



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 54 OF 2007

IN THE MATTER OF THE MARRIAGE ACT 2014 OF THE LAWS OF KENYA

SMN.....PETITIONER

VERSUS

EM.....RESPONDENT

JUDGMENT

1. The Petitioner in this case, SMN has petitioned this Court seeking the following orders against the Respondent;

(i) THAT the Marriage between the Petitioner and the Respondent be dissolved.

(ii) THAT legal custody of the minor issues of the marriage namely AN and AG be granted to the Petitioner.

(iii) THAT the Respondent do bear the costs of this Petition.

2. The Petitioner, a retired teacher testified as PW 1 and said he got married to the Respondent in 1994 and the union was blessed with four children as follows;

(i) AK - Male born in 1985

(ii) MN - Female born in 1986

(iii) AN - Male born in 1988

(iv) AG- Male born in 1999

3. The Petitioner said during the subsistence of their marriage, the Respondent committed adultery and she was cruel to him.

4. He said he had set up a tailoring business for her but she never used to go to the shop and she could come home late and when the Petitioner asked her where she could go she used to say that she had gone to take measurements.

5. The Petitioner said at one time the Respondent went with a man and did not return home until the following day. She told him she had been hijacked.

6. The Petitioner said the Respondent was a heavy drinker who could sell cows and chicken belonging to the Petitioner to entertain men, eat meat and drink beer.

7. He said they never agreed on anything and that they were always quarreling. He said she never looked after their children who always went to school dirty. She also used to hide clothes in her neighbor's house where she could change and go for functions.

8. The Petitioner asked the court to dismiss the cross petition and grant him the prayers he is seeking in this Petition.

9. The Respondent who testified as Pw 1 said the Petitioner married her in 1984 under Kikuyu Customary Law. He said they got four

Children and the Petitioner who used to be her teacher before the marriage started mistreating her.

10. The Respondent said in 2005 the Petitioner had an affair with a woman he was singing with in the choir and he started mistreating her and the children. She said the woman called M lives at their home.

11. The Respondent denied that she had an affair with one K and said he was a regular visitor to their home.

12. I have considered the evidence in case together with the submissions filed herein. I find that there is no dispute that the Petitioner and the Respondent got married in 1994 and cohabited as husband and wife until 23rd November 2005 when the parties separated.

13. There is no dispute that the couple was blessed with four children who are now grown ups.

14. The issues this Court must determine are as follows:

(i) Whether the marriage between the Petitioner and the Respondent should be dissolved.

(ii) Whether the Cross Petition should be allowed.

(iii) Who pays the costs of this suit?

15. The Petitioner has petitioned for dissolution of the marriage on the grounds of adultery and cruelty. The particulars of the adultery and cruelty are contained in the Petition. Cruelty as was quoted by Justice S.J. Chitembwe in **KAS vs MMK (Divorce Cause No. 10 of 2016)** from the Black's Law Dictionary is defined to be:

“the intentional and malicious infliction of mental and physical suffering on a living creature”.

Mental cruelty was further defined to be:-

“.....one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse...”

16. There is evidence that the Petitioner and the Respondent separated on 23rd November 2005 and they have never stayed together since that time.

17. Under the Matrimonial Causes Act Cap 152, Section 8 (1) provides grounds of petition for divorce as follows:

(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent-

(a) Has since the celebration of the marriage committed adultery; or

(b) Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) Has since the celebration of the marriage treated the petitioner with cruelty; or

(d) Is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

and by the wife on the ground that her husband has, since the celebration of the marriage been guilty of rape, sodomy or bestiality.

18. I find that there is evidence that the Respondent in this case was responsible for the breakup of her marriage to the petitioner by her conduct. The conduct of the respondent was unbecoming and the same caused the petitioner pain and anguish.

19. I find that the marriage herein has broken down irretrievably and I accordingly allow the Petition. As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by **section 66(2) (e)** of the **Marriage Act, 2014** and was not recognized in the repealed **Matrimonial Causes Act**. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.

20. I also find that the cross Petition and answer to petition were not proved and the same are dismissed. The Respondent is seeking maintenance in her cross petition. A party cannot be allowed to benefit from her wrong doing and for that reason I rule that the Respondent is not entitled to maintenance from the petitioner.

21. I accordingly order as follows:

(i) That the Marriage between the Petitioner and the Respondent be ad is hereby dissolved.

(ii) That the Cross Petition and answer to Petition were not proved and the same are hereby dismissed.

(iii) That the Children of the marriage are all grownups and prayer 2 of the Petition must fail.

(iv) THAT the Respondent is not entitled to any maintenance from the Petitioner for reasons that she was responsible for breakup of the marriage.

(v) Finally, I order that each party bear its own costs of this suit.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 5TH DAY OF APRIL, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI