



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Divorce Cause 14 of 2007

M.K.....PETITIONER

VERSUS

G.N.D.....RESPONDENT

J U D G M E N T

M.K the Petitioner herein took out a petition in which she prayed for the marriage between her and G.N.D, the Respondent, to be dissolved. She also prayed to be paid alimony and costs of the petition. When served, the Respondent filed an answer plus a cross petition to oppose the petition. The Respondent also sought for the marriage to be dissolved.

When the matrimonial cause came up for hearing, the petitioner and the respondent each testified without calling for independent witnesses. In the petition, the Petitioner listed adultery and cruelty on the part of the Respondent as her grounds for divorce. M.K, produced a copy of the marriage certificate which showed that her marriage with G.N.D was solemnized at the Registrar’s office, Mombasa under the Marriage Act on 15th June 1990. She said their marriage was blessed with three children namely C.N, K.N and V.N. She accused the Respondent for committing adultery with one D.A, She alleged that the Respondent cohabited with D.A in Malindi where he works. She further said that she was even assaulted by the aforesaid lady when she visited the Respondent in Malindi. The petitioner accused the Respondent of being cruel to her in that they lived their own separate and distinct lives since 2006. She alleged that the Respondent sabotaged her business so as to ruin her financially.

In his answer and cross-petition, the Respondent denied the Petitioner’s allegations. He however admitted that he is cohabiting with D.A2 and not D.A. The Respondent also admitted he sired children with D.A2. The Respondent in his cross-petition asked for the marriage to be dissolved on the ground of cruelty. He accused the petitioner of committing adultery with one J.M. He also accused her of denying him consortium. He claimed that the marriage has irretrievably broken down.

I have considered the evidence tendered by both the petitioner and the Respondent. The Petitioner has relied on two grounds to have the marriage dissolved. These grounds are adultery and cruelty. The standard of proof in matrimonial offences is higher than a mere balance of probabilities. It is said to be beyond reasonable doubt. The Court of Appeal in Wangari Mathai =vs= Mwangi Mathai [1980] 154 restated the standard of proof as follows:

“When considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction is that the court must be satisfied beyond reasonable doubt or satisfied so as to feel sure that guilt has been proved.

.....

The charge of adultery is a serious matrimonial offence. Circumstantial evidence in proof thereof ought to be carefully and cautiously considered, the court being required to move with great care. The standard of proof required is very high. The charge must be proved clearly, beyond establishing a mere balance of probabilities or preponderance of probability or a mere suspicion and opportunity to commit adultery. It must be proved to the satisfaction of the court, which means that the court must be satisfied beyond reasonable doubt or satisfied so as to fell sure.”

The late Justice Chesoni (as he then was) in Meme =vs= Meme [1975] K.L.R. 13 held interalia as follows:

“That the question whether cruelty had been established was a matter of degree and fact to be decided on all circumstances of the particular case. To establish cruelty the complainant must show to the satisfaction of the court

- (i) misconduct of a grave and weighty nature,
- (ii) real injury to the complainant’s health or reasonable apprehension of such injury
- (iii) that the injury was caused by misconduct on the part of the respondent and
- (iv) that on the whole of the evidence the conduct amounted to cruelty in the ordinary sense of that word.”

Let me apply those principles in this petition. The Petitioner has put forward the grounds of cruelty and adultery in seeking for the dissolution of the marriage. On cruelty, the Petitioner alleges that the Respondent has occasionally assaulted her. That conduct has caused her physical and emotional harm. She also alleged that the Respondent has no respect for her. She also alleged that the Respondent has withdrawn all the financial support. He also accused the Respondent of deserting her for over a year. The Petitioner denied all the allegations save that for the allegation of desertion. The ground of desertion is specifically provided for as a ground for divorce. In this cause the Petitioner has set out the same to prove cruelty on the part of the Respondent. I am convinced that though the ground of desertion is not pleaded, nevertheless the act of desertion caused the petitioner mental and emotional anguish so as it can be said that the Respondent was cruel to the petitioner. On his ground alone I am satisfied that the petitioner has proved that the Respondent was cruel to the petitioner.

Turning to the ground of adultery, the law requires that the person alleged to have committed adultery with the spouse be made a co-respondent. In this case the Petitioner did not make D.A the co-Respondent. However the Respondent does not deny that he cohabited and even has sired children with D.A2. He states that he was prompted to do so by the petitioner. He alleges that the petitioner has committed adultery with one J.M thus denying him his consortium. Of course two wrongs do not make a right. If the Respondent was aggrieved by the petitioner’s conduct, he should have applied for the marriage to be dissolved before taking another woman into his life. The Respondent breached the law when he married another woman while his marriage with the petitioner was legally in existence. The Respondent had no capacity to contract another marriage while the marriage solemnized under the Marriage Act had not been dissolved. It suffices by referring to section 37 of the Marriage Act which provides as follows”

“any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contradicting a valid marriage under any native law or custom, but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom or in any manner apply to marriages so contracted.”

It is clear that the offence of adultery admitted to have taken place. The Respondent says that he was

driven to commit adultery by the petitioner. I am convinced that the petitioner has proved the ground of adultery to the required standard.

The Respondent has put forward two grounds to seek for the marriage to be dissolved. One is cruelty and the other is that the marriage has irretrievably broken down. The Respondent has alleged that the Petitioner committed adultery with one J.M. That man was not made a co-respondent in the cross petition. There is no admission like in the petition of adultery. The Respondent's evidence in proving this claim did not meet the required standard hence the cross-petition was not proved. It is obvious that the marriage has irretrievably broken down hence it is no longer tenable to maintain it. Blame for the failure of the marriage squarely lies on the Respondent.

In the end and for the above reasons I allow the Petition and dismiss the cross-petition. The parties did not ask for costs, so I direct that each party meets its own costs. The marriage is hereby dissolved. A decree nisi is issued which should be made absolute within two (2) months.

Dated and delivered at Mombasa this 30th day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of the parties but in the absence of the advocate.