



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

DIVORCE CAUSE NO. 1 OF 2017

MK.....PETITIONER

VERSUS

GNK.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Marende Necheza Advocates for the Petitioner

Tonia Mwanja Advocates for the Respondent

JUDGMENT

This is a petition for divorce by **MK** seeking dissolution of his marriage with the respondent **GNK**. According to the petition, the petitioner on or about April 1999 he celebrated a Mijikenda Customary marriage with the respondent **GNK**. Following the fulfilment of the customary rituals and rites both of them cohabited together as husband and wife at Kilifi county.

The petitioner's case

The petitioner on oath testified that the marriage entered into with the respondent started experiencing relationship problems. The petitioner told the court that of elements of cruelty from the respondent which constituted infidelity, acts of insult, in the presence of their children and threats of immediate violence all made him to move out of the matrimonial home.

The petitioner also told the court that the respondent was advanced Kshs.320,000/= secured from Imarika Sacco which was misappropriated without due regard to the children's education. The petitioner father told the court that the marriage has irretrievably broken down for reason that the respondent by blatantly ignores him without any communication or emotional support. That by conduct of the respondent on the issue of cruelty and adultery, the petitioner moved out of the matrimonial home an act which there was no connivance on his part.

The petitioner set of evidence presented on oath shows that the respondent no longer cooks or provides conjugal rights as they live a part for some time now. This was supported by the petitioner's testimony that although they stay in the same house the respondent without any justification severed any communication about the welfare and best interest of the marriage.

The respondent (DW1) adopted her affidavit which constitutes her rejoinder to the petition. The respondent disputed allegations of cruelty and adultery levelled against her by the petitioner. regarding her relationship with the petitioner, the respondent testified that all along she has struggled to maintain the children without any assistance from the petitioner.

According to the respondent, it was the petitioner who deserted the matrimonial home without any excuse or acts of cruelty alleged by the petitioner. The respondent reiterated that she is willing to reconcile with the petitioner for them to have a fresh start.

The applicable Law

Section 98 (1) of the Marriage Act 2014 provides that:

“A subsisting marriage which under any written or customary Law hitherto in force constituted a valid marriage immediately before coming to force of this Act is valid for purposes of this Act.”

Section 45 – recognizes marriage celebrated in accordance with the customs of the communities of both parties to a marriage.

The dissolution of a customary marriage is provided for under Section 69 (1) of the Marriage Act. The Act recognizes that marriage under Customary Law like any other system of marriage in Kenya can be dissolved on any of the following grounds:

Ø **Adultery**

Ø **Cruelty**

Ø **Desertion**

Ø **exceptional depravity**

Ø **Irremovable freedom of the marriage or**

Ø **Any valid ground under Customary Law of the petitioner**

In considering the dissolution of a marriage each of the grounds stated herein are distinct and the petitioner ought to prove by way of evidence on a balance of probabilities.

In this petition from the affidavits and oral evidence on oath by both the petitioner and respondent the following facts are undisputed:

- 1. The marriage in contention was celebrated under Miji Kenda Customary Law in the month of April 1999.**
- 2. That the petitioner and respondent have cohabited together as husband and wife at Kilifi township, matrimonial house.**
- 3. During the subsistence of the marriage both were blessed with six children.**
- 4. That the petitioner and the respondent no longer live together in the matrimonial home for a period spanning over 5 years.**

The second aspect of this case is that the petitioner and respondent have not taken any positive steps to reconcile and restore the marriage relationship to the original intention of cohabiting together till death set them apart.

The result of the evidence from the petitioner illustrates that he can no longer forbear the acts of cruelty and infidelity. As to what constitutes cruelty in Law as a ground for dissolution of marriage is a matter of great jurisprudential discussion. The case of **Malink v Malink [1975 – 77] 8 ALR 141, Skinner C.J.** stated as follows:

“In determining what constitutes cruelty regard must be had to the circumstances of each particular case.”

The generally accepted legal definition of cruelty is the proposition in a well known *case of Russell v Russell [1896] 322 AC* where the court held:

“There must be danger to life, homes or health bodily or mental or a reasonable apprehension of it to constitute legal cruelty. It is not sufficient for a petitioner to establish trying and tiresome bad conduct on the part of the other spouse, it is necessary to show that the conduct had caused danger to life limb, or health or has given rise to reasonable apprehension of such danger.”

Whether the conduct of the petitioner and respondent qualifies to be that of cruelty is a matter of evidence dependent on the facts of each case.

The issue was expressly stated in the case of **W.M.M. v B.M.L. [2012] eKLR**, where the court held:

“Courts have avoided formulation of an exhaustive definition of cruelty, acts of cruelty, like acts of negligence in the Law of Torts are said to be infinitely variable.”

According to the petitioner, the respondent engages him on unnecessary insults in the presence of their children. That during the duration of the marriage he has been evidentially formulated as the respondent ceased to have any communication on their relationship as husband and wife. That in the view of the verbal insults which were unsolicited he fears for his life and health.

The petitioner also told the court that the mental anxiety and anguish necessitated him to desert the matrimonial home to seek refuge in a nearby church. In essence, the petitioner and respondent over 5 years have not had restitution of conjugal rights and there is no evidence of that happening any time soon.

The respondent on the other hand has remained within the matrimonial home without companionship of the petitioner. The petitioner and the respondent no longer enjoy equal rights during the marriage union so entrenched in our constitution.

Now in the instant petition though both petitioner and respondent seemed to tone down the level of the breakdown of the marriage, the nature of accusation and implied conduct clearly demonstrate a marriage broken down irretrievably.

As I observed and in considering the broad issues of the petition, the performance of their obligations to the marriage manifest lack of emotional, social-economic support for each other. Strictly speaking, though the respondent seems to live in denial their marriage has hit the rocks. The situation recounted by the petitioner and not successful rebutted by the respondent in innumerable ways fits the dicta in the Namibian persuasive authority of **Kagwe v Kagwe [1384] 2013 NAHRED** where the court opined that:

“Malicious desertion takes place when a spouse, without just cause, either physically leaves or remains away from the matrimonial home intending not to return to it, or otherwise so comports himself as to evince an intention to bring the marriage relationship to an end. Constructive desertion is a species of malicious desertion, it takes place when the defendant with intent to put an end to the marriage does not leave the matrimonial home himself but is guilty of conduct which either compels the other spouse to do so or renders it clear that the marriage relationship can no longer continue”

It is not in doubt this principle underscores the contextual position of the marriage relationship between the petitioner and the respondent. In effect the petitioner has no intention of reconciling with the respondent so that they can bury the hatchet to live together as husband and wife. There is no spousal maintenance from the petitioner and the respondent has withheld conjugal rights among other acts of cruelty forcing the petitioner out of the matrimonial home. If one or more of these questions are not answered in the affirmative is there a marriage union worthy to be sustained by this court? How will one categorize a marriage without intimate sexual intercourse? I do agree with the persuasive authority in the case of **Bonhomme v Bonhomme [1990] 13 MLR, Makuta C.J.** of Malawi stated:

“I need not of course overemphasize that sexual intercourse is a very strong natural instinct and it reduces the marriage to a mere shadow if it is denied unless there is justification such as for example, illness or incapacity.”

In **Sheldon v Sheldon [1966] 2 WLR 993** It was held that:

“conduct of a young man, having no physical or psychological infirmity, and after years of normal marital relations, in persistently refusing his young wife sexual intercourse over along period without explanation or excuse, knowing that it is causing injury to her health, constituted cruelty in law such that the wife ought not to be called to endure any longer.”

From the evidence, I am duty bound to point out that even if the respondent is for reconciliation with the petitioner, the facts on the ground tell a difference story.

The court takes judicial notice pursuant to Section 119 of the Evidence Act which reads as follows:

“The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

Having re-evaluated the evidence, the common grounds of both malicious and constructive desertion, cruelty, denial and withholding of conjugal rights stand out as matters of evidence in this petition.

The concept of marital privileges only found in a marriage set up are no longer available to the petitioner. There is no evidence that the respondent has made any moves towards creating sexual contact with the petitioner.

Underlying this, to what extent can there be justification to assume that there would be common ground to reconcile the petitioner and respondent to ascribe to the marriage vows.

It is pertinent to observe that the conceptual psychological and physical elements of cruelty as clearly defined in law has been proved on a balance of probabilities against the respondent on the same point acts of desertion for a long period of time to live away from the matrimonial home in an irreconcilable ground from the evidence adduced by the respondent.

This court is cognizant of the words of **Bundesgerichtshof sixth civil senate on 22.2.1973 J2** making reference to a marriage institution said:

“Admittedly, marriage is a human institution which is regulated by law and protected by the constitution and which in turn creates genuine legal duties its essence however consists in the readiness found in morals, of the parties to the marriage to create and maintain it.”

These words carry emphasis that in the marriage between the petitioner and respondent each must take responsibility to sustain or destroy the union, it survives or disintegrates in their hands. The court as a forum regrettably has no device to salvage a marriage irretrievably broken down. Here is a case the respondent urges this court to breathe life to an empty legal shell destroyed in all fairness by the very people charged with both the moral and legal duty to maintain it.

I am satisfied the petitioner has satisfied the elements for dissolution of their marriage on a balance of probabilities entitle him to a decree Nisi. Thereafter, a decree absolute to issue within sixty (60) days from today's Judgment. Neither party is condemned to pay costs for the litigation.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of

1. The petitioner
2. Ms. Mwanja for the respondent