



MN v CMN (Divorce Cause 8 of 2019) [2024] KEHC 1301 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
DIVORCE CAUSE 8 OF 2019
JRA WANANDA, J
FEBRUARY 16, 2024**

BETWEEN

MN PETITIONER

AND

CMN RESPONDENT

JUDGMENT

1. By the Petition dated 22/07/2019 and filed through Messrs Mathai Maina & Co. Advocates, the Petitioner pleaded that in or about the year 1994, the Petitioner and the Respondent started cohabiting as husband and wife, that on 30/10/2014, they formalized the marriage by conducting a church wedding/Christian marriage in accordance with the *Marriage Act*, Cap. 150 at PCEA Ayub Kinyua Church in Eldoret West, that the marriage was blessed with 3 issues – born in 1997, 2002 (deceased) and 2016 – and that during the subsistence of the marriage the Respondent treated the Petitioner with cruelty, adultery and desertion.
2. She gave the particulars that the Respondent mistreated the Petitioner by denying her conjugal rights for a period of over 4 years, that the Respondent engages in extra-marital affairs with other women whom he committed adultery and specifically [.....] with whom they live together and sired children, that the Respondent has been cruel to the Petitioner by physically assaulting her and locking her outside at night when she returns from work, that the Respondent rammed the Petitioner’s car from behind after being caught by the Petitioner coming from a woman’s house with whom he was committing adultery, that the Respondent has been uttering demeaning and derogatory words to the Petitioner and her parent with the sole intention of inflicting pain and causing mental anguish, that the Respondent has deserted the Petitioner for a period of 4 years continuously as he stopped visiting her and the children, and that the Respondent threatened the Petitioner that he was going to kill her since he is not afraid of going to prison.
3. The Petitioner therefore averred that the actions of the Respondent have caused her a lot of pain and stress hence she has been admitted in hospital on various occasions due to stress related conditions. She



pleaded further that the acts of the Respondent also affect the children more specifically their eldest daughter whom the Respondent had threatened to beat up if she opened the door for the Petitioner, that the Respondent has wilfully neglected her for 4 years to date and has been spending with other women by going for holidays using money earned by the Petitioner. According to the Petitioner therefore, the marriage has broken down irretrievably and it cannot be salvaged. She accordingly prayed that the marriage be dissolved and decree absolute be issued. She also sought costs of the Petition.

4. In response, through Messrs Teti & Co., the Respondent filed his Response and Cross-Petition dated 16/08/2019 in which he only admitted that the parties were blessed with 2 children born in 1997 and 2002. He stated that the third alleged child is illegitimate and was born out of wedlock, that the Respondent shall crave that a DNA test be conducted on the said child to establish paternity, that the Respondent is a businessman and the businesses are his only and the Respondent does not have any interest or right in the same. He denied the allegations of cruelty, adultery and desertion and added that the parties have been cohabiting peacefully until the year 2015 in the month of August or thereabouts when the Petitioner changed, became adulterous, hostile and abusive towards the Respondent, started returning home very late at night and has treated the Respondent with cruelty ever since. He contended that since 2015, it is the Petitioner who denied the Respondent his conjugal rights and that regarding the alleged extra-material affairs, the woman named in the Petition is a stranger and does not exist. Generally, he denied all the particulars listed against him in the Petition.
5. The Respondent then listed his own particulars of cruelty, adultery and desertion allegedly committed by the Petitioner. The particulars he gave were that the Petitioner engaged in extra-marital affairs which led to the birth of the said third child, that since 2015 she started returning home late at night while drunk and disorderly and when asked about it, she became hostile and abusive towards the Respondent in order to demean him in front of the children, that she made false accusations of extra-marital affairs against the Respondent, that she is a woman of ungoverned temper and has habitually used violent and obscene language against the Respondent and their relatives and friends, that since 2015 she has been inciting the children against him so that they may hate him, that the Petitioner has on several occasions insulted the Respondent in the presence of the children, a behaviour that has occasioned a lot of embarrassment to him, that since 2015 the Petitioner has denied him conjugal rights claiming that he is not of her class, and that since 2015 the Petitioner does not cook for him.
6. The Respondent proceeded to list further particulars of similar nature and he, too, pleaded that the Petitioner's conduct complained of has psychologically affected him causing a lot of mental stress. Like the Petitioner, he too, pleaded that the marriage has broken down irretrievably and that all efforts to salvage the situation have been fruitless. He prayed that the Petition be dismissed and that instead, the cross-Petition be allowed, the marriage be dissolved and a decree absolute be issued. He too prayed for costs.

Hearing of the Cause

7. After long-drawn and protracted interlocutory litigation spreading over a number of years, the matter eventually came up for trial on 4/10/2023. Each of the parties testified.
8. The Petitioner adopted her Witness Statement and List of documents and then basically reiterated the matters already set out in her Petition. She stressed that the Respondent committed adultery when he moved out to go and live with other women, that he admitted that he has been living with other women and started families and asked the Petitioner to take it or leave it, that he threatened the Petitioner if he stayed so the Petitioner decide to move out, that he had become violent. The Petitioner stated that the fact that the Respondent had started another family was very devastating to her. She prayed that the marriage be dissolved.



9. In cross-examination, she stated that she filed this case after she had already moved out of the home, and that she never returned to the home. She conceded that she had not supplied documentary evidence of the allegations of cruelty and that she has never reported the same to the police. She also conceded that she has not shared the matrimonial bed with the Respondent 4 years before and 4 years after filing this Cause. Regarding the third child alleged by the Respondent to be illegitimate, the Petitioner strongly denied the allegation and insisted that the child belonged to the Respondent. She denied that it is the birth of the child that caused the problems between them and stated that she was ready for a DNA test. She conceded that she had not given details of the other families that she alleged were started by the Petitioner and other women. She reiterated that she had tried reconciliation but it did not work. In Re-examination, she stated that one [.....] is one of the women that the Respondent had an affair with, that she tracked down the Respondent to another woman's house and when she asked the Respondent why he was cheating on her, he said that it was because the Petitioner could not safely have a child, that they then resorted to In Vitro Fertilization (IVF) and that the Respondent was the sperm donor.
10. On his part, the Respondent too adopted his Witness Statement. He reiterated that the third alleged child was not his, that the issue of IVF is a lie as he never went for any, that he asked to go and see the donor but the Petitioner declined, that it is the birth of the said child that was the source of the disagreements between the couple, that since then the Petitioner became hostile and started coming home late, and that only the house-girl was serving him. He claimed that he tried reconciliation but it has not worked. He denied knowledge of the alleged [.....] with whom the Petitioner alleged the Respondent had a family and denied that she was his lover. He denied that he had another family and prayed that the marriage be dissolved.
11. In cross-examination, he conceded that the IVF procedure does not involve sexual relations with any man. He also conceded that he did not mention the names of the men he alleged were the Petitioner's lovers. He insisted that the Petitioner had denied him conjugal rights although he conceded that he has never sought restoration thereof. In Re-examination, he insisted that he never authorized the IVF procedure, that he never even knew that the Petitioner had gone for it in Nairobi, she only told the Respondent subsequently, and that he does not believe it. Regarding the names of the Petitioner's alleged lovers, he stated that he did not name them because everything was being done secretly and that he only saw a pregnancy.
12. Upon close of the trial, and pursuant to directions given, the parties then filed written submissions. The Petitioner's Submissions was filed on 19/10/2023 while the Respondent's was filed on 21/11/2023.

Petitioner's Submissions

13. Counsel for the Petitioner cited Section 65 of the *Marriage Act* 2014 which provides the grounds under which a party may move the Court for dissolution of a marriage. He submitted that it is clear from the evidence of the parties that the marriage is irretrievably broken down, that the parties want out and can no longer live together having attempted to solve their differences through other parties but the same having proved futile. He also cited Section 66 which lists the instances when a marriage may be deemed to have irretrievably broken down. In conclusion, he urged the Court to find that the Petitioner has established all the grounds for dissolution of the marriage, proceed to annul the marriage and a decree nisi be issued.

Respondent's Submissions

14. On his part, Counsel for the Respondent, too, cited Section 65 of the *Marriage Act* 2014 and submitted that the same outlines the grounds for dissolution of a Christian marriage, that Section 66 then gives instances when a marriage is considered to have irretrievably broken down, that these



instances include, but are not limited to, acts of adultery, cruelty and desertion. He cited the case of *IAO v FOO* [2019] eKLR and submitted that applying the test set out in the said authority, the Respondent had proved the existence of the marriage, adultery, cruelty and desertion and that therefore the Respondent had proved the elements for dissolution of the marriage hence divorce should be granted as prayed in the cross-Petition.

Analysis and Determination

15. Upon considering the record, including the Respondent's evidence, the issue that arises for determination is "whether the marriage has irretrievably broken down to the extent that it should be dissolved."

16. Regarding the grounds recognized in Kenya for dissolution of marriages contracted under the Christian faith, Section 65 of the *Marriage Act* 2014, provides as follows:

"S.65 – A party to a marriage celebrated under Christian system of marriage may petition the court for a decree for the dissolution of the marriage on the ground of: -

- a) one or more acts of adultery committed by the other party;
- b) cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or
- c) desertion by either party for at least three years immediately preceding the date of presentation of the petition;
- d) exceptional depravity by either party;
- e) the irretrievable breakdown of the marriage.

17. Regarding the phrase "irretrievable breakdown of the marriage", as used in Section 65(e) above, Section 66(6) of the same Act, provides as follows:

"(6) A marriage has irretrievably broken down if-

- a)) A spouse commits adultery;
- b) A spouse is cruel to the other spouse or to any child of the marriage;
- c) A spouse wilfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;
- d) The spouses have been separated for at least two years, whether voluntary or by decree of the Court, where it has;
- e) A spouse has deserted the other or at least three years immediately preceding the date of presentation of the petition;
- f) A spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;
- g) A spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is



improbable during the life time of the Respondent in the light of existing medical knowledge; or

h) Any other ground as the Court may deem appropriate.”

18. Although the parties have each pleaded the grounds of desertion, cruelty and adultery, the grounds of desertion and adultery were, in my view, not supported by cogent evidence and consisted of only allegations. During cross-examination, both appears were clearly indecisive and inconclusive in their responses.
19. Regarding desertion for instance, neither party was able to establish the statutory timelines set out under Section 65(c) and 66(e) above. I say so because for desertion as a ground for divorce to be proved, the said provisions require that it be demonstrated that the desertion had been in existence up to “at least 3 years preceding the date of presentation of the petition”. In this case, although there were allegations that the parties have not shared the matrimonial bed up to 4 years before these proceedings were filed and 4 years after, and that the same has continued to remain the case to date, it was not clear whether they have nevertheless been sharing the same house. It appeared to me that the sharing of the matrimonial home by the spouses has been “on-and-off”. The respective parties seem to have moved out on occasional different times and perhaps returned, before again moving out. No effort was however made by the parties to provide clarity on this issue.
20. Regarding the ground of adultery, although each spouse accused the other of engaging in extra marital sexual affairs, again the same was not well established. The Petitioner accused the Respondent of having other families with other women and in turn, the Respondent accused the Petitioner of getting a child out of wedlock. Each denied the accusations. In the circumstances, and in the absence of helpful evidence, the Court is not in a position to establish the correct position.
21. I would therefore state that, although pleaded both in the Petition and in the cross-Petition, respectively, neither party proved the grounds of desertion and cruelty to the satisfaction of the Court.
22. Out of the grounds alleged, the most apparent and accusation made by the parties against each other is on the ground of cruelty. As regards the standard of proof required to satisfy the Court that the matrimonial offence of cruelty has been proved, the Court of Appeal in the case of in *Kamweru v. Kamweru* [2000], eKLR, stated as follows:

“applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly, cruelty or desertion may be proved by a preponderance of probability, that is to say that the court ought to be satisfied as to feel sure that the cruelty or desertion or even adultery (all being matrimonial offences) has been (as the case may be) established”.

“The last point, which has been made time and again by various court, and which is worth reiterating here, is that there is no comprehensive definition of cruelty. Each petition found on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore, it is not very helpful to rely on facts of previously decided cases as precedent.”

23. During the trial, the parties vividly, very passionately and with high level of clarity described the instances of cruelty against each other. I could discern the pain on each party’s face as they narrated



case after case of cruelty. The resentment against each other caused by acts of cruelty was evident. The evidence presented, though mainly verbal, was credible and was not shaken even in cross-examination. From general humiliation, disrespect, and ignoring of each other to more serious allegations such as cases of violence and deliberate denial of conjugal rights, the parties recounted the tribulations each went through in the hands of the other. I am therefore prepared to find that both parties proved the ground of cruelty against each other.

24. There is also Section 66(6)(h) already referred to above and which permits dissolution of a marriage on the sole ground that the marriage has irretrievably broken down on account of “any other ground as the court may deem fit”. In the Court of Appeal case of *JSM v ENB* [2015] eKLR, the following was stated:

“The error on the part of the learned judge notwithstanding, could the marriage, on the basis of the evidence that was adduced, have been dissolved as having irretrievably broken down on account of “any other ground as the court may deem fit”, within the meaning of section 66(6)(h) of the *Marriage Act*? What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down.”

25. Further, in the case of *N V. N & another*, [2008] 1 KLR (G&F) 16, delivered long before irretrievable breakdown of a marriage was recognised as a ground for divorce in Kenya, Madan J. (as he then was), eloquently painted the classic picture of a marriage that has irretrievable broken down, which he did in the following poetic terms:

“This husband and wife have gotten themselves into a real grand-sized matrimonial tangle. In the words of the poet there are winds of sorrow where their voice was, silence where their love was. Their eyes loudly tell the story of their unhappiness. Their hearts are dried up and they do not stir for each other any more. They must have forgotten their reading from St Paul’s letter to the Corinthians that love is patient and kind; love does not keep a record of wrongs. Love never gives up; its faith, hope and patience never fail. This husband and wife look like being soaked in misery with their hearts dead for each other ... Their own road of love has petered out, they are in a cul-de-sac of their own making of their marriage which has after some years turned out to be an intolerable any longer.”

26. In this case, both parties expressly told the Court and were emphatic that their marriage had irretrievably broken down and each wanted out. Each party had no second thoughts on whether the marriage could be salvaged or whether they could reconcile. When these questions were to put to them, each was quick to respond that there was no room whatsoever for reconciliation. Each insisted that the only solution was a decree of divorce. From the evidence on record, it is clear that the couple no longer benefits from or enjoys any companionship. Each spouse accuses the other of desertion, cruelty and adultery and of humiliating the other. According to each party, the marriage has irretrievably broken down. The couple has not shared the marital bed for many years and both want the marriage to be annulled. Each party has given strong testimony of the accusations levelled against the other. I therefore find and hold that the relationship between the two has reached a point of no return



27. The record does not indicate and none of the parties has suggested that there was collusion in the presentation of the Petition and the cross-Petition. On my part, I am satisfied that there was no collusion. In light of the evidence on record, I find and hold that the marriage has irretrievably broken down within the meaning of Section 66(6)(h) of the Marriage Act, 2014.

Final Orders

28. The upshot of my findings above is that both the Petitioner's Petition dated 22/07/2019 and the Respondent's Cross-Petition dated 15/08/2019 are allowed. Consequently, I issue orders as follows:

- i. The marriage between the Petitioner and the Respondent celebrated and/or conducted on 30/10/2014 at the PCEA Ayub Kinyua Church, Eldoret West under the African Christian Marriage and Divorce Act, Cap. 115, Laws of Kenya (now repealed) and including any prior period during which the parties may have cohabited as husband and wife before formalizing the marriage as aforesaid, is hereby dissolved.
- ii. Decree *Nisi* to issue, and to be made absolute upon lapse of three (3) months from the date hereof.
- iii. Considering that this is a family matter, I direct that each party bear his or her own costs of the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF FEBRUARY 2024

.....

WANANDA J.R. ANURO

JUDGE

