



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE 44 OF 2007

R.A PETITIONER

- Versus -

S.M.F.K..... RESPONDENT

J U D G M E N T

This petition was dated and filed in court on 10th September, 2007. the Petitioner thereby prays for orders that –

1. The marriage between her and the Respondent be dissolved.
2. The Respondent be ordered to pay costs of these proceedings.
3. The court do make such order or further orders as it may deem fit and just.

In her petition, the Petitioner accuses the Respondent of having treated her with cruelty since the celebration of marriage. The particulars of cruelty are said to be –

- (a) That the Respondent has been sleeping outside his matrimonial home thereby committing adultery with women.
- (b) That throughout the marriage, the respondent has been treating the Petitioner with cruelty and brutality whenever asked “why the Petitioner ...”
- (c) That sometime in the year 2000 the Respondent confessed to the Petitioner having a relationship with a woman and called her his wife, which action constituted adultery and as a result it has greatly mentally traumatized and affected the Petitioner.
- (d) That the Respondent has resulted in using abusive and offensive language to the Petitioner verbally portraying the Petitioner to be a harlot, prostitute and not a right thinking member of the society which actions have greatly mentally affected the Petitioner.

(e) That the same year the Petitioner decided to leave the matrimonial home and left all the children with the Respondent and to date there has been no reconciliation.

(f) That by reasons of the Respondent's behaviour and/or conduct aforesaid "the Petitioner her conjugal rights for the period the petitioner left her matrimonial home" (sic).

Although the Respondent was duly served with the relevant court papers, he neither entered appearance, nor did he file any other papers. At the hearing of the petition, he did not attend even though he was also served with a hearing notice. The Petitioner gave sworn evidence, stating that the parties first married under customary law in 1978. Thereafter the couple went for what the Petitioner called an "official marriage" in the Registrar's office in 1987. They were blessed with their first child in 1979, and it was when the child was about 6 months old that her husband began misbehaving. According to the Petitioner, he started going out and having women friends and committing adultery.

After the Petitioner got her second child in 1981, a woman friend of the Respondent, whose name the Petitioner did not know, brought the Petitioner a letter from the Chief requesting her to appear before the Chief on a specified date. When she went, the Chief told her that that lady had complained to him, alleging that the Petitioner was accusing that that lady of moving around with the Petitioner's husband. But the Petitioner did not even know that lady. The Chief found that the other woman was in the wrong and warned her not to move around with the Petitioner's husband.

The Petitioner further testified that the Respondent neglected maintaining the family. He never left food in the house, or anything else, yet he was a clerk with the Kenya Ports Authority.

On another occasion he beat up the Petitioner.

Finally, the husband married in 2000. The couple has been separated since that year. The Petitioner accordingly asked for divorce as prayed.

I have considered the pleadings and the Petitioner's oral testimony. She impressed me as a witness who was very economical with words. Even when the court went out of its way to explain to her what she needed to prove in her petition, she only fumbled around. This was one litigant who could have done better with some legal aid. Although her main ground of complaint is cruelty as spelt out in the petition, the particulars given in support of that ground revolve around adultery. But these particulars and the testimony in court are too generalized. Adultery cannot be proved by such generalizations. For instance, it does not help to say that the Respondent was sleeping outside his matrimonial home thereby committing adultery. The Petitioner thereby seems to suggest that if and when a husband sleeps out of the matrimonial home, he commits adultery. It does not follow. Some proof of adultery is required on a higher degree than a mere balance of probability. Suspicion and speculation alone are not enough.

The incident in which the chief is alleged to have summoned the Petitioner does not have any probative value in the absence of corroboration. She could have produced the letter which she received from the Chief, or even call the Chief himself as her witness. But she did not do any of these.

However, the allegation that the Respondent married another woman in 2000 with whom he is living and which led to the Petitioner leaving the matrimonial home is serious. Only the Respondent could have denied it, but he did not do so. In the absence of a denial, that evidence is uncontroverted and it constitutes proof that the Respondent has indeed committed adultery. That would entitle the Petitioner to a dissolution of the marriage.

Secondly, it is about eight years since the Petitioner left the matrimonial home. According to her, there has been no reconciliation. This is a clear sign that this marriage has irretrievably broken down.

From the above account, I find that the Respondent has committed adultery and that this marriage has irretrievably broken down. I accordingly make the following orders –

1. That the marriage solemnized between the Petitioner and the Respondent at the Registrar's Office in Mombasa on 2nd October, 1987 be and is hereby dissolved.
2. Decree nisi to issue.
3. Decree nisi to become absolute after six months.
4. The child E.M.M to remain in the custody of the Respondent until she attains the age of 18 years or until further orders.
5. Each party to bear its own costs of this petition.

Dated and delivered at Mombasa this 6th day of June, 2008.

L. NJAGI

JUDGE