REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

DIVORCE CAUSE NO. 66 OF 1997

M……...……. PETITIONER

VERSUS

M……...RESPONDENT

JUDGMENT

This is a divorce cause filed by the petitioner in this Court on 19th May 1997.

Before then the couple had lived together as husband and wife under customary law in the latter part of 1990. The stay, was on 18th September, 1992 converted to a statutory marriage at the Registrar's Office Sheria House.

Out of this union two issues were raised, namely,

(1) SSW born on 20th February, 1994 and

(2) KJK born on 11th January, 1992.

The petitioner says further that when she came to live with the respondent she found him with a daughter called FR born through an association between the respondent and one NM. That the couple decided to adopt this child as their own.

Nevertheless, though the respondent had promised the petitioner that he would no longer associate with NM, it came out that this was not so. NM came to the matrimonial home sometime in 1994 with two more children and alleged she had given birth to them with the respondent. She left the children with the petitioner who looked after them for one year.

There was also one AR who went to the petitioner's office and introduced herself to the latter as the respondent's girlfriend who had given birth to a child with him but that the respondent had refused to pay hospital bills.

That when the respondent was confronted with this information, he promised not to associate with AR anymore but that later on the petitioner discovered photographs the respondent was still taking in company of the said AR.

Then there is one CS with whom the petitioner suspected the respondent had illicit association with. She called the petitioner's house many times to abuse the latter. She even waylaid the petitioner when the latter was parking her vehicle to go to the office and actually attacked her several times.

That in January 1997 CS came to attack the petitioner in the new matrimonial home and boasted it was her who looked for this house with the respondent.

That as she was talking to the petitioner, the respondent came in and CS then attacked the petitioner telling her that the respondent was not her husband; but that the respondent did not do anything, instead he left with CS that evening only to come back at around midnight and purport to apologize.

The petitioner thought the respondent's behaviour had gone too far and this is why she decided to leave the matrimonial home and to file this divorce cause.

The petition was based on adultery and cruelty on the part of the respondent. Incidences of adultery are mentioned in paragraphs 10, 13, 14, 15, 16 and 17 of the petition while those of cruelty are mentioned in paragraphs 11, 12, 18, 19, 20, 21, 22, 23 and 24 of the petition.

In the preceeding paragraphs of this judgment I have alluded to alleged incidents of adultery, namely, the respondents relationship with NM, AR and CS.

As regards cruelty the petitioner referred to the respondent's reaction when she wanted to leave him due to his relationship with other women when he warned to finish her if she did so.

In another part of her evidence in chief to demonstrate the respondents cruelty she testified thus:

"sometimes the respondent is harsh. He would show he wants to strike me but since I am not a fighter I would give up."

In another part she said:

" The respondent came back after midnight and continued saying sorry. I told him I wanted to leave but that we should discuss about children. He threatened to finish me."

"A week later I left alone, I had earlier left with children and the respondent could come to wherever I had gone with police to harass me."

"After this there was so much harassment with the respondent writing letters for me to be removed from the Ministry of Foreign Affairs to another ministry."

"One time my documents were snatched from me in 1995 including a passport. I swore an affidavit to this effect and the passport was replaced. Later the respondent went to the Immigration Department and produced the passport and said I was holding two passports in 1997. Through his friends I was harassed. Police came in and CID were involved to investigate me."

"Adultery and cruelty have affected my life. I was very thin and could forget many things. But since I left I have improved."

During cross-examination, the petitioner referred to the same incidences of adultery as alluded to during examination-in-chief and an incident when the respondent went to her residence with police at either Imara Daima or Upper Hill to harass her and threw her things out and took the children away with him.

The respondent agreed in his evidence that he had started living with the petitioner in 1990 and that when she came to his house he was staying with a daughter called F whom he had begotten with NM.

That during this period the respondent got the petitioner jobs at JT and M I B M. That the marriage between the parties was celebrated on 18.9.92 at the Registrar's Sheria House Office.

According to the respondent problems herein started during 1996 either because the respondent had run into some financial problems or that the petitioner had started behaving dishonestly. She left the

matrimonial home for a week but the parties reconciled through their church pastor, one Airo and they re-united.

That due to financial problems the respondent sold or rented out some of his vehicles to sustain the family but the petitioner was not understanding.

That she kept nagging the respondent and even went to her parents home in Mombasa with the children forcing the respondent to look for money and go there to try and settle the matter. That this is why he approached the children department for assistance in order to get the children from the custody of the petitioner's parents through High Court Civil Case No 2483/96.

Neverthless, the case was withdrawn by the respondent when the couple decided to resolve the matter amicably and the petitioner returned to the matrimonial home.

That financial problems persisted and this strained the couple's relationship further and the petitioner left the matrimonial home on 31.1.1997 with children.

That attempts by the respondent to re-unite with the petitioner failed when

the petitioner became hostile and barred him from entering her residence.

Then she filed this petition.

The respondent denied committing adultery with any of the women named. Of NM he said she was the biological mother of F and since he got married to the petitioner, he had not had any intercourse with her otherwise it would not have taken the petitioner so long to leave the matrimonial home. That CS was his relative and he could not have committed adultery with her.

About AR and FG, the petitioner got their contacts from his diary otherwise he had not committed adultery with either of them. The respondent suspected an illicit relationship between the petitioner and one RW and even set up his own machinery to investigate RW's coming in and out of Kenya; otherwise this petition was a fabrication by the petitioner on the advice of Fida. He prayed that the same be dismissed.

This petition was for the dissolution of the marriage between the petitioner and the respondent and for custody of the children. The petitioner also wanted school fees for the children to be paid by the respondent, otherwise she is capable of caring for their other and her own needs.

From the answer to the petition and his evidence in court, the respondent opposes it, saying it was because poverty had set in the family to reduce the lifestyle she was used to or that she wanted her freedom to enjoy herself with the likes of RW.

This is the evidence I have heard from the parties to this divorce cause out of which a decision should be made one way or the other. As I stated earlier the divorce cause was based on cruelty and adultery.

As regards cruelty as a matrimonial offence upon which a petition for dissolution of marriage may be grounded, it is defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health; bodily or mental, or as to give rise to a reasonable apprehension of such danger (see *Russell v Russell* [1895] P 315, 322 and *Honton v Honton* [1940] P 187).

For cruelty to be established two tests must be satisfied. They are; first whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel; and, secondly whether the conduct has caused injury to health or a reasonable apprehension of such injury.

In the case of *Gollins v Gollins* [1964] AC 644 at page 670 Lord Evershed said:-

"The question in all such cases is, to my mind, whether the acts or conduct of the party charged were "cruel" according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman."

The Court, in a case revolving around cruelty, looks at the conduct of the respondent and not at his or her person. The conduct of the respondent must be grave and weighty to such an extent that it can be described as cruel in the ordinary sense of the word and the burden of proof lies on the petitioner to establish injury or a reasonable apprehension of such injury to his/her life, limb or health before the respondent's conduct can be described as cruel.

In the case of *Mulhouse v Mulhouse* [1966] P 39 Sir Joselyn Simon P said at page 49:-

"Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt; *Bater v Bater* [1951] P 35. That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be proved of a grave and weighty nature. It must be more than mere trivialites. In many marriages, there are occasional outbursts of temper occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances though if carried to a point which threatens the health of the other spouse the law will not hesitate to give relief.

Secondly, it must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury. Of course if there is violence between the parties, the Court will not stop to inquire whether there is a general injury to health, but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it. Thirdly it must be proved that it is the misconduct of the respondent which has caused injury to [the] health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought the trouble on himself or herself, the Court must be satisfied that such conduct can properly be described as cruel in the ordinary sense of the word."

In *Meme v Meme* [1976] KLR 13 at page 19 the late Chesoni – J, as he was then agreed that though *Mulhouse v Mulhouse Ibid* was an English case, the general principles laid down in that case equally apply in Kenya and that on a charge of cruelty the four elements stated therein must be proved to the satisfaction of the Court.

He deliberately used the phrase "to the satisfaction of the Court" instead of "beyond reasonable doubt" because the latter gives the impression of the case being of a criminal nature whereas matrimonial proceedings are civil.

In *Meme's* case the evidence led by the petitioner against the respondent consisted of assaults and beatings, using abusive language and willful neglect to maintain the wife and children and threats to kill the wife committed between 1965 and 1967.

Evidence of all these acts was given before the Court in that case and a *decree nisi* was granted.

In *Bethune v Bethune* [1981] P 205 the Court held systematic neglect and insults to the wife to be conduct constituting legal cruelty on the part of the husband and granted *decree nisi* in favour of the wife.

Against the background of the above-stated decisions, what does one make of the present situation? The petitioner testisfied in this case and said whenever she raised the issue of the respondent's illicit relationship with

Naomi or other girlfriends and suggested that she should leave, he became harsh and/or warned to finish her. That since she was not a fighter, she relented.

In paragraph 11 of the petition the petitioner alleged that since the celebration of the marriage the respondent had treated her with cruelty and stated in paragraph 12 thereof that the respondent

"who is a man of violent temper has frequently nagged, sworn at, abused and struck the petitioner".

No particulars of such cruelty were set out in the plaint and no evidence was adduced as to the respondent's violent nature, frequent nagging, abuse or striking of the petitioner.

Thus the evidence adduced by the petitioner relating to the respondent's cruelty did not establish the gravity and weighty nature of the respondent's conduct and/or that such conduct had caused injury or a reasonable apprehension of such injury to the petitioner.

I cannot equate the petitioner to a rural peasant who cannot make out the principles required to be established before a marriage between her and the respondent can be dissolved.

Even if she was represented by a lawyer who is aware of the tests stated above and must blame herself for not articulating them as required by law.

As regards adultery, the acts constituting it must, too be set out in the plaint rather than simply stating names of women and associating them to the respondent illicitly.

I am aware of the fact that it is not easy or necessary to adduce direct evidence to prove adultery. The practice has always been to infer evidence of adultery from surrounding circumstances; eg confessions and admissions, improper behavior, undue familiarity, suspicious circumstances or such other circumstances tending to associate such woman or women to the respondent illicitly.

In this regard the petitioner testified as to how she had found a child F with the respondent when she married him and even accepted to take care of the child as her own.

But in 1994 NM came to the petitioner's (matrimonial) home with 2 other children and alleged though the respondent had rented her a house, he had not paid rent and that she had been evicted from the house, but that since she had his children she decided to come to the matrimonial home with them.

According to the petitioner NM was very hostile and when she was let into the house she started telling the petitioner that though she had accepted the former as her co-wife, the petitioner had left her to suffer while she herself enjoyed.

The petitioner had just delivered her first baby and was very weak. She did not know what NM was talking about, so she called in the respondent uncle for a discussion over this matter because NM had brought her children to the matrimonial home.

The children remained in the matrimonial home for one year until the petitioner asked the respondent to get a solution to this problem – otherwise she could leave.

The children, R, 4 years old and S – 2 years old, appeared to know the respondent well as they referred to him as "daddy".

But when the petitioner came to live with the respondent during 1990 she did so in the customary context and if these children were that old and the marriage was converted to a statutory one on 18th September 1992, the most reasonable presumption is that these children were born during the subsistence of the customary marriage and since the petitioner was aware of NM's existence as the respondent's mistress before marrying him, she should not be heard to complain of adultery between the respondent and NM since all customary marriages are presumed to be polygamous.

Then there is evidence of CS whom the petitioner called the worst of the respondent's girlfriend; because she could call the matrimonial home twenty times a day, but she did not disclose what the calls entailed.

That whenever the petitioner confronted the respondent about these women, the latter just said

"These women are always following me; they want to spoil my name."

That in January, 1997 CS went to the new matrimonial home the petitioner and the respondent had moved into and claimed its her and the respondent who had looked for and found that house.

That as she was talking the respondent came in and just stood by as CS attacked the petitioner and told her how she was not the respondent's wife. That the respondent and CS left the house together that evening only for the respondent to come back at midnight to say "sorry".

The petitioner left the matrimonial home a week after this incident because

Caroline had come to the matrimonial home and attacked her in the presence of the respondent who did not protect her.

As for AR the petitioner said the former came to her office in 1995 to explain her relationship with the respondent and that she had given birth to the respondent's child but that the latter had neglected to pay hospital bills.

That because of the nature of her work she was re-leaved of duties due to this pregnancy.

The respondent, of course denied having any other children with NM after he married the petitioner. He said CS was his relative and that she had come to the matrimonial home once but that the petitioner had not treated her well.

That he had no illicit association with AR and that the petitioner had only got the telephone number of this girl in his diary to make such incorrect conclusions.

The standard of proof required in a charge of adultery is very high. In

England, it has on various occasions been likened to that in criminal law, that is, beyond reasonable doubt.

The evidence necessary to establish an act or acts of adultery must go beyond establishing mere suspicion and opportunity to commit adultery.

The evidence adduced by the petitioner here is circumstantial; most of which she was told, by NM and AR.

As regards CS the petitioner was all alone when attacked. The person present was the respondent who does not say anything about that incident because he is the person "charged" herein.

If I admit for one moment that the petitioner was harassed by police wherever she left the matrimonial home, whereof the respondent gave quite a plausible explanation, or that NM came to the matrimonial home with two other children, or that AR explained to the petitioner that she had had a child with the respondent or even CS's conduct towards the petitioner, the latter has not told the Court whether her health was injured

or that she had reasonable apprehension of such injury as a result thereof.

As William J said in *Beer v Beer* [1948] P 10-13, mere suspicion is not sufficient to justify a finding of adultery. An allegation of such magnitude must be proved to the satisfaction of the Court, and where evidence pointing to guilt is entirely circumstantial ..... it is quite impossible for the Court to draw the inference of guilty, unless it is cleary satisfied that the facts relied on are not reasonably capable of any other explanation.

If AR went to the petitioner's office to tell her about having given birth to a child with the respondent what strength does one attach to this statement! Or that CS told her she was not the wife of the respondent what was important about this? Or do these statements in themselves implicate the respondent with adultery with these women? I do not think so.

Yes, NM might have come to the petitioner's matrimonial home with 2 other children alleged to belong to the respondent. But here, the question is when were these acts of adultery committed, if at all? A strong inference points to this having happened during the customary/polygamous marriage between the couple between 1990- 92 and if this be so under such marriage there is unlikelihood of anything like adultery.

In *Meme's* case the late Judge Chesoni said:

"Adultery is a serious matrimonial offence and it must, where it is alleged, be proved clearly. To prove adultery evidence of a guilty inclination or passion is needed in addition to opportunity to commit it. The evidence of a single witness is enough without corroboration. But where evidence of a single witness arouses the supicions of the Court that a true case is not being disclosed, in the sense that adultery may not have been committed - --- that evidence must be corroborated before the Court with affix guilt."

In this case the petitioner has adduced evidence of no more than a state of facts equally consistent with guilt or innocence. She has raised suspicion which I found weak against the respondent, not really sufficient to affix guilt.

Adultery here had to be clearly proved to the satisfaction of the Court.

But from my analysis of the evidence of both parties it was not. The evidence of the petitioner as to the respondent's conduct or actions was not such as to afford reasonable grounds for believing that he had committed adultery with either NM, AR or CS.

In my judgment the petitioner has not made out sufficient charges of either adultery or cruelty against the respondent.

On the other hand if the respondent had committed any of these acts then the petitioner showed such tolerance which would give the Court reason to believe that she condoned these acts.

For instances when NM came in with 2 children claiming that they were the respondent's, she accepted and even lived with them for one year before she asked the respondent to get a solution to this problem or else she would leave him.

It was in 1994, but she never left or filed this suit until 1997. What does the Court make of this? That she was not seriously opposed to the respondent's conduct in relation to NM? Particularly after he apologized.

What of AR? She went to the petitioner's office around 1995 to tell her she had given birth to the respondent's child? Why could she do this? To tease the petitioner or was this a genuine report!

All the same the petitioner took no action except to confront the respondent with the information who also apologized. And when did she know of CS's relationship with the respondent – not in

1997! She took no action until 1997 when she left the matrimonial home and filed this petition.

It would appear in this case whenever the conduct of the respondent in relation to women came afore, he apologized and the petitioner took his word to continue living at the matrimonial home. She had understood the respondent as she had actually married him when he had a relationship with Naomi. This is why she accepted to "adopt" F and also stay with the other 2 children of NM for one year though their mother was there.

Sorry this petition has not been proved on the standard of proof required by law to warrant an order of divorce being made. I dismiss the same with an order that each party bears his/her own costs thereof.

Dated and delivered at Nairobi this 21st day of March, 2001

D.K.S. AGANYANYA

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JUDGE