



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
DIVORCE CASE NO. 7 OF 2017

BRM.....PETITIONER

VERSUS

MGC.....RESPONDENT

JUDGMENT

1. In the Petition dated 27th April, 2019 BRM prays for the dissolution of the marriage between her and the Respondent, MGC. She prays for the custody of their child, SM, who was aged 16 years at the time of filing the Petition. She also prays for the costs of the proceedings.

2. The facts that emerged from the pleadings and the evidence adduced by the parties disclose that the Petitioner and the Respondent got married under the repealed African Christian Marriage and Divorce Act, Cap. 151, Laws of Kenya, on 26th August, 2000 at St Stephen ACK Church, Malindi. They thereafter cohabited as man and wife at [Particulars withheld], Watamu.

3. The Petitioner's case is that the marriage ought to be dissolved on grounds of adultery, desertion and cruelty. She particularized her allegations at paragraph 6 of her Petition as follows:

“a. The Respondent denied your Petitioner her conjugal rights and instead, he became involved in adulterous acts and started committing adultery with one NCT.

a. The Respondent deserted the matrimonial home in the year 2007 and ever since he has not returned.

b. The Respondent is quarrelsome and fond of hurling abuses at your Petitioner.

c. The Respondent has been cruel throughout the said marriage by failing to provide your Petitioner and the child with maintenance as a result of which your Petitioner has mostly received assistance from her brother.”

4. It is the Petitioner's case that attempts at reconciliation have hit a brick wall.

5. In his reply dated 3rd January, 2018 the Respondent denied the Petitioner's case in its entirety. He nevertheless sought dissolution of the marriage and prayed for custody of the child of the marriage. He also asked to be awarded the costs of the Petition.

6. The parties filed and exchanged witness statements which they adopted at the hearing. The Petitioner testified as PW1. Her testimony was that immediately after she gave birth to their only child in 2001 the Petitioner started being cruel to her. He denied her conjugal rights. It was the Petitioner's evidence that the Respondent started cheating on her and more specifically with one NCT. The Respondent ultimately left the matrimonial home in 2007 and went and lived by himself.

7. The Petitioner also testified that the Respondent provided for their child. She urged the court to give the custody of the child to the Respondent and allow her visitation rights. The Petitioner concluded by stating that her marriage to the Respondent has irretrievably broken down and urged this court to dissolve it.

8. The Petitioner called PW2 Muema Kalouni, a pastor with the African Inland Church at Kataye as her witness. The witness told the court that shortly after the wedding the Petitioner and the Respondent had marital problems. The Petitioner approached them for mediation but attempts to reconcile the couple failed.

9. The Respondent testified as DW1. His testimony was that it is the Petitioner who denied him conjugal rights. He confirmed that attempts

by PW2 to reconcile them were not successful.

10. A perusal of the pleadings and the evidence adduced shows that no evidence has been adduced to support the allegations of adultery and cruelty made by the Petitioner. The Petitioner did not place anything before the court to prove that the Respondent cheated on her and specifically with one CT. There was also no evidence adduced in support of the allegation of cruelty by the Respondent. The evidence of the Petitioner actually proved the contrary.

11. It was the Petitioner's testimony that the Respondent provided for their child who was in form three in a school in Nairobi at the time she testified. Although she had asked for the custody of the child in her Petition, she revised this request in her testimony and urged the court to let the Respondent have the custody of the child.

12. There was concurring evidence from both sides that the Respondent left the matrimonial home in 2007. By the time the Petition was filed in 2017 the matrimonial bed had been cold for ten years. The parties agreed that attempts to reconcile them were not fruitful. There is therefore evidence that the Respondent deserted the matrimonial home. Everything points to a marriage that has broken down beyond repair.

13. Under Section 65(c) of the Marriage Act, 2014 desertion by either party for at least three years immediately preceding the date of presentation of the divorce petition is a ground for dissolving a Christian marriage. In the circumstances of this case the only just thing to do is to unyoke the parties from this contract. The Petition is therefore allowed and the marriage between the Petitioner and the Respondent is dissolved.

14. There is the question of the custody of SM. It is noted that she was 16 years when the Petition was filed in 2017. She is now an adult and she can decide for herself whom she wants to live with. I will thus not make any custody orders. It is, however, important to state that the Respondent shall continue providing for SM until she finishes her college education.

15. It is not appropriate to award costs in a matter like this. Each party will therefore meet his/her own costs.

Dated and Signed at Nairobi this 2nd day of April, 2019

W. Korir,

Judge of the High Court

Dated, Signed and Delivered at Malindi this 9th day of May, 2019

R. Nyakundi,

Judge of the High Court