down in Nairobi that things were not going right, e.g. the petitioner coming late at night, drunk. That the petitioner gave many excuses, e.g. plenty of work, get – together after work, etc. Respondent added that at one time the petitioner came home at around 3 a.m., smelling of alcohol; that the respondent questioned the petitioner's behaviour and that her response was that it was due to her work as she was with colleagues and her bosses. It was the respondent's case that the petitioner was a spendthrift and did not take good care of money and would not even reveal her income to him while he kept his payslips in a file to which the petitioner had access. Respondent said after he shifted to Nairobi to live with the petitioner, he stayed with the petitioner for only about 6½ months before the two separated. Respondent said he sought the intervention of a 'saved' Christian neighbour who prayed for him and the petitioner over their marital problems but that did not help. Respondent said he asked the petitioner to accompany him to his parents' Kitui home to discuss the marital problems but that the petitioner refused.

It was the respondent's case that the situation continued to deteriorate until one time the respondent came home and found the petitioner had left with the child to her parents house in Nairobi West. That after about a week, the petitioner left her parents' home in Nairobi West and went to Madaraka Estate. Respondent said he did not know why the petitioner left the matrimonial home for her parents' home in Nairobi West or why she left the parents home for Madaraka Estate.

Regarding the issue of his navy shirt, the respondent had this to say: About a week after the petitioner left the matrimonial home and went to her parents' home in Nairobi West, she telephoned the respondent to say the daughter, BMK, was sick. Respondent went to petitioner's place of work with a view to taking medicine to his daughter. The petitioner told him she had shifted to Madaraka Estate. Petitioner and respondent then proceeded to the petitioner's Madaraka Estate apartment. The daughter was excited to see the respondent and forced him to sleep at the apartment. Petitioner washed the navy shirt the respondent was wearing that day and hang it just outside the door to the apartment to dry overnight for him to use next day. Sometime after midnight, there was a fierce knock on the petitioner's apartment door. This, according to the respondent, was around April, 1997. Respondent said he asked the petitioner to open but she declined. A male voice hurled insults from outside the door at the petitioner. Respondent said he asked petitioner who was doing that and she said it was her friend. At the time the respondent wanted to leave, the navy shirt was not there. Respondent reported the disappearance of his navy shirt to Nyayo Police Post and recorded a statement on the matter. Petitioner was summoned to Nyayo Police Post to make a statement. Respondent kept ringing Nyayo Police Post to ascertain if the police had recovered the shirt but they said they had not. The respondent said that after 4 months he received a letter dated 23.05.97 from petitioner's then lawyers, Nzioka & Co. Advocates saying that his communication with the petitioner should be through the lawyers. Respondent told this court that prior to the lawyers'

letter, he was talking to the petitioner trying to reconcile with her but the letter put his reconciliation efforts to an end.

The respondent denied the petitioner's accusation that he never did anything towards maintenance of the child. Respondent said he even took out an education policy for the child. He denied petitioner's accusation that he did not visit his daughter in school or anywhere else to know how she was going on. Respondent said that in early 2005 he attempted to visit the daughter at San Damiano School in Ol Donyo Sabuk around Kilimambogo. At the gate he was told that his name did not appear in the register as the child's parent and he was turned away. Respondent interpreted this to mean the petitioner had blocked his access to the daughter. Respondent added that after the letter of 23.05.97 from Nzioka & Co. Advocates, the petitioner never invited respondent to go and see the daughter.

The respondent denied that the petitioner got ulcers because of his cruelty to her and drew attention to letter dated 11.06.97 (Exhibit 13) from Forces Memorial Hospital, Nairobi addressed to whom it may concern stating that the petitioner had had episodes of abdominal pain since 1993; that a barium meal done in August, 1994 showed features of peptic ulcer disease; that she had received helpful treatment and that of late the episodes of abdominal pain had been very rare and that the hospital considered her to be almost cured of the problem.

The respondent reiterated the prayers in his answer to petition and cross-petition.

There is in the court file an answer filed by the petitioner on 30.09.04 to the respondent's cross-petition. Vide that answer, the petitioner essentially asked the court to dismiss the respondent's cross-petition.

I have given due consideration to the petition, answer thereto, the cross-petition and the evidence tendered by the parties in support of their respective cases as well as authorities cited.

Only the parties testified in this case and called no other witnesses to support their respective claims.

The respondent, through his counsel, cross-examined the petitioner at length while the petitioner chose not to cross-examine the respondent.

During the petitioner's cross-examination interesting evidence came out. Samples are:-

- a) The petitioner acknowledged having given birth to BMK before marrying the respondent; that the respondent's cruelty towards her (petitioner) started before the petitioner married the respondent, yet despite the said respondent's cruelty, the petitioner consented to marry him.
- b) The petitioner acknowledged that there was no time she had to seek medical treatment after any of the beatings she said she suffered at the hands of the respondent.
- c) The petitioner acknowledged saying during her examination-in-chief that the respondent never gave her and the child any financial assistance. However, the petitioner conceded during cross-examination that the respondent used to give her and the child financial assistance but with a lot of difficulty.
- d) The petitioner said at one stage of her evidence that she started buying clothes for herself, child and the respondent after she gave birth to BMK in 1992 but later changed to say she bought clothes for the respondent from 1991 to 1997.

Additionally, in her written submissions dated 10.01.08, the petitioner acknowledged that the respondent had enquired about her income. She conceded that she saw no need of revealing her salary since she saw herself as the bread-winner and that if the respondent knew about her salary, he would take the money and use it on alcohol. This shows her high distrust of the respondent.

The foregoing concessions by the petitioner have the effect of weakening her case.

My overall assessment is that the parties were suspicious or doubtful of each other's fidelity and that this adversely affected their matrimonial harmony, with the result that each wanted divorce but was keen to hold the other party as being responsible for the breakdown of the marriage. I formed the impression that each party engaged in some exaggeration of certain aspects of the relationship between the two of them while suppressing others with a view of showing the other as the devil in a union which would otherwise have been a happy one.

There is no doubt that the marriage has irretrievably broken down. The outstanding issue is the question of who should be held responsible for the breakdown. I find each party guilty of contributory cruelty. Accordingly, I hereby pronounce a decree of divorce and order that the marriage between the petitioner and respondent be and is hereby dissolved. *Decree nisi* shall issue forthwith, the same to be made absolute after expiry of the statutory period of 3 months upon application therefor. I note that the child, bmk is female and that she has predominantly been in the physical custody of the petitioner. The said child, born on 17.11.92, is now around 16 years of age. It would be more appropriate for her to have a mother-figure around her. In the premise, I grant legal custody of the said child to the petitioner until the child attains majority age but the respondent shall have visitation rights to and by the child. The parties shall bear their own respective costs.

Orders accordingly.

Delivered at Nairobi this 19th day of May, 2008.

B.P. KUBO

JUDGE