

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Divorce Cause 21 of 2005

F.M.K.....PETITIONER

VERSUS

S.N.S.....
.....RESPONDENT

J U D G M E N T

The Petitioner F.M.K and the Respondent S.N.S were married on 5.1.1996 under the Marriage Act (Cap 150 Laws of Kenya). They have no children. The complainant lived and cohabited as husband and wife in Nyali in Mombasa although they have also lived in Germany. The marriage experienced problems and on 10.3.2005 the petitioner lodged this petition for divorce on grounds of cruelty and dessertion.

On being served with the Petition the respondent filed a Cross-Petition on 29.6.2005 on grounds of dessertion, adultery and cruelty. I have not traced an answer to the petition and the one to the cross petition. On 20.7.2007 the Deputy Registrar issued his certificate that the pleadings were proper and that the Petition be heard at Mombasa.

When the matter came up for hearing on 3.7.2008, only the Petitioner attended. His petition was therefore heard in the absence of the respondent and her counsel.

The Petitioner testified that since the celebration of their marriage the respondent has treated him with cruelty. She was given to drunken habits and frequently struck the Petitioner. The Petitioner recalled one incident on 1.1.2004 when the respondent assaulted him and he had to seek police help. He produced "P EX3" a document written by the OCS Nyali Police Station stating that the petitioner had reported an assault on him committed by the respondent. According to the Petitioner, the respondent frequently quarreled him which quarrels frequently involved the police.

The Petitioner further testified that in April 2004, the respondent left the matrimonial home and has never returned. He did not send her away and has not seen her since. In the petitioner's view their marriage is a shell and has irretrievably broken down. It should therefore be dissolved.

Having considered the evidence adduced before me, I am satisfied that the petitioner has established the grounds of cruelty and dessertion. For cruelty to qualify as a matrimonial offence, 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 (**See Russell -V- Russell [1895] P 315 and Herton -V- Herton [1940] 3 ALL ER 380.** The evidence adduced by the petitioner has not been controverted.

On the ground of dessertion there is the uncontroverted evidence that since April 2004, the respondent has not resumed cohabitation with the petitioner. It is now more than 4 years since. I find and hold that the ground of dessertion has also been established. In the end I find and hold that the respondent has since the celebration of her marriage with the petitioner treated the petitioner with cruelty and further that she is in desertion of the petitioner. The marriage between the Petitioner has therefore irretrievably broken down and is hereby dissolved. Dicree nisi shall issue forthwith and the same will be made absolute after the statutory period.

The respondent's cross petition is dismissed. I make no order as to costs.

Orders Accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of Adagi Ms for the Petitioner.

F. AZANGALALA

JUDGE

25TH JULY 2008