



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 155 of 2003

P A T..... PETITIONER

VERSUS

R W O..... RESPONDENT

JUDGMENT

P A T, petitioned the court for an order to dissolve her marriage to **R W O** on grounds of cruelty and adultery whose particulars she gave in paragraphs 6 and 7 of the petition.

The respondent was served with the Notice of the institution of the petition, and he subsequently entered appearance and filed an answer to the petition through Messrs B. M. Wamalwa advocates.

In court during the hearing, the petitioner, who works as a catering officer, testified that she got married to the respondent on 6th June 1995, at the Registrar General's office in Nairobi. She produced her marriage certificate as Ex.1.

The couple lived and cohabited as shown in para 2 of the petition. They have a daughter, M, aged 12 years old who lives with the petitioner.

The petitioner stopped living with her husband sometime in 2000, because of having found him in be having sex with her younger sister P, who was aged 16 years old at the time. The incident took place in 1999, and her husband apologized for it, but the petitioner refused to accept the apology as this was an underage sister, whom she was looking after alongside her other siblings after the death of both their parents.

The petitioner recalled that prior to that incident, the respondent had a sexual relationship with his late brother's wife, an incident which caused her much stress and unhappiness. She, however, forgave him for that illicit affair after intervention by her husband's parents.

The petitioner organized a family meeting at which she related what the respondent had done to her younger sister, and also told them that she could not live with her husband any longer for fear of him continuing to sexually abuse her younger sibling. Unknown to the petitioner, it transpired that the baby her younger sister P had had the previous year was also fathered by the respondent but the said baby had died.

The respondent's behaviour affected the petitioner adversely. This coupled with the fact that he was irresponsible and did not make any financial or any other contribution in the house made the petitioner as

her husband to leave the matrimonial house which he did. She now prays the court to order her husband to take responsibility and pay maintenance and school fees as he now has a job as a storekeeper at [PARTICULARS WITHHELD], Nairobi. She prayed for the custody of their daughter Michelle.

The petitioner's sister, P lives in Baringo. She is now grown up and married and lives with her husband.

She recalled that in 1998, she was living with the petitioner who is her elder sister, in Nairobi, whilst a student in Thika District. She testified that her sister P.A.T was away from the house for one month, attending a course at Utalii Colleged. This was in January 1998. She remained living in the house with the respondent and other children. It was then that the respondent started enticing her into having sex with him in his bedroom. She was only 16 years old by then. She got pregnant and delivered a baby boy in October 1998, but the same died a year later in October, 1999.

P confirmed that she did not report to her sister about the affair with the respondent because she was afraid, but later, the respondent persuaded her again to continue having sex with him after the death of the baby, as he threatened her that he would report her to her sister, the petitioner, if she refused.

P got pregnant again in December, 1999. This time, her sister, the petitioner discovered what had been going on between P and her husband. Obviously she was upset. P ran away from the house and went to their rural home in Nyanza, where she gave birth to a baby girl. The respondent did not assist her in looking after the baby but in 2002, she got married and subsequently gave birth to her 3rd child, whom she was holding whilst giving evidence in court. She confirmed on re-examination that her sister did find her and the respondent having sex in their bedroom that is how the issue came to light.

The respondent described the petitioner as his wife since 1995. They have a daughter, M, but prior to their marriage, they each had a child.

The respondent met the petitioner in 1995 at the Kenya Airways offices where he worked as a [PARTICULARS WITHHELD]. He lost his job in 1995, but found another job at a Dry Cleaners where he worked till 1998. After that he did not have a job and it was the respondent who took care of the family, till the time he left the matrimonial home. He denied having made P pregnant twice.

The respondent currently works at the [PARTICULARS WITHHELD] as a store keeper earning a salary of Kshs.27,000/= gross, and Kshs.11,000/= after taxation.

The respondent admitted that he lives with a woman named B, but this was after he had stopped living with his wife, the petitioner, whom he said he still wants back, and he also wants custody of their baby.

I directed both parties to file affidavits of means as I have no way of knowing their personal incomes. I have scrutinized the pay slips attached to the two affidavits of means and noted their contents. I have also considered the evidence adduced by the petitioner, about her life with the respondent which life seemed quite turbulent considering the evidence adduced by the petitioner's sister P. I believed that evidence which I find showed complete betrayal by the respondent, a fully grown up man who started and continued having a sexual affair with an underage girl. Though he denied the affair, I am satisfied from the oral evidence that the affair did take place, resulting in the birth of two children by the underage girl. There was no suit filed by her before me, so I will not pursue her possible claims and violations of her rights by the respondent.

Be that as it may, and for the purpose of the divorce proceedings, I find the respondent's behaviour and conduct to have caused pain, anxiety and shame to the petitioner, as she testified. This was cruelty on the part of the respondent on his wife the petitioner, who was playing the role of a parent to her siblings after the loss of both parents. It is not surprising that the petitioner ordered the respondent out of the matrimonial house!

There was the further evidence that the respondent was irresponsible and never provided for the family for the period the couple lived as husband and wife. The respondent admitted this to the extent that he

said he did not always have a job, but that when he did, he contributed to the family welfare, however, according to his further testimony, he had not given any assistance to his wife or daughter M, since 2000, when he left the matrimonial house. He claimed in his written submissions that he opened an account for M and attached some copy of a card, however, this evidence not having been adduced during his oral testimony on oath, and not having been tested on cross examination, cannot really be relied on in the absence of corroboration. It was also surprising that the respondent said that he wanted to have custody of their daughter M, yet he has not made any contribution towards her school fees or maintenance since 2000. I was not sure whether he was sincere, as such, I cannot trust her with the custody of M.

Having said that, and from the evidence on record, I find that the petitioner proved, on a balance of probabilities that the respondent was cruel to her during the subsistence of their marriage. For that reason, I proceed to dissolve the marriage between the petitioner and respondent. Further I award the custody, care and control of M, to the petitioner, but with reasonable access to the respondent. Such access must be arranged on terms acceptable to both parties. The respondent will pay a sum of Kshs.6,000/= p.m. towards maintenance and other expenses of M beginning from 1st October 2008. Finally, the respondent to pay the costs occasioned by these proceedings.

Dated at Nairobi this 19th day of September, 2008.

JOYCE ALUOCH

JUDGE OF APPEAL