

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Divorce Cause 32 of 2003

A.D.KPETITIONER

VERSUS

P.L.KRESPONDENT

J U D G M E N T

A.D.K, Petitioned this court to dissolve the marriage between him and P.L.K, the Respondent herein. The petition is dated 4th September 2003 and is verified by the affidavit the Petitioner swore on 25th September 2003. When served with the petition, the Respondent filed an answer to the petition and a cross-petition. In the cross petition the Respondent also prayed for the marriage to be dissolved.

When the petition came up for hearing the petitioner and the Respondent each testified without calling for the evidence of independent witnesses. The petitioner told this court that he got married to the Respondent in 1976 in Bombay, India, according to Hindu Law, which law does not permit polygamy. He produced a copy of the marriage certificate. The Petitioner said he and the Respondent moved to Kenya where they cohabited as husband and wife in Nairobi, Voi and later at Mombasa. The Petitioner was employed as a Government doctor while the wife opened a private practice at Voi and later in MOMBASA. The couple was blessed with two children namely R.K and B.K aged 28 and 24 years respectively. The Petitioner claimed that they lived happily until 1995 when the Respondent became disinterested in having intimate relations with him. The Petitioner said this attitude forced him to seek sexual satisfaction elsewhere. He admitted having had an affair and a child with his secretary. He also conceded deserting the matrimonial home at Nyali. He said he moved to [particulars withheld] where he cohabits with his secretary called E as husband and wife. He even has a second child with her. The Petitioner blamed the Respondent for showing him disrespect and showing no love for him. He said it is her conduct of attending parties every weekend which forced him to seek for solace from her current woman. The Petitioner said he has made attempts to reconcile with the Respondent in vain. The Petitioner said that the marriage has irretrievably broken down.

On her part, the Respondent denied the Petitioner's accusations. She instead accused the Petitioner of adultery. She also accused the Petitioner of failing to rise to the occasion any time he attempted to make love with her. She claimed that she used to get infections any time she had sex with the Petitioner. She further said that the petitioner had threatened to kill her and this made her write secret notes to keep as evidence in case she died in mysterious circumstances. She produced in evidence a copy of such a note she wrote on 18th October 1995. The Respondent sought for the marriage to be dissolved with costs. She entirely blamed the Petitioner for the failure of the marriage.

I have considered the evidence tendered by both sides. Each of them is blaming the other. The couple agree that the marriage should be dissolved for the reasons given in their testimonies. The overall picture is that the marriage has irretrievably broken down and what remains is a shell. I have carefully taken into account the evidence tendered. The court of Appeal in **Wangari Mathai –vs- Mwangi Mathai [1980] K.L.R. 154** adopted the position taken by Law JA who stated as follows in page 157 as follows:

“I am of the opinion that, when considering the question of the standard of proof requisite to

establish the commission of a matrimonial offence, the safe and proper direction should be that the court must be satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved, there is no need for a court to preoccupy itself with other words and expressions used by other judges in other places.”

Applying this standard of proof to this case can it be said that the Petitioner has proved his petition? In the petition the Petitioner relied on the matrimonial offence of cruelty. In his testimony the Petitioner claimed that the Respondent has lost interest to have sex with him. He also claimed that the Respondent had no time for him but was instead busy attending parties.

I am convinced that the allegations made by the Petitioner against the Respondent were not proved to the required standard in matrimonial offences. There was no cogent evidence proving cruelty on the party of the Respondent. Whatever strange behaviour exhibited by the Respondent towards the petitioner provoked the petitioner who admitted having committed adultery. For this reason I dismiss the petition with costs to the Respondent.

I have already stated that the Respondent had sought for the marriage to be dissolved in her cross-petition. In the cross-petition, the Respondent relied on two main grounds namely adultery and cruelty. After a careful consideration of the Respondent’s evidence tendered in support of the cross-petition, I am convinced that the matrimonial offence of cruelty was not proved against the Petitioner. I am however satisfied that the offence of adultery was proved. The offence is admitted by the Petitioner. The practice of polygamy is not acceptable under the Hindu Law. On this account the Respondent’s cross-petition succeeds. Consequently I order for the marriage between the couple dissolved. A decree nisi be issued and should be made absolute within two (2) months from the date hereof. Costs of the cross-petition is given to the Respondent.

Dated and delivered at Mombasa this 23rd day of June 2008.

J. K. SERGON

J U D G E