



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 77 of 2002

G.L.I PETITIONER

VERSUS

A.Z.M RESPONDENT

JUDGMENT

The petition for dissolution by the wife was filed on 22nd April, 2002. The husband filed the Answer and cross-petition on 31st May, 2002.

The hearing commenced on 19th February, 2004 but due to various administrative reasons it did not proceed further and eventually it fell on the lap of this court. It was directed that the petition to proceed from where it was left by the previous Judge.

It is not in dispute that the parties got married on 6th September, 1996 at the Registrar's office, Nakuru. The Petitioner is a nurse by profession and has been working with NGO called [PARTICULARS WITHHELD]. The Respondent is an Army officer.

The couple cohabited in Nairobi, Nakuru and back to Nairobi. Eventually, they separated in October, 2001.

The marriage bore three children. The eldest daughter D has been staying with the Respondent's mother at Mombasa since she was about six months by consent of the couple.

In the beginning of the marriage, it emerged that the Petitioner was staying at Nairobi and the Respondent was at Nakuru near his Army base. The couple used to be together at both places during the time available to both. Eventually the Petitioner moved to Nakuru as it was financially constricting to have two houses. According to the Petitioner it was mutually agreed that she would take up a job at Southern Sudan which was a better paid job and also because she was allowed to come back to Kenya every two months. When she would come home, they would go together to see the child at Mombasa.

The Petitioner has alleged that the Respondent has treated her with cruelty. According to her he was verbally and physically abusive.

Both parties have stressed on an incident occurred on 24th October, 2001. The Petitioner was taking a course in Diploma in Health Care Management. According to her, she came back from her classes and the Respondent opened the gate for her. She went to the bedroom and he followed her. He told her 'I am going to Mombasa and I want to find you out of this house.' The couple was living at [PARTICULARS

WITHHELD]. When she asked why would she leave, she found herself on the ground and the Respondent beating her. She was six months pregnant with the last born child. She managed to kick him and to come out to the sitting room. The Respondent followed her there and dragged her back to the bedroom. He continued beating her with kicks and blows. She was totally weak to resist and started bleeding from private parts. He left her in that condition by stating that if he found her in the house when he came back from Mombasa he would kill her. Thus she left the house with two children.

The Respondent's version of the said incident of the said incident is as under.

According to him the Petitioner was to travel to her parent's house for remembrance of her late father which fact is also stated by the Petitioner. She asked for some money. He was to go to Mombasa and did not have money. But he told her that he would borrow some. She told him that she would wait. But when she came back home, she came straight to the bedroom where he was and started hurling very abusive words and struck him. He restrained and she eventually filed a complaint to the police and he was charged with an offence of assault causing grievous harm.

It cannot be disputed that the Respondent was acquitted of the charge. The proceedings and judgment of the said case was produced in evidence. He raised the same defence as averred before the criminal court. The learned Magistrate acquitted the Respondent by stating that there was no medical evidence which could have been invaluable in proving the charge.

Be that as it may, due to the basic differences as regards laws of burden of proof in criminal proceedings and civil proceedings, as well as matrimonial proceedings, this court is not estopped from evaluating the evidence produced before this court.

It is not in dispute that the parties separated after the aforesaid incident and, since that day, have not reconciled.

Looking at her evidence, the Petitioner did agree that she managed to kick the Respondent when he tried to strangulate her and managed to go out of the sitting room but the assault continued. The Respondent also has stated that the Petitioner struck him and he defended himself. He did not give any details of the incident despite the same as were given in detail by the Petitioner. He, of course, relied on the judgment acquitting him. But on perusal of the same, I did not find any finding of fact that the Respondent was injured which fact shows that the Respondent did use more force than necessary just to defend him from a bare striking by the Petitioner. I do not intend to forget, while I say so, to keep it in my mind and observation that the Respondent is a trained Army Officer having ability and strength to overpower the Petitioner without injuring her seriously, even if it was true that it was the Petitioner who struck him, which I do not find to be true under the fact and circumstances put forth by both of them.

I shall thus find that the Petitioner was physically violated with serious threats and had to succumb to the warnings from the Respondent when she moved out of the matrimonial home after the incident.

Even if it was a sole incident, in my opinion, it is an act of extreme cruelty which endangered the Petitioner's safety, physical and mental, and agree with the submissions made by her learned counsel and find that the Respondent is guilty of cruelty. I also find that the Petitioner has not condoned the said act of cruelty.

The averments of the Petitioner as regards witch doctor's presence in the house has not been substantiated and she has failed to prove what adverse effect she suffered due to his presence. I shall thus reject her contention in respect thereto.

The Petitioner denied that she was violent, abusive and hot tempered. She stated that it was not her and being a mother of three children she cannot be so. In any event the Respondent has not pleaded any particular incidents to prove those allegations, or gave evidence thereon.

The Petitioner denied that she would engage in excessive consumption of alcohol. She admitted that

it was the Respondent who introduced her to drinking and she would drink as she was taught. She further stated that she has stopped drinking after she left matrimonial home.

She denied that she insulted her mother-in-law when she went to Mombasa to visit her first born. She explained what happened and did not take the daughter after the mother-in-law told her to obtain consent of the Respondent. The mother-in-law and her are in talking terms, that she loves her and talks to the daughter on the mobile phone of the mother-in-law.

The mother-in-law agreed that they are in talking terms and was ready to release the child if they both went to her because they both left the child under her care since she was six months old.

As regards the other two children the Petitioner stated that the Respondent has not asked about their welfare and has not seen the last born since the birth. This fact is not denied by the Respondent

The Respondent also has not denied the fact that at present he lives with another woman and her own child as well as her child sired by him.

Although not pleaded, the aforesaid fact shows that their marriage is no more, as the Respondent has chosen to make a new life for himself. Though I would fall short of finding that he has committed adultery because of technicality, I cannot ignore a fact put forth on record from evidence by one party and not denied by the other.

As regards the custody of the children is concerned, I tend to agree with the submissions made by Mr. Amolo, the learned counsel for the Respondent that the issue of custody of the first born daughter D should not be disturbed till her wishes are ascertained and I do hereby find so.

The custody of the other two children has been with the Petitioner and I have no reason to disturb this position either. As a matter of fact the Respondent has not even bothered to see or tend for the children since October, 2001. I do not agree that this court should not make an order of custody from the evidence before me and that the issue should be determined elsewhere.

Under the laws, I have the right to determine and shall find and order that the custody, care and control of other two children of the marriage is granted to the Petitioner who shall be at liberty to file the application for maintenance, if so wishes.

I am also of a view of that the children of the marriage should be united and grow up together to realize love and affinity for each other.

In the meantime the Petitioner shall have unlimited access to D the first daughter.

Lastly, I have already found that the Respondent is guilty of cruelty against the Petitioner and thus her prayer for dissolution of the marriage is granted.

I direct that the marriage solemnized between the parties be dissolved and decree nisi be made absolute within 45 days. I dismiss the cross-petition.

The Respondent shall pay the costs of these proceedings.

Dated and signed at Nairobi, this 16th day of October, 2008.

K.H. RAWAL

JUDGE

16.10.08