



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

DIVORCE CAUSE NO. 52 OF 2010

JNM.....PETITIONER

VERSUS

GGB.....RESPONDENT

JUDGMENT

1. The Petitioner JNM has filed this Petition dated 13.11.10 seeking the dissolution of her marriage to the Respondent GGB. **The marriage was solemnized at the ACK Church at Mahoo, in the then Taita Taveta District on 29.4.06.** Following the marriage, the couple cohabited in Tononoka and then Bamburi. The marriage is blessed with 1 child born on 20.10.06.

2. The grounds for divorce as stated in the Petition are cruelty, desertion and adultery, the particulars of which are set out in paragraph 7 of the Petition. The Petitioner claims that the Respondent was cruel to her in that he deserted the matrimonial home for over two years and did not provide shelter, food, clothing, medical care or education for their child. The Respondent persistently subjected the Petitioner to verbal abuse and even threatened to visit her place of work and cause chaos. The Petitioner avers that the Respondent once knowingly infected her with a venereal disease. She also accuses the Respondent of kidnapping their child and took away her wedding and engagement rings to start a new life away from the Petitioner. As a result of the Respondent's conduct, the Petitioner has suffered mental and psychological agony and anguish. She prayed for the dissolution of the marriage. She also prayed for custody and maintenance of the child of the marriage.

3. The Respondent in his Answer to Petition dated 12.1.11 which he amended on 1.2.11, denies all the allegations of cruelty, adultery and desertion. He avers that he supports his family and even funded the Petitioner's diploma course and is currently educating the child of the marriage.

4. In his Cross Petition, the Respondent prays for dissolution of the marriage on grounds of cruelty and adultery. He accuses the Petitioner of cruelty. In 2008, when he was transferred from Bamburi to Bomet Police Station, the Petitioner unilaterally left the matrimonial home and moved in with her parents. Whenever the Respondent came to Mombasa to visit her, he was forced to stay in a "lodging" where the Petitioner often refused to join him, thus denying him conjugal rights. That the Petitioner ran down a boutique that the Respondent's mother had opened for them and let the rent of the premises thereof fall into arrears. That in December 2008 the Petitioner declined to join the Respondent for Christmas at his rural home stating that she was no longer interested in him. The Respondent further avers that in October 2009 the Petitioner left the matrimonial home for Nairobi where she now lives, abandoning the child of the marriage who was in bad health prompting the Respondent's mother to take custody of her.

5. The Respondent further accuses the Petitioner of adultery with one G D. That in 2008 his mother saw the Petitioner with the said G D at Sun and [Particulars Withheld] where they had been spending the night together. That in October 2008, the Respondent paid the Petitioner a surprise visit but found she was not home. He found pictures of the Petitioner and the said G D. At about 7 pm, the Petitioner returned home in the company of the said G D. That their child also told the Respondent that the said G D habitually spends the night at the Petitioner's home. The Respondent prayed for dissolution of the marriage, custody of the child as well as maintenance for himself and the child.

6. The Petitioner in her testimony gave vent to the allegations in the Petition. She stated that when the Respondent moved to [Particulars Withheld] in 2008, he stopped paying rent for their house and maintaining the child. She relied on proceedings of a small shop where she sold used clothes. She visited the Respondent in [Particulars Withheld] in 2008 for 4 days and upon her return she discovered she had contracted a venereal disease. When she confronted the Respondent, he admitted to having been unfaithful. The Petitioner stated that because the Respondent neglected her and their child, she moved to her parents' home who helped her with the upkeep of the child including her education and paying medical bills. She further stated that the Respondent took the child from her and refused to return her. That all efforts at reconciliation had failed.

7. On cross examination, the Petitioner stated that she was pregnant but that the Respondent was not responsible. That she was also pregnant in 2012 but she lost the baby. She denied having an adulterous relationship with G D. She also denied living with one M but stated that she wished to marry him.

8. The Petitioner closed her case on 28.7.15. Shortly thereafter Muriithi, J. who was seized of the matter was transferred. On 1.10.15 when the matter came up before me, I gave directions that proceedings be typed so that the matter would proceed from the point at which it had reached. On 21.7.16 when the matter came up for hearing, Counsel for the Respondent was not ready to proceed as the Respondent was not in Court and she asked for a last chance. Given that this is an old matter having been filed in 2010 and had been heard before 4 judges, I granted a last adjournment and by consent, the matter was fixed for hearing of the Respondent's case on 27.10.16. On 27.10.16 however, neither the Respondent nor his counsel attended Court. Consequently the Respondent's case was closed.

9. I have considered the Petition and the uncontroverted testimony of the Petitioner. As stated earlier, the Respondent did not make an appearance on the hearing date to answer to the Petition or to prosecute his Cross Petition. It was therefore not possible to prove the veracity of the allegations contained in his Answer to Petition. Further, the Cross Petition is hereby dismissed for want of prosecution. The Court did on 20.12.12 direct that no orders would be made on the issue of custody of the child and that parties were at liberty to move the Children's Court.

10. The marriage herein is a Christian marriage having been solemnised at the **ACK Church** at [Particulars Withheld], **in the then Taita Taveta District**. The Marriage Act, 2014 at Section 65 provides for the grounds upon which a Christian marriage may be dissolved. These include:

(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;

(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;

the irretrievable breakdown of the marriage”

11. The Petitioner accuses the Respondent of cruelty and adultery. On cruelty, Marriage Act provides that one of the grounds upon which a Christian marriage may be dissolved of is cruelty, whether mental or

physical, inflicted by the other party on the Petitioner or on the children, if any, of the marriage. The Petitioner testified that the Respondent has been cruel both to her and to their child. He had failed to support the child of the marriage. The Respondent persistently subjected the Petitioner to verbal abuse and even threatened her to visit her place of work and cause chaos. The Petitioner avers that the Respondent once knowingly infected her with a venereal disease. She also accuses the Respondent of kidnapping their child and took away her wedding and engagement rings to start a new life away from the Petitioner. This evidence was not controverted. Further the record shows that there was an order of this Court for the Respondent to produce the child. This conduct of the Respondent no doubt caused the Petitioner mental, emotional and psychological anguish. I am satisfied that the ground of cruelty has been proved.

12. On adultery, the Petitioner claims that the Respondent infected her with a venereal disease and that when she confronted him he admitted that he had committed adultery. I must hasten to add that the Petitioner herself was pregnant at the time she testified before court. She admitted that the Respondent was not responsible and further that she had been pregnant before but lost the baby. She further admits that she wished to marry one M. The conduct of the Petitioner is just as reprehensible as that which she accuses the Respondent of. Consequently, I find that there is no hope for this marriage. It appears that both parties have been guilty of adultery. They have moved on and are no longer interested in the marriage.

13. Accordingly, I pronounce a decree of divorce and order that the marriage solemnised at **ACK Church at [Particulars Withheld], in the then Taita Taveta District on 29.4.06** be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 1 month. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th January 2017

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M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondent**

.....**Court Assistant**