

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

Divorce Cause 6 of 2002

A K R PETITIONER

VERSUS

A K R RESPONDENT

JUDGMENT

The Petitioner, A K R, filed this petition for divorce seeking her marriage with the Respondent, A K R, solemnized on the 2nd April, 1985 dissolved. The Petitioner pleaded that although their marriage had been blessed with four children the respondent had deserted from the home for a period of over ten years. The petitioner further averred that the respondent had subjected her to cruelty by physically and verbally abusing her. Due to the above desertion and cruelty, the petitioner was of the view that the said marriage had irretrievably broken down to the extent that the only solution was to have it dissolved. The petitioner further pleaded to be granted custody of the children of the marriage and the respondent be ordered to provide maintenance for the petitioner and the children of the marriage. She further prayed to be awarded costs of the petition. The respondent upon being served with the petition, filed an answer to the petition. He denied that he had deserted from their matrimonial home. The respondent averred that it was the petitioner who had herself deserted the matrimonial home with the children of the marriage. The respondent urged the court to dismiss the petition for divorce and make an order compelling the petitioner and the children of the marriage to return to the matrimonial home at Cheborge. Direction having been issued, this petition was listed for hearing on the 29th of November, 2005 by the petitioner. The respondent's counsel was served with hearing notice for the said date scheduled for hearing. On the said hearing date neither the respondent nor his counsel attended court. This court being satisfied that the respondent was properly served with the hearing notice, ordered the petitioner to proceed with her case, the absence of the respondent notwithstanding. The petitioner called one witness, herself. She testified that she is a teacher at [particulars withheld] School for the Deaf. She was formally married to the respondent in 1985 after they had cohabited together as husband and wife since 1977. They got married on the 22nd April, 1985 at Sheria House, Nairobi (*copy of Marriage Certificate produced as petitioner's exhibit no. 1*). The petitioner testified that her marriage with the respondent was blessed with four children, two boys and two girls born between 1977 and 1988. During the subsistence of their marriage, the petitioner and the respondent lived together as husband and wife at Nairobi and later at Cheborge, Litein. The petitioner testified that their marriage was a happy one until the year 1988 when their said marriage started experiencing problems. She testified that the trouble started when the respondent made a decision to transfer the petitioner and the children of the marriage to their rural home in Cheborge, Litein. The respondent made a decision to remain in Nairobi. The petitioner testified that the respondent effectively abandoned them; he refused to provide for their upkeep and when he visited them at home, he was violent towards her.

The petitioner narrated two incidences where the respondent physically assaulted her to the extent that she lost three of her lower teeth. On the other occasion, the respondent slapped the petitioner so hard on her face that her ear drum was ruptured. As a result of the said assault, the petitioner stated that she had lost the power of hearing in the said ear. She further complained that the respondent had constantly verbally abused her. He called her a prostitute and a person who was not likely to take care of their properties. It was the petitioner's evidence that the situation deteriorated to the extent that due to the constant threats posed to her life by the respondent, the petitioner was forced to move from the matrimonial home at Cheborge to her place of work at Litein. The petitioner further testified that since 1996, the respondent had deserted the matrimonial home; the petitioner and the respondent had not consummated their marriage during this period. The petitioner testified that since the year 1996 the respondent had failed to provide for the upkeep of the family including paying the school fees for the children of the marriage. The

petitioner stated that although the children required education both at the secondary school level and at the tertiary college level, the respondent had abdicated his responsibility and left the burden of educating the children to the petitioner alone. The petitioner testified that her marriage with the respondent had irretrievably broken down and there was no chance that it could be salvaged. She prayed to be granted custody of the children of the marriage and further for an order compelling the respondent to provide maintenance for her and the children of the marriage. She further prayed to be granted the costs of the suit.

I have carefully considered the evidence adduced by the petitioner in support of her petition for divorce. The issue for determination by this court is whether the petitioner has established to the required standard of proof that she ought to be granted the petition sought. As stated earlier in this judgment, the respondent was served with the hearing notice of the date when this case was fixed for hearing. Neither the respondent nor his advocate attended court. The hearing of this divorce proceedings therefore took place in the absence of the respondent. The evidence adduced by the petitioner was therefore uncontroverted. She testified that the respondent had been cruel to her and deserted their matrimonial home. On the aspect of cruelty, the petitioner testified that the respondent had physically assaulted her to the extent that she had sustained injuries of a permanent nature. She had lost three of her teeth when the respondent hit her on the mouth. Her ear drum was perforated when the respondent slapped her on her face. The petitioner had lost hearing on the said ear. The petitioner further testified that the respondent had verbally assaulted her by calling her a prostitute and casting aspersions on her ethnic background. She narrated how the respondent threatened to harm her with a panga to the extent that the petitioner was forced to run away from their rural home at the Cheborge. The petitioner took this action because she feared for her life. In 1996, she moved to Litein when she was employed together with the children of the marriage. The petitioner further narrated how the respondent had made no effort to provide for herself and the children of the marriage since the year 1996. She told the court how she had single-handedly struggled to fend for and educate the children of the marriage. The petitioner testified that since 1996, the respondent had deserted the matrimonial home. They had not consummated their marriage since then.

Having carefully evaluated the evidence adduced by the petitioner, which evidence was uncontroverted, it is clear that the marriage of the petitioner and the respondent had irretrievably broken down that it is not capable of being salvaged. The incidents narrated to the court by the petitioner are sufficient proof that the petitioner and the respondent cannot live together harmoniously as husband and wife. It is clear that the respondent no longer considers the petitioner to be his wife more so since he has deserted the matrimonial home for a period of nearly ten years. Furthermore, in the atmosphere of fear and distrust, no marriage can be sustained. The petitioner narrated how she was physically assaulted to the extent that she sustained injuries of a permanent nature. She also lived in constant fear that the respondent would assault and would eventually fatally injure her.

In the circumstances of this case I do hold that the petitioner has proved her case to the required standard that the petition for divorce ought to be granted. The petitioner prayed that she be granted the custody of the children. From the evidence adduced, it is clear that three of the issues of the marriage are over the age of eighteen years. Only the last born F J is a minor. In the circumstance of this case I grant custody of the said F J to the respondent. The petitioner complained that the respondent had abandoned his parental responsibility to provide for the upkeep and for the education of the children of the marriage. This is in spite of the fact that the respondent was a long serving technician in the Ministry of Public Works. I do therefore order that the respondent shall provide for the maintenance and the upkeep of the petitioner and the children of the marriage. In this regard, I order that the respondent shall pay the school fees for FJ and the college fees for their 2nd born son who is a student at [particulars withheld]. Further, should any of the other children indicate a wish to further his or her education, the respondent shall provide for the same. If the respondent fails to comply with the order of this court, the petitioner will be at liberty to make appropriate application for orders of this court to compel obedience of the said order. In the premises therefore this court enters judgment for the Petitioner against the respondent as hereunder: -

- (i) Decree Nisi is hereby issued dissolving the marriage solemnized between the petitioner and the respondent on the 2nd April, 1985. The said decree Nisi shall be made absolute within three month's of today's date.

(ii) The petitioner is granted custody of FJ, the minor issue of the marriage.

(iii) The respondent is ordered to pay maintenance for the petitioner and the children of the marriage. In particular the respondent is ordered to assume responsibility for the payment of the school and college fees for the children of the marriage.

(iv) The petitioner shall have the costs of this petition.

Dated at Kericho this 2nd day of December, 2005

L. KIMARU

JUDGE