

REPUBLIC OF KENYA

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

Divorce Cause 125 of 2001

SM PETITIONER

versus

MKM RESPONDENT

JUDGMENT

SM and MKM solemnized their marriage under the Marriage Act on 13/8/1983. There are two issues of their marriage who are now both adults.

SM petitioned this court on 11/7/2001, for the dissolution of their marriage on the grounds of cruelty, which allegation MKM denies. She alleges that he relocated from Kenya, leaving her and their children behind and that he now has another family in Japan. She urges this court to dismiss his petition.

SM an Engineer, currently working with the J[...] University Nairobi, testified that his wife has treated him with cruelty and that she assaulted him and bit his hand in 1997 while she had visited him in Japan; that she also threatened to kill him; that she declined to cook for him thus denying him food and she also denied him love, as a result of which he has been unable to share a house with her, hence his reasons for seeking an order for the dissolution of their marriage. He also prays for costs of the suit.

The respondent chose not to call any evidence.

I need not reiterate that the onus of proof lies on him and the fact that the respondent chose not to give evidence can not lower the standard of proof.

In a suit where the petitioner alleges cruelty, it is for him to satisfy the court, and he is under an obligation to prove his case on balance of probabilities, and thereby to establish that there *'existed a misconduct of a grave and weighty nature; that there was real injury to his health or reasonable apprehension such injury; that the injury was caused by misconduct on the part of the respondent, and that the conduct amounted to cruelty in the ordinary sense of that word'* (**Meme vs. Meme [1976] K L R 13**).

I have evaluated the evidence on record and I find that one would have

expected the petitioner to call evidence to prove the cruelty, least of which should have been medical evidence in support of his allegations of the physical cruelty, but all that he said was that he treated the bite. Such omission can only mean that she never assaulted him and also that he never sustained the alleged injuries, all of which, in my humble opinion tended to water down his evidence.

I am on the other hand convinced that even if there were acts of cruelty, which I am not convinced there were, the fact that he continued living with the respondent and did not move this court for a period of four years is a clear indication that he connived the alleged acts of cruelty, which again waters his case down further.

The upshot of all this is that the petitioner has failed to prove his case as expected and I dismiss it with costs.

Dated and delivered at Nairobi this 4th day of December 2008.

JEANNE GACHECHE

Judge

Delivered in the presence of: