



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 63 OF 1997

Z C BPETITIONER

VERSUS

J B N BRESPONDENT

JUDGMENT

The respondent herein, N B married, the Petitioner on 3rd September, 1985 at the office of the Registrar of Marriages, Nairobi.

This marriage appears to have been taken up by persistent domestic quarrels and/or fights which ended in the petitioner leaving the matrimonial home on 29th July 1994.

It is alleged on that day the quarrel involved the petitioner throwing an iron box at the respondent and smashing various parts of the family motor vehicle.

Then the petitioner left the matrimonial home for fear of being killed and she has never come back.

The petitioner stayed away from the matrimonial home for a considerable time and on 6th May 1997 she filed a petition in court for orders that she be not bound to cohabit with the respondent; that the respondent be ordered to provide her and the children reasonable maintenance; that she be given custody of the children; that the respondent be restrained from harassing, abusing and/or otherwise molesting her in any manner; that the respondent be ordered to vacate the suit premises and find alternative accommodation and be restrained from invading the residence and/or removing furniture and/or other household effects from the matrimonial home. There was also a prayer for costs of the cause.

This cause was not heard but on 22nd March 2000 prayers 1,4,5,6 and 7 of this petition were withdrawn and dates set for the hearing of the cross-petition and answer which the respondent had, in the meantime, filed.

The dates fixed were 3rd May 2000, 23rd May 2000, 25th October 2000, 5th December, 2000, 20th November 2001, 25th April, 2002, 7th May 2002, 29th May, 2002, when parties testified in the petition, cross petition and submissions made by counsel for the parties.

The cross-petitioner (respondent) testified that there were 4 issues of this marriage between him and the petitioner, namely K, K, J, J both born on 5th April 1985 J J B born 2nd March 1988 and J J B born on 24th May 1991.

At the time of filing the cross-petition, he was a flight safety manager with Kenya Airways which position he held at the time of giving evidence in this case.

That he filed the cross petition in response to a petition which had been filed by the petitioner and which had been withdrawn per the order of 22nd March 2000.

The respondent stated that he had not been cruel to the petitioner, the main contention in the almost withdrawn petition – almost because prayers 2 and 3 relating to the custody and maintenance of children were left intact.

According to him, problems between the two parties started during the last month of the birth of Jepkoech during 1991 when he booked for her at M.P. Shah hospital but she refused to confirm this booking.

That instead of this, the petitioner came up with a form which indicated that Jepkoech would be the last child in the family and which the petitioner threatened that if the respondent did not sign this form he could not see the child. And that because of this threat, the respondent signed the form.

The respondent complained that he was forced by the petitioner to stop having more children and even invited the petitioner's father to cancel her on this issue but that since then she became vulgar, uncooperative and started swearing she would kill him; such that she made his life difficult.

The respondent complained that the petitioner deserted the matrimonial home 4 times, namely on 13th April 1992, for 4 days, without excuse; 6th July 1992 – for 5 months and 13 days 13/2/94 for 7 days and 29th July 1994 when she has remained away up to the time of his testimony in court.

That all this time, the respondent did not know where the appellant was.

According to the respondent the petitioner took a lot of alcohol on 13th February 1994 with a view to committing suicide.

That on 24th February 1994 the petitioner's father and two others came to the respondent's home and a meeting was held in which the said petitioner's father said his family had made a decision to dissolve the marriage between the two.

That he protested about this decision which became the cause of exchange of correspondence between him and the petitioner's father produced in this cause as exhibit 2.

The respondent stated that though some of the children were born before the performance of the statutory marriage, a customary marriage had been performed by virtue of the customary appointment hence these were legitimate children of the marriage.

He said he had treated all the children equally. That on 18.3.97 the petitioner abandoned the children and they were dropped at his house by the provincial children's officer.

That they had earlier gone to see the petitioner with a few requests but that they were returned by the children's officer later purportedly to collect clothes and books.

That though the respondent went to the children's officer at Nyayo House on 19.3.97 and attempted to make suggestions, all were met with resistance by the respondent and that she created an environment which in which no reasonable marriage could subsist.

On cruelty the respondent alleged the petitioner attempted to start him on 19.3.94 but that he disarmed her with all the force he could and that on 26.8.94 the petitioner threatened to kill him after a domestic quarrel and when he had just come from hospital.

That on 21.4.92, the petitioner went to attend a religious rally then take the child Kiprop to hospital and on 29th July, 1994 she refused to iron his handkerchief and destroyed many households including shoes, the family car and that when he came out she ran away and had never returned.

That when he called a reconciliation meeting in Nairobi which was attended by the petitioner's father, none of these issues were discussed but they kept on recurring.

In his view, the petitioner was not genuine in calling for reconciliation after all the attempts to reconcile had failed though, in them, he involved the petitioner's father, Ambassador Bett, Koech and other relatives.

That even in 1995, he discussed the matter with his brother who undertook to reconcile the parties but that this failed.

That since the petitioner left the matrimonial home on 29.7.94 with a number of household items, she had visited the house several times removing all movable households including electric cooker, utensils and others, leaving only old furniture, music system and a T.V. , bed, mattress and dinning table and chairs.

The respondent stated that the petitioner did not leave the matrimonial home due to his harassment and that all the time she left home in his absence. He blamed the petitioner for not contributing financially to the welfare of the children who are in school.

He stated that this marriage cannot be sustained and he prayed for its dissolution and that he be granted the custody of the children whom he has had since 29.7.94.

The petitioner also testified, she said though she had been living with the respondent under customary arrangement as husband and wife since February 1995, she statutorily married him in September 1985.

She stated that she moved out of the matrimonial home on 29th July, 1994 when the respondent beat her up and told her to leave.

That for 2(two) months before the incident, the two had been sleeping in separate bedrooms and that although the respondent had been beating her before the one of 29th July, 1994 was very severe.

The respondent walked into her room and found her ironing her dress to go to the office and remarked.

“You only know how to iron your clothes when my handkerchiefs are not washed ”.

That because she did not answer him as he spoke, he got agitated and asked why she was ignoring and/or assuming him.

But when she started talking to tell him she was not ignoring him but avoiding an argument, the respondent grabbed her and knocked her against the wall, then he boxed her on the left jaw.

That she had got used to being beaten as this had become the order of the day.

The petitioner then said she went downstairs for her shoes and saw the family car in front of the house. That though she had taken a loan to buy it, the respondent had refused to carry her in it and even withdrawn a duplicate key from her – hence this was a bone of contention.

So when she saw the vehicle she felt very bitter because of having been beaten.

That she took a stool and used it to hit the bonnet of it but the stool broke and she could not use it to break the windscreen though she wished to do this but she used it to break the rear lights.

Then she ran out of the gate when she saw the respondent coming downstairs. That the respondent locked the gate with her outside and when he came out at around 9.30 a.m. he told her to leave the home

otherwise if he found her on his return in the evening he would kill her.

However, she went back to the house about half an hour later, and found the respondent had removed all items he thought were hers and placed them on the corridor.

That one of those items was a letter written by the respondent telling her to go look for another residence.

The petitioner said she went back to the house a day later with her brother to try talk to the respondent but he was not at home. She did not find it safe, so she picked a few of her belongings from what had been placed in the corridor and left.

That from then, the petitioner had not returned to the matrimonial home.

The petitioner testified that she does not wish to divorce the respondent because the beating of 29th July, 1994 was not the first one and acknowledges that the two have had a difficult marriage.

On the contrary she believes that with the passage of 6 years since they separated, they had matured and that they can move on with the marriage.

She denied forcing the respondent to sign the form for her to be operated on and to stop delivering but that this was by agreement.

About the alleged desertion by the respondent on 13th April, 1992 the petitioner said the former had beaten her, so took a few days leave to go and rest at her mother's home and that it was not her going away which caused the child to be burned.

That on 6th July, 1993 she went to the house and carried away a few items and the 4th born child and that by this time communication between the couple had completely broken down.

That the respondent went out of the country without informing her and/or leaving behind money to feed the children and that if she went to the family business to take money therefrom, on his return, the respondent would beat her up.

That he had no respect for her and had given his girl friends the house telephone and if they telephoned the house and found her there, they abused her.

That because of these frustrations the petitioner needed a break to rest and this is why she left the house.

She stayed away for 6 months and they went to her parent's home to sort the matter out and they reconciled.

About the desertion of 14th February, 1994, the petitioner said she had gone to Eldoret to attend the burial of her aunt and from there she went to see her mother in law at Koibatek.

As regards the accusation by the respondent that the petitioner had taken lots of alcohol on 13th February, 1994 she claimed because of the problems she was experiencing she had heard that if one takes it he/she forgets his/her problems. That she was not taking it to commit suicide.

That it was not true that the petitioner's father played a big role in ensuring that the couple do not live together, but that, if anything, he tried very much to put the two together.

She acknowledged the reconciliation meeting of 24.2.94 which was attended by herself, the respondent, her father and Morogo and in which the respondent used abusive language.

That another reconciliation meeting proposed for 12th March, 1994 did not take place as the respondent cancelled it.

The petitioner referred to the incident when, on 19th March, 1994 the respondent came home to find children with chewing gum and called them in the house to discipline them.

That he beat one so hard that the petitioner could not bear it but when she intervened he started beating her and threw her on the floor in such manner that she was almost left naked in front of the children. That she was so ashamed she asked her son Kiprop to go get a knife from the kitchen. That when he brought the knife the petitioner gave it to the respondent and told him to use it to cut her instead of shaming her in front of the children and the maid.

The petitioner denied she was cruel to the respondent that or she left the matrimonial home for the sake of leaving. That it was because she was mistreated.

She opposed the dissolution of their marriage and denied that she does not want the children of the marriage.

That though they have stayed with the respondent since she left the matrimonial home in 1994, this has not been out of their choice.

That she left the children behind because of the way she was thrown out and that her attempts to see them were thwarted by the respondent who once found her in the house and actually beat her up.

That the respondent has not encouraged her to buy anything for the children and that once she tried to buy them crisps, popcorns and rings and/or handkerchiefs but the respondent sent them back to her post. They were produced in this case as exh.1 and 2 (defence).

That even when she went to the house and left little money for them to buy small things like rubbers and pencils the respondent returned all these through the post.

The petitioner stated that if the court decided to grant the divorce, she should be granted the custody of the children because they are still minors.

According to her the second born child has a deformity on both hands and cannot turn them properly and for some reason or other, the respondent does not like her. That he calls her names, beats her and discriminates against her.

She wants the custody of these children because she is in a better position to give them encouragement.

She referred to the businesses the respondent runs apart from the income from his regular employment – but she was not able to show the income earned by him per month.

The petitioner wants to go back and live with the children in the matrimonial home which she purchased with assistance of the loan she took from her former employer Kenya National Assurance Co. Ltd. – now in receivership.

That the loan form had to bear her husband's name according to the company regulations and this is how the respondent is coowner of the house.

According to her evidence, by the time her former employer went under, the full mortgage loan had not been repaid, so she went to her new employer and applied for another loan to redeem the mortgage which was approved but that when mortgage documents were sent to the respondent for execution, he declined to do so, hence interest on the former loan continues to escalate.

She testified that she cares about the welfare of the children and this is why she buys them small things like underwears and uniforms. She produced receipts for these (see exh. 8). She even produced the letter to confirm the approval of the loan (exh. 9).

She prayed for the dismissal of the cross-appeal, but that if it was granted, she would like to be granted custody of the children with whom she should live in the matrimonial home. She also prayed for maintenance for herself and the said children. She also prayed for costs of the cross-petition.

There were no other witnesses in the petition and crosspetition. When the petition for judicial separation was filed by the petitioner, it was based on cruelty whose particulars were spelt out in paragraph 6 of the petition.

They ranged from assaults, disrespect, failure to maintain the family, denial of petitioner to use family facilities including the car and telephone, denial of conjugal rights, denial of association and assembly with friends, respondent's hatred of petitioner's family friends; neglect and refusal to tell the petitioner when the respondent was going out of the country due to the nature of his job, and/or his whereabouts during these trips.

On the contrary, when the respondent filed his answer and cross-petition – he stated that the petitioner had a compelling propensity for violence, unreasonableness, hysteria and bouts of hyper – temper bordering on temporary insanity and attempted to demonstrate this by listing instances in paragraph 3 of the answer

The instances included one where the petitioner ordered the respondent to sign a form to stop-child-bearing; her uncowww. operativeness after a family meeting chaired by her father, her disappearance from the matrimonial home from 13th April 1992 taking from the matrimonial home of some household effects on 6/7/93, taking excessive alcohol with a view to committing suicide on 13.2.94 a resolution orchestrated by the petitioner's father in a family meeting held on 14th to 16/2/94 – communicated formally to the respondent on 24.2.94, the petitioner's packing of her belongings on 28.2.94, the petitioner's abandonment of the issues of the marriage on 11.10.95; the petitioner's writing a letter to the respondent's advocates indicating her intention to terminate the marriage on 11.4.96; and the petitioner's abandonment of the children of the marriage to the provincial children's officer on 18.4.97.

In the cross-petition the respondent alleged cruelty and desertion against the petitioner particulars whereof are contained in paragraphs 6 and 8 of the answer and cross-petition.

As to cruelty the respondent referred to the incident which occurred on 19th March, 1994 when the petitioner allegedly wanted to kill him with a kitchen knife, on 26th March, 1994 when the petitioner threatened to kill him after he had come from hospital, on 21.4.92 when the petitioner refused to take the child Kiprop for medical treatment the petitioner refusing to iron the respondents handkerchief on 29.7.94, the petitioner's cruelty to the children of the marriage, her refusal to accept concerted attempts at reconciliation, and her looting of the matrimonial home of any valuables without lawful excuse.

As regards allegations of desertion by the petitioner, the incidents when the petitioner left the matrimonial home for 5 months on 6.7.93; on 13.2.94 when she left for Eldoret, on 24.7.94 when she disappeared from home, on 29/7/94 when she deserted the matrimonial home and had not come back by the time this case was going on.

He prayed for the dismissal of the petition and the dissolution of the marriage.

He also prayed for custody of the children of the marriage with the petitioner making periodical payments to him for their maintenance. The respondent also asked for costs of the cause from the petitioner.

In their testimonies parties testified about all the incidents of cruelty and desertion and what emerged from them was that each blamed the other for the incidents.

Though the petitioner did reply to the cross-petition, I observed too that what was stated in that cross-petition was nearly the same as what the petitioner had raised in her application for judicial separation save, of course, the issue of desertion which she denied in her said reply.

Though the petitioner had petitioned for Judicial Separation, she withdrew this prayer save for custody of children and maintenance for them and herself which the respondent also prayed for in his cross petition.

Those are then the issues to be decided upon together with the cross petition for divorce by the respondent.

Desertion is described as the self induced leaving of a matrimonial home by one of the parties to a marriage without just cause for 3 years or more.

As regards the petitioner leaving the matrimonial home on 13.4.94, it was for either 4 or 7 days. She replied that she left due to harassment.

In respect to her leaving the matrimonial home on 6.7.93, she said it was due to harassment and that she had gone to visit a relative and there after she went to live in a rented house for five (5) months.

That on 13.2.94 she had gone to attend the funeral of her aunt then she went to Baringo on 17.2.94 to visit the respondents' mother and that she came back to Nairobi on 18.2.94.

Though in reply to cross petition she said she does not take alcohol, in court she admitted she took some on 13.2.94 in order to forget her problems.

That her father was not involved in the break up of the marriage but that he was involved in reconciling the parties.

On 29th July, 1994 the petitioner stated she left home as a result of a dispute which arose over the ironing of the respondent's handkerchief and over which a fight occurred wherein she got very angry and went out to damage the family car because though she had put in money to buy it, the respondent had denied her the use of it. According to her, the respondent threatened to kill her if he found her in the house after this incident and this is why she had not gone back.

Though she has stayed away for all this long, she says she is willing to try the marriage again, hoping both have now matured.

Pausing here for a moment, has the respondent proved that the petitioner has deserted the matrimonial home to satisfy the description of desertion as given herein-above?

If there is any period the petitioner has been away from the matrimonial home for a long time is from 29th July, 1994 to date but given the evidence I have heard and recorded this was not on her own volition.

The impression I got from the respondent while testifying is that he is a man who has made up his mind not to have the petitioner any more as his wife.

This is why he does not want and cannot allow the petitioner to visit the issues of marriage at their schools or even send them anything.

After all evidence was adduced of how the respondent posted back to the petitioner crisps, popcorn and handkerchiefs the petitioner sent the children.

This is not conduct of a man who would allow the petitioner to get in contact either with him or the children of the marriage and I am sure after the incident of 29.7.94 he would not have allowed her to the matrimonial home.

During the evidence, the respondent did not even hint that after 29.7.94 he tried to look for the petitioner to no avail instead the petitioner has sneaked into the house to see the children under threat that if she was found there she would be killed.

If the respondent was serious about this marriage and the petitioner had only applied for Judicial Separation in her petition, he would have answered to it and left it at that but to go to the extent of filing a cross petition showed his intention of ending this marriage under the guise that the petitioner's father had directed in a family meeting that this marriage should be dissolved.

But as far as I am aware, a statutory marriage can only be dissolved for statutory grounds which are proved and not because of resolutions passed in a family meeting.

The respondent's cross petition is based on grounds of cruelty which have been sufficiently traversed by the petitioner who has shown by her testimony that the respondent has been unnecessarily hard to her and even to the children. His harshness has been demonstrated by his intention to ensure the children of the marriage have no contact with their natural mother and that she sends them nothing when at the same time he asks for maintenance of the same children from the petitioner.

The case of *Meme vs Meme* gives instances of cruelty which can give rise to divorce of a marriage but evidence adduced by the respondent in this cause does not meet the standard in Meme's case.

Though the issue of the family house is being handled elsewhere, it has featured prominently in this divorce cause.

But what has moved me most is a situation here, where the petitioner took a loan to purchase it, she is not staying there and no arrangements are being made by the respondent who is living there to redeem the mortgage thereon with ever increasing interest thereon which might end up with the house being sold and the petitioner getting nothing.

What form of frustration and humiliation does this cause the petitioner, if not cruelty in the real sense of the word?

He has a family car in which the petitioner put in some money to buy and yet she was denied use of it even before she left the matrimonial home!

How can the petitioner's refusal to iron the respondent's handkerchief, if at all, become so big as to form part of the grounds of this cross petition for divorce; unless the respondent had premeditated ideas about this marriage long before!

If a husband is living in a house which the wife took a loan to buy and does not or refuses her use of the car she put in money to buy, help her to repay the loan and at the same time causing her lots of harassment as indeed the respondent appears to have done in this case, he must expect her to grumble due to frustrations and should not turn round to accuse her of cruelty when she raises such complaints.

The demeanour of the respondent while he testified in this cause gave me the impression that he has been largely to blame for the break-up of this marriage by picking up trivial domestic quarrels and building mountains therefrom and I would have dismissed his cross petition for divorce save the testimony I have received from both parties shows this marriage has irretrievably broken down due to divergent attitudes towards it by both.

The petitioner has been away from the matrimonial home for close to 8 years now and making an order that the parties come back together as husband and wife would be creating many unnecessary problems for them which might turn out to be insurmountable. The views they hold at the moment about this marriage are at variance and they may not understand one another for a long time, to come. They have not met or communicated all this time in an attempt to come together.

I grant an order that the marriage between these two parties do stand dissolved and that a decree nisi do issue to become absolute six

(6) months hence.

As regards custody of children, the respondent has been very unreasonably harsh to deny their natural mother access to them and the longer this case has dragged on he has been happy and at an advantage to keep them with him.

The respondent's nature of the job is such that he is out of the country from time to time but in spite of this, he has kept these children with him for the last 8 years, albeit, according to the petitioner, not satisfactorily.

But there has been no independent evidence of the respondents' inadequacies as to his care of these children. In the circumstances, I would order that the said respondent continue to have custody of these children, and, as he has maintained them for the last 8 years without any complaint, I direct that he do continue to maintain them solely, unless, of course, the petitioner on her own volition wishes to assist in her own small way.

But being the children's natural mother, I order that free visitation rights to them be accorded to her. These could be in form of seeing them at school, at the matrimonial home or even arranging for them to stay with her during school holidays as counsel and the parties should be able to arrange.

It is not possible for court to order the petitioner to stay with the children in the matrimonial home as she would wish lest more complicated problems are created between the couple by that sort of arrangement.

The respondent with pay to the petitioner half ($\frac{1}{2}$) costs of this cause, either agreed or taxed. Liberty to apply.

Delivered and dated this 25th day of June, 2002.

D.K.S AGANYANYA

JUDGE