



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

DIVORCE CAUSE NO. 11 OF 2015

MN.....PETITIONER

VERSUS

JKN.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Mouko for the Petitioner

The respondent J.K.N. in person

JUDGMENT

Introduction

This is a petition by **MN** who seeks dissolution of her marriage to the respondent **JKN** on grounds of cruelty and desertion. The petitioner filed the petition dated **7.8.2015**. The respondent in his cross-petition dated **23.9.2015** alleged various acts of cruelty, adultery and desertion against the petitioner.

The evidence

The petitioner in her evidence testified and adopted her witness statements and averments in the petition. She gave evidence on oath that she met the respondent sometimes back in 2006 when they engaged and celebrated their marriage on 9.12.2006 at [particulars withheld] Church of Christ by Holy Spirt. During their good old days, the petitioner and respondent co-habited and moved together to Watamu where they were blessed with three issues of the marriage.

At some point the petitioner told the court that the marriage started experiencing problems as the respondent triggered incident of assault, overacting to issues, treating her with disrespect, hurling insult, fabricating false allegations of her having an affair, denying her access to the children, evicting her from the matrimonial home, especially one incident when she was carrying the pregnancy of their 2nd born child which conduct caused her to forcibly leave the matrimonial home. According to the petitioner, some efforts were made in 2014 to have them be reconciled but due to some persistent acts of both physical and mental cruelty she could not persevere anymore to provide the necessary support to the family in all respect.

Further the petitioner told the court as soon as she moved out from the matrimonial home, the respondent has taken no steps to organize any reconciliation meeting nor had any contacts as evidence that there is a likelihood of salvaging the marriage.

In MN testimony the petitioner gave evidence that acts of cruelty from the respondent has occasioned to suffer mental anguish, deprivation of companionship, maintenance, lack of access to the children of the marriage. As a consequence, she was emphatic to the court that the marriage with the respondent has broken down irretrievably and the petition for divorce should be granted to free her from physical and emotional stress.

The Respondent's Case

The respondent JKN filed a cross-petition and denied all allegations of cruelty by the petitioner but asserted cruelty, adultery, use of abusive language, being disrespectful, desertion, failure to promote the welfare and best interest of the children of the marriage, severally denying him conjugal rights and physical assault.

The respondent further gave evidence and relying on his cross-petition that on several circumstances it was the petitioner who has treated him with cruelty, neglect, assault, desertion and abuse. The respondent states that in July 2007 after a small disagreement the petitioner attacked him with a knife inflicting grievous harm. That in November, 2011 at their Nyali home the petitioner attacked him by deodorant bottle which in the course of it resulted into some injuries. That at one occasion the respondent was staying with his sick brother whom the petitioner MN used to mistreat by denying him the basic necessities.

According to respondent's testimony the petitioner used to refer to the children as '*Vinyangarikas*'. It was the respondent's evidence that the petitioner as the primary care-giver of conjugal rights the same were withdrawn without notice which caused him mental anguish and anxiety. The respondent further testified that the petitioner on certain occasions talked ill of him in front of the pastor and other church members which occasioned him prejudice and embarrassment.

According to the respondent during the subsistence of the marriage the petitioner used to withhold and hoard foodstuffs in a manner which denied the family basic access to food. That the dirty environment contributed by the petitioner caused their children to be infested with jiggers affecting their performance in school.

The respondent further told the court that the petitioner at one time abandoned their children forcing him to take control and custody for their best interest and welfare.

According to the respondent it was the petitioner who deserted the matrimonial home on 14th April, 2015 without any connivance from him and since then she has never sought any reconciliation or a come back to the marriage.

The respondent further called evidence from **Wamalwa Bridgit** a director of the [particulars withheld] School where their children were studying. Her main concern was that the petitioner rarely visited the children in school in contrast with the respondent who actively participated and checked on their performance.

The petitioner through her counsel **Mr. Mouko** filed skeleton submissions to buttress various perspectives on the matter. On the other hand, the respondent also put in his written submissions.

I have considered this matter carefully, taking into account the evidence and submissions which touched on various issues which I now have a chance to reflect on in the decision which I am about to make in determination of this petition.

The Law and analysis

Our constitution envisages a marriage union where every spouse participates with dignity and equality regardless of gender. According to Article 45 of the Constitution the family is the natural and fundamental unity of society and the necessary basis of social order and shall enjoy recognition and protection by the state.

The totality of the evidence would be analyzed in the instant case bearing in mind the provisions in Article 45. Therefore, on the basis of petition and cross-petition from my perspective the following issues stand out to be the determinant of the petition or cross-petition.

- a). Whether the petitioner and the respondent proved grounds of cruelty, desertion, or the marriage having irretrievably broken down.**
- b). Whether the marriage union has initially celebrated in 2006 is reserving a dissolution by the decree of the court.**

The relevant sections of our law in respect to a dissolution of a marriage contracted by couples like the petitioner and the respondent who professes Christian religion is provided for under Section 64 and 65 which provides as follows:

“S.64 – the parties to a marriage celebrated under part 111 may seek services of any reconciliation bodies established for that purpose that may exist in the public or place of worship where the marriage was celebrated.

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.**

Some fundamental issues arise pursuant to the provisions of Section 65 as to the definitive characteristics of the various element for a petitioner of cross-petitioners to establish on a balance of probabilities for a dissolution of marriage.

For instance, the determination of the nature and gravity of cruelty is based on the court's weighing of several factors.

A number of decisions under our law bears me witness on interpretation given to the phrase cruelty to qualify as a ground for dissolution of a marriage. In the case of **Hadden v Hadden [1859] 1 SW Sherman J** held and said: -

“I do not think there is such a thing as legal cruelty as distinct from actual cruelty; cruelty means conduct whether in legal language or the vernacular.”

The two interpretations were further distilled in the case of **Russell v Russell [1997] A-C-445** where the court said: -

“It was conceded that indeed it is beyond controversy that it is not every act of cruelty in the ordinary and popular sense of the word which amounted to saevitia or cruelty entitling the party aggrieved to a divorce; that this may be many willful and unjustifiable acts inflicting pain and misery in respect of which the relief could not be obtained. That it must be conduct of such a character as to have caused danger to life, limb or health (bodily or mental or as to give rise to a reasonable apprehension of such danger.”

The other relevant principles of the Law are found in the persuasive by the Supreme Court of India in **Parveen Mehta v Inderjit Mehta 2002 5 SCC 706** while interpreting Section 13 (1) (i).

a) of the Hindu Marriage Act which has similar provisions on cruelty with Section 65 of our Marriage Act 2014 stated as follows:

“Cruelty for the purpose of Section 13(1) (i-a) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty, it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

Where the existence of a marriage is attacked on grounds of cruelty the duty of the court to interfere in such an institution is not to punish the husband or vice versa but to protect the aggrieved party from any such continuing acts of cruelty.

Another distinguishing feature the law considers is the physical and the ties of affection between the petitioner and the respondent and the triggers which deliberately provoked any of the spouses to file for dissolution of the marriage.

It is trite from the above definition on cruelty the law places a lot of importance to the institution of marriage resting the burden of proof to the petitioner who pleads and alleges any grounds for divorce as provided for in the Act. The overriding objective of the Act was to avoid giving a definite meaning to the ground on cruelty leaving it all to the facts of each case.

This is fortified in the case of **Colarossi v Colagrossi [1965] E.A. 129** applied this legal position as stated in the following passage: -

“no comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury of life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.”

In my view applying the principles illustrated above, the dominant matter for consideration of the court is whether the circumstances by the petitioner and respondent are so infinitely varied that in light of the evidence that their conduct has failed the institution of marriage.

One of the critical features of this case, is what the petitioner and cross-petitioner refers to which primarily on crucial assessment is incompatible with the marriage which was celebrated in 2006 at [particulars withheld] Church.

From that very day their institution was blessed with three children currently in custody of the respondent. The cruelty alleged by the petitioner traversed largely on assault, verbal abuse or insults, eviction from the matrimonial home which included the critical period bearing the burden of pregnancy of their second born child. The mental and physical anguish endured over time by the petitioner before she called it a day in 2014. The grievance arising from this disharmony led to attempts being made to have resolved amicably to the dictates of the law but the approach bore no fruits.

When I evaluate the evidence given by the petitioner hers was a narrative of acts of violence, harassment abuse and want of care by the respondent.

What is also intriguing in this petition is the elaborate cross-petition from the respondent who leveled various allegations against the petitioner on assault, adultery, irresponsibility, lack of affection and breach of duty as a homemaker. The Law does not envisage cruelty of any of the spouses at the instance of each other. A husband is not permitted to treat his wife with cruelty and vice versa.

In this case the respondent in answer to the petition took a swipe against the petitioner that he also suffered physical assault, infidelity, denial of conjugal rights and did not performing her duties a mother and wife. The question I asked myself, is as in **Bagnali J in Ash v Ash 1972 Family 135** in the following words:

“The general question may be, can this petitioner with his or her character and personality, with his or her faults and other attributes good and bad and having regard to his or her behaving during the marriage reasonably be expected to live with the respondent.”

The test manifested in both the petitioner’s claims is that the marriage began to deteriorate in 2014 and she admits of having not been romantically involved with the respondent. The petitioner giving a brief history she has been unhappy due to most of the occurrences of the circumstances of habitual assault for leveling of falsehood conduct, malicious and scandalous actions which are intended by the respondent to destroy the value of their marriage. It follows therefore, that the circumstances of this petition are such that the only feasible course open to the parties is to have them stay apart as plainly inferred from the relevant evidence presented before this court.

This is a marriage of couples who appeared to me to be educated, working for gain at different public institutions. On the other hand, they were not able to resolve any of the conflicts amicably to save their marriage from breaking down. The behavior of both of them is illustrative of spouses who can no longer tolerate each other.

The frost relationship that exist was played out in the course of the trial in this proceedings. The court had to contend with accusations and counter accusations with each one of them taking a hardline position and blame game for the predicament they find themselves. It is generally degrading when a husband treats his wife like a chattel to the extend the once flourishing love and the sanctity of the marriage fellowship gets drained that the humanity in them no longer exists. In the petitioner’s own words, the latter years the marriage has broken down irretrievably and there is now no hope of reconciliation.

The respondent in his cross-petition has been unpleasant about the petitioner towards the petitioner’s behavior towards himself and the children. The facts that the marriage between the petitioner and the respondent are clearly broken down cannot be attributed to one spouse alone. This court has a regard to the whole story of the matrimonial relationship since the marriage came into existence. I find it necessary to consider the passage from Rayden on divorce 12th Edition Volume 1, p 219 where the learned author made several important observations as may be noted herein.

“In all these cases the totality of the evidence of the matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person’s point of view, after a consideration of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called upon to endure it.”

My conclusion is that in the context of this petition and cross-petition and having heard both parties give evidence, I am satisfied the marriage has irretrievably broken down in this court has nothing left to salvage. The petitioner and respondent no longer enjoy romantic love, submissiveness, respect and experiential conjugal rights on account of cruelty. Given the animosity that has developed the petitioner and the respondent coupled with the fact that the petitioner moved out of the matrimonial home and stays apart is in itself a strong indicator that the marriage chain has broken down. To end impunity against each other this marriage ought to be dissolved. The above characteristics are held to constitute elements of cruelty as a ground for divorce.

In my judgement the acts of cruelty explained by the petitioner and respondent to this court renders me to find that the marriage has irretrievably broken down. It is clear that none of them can be compelled to live under the same roof that could be successfully tagged as a matrimonial home.

Perhaps the other key ground which was ventilated in this petition is with regard to desertion. The Supreme Court of India said this in relation to desertion **Bipinchandra Jaisinghbai Shah v Prabhavati [AIR 1957 SC 176]** while adopting the principles from Halsbury’s Laws of England defined the concept of desertion as a ground of divorce in the following words: -

“What is desertion? “Rayden on Divorce” which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-

“Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party.”

The legal position has been admirably summarized in paras 453 and 454 at pp. 241 to 243 of Halsbury’s Law of England (3rd Edn), Vol. 12, in the following words:-

“In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged

attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence."

In terms of Section 65 it specifies that the desertion of another party is the ground for divorce. The rationale is that family relationship is built on the need to stay together on the basis of faith, provides necessities of life, bring up a family, companionship, social and sustainability of human relationship, love, customs and culture.

For desertion as a ground for divorce, it must be that the husband or wife have been living separately for more than 3 years with no intention to live together. However, under the Kenyan Law, if spouses are still living together under the same roof even if they do not enjoy the duties, or obligations and love nor conjugal rights at all it is not normally considered desertion.

In the instant case, the parties attested under oath, they have lived apart by reason of incompatibility for a continuous period of at least 5 years prior to the determination of this petition. The petitioner in her testimony was categorical that there is no reasonable prospect that they will be reconciled to restore their normal marriage relationship. On the basis of the record, the respondent maintained that a mediation be attempted by a neutral facilitate to prevent nullification of the marriage. The gravamen of the claim by the respondent is that the irretrievable breakdown assertion by the petitioner is unfortunate narrative held by the petitioner so that this court can sanction the divorce. In the midst of all this the act of the petitioner moving out of the matrimonial home since 2014 is a relevant factor in this divorce has not been adequately controverted by the respondent.

It is a general presumption in law under Section 119 the Evidence Act that this court takes cognizance that by the petitioner leaving the matrimonial home is not necessarily a deserter. The fact and evidence proved that the home had been broken down by the respondent driving her to another place altogether. It seems to me the intention of the respondent was to bring the cohabitation with the petitioner to an end.

As the petitioner as shown since deserting the matrimonial home there was sufficient evidence that the respondent has even locked her out of any right of access to visit her children currently in his custody. The respondent on his part, took the view albeit wrongly so that the petitioner remains out of touch with her children.

To speak of desertion in any event, we must first establish whether since 2014 there is a marriage between this couple. If the definition in the case of **Bipinchandra Jaisinghbai Shah (supra)** and the Court of Appeal decision in **Kamweru v Kamweru [2000] eKLR**, is anything to go by. The facts relied upon by the petitioner and the respondent fall within the context of this principles by the Court of Appeal:

"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."

"that there is no comprehensive definition of cruelty. Each petition founded 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.

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.

...It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds of divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriageWhat 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

It is evident from the evidence broadly speaking the petitioner deserted the matrimonial home way back in 2014 on grounds that she was

driven away by the acts of cruelty from the respondent whose intention was to terminate the marriage without her consent. This view by the petitioner, can be affirmed when weighted with the respondent conduct who has not made any efforts to influence reconciliation to end the long standing physical separation with the petitioner.

The court observes that for the petitioner to move out from the matrimonial home the marital relationship which existed in light of the facts and circumstances, she had reasonable grounds not to continue to tolerate the serious acts of cruelty from the respondent. The divergent view taken by the respondent may not inspire confidence that the decision by the petitioner to desert the matrimonial home was not without a just cause or excuse.

As recounted from the petitioner's testimony the act of assault, insults, ill-will and degrading treatment had made co-habitation with the respondent intolerable.

It follows therefore, that the petitioner has established her accusations against the respondent on a balance of probability to sustain her petition for dissolution of the marriage.

A perusal of the respondent evidence shows that he has no spousal relationship with the petitioner save for the children but even with that they no longer share a common heritage.

Further in his examination in chief and cross-examination, the respondent admitted that he has even denied the petitioner physical access and custody of the children.

It appears to me though the respondent evidence seems to suggest that there is room for mediation for marital establishment his demeanor and credibility paint a different picture altogether.

The degree of disharmony which continue to exist between the petitioner and the respondent since her forced desertion to me appears to be irreversible.

I am compelled to hold as such that as the petitioner and respondent drift away they are also locked in a long bitter contest over their children. As it now stands the petitioner continues to be denied access to the children who at the moment are in custody of the respondent. This action emphatically denying the petitioner access to her children constitute emotional and mental cruelty.

In light of what transpired above one of the significant fruits of this marriage was a blessing of three issues who are entitled to the rights which flow from such a marriage. Custody and control of the minor's best interest and to safeguard their welfare shall be the responsibility of both parents which also attracts legal consequences. It is difficult to fathom that the respondent in the context of their differences with the petitioner can terminate her parental rights without any legal justification. Interestingly in this case the respondent shot himself in the foot by lying in Court and showing himself as unreliable and unstable person by asserting that he is the only fit and proper person to look after their children.

In the result the court is of the opinion that in this particular case it is important that they should have equal say in the raising of their children even after the dissolution of the marriage. What I heard in this petition is likely to put at risk the children both physically or emotionally in terms of this issue I direct that the pending children's case before the Chief Magistrates Court be prioritized and determined expeditiously.

On the main petition, the position I have arrived at as pointed out drives me to one logical conclusion and the following orders shall abide the determination.

It is therefore, not open as suggested by the respondent that this petition be referred to a conciliator or mediator to settle any other issues that which formed the basis of their conflict.

The foregoing observations before me and the evidence only goes to establish that there is an irretrievable breakdown of the marriage on grounds of cruelty and desertion. There is no legitimate purpose that will be served by the retention of the marital covenant which is better untied to set each spouse free and free indeed.

Presumably, on 9th December, 2006, withheld] Church of Christ by Holy Spirt the petitioner and respondent must have recited the time spiel vow at the altar which I do hereby refresh their memory which must have gone like this: ***"to have and to hold, from this day forward, for better, for worse, for richer, for poorer, for sickness, in health, until death do us part."*** ***"what God has joined together let no man put asunder."***

All that previously decreed on the altar, cannot wait for death to set you apart. As the marriage has broken down irretrievably let there be a divorce and may you not find fault or stigma with one another. As the ***'maxim' goes" trust is like virginity you lose it never comes back."***

In the upshot I am satisfied the marriage celebrated on 9th December 2006 between the petitioner and the respondent ought to be dissolved. The ***Decree Nisi*** be granted to both the petitioner and respondent and a ***Decree Absolute*** within 60 days from today's date. For the purpose of this petition, I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

The petitioner