



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. DIVORCE CAUSE NO. 111 OF 1996

M K N PETITIONER

V E R S U S

M W M..... RESPONDENTS

D R A F T J U D G M E N T

The husband in this cause obtained leave to file the petition within three years of celebration of the marriage and filed this petition. The wife denied allegations of cruelty made by the husband and also filed cross-petition on the grounds of cruelty and adultery.

The husband is a divorcee and have the custody of two daughters from the earlier marriage. The wife was a tenant of the otherhouse and that is where their friendship culminated in her moving in to the husband's main house and in their subsequent marriage.

The husband is a banker and the wife is working for an non-governmental organization knows as Pathfinder International. Her work requires her to be out of her main station i.e. Nairobi. The couples have one male child of their marriage named B P N. At present they have joint custody of the child as per court's order made on 17th October, 1996.

The husband has petitioned for decree of divorce on the ground of cruelty which are enumerated and deponed upon by him in his testimony before the court. The main grounds of the cruelty alleged by him are contempt towards marriage and lack of matrimonial love, disregard for the issues of earlier marriage, quarrelsome, unreasonable and argumentative as well as selfish nature, user of abusive language, short tempered exposition, non-disclosure of the physical condition of HIV positive, due to the adulterous relations she was having with male acquaintances.

The wife on the other hand pictures herself as a caring, generous and of sacrificing nature. She has filed her crosspetition alleging cruelty which included neglect, lack of care, abuse in front of public and other children, refusal to have dialogue on family matters, false accusations of adultery and physical violence. An incidence of 16th February, 1996 has been more specifically particularized in the cross-petition.

She has also alleged acts of adultery in her Crosspetition. I do note from the record that she abandoned paragraph 7 (a) (ii), (iii) and (iv) before the Senior Deputy Registrar when the parties were seeking Registrar's Certificate. Paragraph 7 (a) was amended to read 'various' instead of the words '*following*'.

This paragraph 7 (a) (i) (v) & (vi) were still retained.

I must state here that in spite of the abandonment paragraph 7 (a) (ii), the acts if alleged adultery committed by the petitioner with W M was placed in evidence and the petitioner was recalled to

controvert that evidence. This evidence although on record and controverted, in my view is an abuse of the process of the court. I also admit that I allowed the evidence but the same was done through an error because it was not this court which allowed to sneak in the allegation and evidence thereon in an indirect way. The evidence was led although paragraph 7 (a) (ii) was on record which is not true.

Despite the fact that none of the counsel even the counsel for the petitioner has brought to my notice these facts, court shall not allow an improper introduction of the evidence and direct that the evidence relating to the acts of adultery of the petitioner with one W M be expunged from the record of this cause.

That leaves me with the remaining respective allegations of the parties.

It is very well established principle of law that the question whether cruelty has been established was a matter of degree and fact to be decided on all the circumstances of the particular case. I shall add also here that the circumstances of the particular case must include the specific needs, family atmosphere and emotional aspirations of the respective parties which are within knowledge of the other party or ought to be within his or her knowledge. I shall also agree to the principles adopted from English courts and laid down by our courts to the effect that the complainant must show to the satisfaction of the court (a) misconduct of grave or weighty nature (b) injury or reasonable apprehension of such injury to the health due to misconduct on the part of the Respondent and (c) and that on the whole of evidence the conduct amounted to cruelty in the ordinary sense of that term.

I venture to summarise the above principles. I should state that the acts of the Respondents should be weighty or be persistent or numerous and were beyond the normal wear and tear of a marriage. A party complaining those acts is not expected to suffer the same within four walls of home without any recourse of law.

With the backdrop of the above observations the evidence led by both the parties to be examined.

The parties were married on 18th December, 1993. The husband was a divorcee and had custody of two daughters since they were about seven and two years of age. At the time of marriage they were 17 and 12 years of age. They have a son from this marriage.

According to the husband, the wife was not a caring wife or mother. She did not look after his daughters and introduced them as his brother's daughters. She made the older daughter do housework and look after the younger daughter and son. She was out of home due to her duty and had many adulterous affairs with many named and unnamed persons. In September, 1995 their education policy for their young son Brian was refused on apparent reasons of underwriting considerations but the husband came to know that it was due to wife's medical report of HIV positive. She denied the report and did not heed his advise. She left the matrimonial home around 18th February, 1996 with all her belongings but came back in April, 1996) after family reconciliation meeting. According to him in June, 1996, she was admitted to Nairobi Hospital under the care of Dr. Gikonyo and after the positive report they were counseled by Dr. Wairungi. She left the matrimonial home on 28th July, 1996.

The husband further stated when he ceased to have any marital relation with the wife after knowing her medical condition. She started spreading rumours that he was drunkard and was having many adulterous relations. The quarrels also became frequent. He complained she assaulted him in 1995 by pushing him while he was giving a first aid treatment to a cut suffered by their son with a razor blade left by the wife in sitting room. He fractured his finger during that incident. He narrated some incidences which according to him proved that she had adulterous relations with males. One such incident was at a hotel along River Road when the wife was seen by him climbing down the stairs in a company of S M who was a member of bridal party. According to him there was no eating place or bar on the upper floor of that hotel except the lodging place.

It is lastly alleged that she changed the joint account opened for the son into her own name and also changed his Birth Certificate to alter his name.

All these acts according to the husband caused pain and mental anguish to him.

The wife denies those allegations. Although, happenings of most of the incidences mentioned by the husband is agreed, the versions thereof are quite different. She denies being noncaring, quarrelsome, adulterous and HIV positive. She gave a very detailed testimony. She narrated how she gave financial assistance when the husband was without a job stating the income from the farm is not substantial. But she agreed during her Cross-examination that he was paying for mortgage and utility bills. She also stated that he is without a job currently but his two daughters are studying one in U.S.I.U and could be paying around Kshs.80,000/= per term and that she is at present earning roughly Kshs.80,000/=.

She complained that the husband was drunkard, and very rude and abusive to her in presence of visitors, daughters and house help. She denied that she has even admitted of having adulterous relation with any one. She refused that she has physical condition of HIV but stated that she did not find out why the insurance company refused their proposal for educational policy. She admitted that she had never gone to find her physical condition. She said she was admitted to the hospital for her chest problem and had nothing to do with the HIV positive condition.

The husband was described as a non-caring father but she admitted that he cared for his two daughters since their tender age and that while she was away for her work (which according to her was six days in a month) he used to look after the family and house.

She also deponed that she had motherly relation with the daughters by stating she used to buy clothes from them twice in a year from Kenyatta Market on her own volition and that she used to give them money for their personal care and use. She then stated that when C the elder daughter came back home, the relation became sour. She did not much elaborate on it except to say that daughter used to pick up quarrels with their maid and that she had to intervene.

The incidence where the husband was injured was described by her somehow as follows;

The husband had come back on Sunday with a friend totally drunk and again started drinking vodka in a sitting room. On a music system, he had left a razor-blade used by him to cut his nails. Little Brian was on his lap and picked up the blade which cut him. A quarrel ensued and the husband started banging her head against the star-railing. The daughters intervened and according to her he must have hurt his finger during altercation. She said she did not go to the doctor although she was hurt on right side of head & body but she took him to hospital when he continued complaining about the pain on his finger.

The last incident was that of 27th July 1996 when according to her the husband came back home drunk. He threatened her that he was ready to kill her and started strangling her neck. He picked up a knife from the kitchen but during a scuffle it fell and she freed herself and Brian ran to take refuge in a toilet. She was there till 11 a.m. – next day till the husband left home. She left the house with Brian thereafter, never to return back.

To make the record complete, I would note her testimony of the alleged flirtuous behaviour of the husband with their house helps and her terminating their services when he denied the allegation. I shall also state her version of the incident of 16th February, 1996 when according to the husband they talked about her adulterous relations and her condition of HIV positive, while according to her, they discovered the problems which were troubling her which the husband denied. When they went back he abused her in front of his nephew N G and her step brother D G who were staying with them. According to her he threatened to kill her and ready to go to Kamiti Prison, and therefore she left the house next day.

The said Nephew N G gave evidence in support of the wife. On one hand he deponed that while he was studying in University, and staying at dorms, he used to go to his uncle's farm during most week ends and college holidays. Still he gave his opinion that his auntie, i.e the wife herein was kind to two daughters of his uncle. He also repeated the incidence of 16th February, 1996 when his uncle said to him & David (step-brother of the wife) that their marriage was broken and that he was the cause of that breakage. He also reiterated that his uncle said he could kill his Aunt as going to Kamiti was not big deal. It is pertinent to

note that the wife did not mention anything about the husband blaming Nfor the breakage of their marriage. He also did not tell the court why he also left the house next day which the wife also did. I was not very much impressed with the testimony of Njoroge as it seems to me that from whatever reason he had some difference with the husband and he came to the court to help the wife.

With these facts, submissions were made and each counsel contended that their client have proved their respective allegations.

The averment of the husband that he had stopped any marital relation with his wife since May, 1995 have not been either responded or denied by the wife. The incidence of the hotel at River Road was simply denied without much ado. Her refusal or failure to find out the reasons for refusal to accept insurance proposal also given credibility to the evidence of the husband.

Even when the husband put forth his suspicion about her condition, her defiance or failure to prove the same as false also enhanced the anguish of the husband. That proved at least one allegation of the husband that she did not care about the feeling of the husband.

Eventhough the husband has not been able to prove to the satisfaction of the court the allegations any other adulterous relation of the wife, he has sufficiently proved the acts of indifference towards the children of the husband, her indifference to the feeling of the husband, and failure to dispense the illusion of her alleged condition if it was untrue.

As against that the wife also has proved that at least since middle of 1995, the husband became increasingly uncaring towards her. The last incidence of July 1996 was weighty enough to entitle the wife to leave the house under real apprehension of injury to her health.

Considering the evidence as whole the parties are guilty of misconduct of cruelty when both of them became indifferent to the humane part of their life and caused pain and anguish to each other with reasonable apprehension to injury to their mental and physical health.

The upshot of all the above is that the marriage in fact celebrated between the parties on 18th December, 1993 be dissolved. I further direct that the decree nisi be made absolute within three months from the date hereof.

Both of them have also prayed for the sole custody, Care and Control of the son Brian. There is already on record a ruling on interim custody made on 17th October, 1996. It has served well the interest and welfare of the son. During hearing of this cause, no further evidence was produced to enable me make any appropriate finding on that issue. I think I can best serve the welfare of Brian without further evidence to allow the said interim order to continue with liberty to both the parties to make appropriate application with relevant facts.

I further order that both parties bear their own costs for obvious reasons and also looking to their respective financial position.

Dated and delivered at Nairobi this 20th day of June, 2002.

K.
J U D G E.

H.

RAWAL