



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

Divorce Cause 60 of 2005

E.K.APETITIONER

VERSUS

P.MRESPONDENT

J U D G M E N T

In a petition dated 19th September 2005, E.K.A, the Petitioner herein, urged this court to dissolve the marriage between her and P.M, the Respondent herein. She listed two main grounds namely cruelty and that their marriage has irretrievably broken down. The petition and the verifying affidavit were duly served upon the Respondent but the same did not attract any answer and this court directed the petition to proceed for hearing exparte.

E.K.A testified alone in support of the petition. She told this court that she got married to P.M which marriage was solemnized in a wedding held at A.C.K. Church Mombasa in August 2000.

She produced a certified copy of the marriage certificate issued to the couple under the African Christian Marriage and Divorce Act. The Petitioner further told this court that after celebration of their marriage the couple cohabited in their matrimonial home in [particulars withheld] until 26th March 2004 when she left the said home to where she currently lives. She told this court that the Petitioner has been cruel to her because he allowed his mother and his sister to grossly interfere with their marriage. She claimed that the Respondent's mother and sister determined the kind of food to be cooked at the couple's home. She further accused the Respondent of keeping quiet and withdrawing from taking part in any dialogue to solve family feuds. She also accused the Respondent for allowing his sister to bring cooked food to their home thus creating mistrust between her and the Respondent. She also claimed that the Respondent failed to maintain the family. She said that due to the Respondent's acts of cruelty she suffered mental anguish and that she has lost self-esteem.

At the end of the evidence, Mrs. Kipsang advocate for the Petitioner urged this court to dissolve the marriage on basis that the Petitioner had established cruelty and that the marriage has irretrievably broken down.

Having considered the evidence and the Petitioner's advocate's submissions, the following issues arose for my determination:

First, whether or not the Petitioner established the particulars of cruelty and the fact the marriage has irretrievably broken down.

Secondly, whether or not the Petitioner is entitled to the orders prayed for in the petition.

To begin with, this dispute is in respect of a marriage registered under the African Christian Marriage and Divorce Act Chapter 151 Laws of Kenya. Pursuant to Section 14 of the aforesaid Act, the Petitioner should have filed this Divorce Cause before a subordinate court of the first class. The Petitioner has however filed the same before this court. The law does not however attempt to bar this court from hearing and determine the petition. The only problem is that the Respondent will lose his right to appeal to this court pursuant to the provisions of Section 15 of the African Christian Marriage and Divorce Act. Since jurisdiction of this court is not expressly denied I will determine the petition on its merits.

The thrust of the Petitioner’s petition is that the Respondent has been cruel to her. She has enumerated the particulars of cruelty in her petition and through her oral testimony. The late Justice Chesoni he then was, while serving in this court had an occasion to define what is “cruelty” in the case of Meme =vs= Meme [1975] K.L.R P.13 in which he adopted the definition given in the English case of Russell =vs= Russell [1895] 73 LT.295 C.A. that is “Cruelty is a Matrimonial Offence upon which a petition for dissolution of a Marriage may be grounded is defined as a willful and unjustifiable conduct of such character as to cause to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such danger.” I will adopt the above definition in this matter.

It is clear from the definition that a party relying on the ground of cruelty that one must establish two tests in order to prove that ground namely: First, whether the conduct complained of is sufficiently grave and weighty. Secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury. The standard of proof of such a ground is that of beyond reasonable doubt. In this case the Petitioner has alleged that the Respondent has been cruel to her in that he has left his mother and his sister to break loose to control and interfere with her matrimonial duties. She also accused the Respondent of being too silent and aloof while faced with family disputes. I have considered the evidence vis a vis the standard of proof required. It is evident that the petitioner did not give the names of the Respondent’s sister or mother who tormented her. She has also failed to state the dates when the duo allegedly became cruel to her. She also failed to state clearly in which instances the Respondent failed to solve disputes. In my view the Petitioner failed to establish the particulars of cruelty with cogent and credible evidence to the standard of beyond reasonable doubt. The allegations stated by the Petitioner are daily occurrences in marriages, which cannot be said to be grave and weighty to warrant a divorce. The Petitioner should note that cruelty is a serious charge, which cannot be relied upon without enough proof.

Let me conclude this ground by adopting what Sir Jocelyn Simon P. said in Mulhouse =vs= Mulhouse [1964] 2 ALL ER 50

“Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt. That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of strong language and occasional offending silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point which threatens the health of the other spouse, the law will not hesitate to give relief. Secondly, it must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury

.....

Thirdly, it must be proved that it is the misconduct of the respondent which has caused injury to the health of the complainant.”

The evidence tendered shows that the couple were not blessed with children and that each one of them is living separately. What is clear is that the marriage has irretrievably broken down with no prospects of it being salvaged. In short, the marriage is in existence in name and nothing more. It is a shell and hence it serves no useful purpose for it to stand. On this account I will allow the Petition and order that the marriage be dissolved. A *decree nisi* shall issue and the same be made absolute after the statutory period.

Dated and delivered at Mombasa this 19th Day of May 2006.

J.K. SERGON

J U D G E

In open court in the presence of Mrs. Kipsang for the Petitioner and N/A for the Respondent.