



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Divorce Cause 8 of 1999**

P.M.K..... APPELLANT

V E R S U S

C.J.N..... RESPONDENT

CORAM : Before Hon. Justice L. Njagi

Musinga Munyithya for Petitioner

Alando for Respondent

Court clerk – Kinyua

J U D G E M E N T

The Petitioner in this case filed a divorce petition on 15th January, 1999. His case against the respondent is that she deserted him on 14th September, 1997, without any cause; that since the celebration of the marriage she has treated the petitioner with cruelty, and that she has also committed adultery. The petitioner therefore seeks orders that his marriage to the respondent be dissolved, that the petition be granted the legal custody of the three issues of the marriage, and the costs of the petition.

On 6th May, 1999, the respondent filed her answer to the petition and cross petition. To the accusation by the petitioner that she lost all interest in the marriage and displayed a most disinterested attitude, she admits that she lost interest in the marriage because of excessive brutality of the petitioner, and insecurity of herself and the children as the petitioner became violent and militant without any reasonable cause. The respondent also admits that she deserted the petitioner on 14th April, 1998, when the petitioner forcefully threw her and the children out of the matrimonial home and threatened the respondent with death if she continued staying with him at his home. She denies having been cruel to the petitioner, and also denies having committed adultery as alleged and challenges the petitioner to prove it.

In her cross petition, the respondent chronicles a litany of incidents of cruelty by the petitioner, the children of the marriage, and even to her mother. Some of those incidents were reported to the police. She also accused the petitioner of having committed adultery with a German lady named U.H with whom he is living in Ukunda. She finally states that the petitioner does not maintain the children of the marriage in any manner and does not care for their welfare. She accordingly prays for judgement against the petitioner for the legal custody of the children of the marriage; her maintenance as well as that of the children of the marriage; and any further order which the court may deem fit and just to grant.

During the hearing of the case, Mr. Wameyo appeared for the petitioner but the respondent did not attend. The petitioner gave sworn evidence and told the court that the parties married in Church in 1995. A copy of a Certificate of Marriage is already on the court file. Thereafter the couple cohabited and lived

in Makueni District, and their union was blessed with three children. According to the petitioner the respondent run away in March, 1998, and currently lives at Athi River. It was also his testimony that the couple has never lived together for more than five months at a time as the respondent keeps on going away, coming back for about four months, then going away again, etc etc. He further testified that she is now living with a Mr. M permanently. He then narrated some two incidents in which he found her in the company of different men in compromising positions, and she told him that he was not her husband. He also produced a letter in which the author told him that she does not wish to be his wife any longer.

The letter was produced and marked as Petitioner's Exhibit No. 1. Until two weeks before the hearing, he was staying with the children, but she came for them and took them to their grandmother in Athi River. She also sent him an "SMS" three days prior to this hearing, asking him to do what he thought was best for him, and reminded him that they come from different families.

On that basis, he said the marriage had irretrievably broken down, on the basis of which he asked for a divorce, and legal custody of the children. He also urged the court to dismiss the cross petition.

Having considered the pleadings and the petitioner's testimony, I find that the petition is based on the grounds of the respondent having allegedly committed all the offences known in holy matrimony to wit, desertion, cruelty, and adultery. The first condition to be proved in a petition for divorce is that the spouses must have been married for at least three years before the presentation of the petition. Section 8(1) of the Matrimonial Causes Act states:-

"No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage."

The only exception to this requirement is where a judge allows a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner, or of exceptional depravity on the part of the respondent. In this case, the parties contracted the marriage on 11th November 1995. The divorce petition was presented on 15th February, 1999. That is slightly over three years from the date of the marriage, and this satisfies the requirement as to the three year rule.

The first ground of divorce as relied on in this petition is desertion. In his petition, the petitioner alleges that the respondent deserted him on 14th September, 1997. In the answer to the petition, the respondent admits that she deserted the petitioner on 14th April, 1998. In his oral testimony the petitioner said that the petitioner run away in March, 1998. These are three different dates. Section 8(1) (b) of the Matrimonial Causes Act is in the following words:-

"A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent:-

(a) ...

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition."

The petition herein was presented on 15th February, 1999. If the respondent left the matrimonial home as stated in the petition, on 14th September, 1997, that would be about one and a half years before the presentation of the petition. If she left on 14th April, 1998, as stated by the respondent, that would be only 10 months before the petition was presented. And if she run away in March, 1998, it would be 11(eleven) months before the presentation of the petition. In any of those dates, the petition does not satisfy Section 8(1) (b) of the Matrimonial Causes Act, and for that reason the ground of desertion fails, and fails miserably.

With regard to adultery, each spouse accuses the other of committing the offence. But the petitioner has not joined as a co-respondent any of the men he claims to have had an affair with the respondent.

The respondent herself has not joined the other woman, who she names in her cross petition, as a co-respondent. The matrimonial offence of adultery requires a very high standard of proof. In the instant case, the petitioner alleges that he found the respondent with her boy friend at a guest house at Mariakani having intercourse. No evidence is adduced in proof. Especially after the respondent denied the accusation and challenged the petitioner to prove the offence, the petitioner ought to have adduced evidence at least to corroborate his evidence. As it stands, it is the petitioner's word against the respondent's word. As the burden of proof lies on the petitioner, and this has not been discharged, I find that the offence of adultery has only been alleged, but has not been proved.

In respect of cruelty, once again each party accuses the other one of having been cruel. In his petition, the petitioner alleges that the respondent treated the petitioner with cruelty, namely, insulting and shouting at him before the members of the public, refusing to cook for him and mobilising her friends to beat the petitioner. As observed earlier on, the respondent herself narrates incidents in which the petitioner himself inflicted on her and the children of the marriage, some physical harm, and some of those incidents were allegedly reported to the police. The petitioner accuses the respondent of losing all interest in the marriage, adopting a most disinterested attitude, and showing no love to the petitioner. The respondent admits to have lost interest in the marriage due to excessive brutality on the part of the petitioner, and also takes the stand that she left the petitioner when he forcefully threw the petitioner and the children out of the matrimonial home with a threat of death if she continued living with him. In his oral evidence, the petitioner did not deny this accusation.

It seems to me that none of the parties to this petition is really innocent. They are now engaged in a war of nerves in which each party seeks to outdo the other. All these lead to mental cruelty. Translated into English, an undated letter allegedly written in Kiswahili by the respondent to the appellant, would read as follows:-

"I have told you that from today I do not want to be your wife again. I have even explained to your brother that I am not a member of your family again. I have decided to be self reliant for myself and my children. I do not want your assistance any more. I do not need your property any more and you do not deserve my companionship. You are not the only man. I have seen many good men with more property than you. Besides, if I want I can be married again. To me, you are completely useless and you can't tell me anything.

I will never again set foot in your home. I shall look for another man who will also bring up my children. They do not have to be called yours. They can be called those of somebody else. Sorry old man. You have even grown too old and totally unfit for me. To me you are just like the street boys. Good bye. Court matters are yours alone. Very sorry. Very sorry."

The letter is from one C.N.M, which names the petitioner said were the respondent's maiden names.

If this letter is indeed from the respondent, and I believe it is, it would be the last straw that broke the camel's back, if any such straw were needed for the purpose of breaking this marriage. Coupled with the respondent's alleged conduct over the years, I doubt that many men can endure the agony and mental torture that would be generated by such a communication from one's spouse. Without dwelling at length on the subject, I am satisfied that the petitioner has proved such mental cruelty as would entitle him to an order for divorce.

As for the custody of the children, I feel that the court has not been given any or any adequate evidence as would properly guide the court in making an appropriate order for custody. Bearing in mind that the guiding principle is the welfare of the children who are not parties to these proceedings, I think that the court needs more information to guide it in making the most suitable order as to their custody and maintenance. I will therefore stand over the matter for further hearing on that issue.

For the moment, I make the following orders:-

1. That the marriage solemnized on 14th November, 1995, between the petitioner and the respondent

herein be and is hereby dissolved as prayed by the petitioner. Decree nisi to issue.

2. The cross petition is hereby dismissed for want of prosecution.

3. As it is not customary to condemn wives with costs in proceedings of this nature, each party will bear its own costs.

4. The issue of custody is stood over pending more evidence and argument on the point.

5. Parties at liberty to apply.

Dated and delivered at Mombasa this 14th day of September 2006.

L. NJAGI

JUDGE