



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
DIVORCE PETITION NUMBER 16 OF 2014

J K O.....PETITIONER

VERSUS

I O O.....RESPONDENT

JUDGMENT

1. In the divorce petition dated 10th October 2014 the Petitioner seeks for the dissolution of her marriage to the Respondent on grounds of cruelty. She sets out the particulars of cruelty in paragraph 6 of the Petition as follows:

- a) **That the Respondent had on several occasions threatened to injure or harm her without any good cause**
- b) **That the respondent severally assaulted her without any good cause,**
- c) **That the respondent has been nagging, hurling insults, abusing, ridiculing the petitioner, mistreating her and he has no respect for her as his wife,**
- d) **That the respondent does not render conjugal rights to the petitioner,**
- e) **That the respondent failed to provide food, clothes and maintenance to the Petitioner and,**
- f) **That the respondent chased the petitioner out of the matrimonial home without any good reason.**

2. The respondent did not file any response to the petition and as a consequence thereof, interlocutory judgment was entered against him on 22nd December, 2014 after which the petition was listed for formal proof. At the hearing of the petition, the Petitioner testified that she got married to the Respondent through a church wedding conducted on 25th May 2009. She produced a copy of their marriage certificate as P exhibit 1. She added that there were no issues of the said marriage and that they separated on 5th January, 2010 due to the respondent's nagging and abusive behavior. She further stated that the respondent did not provide food or clothing for her and that to add insult to injury, the respondent denied her conjugal rights before finally chasing her away from the matrimonial home. On being chased away from the matrimonial home, the petitioner stated that she went back to her parents' home and that the respondent had never gone to look for her or even see her parents. She thus contended that their marriage had irretrievably broken down and was ripe for a dissolution. I have considered the petition as well as the uncontroverted testimony of the Petitioner.

3. In view of the fact that the respondent did not file any response to the petition, I find that it remains unchallenged. It is clear from the marriage certificate produced as an exhibit by the petitioner that the said marriage was solemnized at [particulars withheld] Church at Nakuru District on 20th May 2009.

4. The grounds for dissolution of marriage are stipulated in **Section 8(1) of the Matrimonial Causes Act** thus:-

“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 the care and treated for a period of at least five years immediately preceding the presentation of the petition and by the wife on the ground that that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.”

5. The petitioner has set out the particulars of cruelty as stated above and the question that begs for an answer in the instant case is whether the Respondent’s conduct since the consummation of the said marriage amounts to cruelty? In **A.M.A v G.S.B HCDC No. 134 of 2010, Kariuki J.** held: -

“It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioners health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental or so as to give rise to a reasonable apprehension of such danger (see Russell v Russell [1895] P. 315,322. See also D. Tolstoy on The Law and Practice of Divorce, Sixth Edn. It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct o amount to cruelty. (See Gollins vs Gollins [1964] AC 644, Williams v Williams [1964] AC 698, 760. Tolstoy, 6thEdn states that the question in all cases is whether the Respondent was himself or herself a cruel person (see Gollins v. Gollins (supra) at page 60 and Williams v Williams (supra) at pg 721. It is however worth noting that intention is not totally irrelevant conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference(see Jamieson v Jamieson[1952] A.C 525,535. Moreover, a deliberate intention to hurt may turn into ‘cruelty conduct’ which without such intention, would not constitute cruelty.”

6. In the instant case, I find that assaulting the petitioner without any good cause, nagging, hurling insults, abusing, ridiculing the petitioner, denying her conjugal rights, failure to provide food, clothes and maintenance to the Petitioner and chasing the petitioner out of the matrimonial home without any good reason amounts to cruelty.

7. I also find that cruelty has been proved within the parameters considered in the 1977 case of **N vs. N (2008) 1 KLR (G&F)** wherein Madan J. (as he then was) held, *inter alia*, that: -

“whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard.”

8. After considering all the above facts, this court is of the view that the petitioner has proved, on a balance of probabilities that the respondent treated with cruelty during the currency of their marriage by

not only physically assaulting her but also subjecting her to psychological torture through his nagging and abusive conduct. Consequently, I hereby pronounce a decree of divorce and order that the marriage solemnized on 20th May 2009 at Nakuru District between J K O and I O O be and is here by dissolved. *Decree nisi* shall issue forthwith, the same to be made absolute after expiry of a period of 30 (thirty) days from the date hereof. Each party shall bear their own costs of this petition.

Dated, signed and delivered in open court this 7th day of March, 2018

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Omwega for the Petitioner
- Omwoyo: Court Clerk