



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Divorce Cause 7 of 2006

S I R M.....PETITIONER

- Versus -

A K M.RESPONDENT

Coram: Before Hon. Justice L. Njagi

Petitioner in person present

Mr. Wameyo holding brief for Mutungi for respondent

Court clerk - Ibrahim

JUDGMENT

The divorce petition in this matter is dated 15th June, 2005, and was filed in person by the petitioner on 20th February, 2006. The petitioner thereby seeks from the court the following orders –

- 1. That a dissolution of the marriage between the petitioner and the respondent be granted**
- 2. That the respondent be ordered to pay the petitioner alimony.**
- 3. That the matrimonial property be divided.**
- 4. That the custody of the children of the marriage be vested in the petitioner and the respondent be made to contribute monthly maintenance.**
- 5. That the respondent bears the costs of this cause.**
- 6. That this Honourable Court do grant such further or other relief as it may deem just and fit to grant in the circumstances.**

According to the petition, the petitioner avers that the parties herein were married on 25th June, 1999 under the Marriage Act, and she annexed to the petition a copy of the marriage certificate. She further states that after the marriage, the parties cohabited at Mombasa, and the marriage was blessed with 4 children – R. M. K. born in 2000; M. V. M., born in 2001; G. M. M., in 2003; and E. M. M., in 2004. The petitioner then states that during the subsistence of the marriage, the respondent has been guilty of cruelty and adultery.

The alleged particulars of cruelty are that the respondent is very violent and has caused the petitioner emotional and physical harm; that the respondent does not maintain the family; and that the respondent has attempted to defraud the petitioner by throwing her out of the hotel business which was set up with the petitioner's funds. The alleged particulars of adultery are that the respondent has had a long standing relationship with one JNN who has borne the respondent a child known as S. K., who was born in 2003; and that the respondent has had several liaisons with other women throughout the marriage.

It is the petitioner's case that the marriage has irretrievably broken down, and all efforts to reconcile the parties have been futile, hence, the prayer for the dissolution of the marriage and consequent prayers.

The respondent filed his answer to the petition on 2nd June, 2006, which answer was dated 30th May, 2006. By that answer, he denies the allegations of cruelty and adultery and further denies each and every alleged particular thereof. In further response to the petition, the respondent avers that the petitioner is guilty of trumping up criminal charges against the respondent in a calculated endeavour to have the divorce proceedings heard and finalized in the absence of the respondent. He accuses her of prompting his arraignment in Mombasa Criminal Cases Numbers[particulars withheld]. With regard to the allegations of adultery, the Respondent states that he has not subsequent to the marriage with the petitioner had any intimate relationship with J N N, and further avers that the allegations of his having several liaisons with other women throughout the marriage are untrue. On his part, the Respondent states that the Petitioner is guilty of adultery and cruelty, which accusations he said he would prove in court, and which actions drove the Respondent out of the matrimonial home. He finally avers that he still loves and cherishes the Petitioner and their children and believes that this marriage may be salvaged, and consequently concludes by stating that the Petitioner is not entitled to the prayers sought.

At the hearing of the cause, the Petitioner appeared in person while Mr. M appeared for the respondent. Each of the parties adduced sworn testimony, and none of them called any witness. The Petitioner adopted and amplified the statements in her petition. She said in her evidence that throughout the marriage, the Respondent has been very violent thereby causing the Petitioner emotional and physical harm. She referred to the three criminal cases in all of which the Respondent was charged with assault. He was convicted in one case, acquitted in the second one, and the Petitioner withdrew the third one **“in the interests of the Respondent.”** She also testified that during their 8 years of marriage, the Respondent never supported the marriage and had not been visiting the children during the year preceding the hearing of this petition. There was some misunderstanding regarding their business, from which the Respondent allegedly attempted to sideline the petitioner on several occasions, even though it was set up through her funds.

The Petitioner further testified that the Respondent has a long standing relationship with JNN, out of which there is a child called SK born on 19th November, 2003, a copy of whose birth certificate was produced as Petitioner's exhibit No. 4. She also said that she knew of another child born of the Respondent with one EM in 2002, a baby boy. On 7th March, 2006, the Petitioner said she found the Respondent with another woman called E M in the Respondent's room. It was this incident which precipitated the assault that led to the Respondent being charged in one of the three assault cases. She also said that there were other affairs but she did not wish to go into their details. Finally, she said that the answer to the petition was filed out of time and therefore she objected to references to that answer.

In cross examination by Mr. M she said that even though she was not working at the time of the marriage, she had her own resources of income, and the respondent was not working at the time. She also said that she did not have any documents to show that the respondent was adulterous except Exhibit No. 4 hereinabove referred to.

The respondent, in his evidence, frankly admitted that before he met the petitioner, he had a relationship with J N N, but he is not in that relationship anymore. He denied that he was the father of JNN's child, SK, and said that the particulars stated in that child's birth certificate Exhibit No. 4 provided by the petitioner, but the respondent denied being the father of that child.

I have considered the pleadings, the evidence on record and the submissions of counsel. Before a divorce

can be granted, it must be shown that a matrimonial offence has been committed. In the present case, the respondent is accused of having committed cruelty and adultery. As regards cruelty, the petitioner's case is that the respondent has been habitually cruel to her. In support of this contention, there is evidence on record that in Mombasa Chief Magistrate's Court, Criminal Case Number [particulars withheld], the respondent was charged with unlawfully assaulting the petitioner on 7th March 2006 occasioning her actual bodily harm. After due process, the respondent was found guilty as charged and convicted of that assault. There were two other similar cases, one being Criminal Case [particulars withheld], as well as Criminal Case No. [particulars withheld]. In the petitioner's own words, she withdrew Case No. [particulars withheld] "in the interests of the respondent". However, the respondent was acquitted in Criminal Case No. [particulars withheld]. According to the petitioner, the respondent was acquitted due to the failure by the prosecution to produce the P3 form in respect of the assault. However, since a copy of the proceedings was not produced in court, it would be unwise to accept that explanation. All that remains is that the respondent retains the stigma of having been convicted in a court of Law of assaulting his wife. An assault is cruel and the respondent has thereby been shown to have been cruel to the petitioner.

Cruelty may be either a state of affairs or even an isolated incident. It may also be either mental or physical. The incident which provoked the assault in respect of which the respondent was convicted was a sad one. On the material date, the petitioner had surprised the respondent when she found him in his room in a compromising position with a lady by the name of E M. For one to find one's spouse "*in pari delicto*", I think, it must be a most harrowing and agonizing experience. For as long as that image lasts in one's mind, it constitutes mental cruelty of a very poignant and unparalleled proportions.

While on that note, the second ground upon which the petition is based is adultery. The petitioner paints a picture of the respondent as a person whose fingers itch to touch every skirt, something of a Don Juan. Apart from E M, the respondent is reputed to have a child with J N N. He denies this. He admits, however, that he had a relationship with JNN before marrying the petitioner. And to make things worse, he still lives with JNN. In his own words, he said in examination in chief:-NN

"Before I met her (petitioner), I had a relationship with another person.... The lady with whom I had a relationship was JNN. I don't have any relationship with her any more. We all stay together i.e JNN and her children, and the petitioner and her children. This has been the state of affairs all along..."

The petitioner produced exhibit No. 4 which is a certificate of birth No[.Particulars Withheld]. The certificate was issued in respect of SK who was born at Coast General Hospital on 19th November, 2003. She is a female child whose mother is shown as JNN, and whose father is indicated as A K M, a name which corresponds to that of the respondent in this matter. The respondent said that he is not the father of that child and that he was not the one who gave the paternity information to the Registrar. Truly, he does not have to give that information. Someone else, for instance, the mother, can easily offer the information and even though the respondent's counsel submitted that the information was tendered by the petitioner, that is not correct.

The record shows that the petitioner said that she got the certificate from Janet. The record further shows that the respondent told the court that the petitioner took that child for a blood test and found that her blood group was different from the blood group of the petitioner's children. That should not come as a surprise to anyone since the petitioner's children and JNN child have different mothers. Where children are born of the same father but different mothers, their blood group will not necessarily be the same.

The respondent has been very economical with his explanation as to how he related with JNN and how she happens to live with his family. Since he does not acknowledge her even as a customary law wife, it follows that any liaison with her will constitute adultery. A certificate of birth is prima facie evidence that the father and mother named therein are the parents of the child, and since the child SK was born during the subsistence of the respondent's marriage to the petitioner, and the respondent is her father, I find that the respondent is guilty of the matrimonial offence of adultery as charged.

Finally, the petitioner told the court that this marriage has irretrievably broken down, and that efforts to preserve it have gone begging. This statement seems to derive effect from the disagreements over the family businesses, incessant court cases between the parties, which depict the couple as made up of persons who cannot manage themselves within the bliss of a marriage. The high watermark in this development was reached in March, 2004, when the spouses went their different ways and have been living separately ever since. There seems to be little, if anything, left to be salvaged from this marriage. For these reasons, I find that this couple needs to be given a de jure spicing of that which is de facto, that is the fact that their marriage exists by name only.

I accordingly make the following orders:-

1. That the marriage solemnized at the Registrar's Office, Mombasa, between the petitioner and the respondent herein on 25th June, 1999, be and is hereby dissolved.

2. Decree Nisi to issue forthwith, the same to become absolute after 3 months upon application thereof.

3. The children of the marriage namely;

- R now aged 7 1/2 years
- M, aged 6 years
- T aged 4 1/2 years
- E aged 3 years

all be and are hereby committed to the custody of the petitioner, on account of their tender ages, until further orders.

4 The respondent will have visiting rights to and from the children at such time and place as will be convenient to all the parties by mutual arrangement.

5. The parties to file affidavits of means within 30 days in order to facilitate determination of the issue of maintenance. As it is not clear what properties the parties have, they should file an originating summons within the appropriate law for determination of the sharing of the properties.

6. Each party will bear its own costs of this petition.

Dated and delivered at Mombasa this 16th day of November 2007.

L. NJAGI

JUDGE

16/11/07

Before Hon. Justice Njagi

CC Ibrahim

Petitioner in person

Mr. Wameyo holding brief for Mutungi for respondent

COURT

Judgement read and delivered in open court in the presence of the petitioner and Mr. Wameyo.

L. NJAGI

JUDGE

16/11/07.