



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
DIVORCE CAUSE 70 OF 2002

MARY MBULA MUTHIANI PETITIONER

VERSUS

FRANCIS MUTHIANI..... RESPONDENT

JUDGMENT

On 10.04.02 the petitioner filed petition for divorce praying:-

- a) That the marriage between the petitioner and respondent be dissolved.
- b) That the respondent be ordered to provide maintenance to the petitioner and the children of the marriage.
- c) That the respondent be condemned to pay the cost of this petition.
- d) That this honourable court grant any further or other relief as the court may deem fit and just to grant.

The grounds upon which the petition is based are adultery and cruelty.

There is referenced in the court file to the respondent having filed answer to the petition vide which he also cross-petitioned for divorce on grounds of cruelty. Somehow upon perusal of the file after the parties concluded their evidence and submissions, I could not find the answer and cross-petition. It, therefore, became necessary to call for a copy from the parties and a photocopy was furnished by counsel for the petitioner.

The parties testified at length on the matters they relied on in support of their respective cases.

The petitioner's case is essentially as follows. She and the respondent got married on 07.12.63 at the African Inland Church, Kasinga in Machakos District. She produced a marriage certificate to that effect, issued under the Marriage Act (Cap.150). There are five issues of the marriage:-

- a) M N, born in 1964.
- b) I N , born in 1965.
- c) R M, born in 1969.
- d) R N , born in 1969.

e) T S, born in 1971.

The petitioner added that both herself and the respondent are retired teachers (primary school teachers) and that the respondent is currently running a business. The petitioner's above averments have been admitted by the respondent.

The adultery ground of divorce relied on by the petitioner was particularized as under:-

- a) On or about 1993, the respondent used to spend many nights away from the matrimonial home.
- b) In 1998, the respondent completely moved out of the matrimonial home and started living with another woman.

In the petitioner's oral testimony before this court, she said the woman in question was one J K who worked as a maid in the respondent's bar and lodging business at Mutituni. Other evidence shows Mutituni to be about 2 kilometres away from the parties' matrimonial home. The petitioner said that after the respondent moved out of the matrimonial home to stay at the premises where the bar and lodging premises are situated, she (petitioner) went to check on him there and found him having tea with J K at around 11.00 a.m. in the table room within the building where the respondent ran his bar and lodging business. According to the petitioner, the respondent was clad in a towel while J K, though wearing a skirt, had only a bra at the top and that the petitioner's clothes and those of J K were mixed. Petitioner told this court that she talked to K who said she was after money. The respondent denied any adulterous association with J K.

The petitioner neither cited J K as a co-respondent nor called her as a witness. Note must be taken that where adultery is relied on as a ground of divorce, it is required that the person alleged to have been involved in adultery association with the respondent, if such person be known, has to be cited as a co-respondent and given an opportunity to answer the allegation. As already noted, the petitioner never cited J K as co-respondent, neither was J K called upon to testify. In these circumstances, I find that the matrimonial offence of adultery leveled by the petitioner against the respondent has not been proved as required by law and the adultery ground must be and is hereby dismissed.

There now remains the ground of cruelty to be considered. Each party accused the other of cruelty. For her part, the petitioner complained, inter alia, that the respondent harassed and beat her up and failed to support her financially. The petitioner produced no medical or other independent evidence regarding the beating alluded to. Petitioner also complained that the respondent has not been supporting her in any way since 1993. It was the petitioner's case that she and the respondent had a joint bank account, with instructions that one signature was enough to operate the account and that the respondent took to withdrawing money from the account and using it alone. The respondent said he and petitioner ran different bank accounts as far as Kenya Commercial Bank was concerned. Petitioner also accused respondent of selling the family cows and using the money alone; of collecting rent from family plots and using the money alone; and of cutting family timber and using the proceeds therefrom alone. The petitioner told this court that the relationship between herself and the respondent is very poor and that the respondent's cruelty has affected her socially, mentally and physically. Petitioner said she suffers from hypertension and arthritis and that her doctor described her hypertension as a sign of depression. No doctor testified on the matter and no medical link was established between the cruelty ascribed to the respondent and the hypertension said to be suffered by the petitioner. The petitioner added that she receives medication for her ailments todate.

The petitioner reiterated the prayers in her petition and called one of her daughters, Ruth Kyalo also to testify on her behalf as the second petitioner witness, P.W.2

The essence of P.W.2's evidence is that the petitioner and respondent had matrimonial problems, which started before 1989. P.W.2 told the court that she and her mother (petitioner) were once chased away from the matrimonial home and she (P.W.2) and the petitioner went to the petitioner's parents' place. That thereafter she (P.W.2) sat down with the petitioner and respondent, with a view to settling P.W.2's

parents' differences but to no avail. P.W.2 talked of an incident where the respondent attempted to beat the petitioner and she (P.W.2) intervened and separated them and assumed their problems were over, yet the respondent left the matrimonial home to go and live at Mutituni. P.W.2 said she visited the bar and lodging where the respondent went to work and stay and found Jane Kadogo there and that the said J K went away upon seeing her.

It was P.W.2's evidence that during her aforesaid visit to the respondent's place of business and abode at Mutituni, she asked the respondent why he left the matrimonial home and that the respondent said it was because nobody boiled or warmed up water for him, for purposes of washing himself. That upon getting that answer from the respondent, she (P.W.2) suggested that the respondent should employ somebody to warm up water for him. It appears to me that this witness, P.W.2 took the respondent's complaint superficially and very simplistically. During her cross-examination, P.W.2 said she is married and does warm up water for her husband. She also said she interviened twice over the petitioner's and respondent's domestic problems, apparently without success. That she (P.W.2) later teamed up with three unnamed persons in a further attempt to solve the petitioner's and respondent's domestic problems whereat the petitioner complained about the respondent cutting down family trees without informing her and that a quarrel ensued between them. P.W.2 said she used to take food to her both parents (petitioner and respondent) before their disharmony started but that she has since been taking food only to the petitioner and also gives her other assistance but not the respondent. P.W.2 denied telling the respondent that a plan had been hatched up by the petitioner to poison the respondent.

On the other hand, the respondent filed answer and cross-petition on 24.05.02. He denied the accusations of adultery and cruelty levelled against him and cross-petitioned that it is the petitioner herself who has been cruel to him. He accused the petitioner of attempting to poison him. Respondent also accused the petitioner of uttering words on 25.09.87 to the effect that she had ceased regarding him as her husband and that she had found another father for the children of the marriage and that the petitioner's aforesaid words irretrievably broke down the marriage. The respondent also averred that the petitioner locked him out from the matrimonial home's living room and that this act plus the petitioner's act of attempting to poison him forced him to seek accommodation elsewhere away from the matrimonial home. The respondent also averred that the petitioner has taught the children of the marriage to treat him contemptuously. The respondent further averred that the petitioner made various attempts to assault him. He narrated, vide paragraph 6 (f) of his answer to petition and cross-petition, that:

'On the 4th day of April 2002 the respondent visited his land on which the matrimonial home is build (sic) with a view to harvesting some timber and on seeing the said respondent the petitioner gathered the children with whose help the respondent was threatened with a thorough beating and hence chased away a matter which he made known to the police.'

The respondent cross-petitioned:-

- a) That the marriage be dissolved.
- b) That the petitioner and the children be ordered to vacate the matrimonial home.
- c) That the petitioner be condemned into the costs of this position and cross-petition.

The respondent testified on his behalf and called no other witness. He produced various documents in support of his case. He maintained that prior to his relationship with the petitioner going sour, he duly provided as husband for the petitioner's needs and also provided as father for the children's needs. The children are now all grown up. He denied the accusations of adultery levelled against him. He said he is now aged about 78 years and has not left the matrimonial home since 1963.

It was the respondent's evidence that he built a matrimonial home for the petitioner in 1965, dug a well in the compound to provide water for the home and put piped water in the petitioner's room from the well. He said he also used his resources to cultivate a shamba on which arrow roots and vegetables were grown for the petitioner to sell and that he also planted coffee. Respondent added that he planted gum trees for

firewood and also bought grade cattle for the petitioner, who sold milk from the cattle to get money. Respondent produced a photograph (Exhibit 'A') showing a lady and a grade animal of the cattle family in a plantation and identified the lady in the photograph as the petitioner.

Respondent said the petitioner was initially a P.3 teacher like himself; that through his initiative he got promoted to P. 2 teacher; that he also paid money for petitioner to take a correspondence course which the petitioner undertook successfully and eventually she too was promoted to P.2 teacher. Respondent produced documents relating to the petitioner's course and explained that payment receipts for the petitioner's course bore her name as that was the only way she would be able to sit examinations and get certificates in her name if successful. Respondent said the petitioner fell ill many times and he produced a bundle of documents including receipts for money relating thereto. It was the respondent's case that he paid for the petitioner's treatment.

The respondent also told the court that he made investments for the petitioner. In this regard, respondent referred to Plot No. Machakos Town/Block 1/92 and said he and some friends, i.e. Peter Muia and Philip Mbindyo got together and purchased the plot; that Philip had his son's wife registered as joint owner of the plot while he (respondent) and Peter Muia had their wives registered as joint owners of the plot. Respondent said it was not true as contended by the petitioner that she is not a joint owner of the plot. Respondent produced an official search (Exhibit 'E') dated 22.06.05 relating to the plot, which shows that Mary Muthiani is among the joint proprietors of the plot. The other joint proprietors are Esther Munyiva Ndivo and Lither Peter Muia. The respondent said he and his two friends developed the plot by putting up a one-storey building thereon which is rented. He produced a photograph of the building (Exhibit 'F') and told the court that the registered owners of the building earn about Kshs.900,000/= per annum and that the petitioner gets her share of the money. Respondent also said he bought shares in Lukenya Ranching & Farming Co-operative Society Ltd for the petitioner and that she was given a 40 – acre plot of the ranch, plus another 20 – acre plot, plus another 5 – acre plot and a commercial plot measuring 50 feet by 100 feet within the ranch. Respondent said the plots were given at different times; that titles for the plots are ready and the petitioner must have collected them. Respondent produced letters of allotment in respect of the plots as Exhibits 'G (i) – G (iv)'. The letters of allotment are in the name of MM, M M, MM. M and M M (petitioner).

The respondent added that he also bought shares for the petitioner from the Kenya Commercial Bank in the name of the petitioner and produced a bundle of documents relating thereto as Exhibit 'H (i) – H (iii)'.

Respondent denied an allegation by the petitioner that he had threatened to sell the aforesaid properties.

Respondent lamented that since 2000 the relationship between him and the children of the marriage is not good, except his relationship with the last born, T S . Respondent produced various documents including receipts to support his case that he paid for the children's education, medical expenses, etc.

It was the respondent's case that the petitioner started becoming cruel to him in 1987. According to the respondent, the petitioner once bit his ear while he was asleep at the matrimonial home and said she wanted divorce and property and that by then the properties the respondent referred to herein were already in the petitioner's name. Respondent told the court he did not agree to the proposed divorce or to giving petitioner the properties as the children were in school. Respondent said he invited his father and the petitioner's parents to arbitrate over the dispute between him and the petitioner; that the parents advised the petitioner to work with him instead of fighting him but petitioner never heeded the parental advice. Respondent said he continued caring for the children; that the petitioner never moved from the matrimonial home; and that she still stays there. Respondent denied having left the matrimonial home. He said he moved out of the matrimonial house in the year 2000 because the petitioner exchanged locks and locked all the rooms, leaving him with nowhere to sleep, so he went to his plot at Mutituni market and started staying there. He said he visits the matrimonial home daily from Mutituni Market, which is about 2 kilometers away. The respondent also accused the petitioner of having refused to warm up water or cook for him and he left.

The respondent also told the court about a plot ascribed to the petitioner to poison him. Respondent gave

the source of his information about the petitioner's plot to poison him as a female teacher called Esther James who, he said, later died. Respondent told the court that the theory of a plot by the petitioner to poison him was corroborated by his daughter, R M who on the same day told him not to eat anybody's food and that she would cook for him. He said this was in 1987. Respondent told the court that subsequently he resumed taking food prepared by the petitioner but on condition that the petitioner tasted the food first. However, he no longer takes food cooked by petitioner and that his last born, T S and his wife cook for him. The other children are employed or doing business. Respondent said the other children do not help him or even speak to him. He added that the petitioner does not speak to him but abuses him instead and that the other children, apart from Thomas Sila, have ganged up with the petitioner against him.

Regarding maintenance, the respondent said the children are mature and working, hence they need no maintenance. As for the petitioner, the respondent says she gets enough money to keep herself going. He said the petitioner gets money from the Machakos Town Plot, i.e.[particulars withheld], alluded to at Exhibits 'E' and 'F' as well as from the *shamba* at the matrimonial home. Respondent said there were grade cows there but that petitioner sold them.

Respondent told the court he keeps cows at his 20 - acre plot at Lukenya – a different plot from the 20 - acre plot there registered in the name of the petitioner. He said he runs a bar at Mutituni and earns about Kshs.10,000/= per month for a plot he owns at Machakos. He added that he supports his last born, Thomas Sila and his (respondent's) mother aged about 100 years.

The respondent concluded his testimony in chief by saying he too wants the marriage dissolved but he does not want the children to be interfered with or their status changed. He urged the court to allow his cross-petition and that he be granted his costs of this cause.

During his cross-examination, the respondent said he moved out of the matrimonial home in 2002. He said he solely contributed to the cost of the borehole and the grade cows and that the petitioner used her money for her own purposes. Respondent said he was not aware of the petitioner's hypertension. Respondent also said with regard to his claim that the petitioner bit his ear that he did not report the matter to the police as he felt ashamed about it. When respondent's attention was drawn to R (M) K's denial in court that she had knowledge of the petitioner's plot to poison his (respondent's) food, the respondent confirmed he heard R M K's denial and interpreted the denial to mean she had changed her position.

Counsel for the parties made submissions to the court after conclusion of evidence in this matter.

Petitioner's counsel submitted in essence that the petitioner has proved her case against the respondent; that after the souring of the relationship between the petitioner and respondent, the petitioner is no longer enjoying the comfortable lifestyle she used to enjoy before the souring of the relationship; and that the respondent should be made to maintain the petitioner at the same lifestyle she enjoyed when the going between them was good. In this regard, counsel referred to Court of Appeal Civil Appeal No.74 of 1984. George Edward Karanu -vs- Beatrice Mbarie Karanu.

On the other hand, respondent's counsel submitted that neither of the two matrimonial offences leveled by the petitioner on the respondent was proved to the very high standard required by law. In this regard, counsel referred to Wangari Mathai -vs- Mwangi Mathai [1980] KLR 154. Respondent's counsel also referred to Meme -s- Meme [1976] KLR 13 to make the point, in essence, that the petitioner's evidence regarding respondent's alleged cruelty, even if accepted, amounted to petty quarrels which do not warrant dissolution of the marriage on the alleged cruelty. On the issue of petitioner's ill – health, respondent's counsel submitted that the petitioner had not brought evidence to prove it, less still that it was caused by the respondent's conduct. Counsel added that, if anything, respondent had tendered unshaken evidence that he played his part as husband by taking care of the petitioner's health. Counsel referred to M -vs- M [2002] 2 KLR 511. Respondent's counsel distinguished Karanu's case (supra) on facts. He said it related to alimony, which is not the issue here. In counsel's view, Karanu's case is irrelevant and should be disregarded.

In reply, petitioner's counsel basically reiterated her position that the petitioner had proved her case against the respondent and that the marriage should be dissolved on the grounds set out by the petitioner.

I have duly considered the rival arguments of the parties, including the authorities cited by their counsel.

Earlier on in this Judgment, I dismissed the ground of adultery and hereby reiterate the dismissal of the said ground,

On the issue of standard of proof of matrimonial offences, I had occasion to reflect in detail on the consideration given to the subject by the Court of Appeal in the Wangari Mathai case (supra) in High Court Divorce Cause No.65 of 2003, Charles Irungu Kioi -vs- Susan Wanjiru Irungu (delivered on 23.09.04). I came to the conclusion and held that the standard of proof in matrimonial offences ought to be somewhere between 'balance of probabilities' and 'beyond reasonable doubt'. I reiterate the same, for the reasons articulated in the judgment in Charles Irungu Kioi's case. In the same case, I held that the issue whether legal cruelty has been established in a given case is principally a question of fact to be determined on the peculiar circumstances of each case. I also reiterate the same.

In the present case, the parties are on common ground that their marriage is a failure and that it has irretrievably broken down. They differ only on the question as to who is to blame for the breakdown. They harbour suspicion of and have lost mutual trust in each other. The petitioner's surviving ground is that of cruelty. The respondent has denied being cruel to the petitioner and cross-petitioned for divorce on the ground that it is the petitioner who has been cruel to him. The petitioner testified on her own behalf and called her daughter, R M K also to testify on her behalf. Among other things, the petitioner told this court that she does not own plot Title No. [particulars withheld]. Her denial of ownership of the plot is demolished by the evidence of the respondent to the contrary, which contrary evidence is supported by the certificate of official search dated 22.06.05 (Exhibit 'E') produced by the respondent showing that the petitioner is indeed one of the three joint proprietors of the plot. The respondent also produced a photograph (Exhibit 'F') showing a beautiful one – storey commercial building on the plot. In view of this evidence, the petitioner's denial of ownership of the plot has been exposed as a lie which, by extension, also exposes the petitioner as a liar. The respondent testified that he assisted the respondent to acquire various landed properties through purchase of shares in Lukenya Ranching & Farming Co-operative Society Ltd, etc. I believe the respondent.

If the petitioner can lie about ownership of plot No. [particulars withheld], she could have lied about many other things. The petitioner suggested the respondent left the matrimonial home without good cause. For his part, the respondent said he stepped aside from the matrimonial home because the petitioner engaged in acts of hostility towards him, e.g. refusing to warm up water or to cook for him, exchanging locks and locking the respondent out of the matrimonial home, etc. The foregoing acts amount legal cruelty. The petitioner's own witness, R M K (P.W.2) told this court that the respondent raised with her the complaint that the petitioner had refused to warm up water for him, whereupon P.W.2 suggested the very simplistic solution that the respondent should employ somebody to warm up water for him. I formed the vivid impression that P.W.2 is close to the petitioner and that her evidence in support of the petitioner ought to be approached with caution.

Prayer (b) in the respondent's answer to petition and cross-petition states that the petitioner and the children be ordered to vacate the matrimonial home. However, in his oral evidence before this court, the respondent said that although he too wants the marriage dissolved, he does not want his children interfered with or their status changed. It is not clear what impact the respondent intended his oral testimony to have on his prayer in the answer to petition and cross-petition that the petitioner and children be ordered to vacate the matrimonial home.

My overall assessment of this cause is that it is unsafe to believe the petitioner's story; that I do not believe the petitioner; and that she has not proved her allegations of cruelty against the respondent to the required standard. The petitioner's charge of cruelty against the respondent fails and the same is hereby dismissed.

I accept the parties concurrent averment that their marriage has irretrievably broken down and cannot be salvaged but I lay the blame for the marriage's breakdown at the doorstep of the petitioner. I find that the respondent has proved that the petitioner was cruel to him, and that the marriage should be dissolved on the ground of the petitioner's cruelty towards the respondent. Accordingly, I hereby pronounce a decree of divorce and order that the marriage between the petitioner and respondent be and is hereby dissolved. *Decree nisi* shall issue forthwith, the same to be made absolute after expiry of the statutory period of 3 (three) months upon application therefor.

The petitioner who has been found to be the cause of dissolution of the marriage is the one in possession of the matrimonial home. She has also been found to be joint proprietor of plot No. [particulars withheld] which according to the respondent fetches around Kshs.900,000/= per year. Petitioner is also said to have other landed properties registered in her name, just as the respondent says he has properties in his name. All the children are grown up and no question of their maintenance arises. The issue of division of matrimonial property between the petitioner and respondent should be the subject of separate litigation. The petitioner shall remain in possession of the matrimonial home until the issue of division of matrimonial property between the parties is determined through separate litigation as earlier directed.

The parties shall bear their own respective costs of the present divorce proceedings.

Orders accordingly.

Delivered at Nairobi this 22nd day of March 2006.

B.P. KUBO

JUDGE