



REPUBLIC OF KENYA

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

Divorce Cause 105 of 2005

S.M.K PETITIONER

VERSUS

M.N.MRESPONDENT

JUDGMENT

The Petitioner/husband by his Petition dated 5th August 2005 seeks dissolution of his marriage with the Respondent solemnized on 1st August, 1995. His grounds for such prayer are that the Respondent has been cruel to him and has committed acts of adultery against the named persons. None of them has been served with his petition, or made co-respondent.

The Respondent/wife thereafter filed her Answer denying allegations made by the Petitioner and also filed Cross-Petition seeking dissolution on the same grounds i.e. cruelty and adultery. She has named one person but has neither served her, nor made her a co-respondent.

The Cross-Petition was answered by the petitioner with denial of the allegations.

It is not in dispute that the couple had cohabited in various places at Nairobi and Jerusalem upto 14th July, 2004 and that they have two issues of marriage, namely

1. N.N.M born on 18th May, 1996
2. L.M.M born on 13th January, 2000.

Both parties testified and had not called any witness. Both agree that it is now impossible to reconcile and resuscitate the marriage.

At the outset, I can, without much ado, find, which I hereby do, that none of the parties has been able to prove their allegations and counter-allegations as regards adultery. They gave evidence which can be regarded; at the most, as grave suspicion, especially when the incidents alleged happened after the relations between the couple were strained.

According to the Petitioner the real problems in the marriage started when he was at Kosovo on an International assignment and could only come to see the family after about three months.

Then he stated that on 27th December, 2002 the Respondent confessed that she fell in love with one A.B who was a tutor in a Seminar she attended and that she was since then in constant communications with him and that she confessed having made love to one T.G who was working with Mugoya Construction Company. The Respondent has denied these allegations.

I have already commented on the issue of adultery and do not intend to repeat the same.

He further testified that the Respondent was very rude, discourteous and many times had told him that he was not '*man enough*' and she would do as she wanted, that she used her income on her side of the family and constantly placed financial constraint on him, that on top of it she would demand more and more from him without any contribution from her, that her mother, mostly under pretext of her weekly normal visit, would demand some money every time, that the constant demands of looking after both the family placed financial and mental strain on him. He elaborated that he paid school fees for her last two brothers for their High school education.

The situation at home became uncontrollable and thus he had to resign from his job at Kosovo to be with the family and put things straight.

The Respondent came late drunk to pick him up at the Airport and rebuked him by saying he was stupid to resign and how and from where they would get money.

After about six months, on 14th August 2003 he got an assignment at Gaza, Palestine. The family was offered a place in Jerusalem, Israel. He used to go to Gaza during the week and come back to family normally on weekends.

He tried to make the family comfortable and happy while in Jerusalem but the Respondent picked up quarrels on the issue of finance. At the end of the year she tried to stab him with a kitchen knife. After the incident he left home to go to Gaza to avoid further confrontations. The only reason for the said threat was that he received a call from his female colleague to give her a lift to Gaza from Jerusalem. According to him it was normal to help a colleague. He said he had given a car to the Respondent at Jerusalem for family purposes and he was using the official vehicle to commute.

On 2nd April, 2004 he had to come to Kenya to see his sick brother. On his return he found all his clothes shredded as the Respondent did not want him to visit his brother.

He then gave details of how much he used to send her and spent on the family while in Kosovo and Israel. He said he used to send shs.40,000/= from Kosovo and add onto the same if required per month. He had taken medical insurance for the family and paid school fees as well as for Respondent's Masters Course.

In Israel he would look after all the requirements of the family, would also fuel Respondent's car when going to Gaza and would leave money for school lunch and other requirements. But, as per the Petitioner the Respondent was not content! She was always complaining despite all his efforts to make her happy and comfortable.

They came to Nairobi on an annual holiday in July, 2004 but he could not stay as the Respondent threatened him with his life after few days of their arrival. She refused to come back to Israel and when he insisted she picked up a quarrel and threatened to kill him.

He then left to go back to Israel and the Respondent thereafter filed a suit for maintenance in the Children's Court. Without his consent she placed the children to Banda School which he could not afford. Her application was dismissed. She filed the appeal but later withdrew and went back to the Children's Court. She has also filed an Originating Summons in the High Court which she withdrew and filed another for distribution of the properties.

He started once again giving evidence on a post card and a letter written in French language. But due to unavailability of their translation in English the same were not produced. They were in reference to the allegations of acts of adultery.

He stated that he had not connived at or condoned those acts of cruelty and has not colluded with the Respondent.

He asserted that their marriage is irreparable and all efforts to do so have failed.

On cross-examination he stated that the problems started in 1999 when the Respondent was pregnant with the second child. He added in his evidence that when they were staying at a home given by her employer (Pangani School) she also threatened to kick him out of that house. He denied that he resigned from his job at Kosovo to join his present job at Gaza. He reiterated that he got it while he was in Nairobi. Once again he was asked questions as to his allegations on her adultery, which in view of my finding, I shall not elaborate. As to her similar allegations against him he said that J.M was a colleague at work and that the Respondent had seen them together at work during her visit and that J would also visit their home. He added that one B.C was a house girl and later was a sales girl at a boutique he opened for the Respondent.

I once again shall not elaborate much on these evidence due to my finding aforesaid.

He denied having any sexually transmitted disease while in Gaza. Once again no proof or details of such sickness was coming forth to prove the allegation of adultery against him.

He explained that if he would have reported her assault on him in Israel the repercussions would have been serious. The Respondent could have been jailed and his contract could have been revoked.

He was shown two documents of transfer of his properties to his family member which were of 13th April, 2004 and 20th April, 2004. They are produced by the Respondent in her evidence. I do not wish to think that these letters were produced to show any acts of cruelty but can be used to sustain her claim as a married woman and I do not wish to elaborate or observe much on these documents except to note that in April, 2004 the Petitioner did transfer two properties registered in his name to his family members.

He insisted that the Respondent was only after material gain and reiterated that in Israel the family lived a luxurious life and he did not save anything from his income.

He was asked about April, 2003 and he stated that when he asked her about her coming home around midnight, the Respondent replied that she was tired of living with him and slept in the drawing room. He saw her next morning at a stand with a friend. Her mother and his father were called by him as, according to him, the matter was getting out of hand. But she disappeared and her mother did not come. After some days presumably under legal advice, she came back crying confessing her adultery. He denied having assaulted her during the meeting and that that was the reason she left home.

On the contrary according to him when he asked her why she was moving with many men she beat him and when he tried to prevent her she complained to Nairobi Women Home.

He reiterated that in July, 2004 he left Nairobi because of her threat and her insistence of not going back. He also reiterated his averments as regards placing the children at [PARTICULARS WITHHELD] unilaterally by the Respondent. He said during last part of his cross-examination that he last saw the children in November 2005 and is scared to go home on his own. He stressed that he had to get an escort from the Children's Court during his last visit.

This was the case of the Petitioner.

Respondent confirmed that two cases namely, one for maintenance before the Children's Court and the other for division of matrimonial properties before the High Court at Nairobi are pending between the parties.

She denied and explained the allegations of adultery against her. After I had considered all evidence as regard cross-allegations of adultery, I have made my finding stated earlier.

She denied allegations of cruelty made and testified against her. She denied that her mother ever asked for any money from them. But she agreed that the school fee for her brothers was an agreed issue. She denied that she refused to contribute, that she threatened to kill him on 2nd April, 2004, that she tore or shredded his clothes. She stated that she had never hired any thugs to kill him.

As regards her cross-petition she stated that the Petitioner's parents had prejudice against her, she being a Kikuyu woman and they insisted that her salary be given to the Petitioner. She agreed that she did not want them to tell her how to live her life, and the Respondent was not happy on her assertion.

She stated that in June, 2003 she found out that the Petitioner had bought a land in Riruta and when she questioned him, a quarrel started and the Petitioner assaulted her. She could not produce any evidence as to her treatment from Nairobi Women's Hospital as the maker of a letter was not called to produce the same.

She testified that in February 2003, after his return from Kosovo he started making unfounded accusations on her adulterous relations and would also ask questions on the e-mails she used to exchange with Alain. According to her he was probing in her life unnecessarily.

Then she talked about their return to Nairobi on holiday in July, 2004. The Petitioner used to go out at night and return early next morning. On 4th July, 2004 he asked her to check on repairs of Riruta Home and to supervise on the same. Next day he left and she did not see him. Later he called her and told her that she was on her own and to take care of the children.

As regards the incident referred by the Petitioner, her version was that when she asked the Petitioner about his affairs with the house girl he refused to talk and she went for her lesson. From there she was called by her mother to come back home as she was called to go there. According to her, the disagreement between them was not serious enough to involve parents and asked her mother to go back. She was locked out when she came back home andhad to sleep at her mother's place. She was refused to enter the house the whole of Easter but on Monday she went there in company of his three friends and still was not allowed. When she was asked to wait outside she started screaming and the Petitioner allowed her to enter. But according to her they resolved the issues and started living together and left for Israel.

I may, apart from what I have found as regards the allegations of adultery, observe that both the parties after the acts of alleged adultery resumed the cohabitation voluntarily. There is no allegation of any further act of adultery thereafter and thus as per law the adultery is deemed to be condoned even if there was evidence to that effect, which I have found to the contrary.

She then deponed that she resigned from her job to go to Israel to be with the family and stated that many times the Petitioner would leave her without money and she added that it was because he used to travel with a female companion. She said that the same happened when he left to see his brother in Nairobi. She had to borrow money or found some money left in their letter-box.

She then gave details of her earnings and expenses. However, I directed her to file an appropriate application to seek maintenance simply because affidavits of means from both parties were not filed and exchanged and also because the Petitioner was not asked any questions on his income and expenses.

I shall thus not make any comments or observations on those details. I also note that her application for maintenance for the children is pending before the Children Court and I do not like to have any duplicity.

In her cross-examination she has agreed that she had filed a suit under Married women's Property Act before the petition herein was filed and after the Petitioner abandoned them. She also agreed that the Petitioner never asked her to give her salary to him and agreed on the evidence of the Petitioner as regards his support to the family while he was in Kosovo. She also agreed that he sent money while in Israel after he left but added that whatever was sent was not enough. She also conceded that he is paying for medical expenses and school fees of shs75,000/= per term as United Nations is paying 75 per cent thereof and also agreed that the Petitioner is on contract. She denied that she threatened to kill the Petitioner and added that, and I quote

"I do not think the reason of quarrels were over money and my resignation without his consent."

This is the evidence before me.

I shall now have to determine whether the allegations and counter allegations of acts of cruelty are proved by both or any of them as per the required standard of proof in matrimonial causes which is stricter than of balance of probability.

According to the Petitioner the cause of his mental anguish was the constant financial demands from the Respondent even for her family members while she was not contributing anything towards the family upkeep. This allegation has not been traversed by the Respondent when she agreed about the school fees of her brother being paid by him and also her insistence that no one should impose on her how to spend her money. His allegations of her being rude, quarrelsome and defiant have not been specifically denied. Her assertion that nobody should interfere in her affairs does confirm those allegations. Even while giving testimony about her financial requirements, she stated that the cash money and financial support given by the Petitioner till to-date was not sufficient. She tried even to show her old pay-slip to support her earnings less than what she earned when she gave evidence to the Court. Similarly the testimony of the Petitioner to the effect that on his return from Kosovo he was rebuked by her and was asked where the money would come from has not been contravened. Her effort to show that he came back to join the job at Gaza is not a denial of the said rebuke. The Respondent against the said evidence, stated that she was assaulted, (which has been explained by the Petitioner as a self defence or avoidance of being beaten) and that unfounded allegations on her fidelity were made which caused her pain and mental anguish are not weighty enough to be termed as serious invasion in the confidence and self respect of a spouse. She has readily agreed that she and A.B were in constant communication even at Israel knowing very well the feelings of the Petitioner as regards their relationships. These facts show a total disregard of a spouse's feeling or a total absence of an honest effort to remove the misunderstanding, if it was so.

Considering the evidence as whole, I do feel that there was a total disrespect on the part of the Respondent towards the sanctity of marriage and that of the feeling of a spouse within married life. On the other hand there was suspicion on the part of the Petitioner as regards fidelity on the part of the Respondent. The whole evidence before me unfortunately draws an unhealthy picture of the marriage.

Both parties in my view, in a smaller or larger part contributed to the actions of other, and in my opinion, the Respondent has played a major part in creating a rift in the marriage, and causing strain to the Petitioner.

Be that as it may, the marriage is no marriage in reality. Both parties have unequivocally stated that the marriage is irretrievably broken down. That means none of them has condoned the acts of cruelty.

In the premises of my observations aforesaid, I direct that the marriage in fact solemnized between the parties on 14th August, 1998 be dissolved.

The decree nisi be made absolute within 60 days.

The Respondent is granted custody, care and control of the two children of the marriage.

The order as to maintenance be determined on an application.

I do not make orders as to costs.

Dated and signed at Nairobi this 18th day of January, 2007

K.H. RAWAL

JUDGE

18.1.2007