



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**DIVORCE CAUSE NO.13 OF 2015**

**EJK.....PETITIONER**

**VERSUS**

**GNJ.....RESPONDENT**

**JUDGMENT**

1. Mr. EJK hereinafter referred as the petitioner filed for divorce against GNJ herein referred as the respondent in a petition dated 17<sup>th</sup> September, 2015 seeking dissolution of their marriage. The petition of Mr. EJK was based upon the Matrimonial Causes Act, section 8. He alleges that his marriage with GNJ had broken down irretrievably and he believes that there is no possibility that they will cohabit together as husband and wife.

**Background**

2. Mr. EJK married GNJ on 11<sup>th</sup> December, 2004 as his lawfully wedded wife at the [Particulars withheld] ACK Church in Kilifi County. The Petitioner, during the subsistence of the marriage cohabited together with the respondent at their matrimonial home in Ganda Location. The said marriage pleads the petitioner was never blessed with any children. For some reason the petitioner alleges that during the subsistence of the marriage without connivance on his part the respondent started treating her with cruelty.

3. The Petitioner further alleges that the respondent deserted the matrimonial home and got married to another man where she has lived continuously without any reference to him. He further gave a detailed explanation that at no time did he contribute to the respondents acts of cruelty or desertion. The petitioner further pleaded that any efforts to have reconciliation have hit a dead end rendering the marriage irretrievably broken down.

4. He has therefore petitioned this Court that the said marriage be dissolved. The petition was served and delivered to the respondent immediately after filing it in the High Court for determination. As the petition was being issued to and delivered upon the respondent they were not living together at the matrimonial home.

5. For one reason the respondent declined to enter appearance nor instruct any legal counsel on her behalf to oppose the petition. She never indicated any interest to defend the petition.

6. In December 2018 pursuant to the notice of motion filed in court by the petitioner a case management hearing was carried out by the Deputy Registrar. In the light of the petitioner's petition and absence of any defence or answer to the petition to deny the allegations, it was directed that the petition proceeds as an undefended suit. There was also a further direction that there should be no other witness expect the petitioner.

7. At the trial, the petitioner essentially relied on his affidavit to show that there was no longer a marriage in existence worthy of its name with the respondent.

**The Law**

8. The grounds for divorce including irreconcilable differences are listed in the Marriage Act. Section 65 which states as follows:

***“A party to a marriage celebrated under part 111 may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds: -***

*(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) Exceptional depravity by either party.*

*(d) Desertion by either party for at least three years immediately preceding the date of presentation of the petition;*

*(e) The irretrievable break down of the marriage.*

10. Accordingly it is important to consider what the courts have interpreted to mean cruelty in a marriage set up. As for cruelty the court of Appeal in **J SMR E.N.B. CA No.5 of 2015** adopting the passage in **Meme v Meme 1976 – 80 KLR17** held that for a party to establish cruelty he must show to the satisfaction of the trial court that there is

*(1) Misconduct of a grave and weighty nature*

*(2) side injury to the complainant's health or reasonable apprehension of such injury*

*(3) That the injury was caused by misconduct on the part of the respondent.*

*(4) That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.*

*“The term cruelty therefore connotes both physical and mental conduct which must be proved through evidence. That it has occasioned danger to the life, limb, health and mental status of the petitioner.”*

See the principles in the case of **NUNZIO COLAROSSO. V MICHELINA COLAROSSO [1965] E.A. 129; Kamweru vs Kamweru 2000 EKLK).**

11. It has been held in Kenya through the above decisions that the standard of proof under the Marriage Act on divorce need not be beyond a reasonable doubt but on a balance of probabilities. As for cruelty, it is not every conduct that causes injury to health which could be considered cruelty.

12. It is contended that in upholding the ground, the circumstances prescribed and peculiarity of the facts of each case be analyzed to establish the sufficiency of evidence which amounts to cruelty.

13. The words of **Lord Stowell in Evans v Evans I Hagg.Con 35** are often applied as a yard stick:

*“Proof must be given of a reasonable apprehension of bodily harm. I say an apprehension because assuredly the court is not to wait until the harm is actually done; but the apprehension must be reasonable not on suing merely from diseased sensibility of mind”*

14. On the other hand, desertion is proved where a spouse leaves the matrimonial home without the consent or authority of the other but never to return back. Turning to the present petition, it's on record that the petitioner clearly stated that the respondent's conduct amounts to cruelty and desertion of the marriage contract.

15. In material, emphasis was given by the petitioner that upon the respondent deserting the matrimonial home she moved on to enter into another marriage without his consent. According to the petitioner she did not bother to think what physical or mental harm would occasion him to desert their home without notice. In his testimony, the petitioner told this court that the respondent's conduct clearly caused agony and anguish to both his physical and mind.

As pleaded by the petitioner and evidence in court he has been able to prove the alleged cruelty and desertion by the respondent. In absence of any evidence to a rebutt prima facie case by the petitioner, I am satisfied that the orders sought be granted as follows..

*(a) The marriage between the petitioner and the respondent has irretrievably broken down and could not be considered worthy of salvage by this Court.*

*(b) The marriage solemnized on 11<sup>th</sup> December 2004 be and is hereby dissolved.*

*(c) That a decree nisi be issued to the petitioner consequently. On expiry of six months a decree absolute to permanently dissolved the marriage be granted to the petitioner costs of this petition be in the cause.*

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 10<sup>TH</sup> DAY OF JULY, 2019.**

.....

**REUBEN NYAKUNDI**

**JUDGE**