



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Appeal 34 of 2004

RHODA WAMBUI NDEKELEAPPELLANT

VERSUS

ERASTUS GEORGE NDEKELE.....RESPONDENT

J U D G M E N T

This is an appeal from the decision of the Principal Magistrate Milimani Commercial Court who dismissed the petition for divorce filed by Rhoda Ndekele Wambui (hereinafter called the Appellant). The divorce cause was filed on 1st September, 2000 where the petitioner had sought for orders of dissolution of the marriage that was solemnized on 4th December, 1982. The Petitioner also sought for orders of custody of the two issues of marriage and maintenance for the children. The Appellant being aggrieved by the decision of the learned Principal Magistrate has listed three grounds of Appeal as follows:-

1. That the learned Magistrate failed to appreciate that cruelty in the form of assault need not have been reported to the police in order to prove its existence.
2. The learned Magistrate failed to recognize the divorce could be granted on the ground of constructive desertion.
3. The learned Magistrate failed to appreciate the weight of the Appellants evidence, which was adequate to prove the case on balance of its probabilities.

According to the pleadings, and the evidence of the petitioner, she complained of acts of cruelty perpetrated by the Respondent since the celebration of the marriage. There are two issues of the said marriage namely:-

- i. Erastus Kimani born on 8th January, 1986
- ii. Esther Wangui born on 19th September, 1988

The Petitioner was not able to get children for several years after marriage and this caused tension which characterized their relationships as this inability by the Petitioner to bear children seem to have been the genesis of the marital disharmony.

The petitioner cited many instances of cruelty in the petition for divorce such as physical and physiological violence, neglect and total breakdown of communication which led to a separation in September 1998 when the petitioner was forced to leave the matrimonial home. Due to assault and what

she termed as threats on her life and that of her children. Since the separation in 1998, the parties have not been able to get together despite efforts by the petitioner to sort out the disagreements with family and friends.

The appeal was opposed by the respondent on the grounds that the petitioner failed to prove the allegation of cruelty. There were no witnesses called and no medical evidence was produced nor was any report made to the local police.

I have carefully examined the whole evidence herein, it would seem that the respondent was also not happy with the petitioner when she arrived home at 1.00 am from a drinking spree with friends. What requires careful review is the test and the weight the learned Magistrate gave to the respondent's evidence.

The Petitioner complained of physical assault and physiological trauma caused by persistent quarrels and unfavourable remarks made by the respondent that seemed to hurt and humiliate the petitioner.

According to a leading Text book RAYDON ON DIVORCE page 98, Section IV CRUELTY is defined as

“Legal cruelty may be defined as conduct of such a character and to have caused damage to life; limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. It is necessary to inquire from what motive such conduct prevails.”

According to the Matrimonial Causes Act, cruelty is recognized as one of the grounds for divorce. It is the duty of the Court to inquire, so far as it is reasonably can into the facts alleged and also to inquire into to any counter-charge which is made against the petitioner and if the court is satisfied on the evidence the court can pronounce the decree of divorce. Both parties herein relied on their own evidence and this is expected because a marriage is a union of two parties and the incidences of cruelty especially the physical violence took place in the privacy of their home. It is highly unlikely that such incidences would be witnessed by independent witnesses. In my humble view I appreciate that the incidences of cruelty were not reported to the police as in most cases of domestic violence where parties are still living together and they have children between them it is usually difficult to aggravate the matter by reporting to the police, this was compounded by the fact that the respondent was believed to be a police reservist at the time.

In consideration of the above, I am of the view that the learned Magistrate placed a higher burden on the Petitioner by finding that there was no report to the police station or a medical report. Cruelty, either physical or verbal does not have to have caused danger to life, limb or health but to have given rise to a reasonable apprehension of such damage.

The other issue to consider is whether the learned Magistrate failed to consider that the respondent was in constructive desertion. Although the respondent denied that he was cruel to the petitioner he stated that there were two occasions when they exchanged unpleasanties because the petitioner was coming more late. What was the consequence of the said exchange? According to the petitioner, she was forced to seek refuge in the childrens' bedroom from February to September, 1998 when she left for fear of her own life. There was no communication between the parties for about six months.

In Halbury's Laws of England Vol. 13 paragraph 585 Constructive desertion is regarded as follows:-

“Desertion is not to be tested merely by
ascertaining which party left the matrimonial
home first. If one spouse is forced by the conduct
of the other to leave home, it may be that the spouse

responsible for driving out is guilty of desertion.

So, for example, if a husband without just cause or excuse persists in doing things which he knows his wife will probably not tolerate, and whom no ordinary woman would tolerate, and then she leaves, the husband will have deserted her whatever his desire or intention may have been. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of a man who, with her some intention, compels his wife by his to leave him”.

I am satisfied that on a balance of probabilities there was tension in this relationship which was exacerbated by acts of violence both verbal and perhaps physical that lead to breakdown of communication and the separation from September, 1998 and thus the Petitioner sought for the dissolution of the marriage within a period of about 2 years. They remained separated and there was no likelihood that they would ever reunite as there was no communication. In this regard, I would differ with the findings of the learned Principal Magistrate in refusing to order dissolution of the marriage between the parties herein.

Accordingly, I allow the appeal and order that the marriage between the Appellant and Respondent be and is hereby dissolved. A decree nisi shall issue after the statutory period of three (3) months.

Each party to bear his/her own cost.

It is ordered.

Judgment read and signed on 22nd July, 2005.

M. KOOME

JUDGE