



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO.36 OF 1998

R W M PLAINTIFF

versus

M A O DEFENDANT

J U D G E M E N T

The Petitioner R W M a German national married M A O on 9-2-94 at the Registrar's office here in Mombasa. They cohabited and lived as man and wife for one week. Their marriage is blessed with one son namely K B born on 14-9-93. The Petitioner claims in this petition that the Respondent has treated him with cruelty. That at one time in 1994 while on holiday the Respondent caused the Petitioner to be arrested on fictitious claims. He has also sought to have this divorce on grounds of adultery. That in November 1997 the Petitioner while on holiday in Kenya saw Respondent with a Swedish man under suspicious circumstances.

In his evidence he said he is living with another woman Rose, the said Rose or another woman living with petitioner was identified in court. He has lived with Rose for 3 years. As for maintenance he said he used to provide same but in 1994 he stopped then resumed again in 1995 but stopped completely in 1997. He called witness Abdul Aziz Hakim Ridham a slot attendant at the Royal Casino whose evidence was that when working at Telephonist at the Ocean Beach Hotel he saw Respondent come and sleep many times with different men in the Hotel, and also that he took a gift to Respondent's from petition and found a European in the house of the Respondent and later an African man there. Then there is PW.3 Rashid Rana a Taxi driver who testified that on two occasions he transported Respondent to Kiembeni together with a white man who was kissing her on the behind seat of the taxi as he was driving.

The Respondent filed an answer to the Petition and also asked for dissolution on grounds of adultery, and although this ought to have been by cross petition, in her evidence she confirmed that they married here in Mombasa. She said that her son a 7 year old goes to school off and on for lack of fees. She denied committing adultery. But claimed that the husband sleeps with other women and even tells her of those women. Indeed she identified one in court as his girl friend.

I have heard the evidence here and first the Petitioner's ground of cruelty was not proved. To prove cruelty as a ground of divorce one must show a sustained conduct on the part of respondent that is intolerable and that such conduct affected the Petitioner's health. Here there was only allegation that Petitioner was arrested by police one day without saying why and although there was no proof there was no attempt even to show when it happened, and for what reason. As for adultery, it is granted that it is difficult for a party to prove actual adultery and all that can be used to prove it is with regard to circumstances from where it can be inferred that adultery took place, but even then the standard of proof

is very high almost to the standard of proof beyond reasonable doubt. The circumstances relied on here as testified to by PW.1, PW.2 and PW.3 are sketchy, suspicious and utterly unbelievable. The Petitioner did not attempt to prove the cohabitation of the Swedish man and the two Petitioner's witnesses are from what I observed of them lying witnesses who were most likely talking from the point of view of doctored evidence. They were unbelievable witnesses.

On the one hand Respondent's claim that Petitioner committed adultery was amply proved as Petitioner himself in a kind of bravado introduced to court a woman he is now staying with in a state of glorious adultery. What can the court do but to agree that that is the state of things. This ought to have been treated procedurary by enclosing a secret information in a sealed envelop to be opened by the Judge at trial that is the procedure.

I reject Petitioner's petition but grant this divorce on the grounds set out by the Respondent on the answer which I treat as cross petition. There will be Decree Nisi, as for maintenance the Respondent to file an application in 14 days. There will also be alimony payable to the wife Respondent to be determined on application. Cost of this Petition to be in the cause.

Dated this 7th Day of August, 2000.

A.I. HAYANGA

JUDGE

Read in chambers to Mr. Kinyua holding brief for Mr. Kabuki for Respondent and Mr. Kanyi for Petition.

A.I. HAYANGA

JUDGE