



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI FAMILY DIVISION**

**DIVORCE CAUSE NO. 108 OF 2015**

**M J M W.....PETITIONER**

**VERSUS**

**J K N .....RESPONDENT**

**JUDGMENT**

1. The Petitioner has filed a Petition dated 28<sup>th</sup> July, 2015 seeking for dissolution of his marriage to the respondent citing grounds of cruelty, constructive desertion and Adultery. The couple's marriage was solemnized on 22<sup>nd</sup> June, 1996 at [Particulars withheld] Church in Nairobi under the Marriage Act Cap 150 laws of Kenya and marriage certificate Serial number; [Particulars withheld] issued to that effect.

2. After executing their marriage vows, the couple who are Kenyan Citizens and designers by profession, settled down and cohabited at various places Inter alia, Umoja Inner core, [Particulars withheld] Estate, Buru Buru Estate and Nyayo Embakasi Estate.

3. After consummating their marriage, it yielded fruit, hence blessed with two issues namely M K M born 2<sup>nd</sup> June, 1994 and A N M born on 27<sup>th</sup> January, 2005.

4. According to the Petitioner, during the subsistence of their marriage, the respondent decided to respect their matrimonial without any reasonable cause. He laid particulars of desertion as hereunder

(a) That since 2005, the respondent had been cold and unloving to the Petitioner.

(b) That since 2011, the respondent had on numerous occasions informed the Petitioner that she wanted to live apart without giving the Petitioner sufficient reasons as to why she wanted them to part.

(c) That in March, 2012, the respondent deserted the matrimonial home taking along everything from the house to unknown destination.

(d) That due to desertion, no conjugal rights had taken place.

(e) That the Parties have been leading separate lives and the marriage behavior then is consequently at the end.

(f) That the said constructive desertion has caused the petitioner unreasonable pain and

agony and further resulted to the collapse of their Family business.

(g) That the said desertion has affected the Petitioner's quality of life and access to his children.

5. The second ground cited for dissolution of the marriage is cruelty which he categorized in the petition under paragraph 8 which In summary pointed out that, the respondent had developed an unloving and an caring attitude towards him, demanding and insisting to live separately despite being married, disclosure that she was engaging in sexual relationship with other partners, her parents intrusion into their matrimonial home and taking away their house hold goods. The Petitioner has stopped and hampered any form of communication thus making it impossible to reconcile, and that she had denied him his conjugal rights.

The 3<sup>rd</sup> ground alleged by the Petitioner is that of adultery in which Petitioner claimed that the respondent had openly disclosed to him that she was having love affairs with other partners.

6. It is the Petitioner's contention that the respondents conduct and behavior as stated above has made their reconciliation impossible hence a broken marriage incapable of restoration.

7. The Petitioner candidly disclosed and indeed made confession in his desertion statement filed on 29<sup>th</sup> July 2015 that he has since moved on with life by getting and engaging another partner with whom a child has been born. He therefore persuaded the Court to let him free and dissolve the marriage as prayed with a rider that there was no connivance nor collusion.

8. Upon being served by the Petition the respondent entered appearance on 28-8-2015 and later filed an Answer to Petition and Cross – Petition dated 18<sup>th</sup> September 2015 and filed in court on 21-9-2015.

9. In her response, the respondent denied having been cold and unloving to the Petitioner. She denied being responsible of their separation and instead accused the Petitioner as having made consortium quite difficult due to his ungovernable temper, extra matrimonial affair, emotional and mental cruelty.

10. She averred that, she was forced to leave their matrimonial home with their daughter on 13-3-2012 by the Petitioner who also destroyed household items.

11. Further, the respondent denied that she deprived her husband his conjugal rights citing their children as proof and sufficient evidence. She instead accused the Petitioner of infidelity hence the fear of contracting a disease thus culminating to withholding of said rights.

12. Respondent however admitted that they have not been living together but exonerated herself from any blame leading or occasioning their separation.

13. The allegation of cruelty and Adultery was also leveled against the Petitioner whom the respondent alleged was having extra marital love affairs with a lady known as D with whom he is staying as husband and wife.

14. With regard to particulars of cruelty as stated in paragraph 8 of the Petition/ referred above, she vehemently denied every allegation contained therein. She categorically denied engaging in any extra marital affair with any woman.

15. In her Cross-petition, the respondent also accused the petitioner of cruelty and adultery. She alleged that the petitioner was an absentee parent, abandoning the respondent who bore the full responsibility of catering for the psychological, emotional and physical needs of their Children, staying away from home till wee hours in the morning, blatant refusal to initiate reconciliation, engaging in Adulterous activities with a lady known as D thus causing her great embarrassment

and to the children and lastly refusal by the Petitioner by not disclosing material and vital information with regard to their joint company business thus exposing her to the risk of creditors. She also prayed for the dismissal of the petition and dissolution of their marriage.

16. In reply to the Cross- Petition the petitioner filed an answer in response thereto on the 1<sup>st</sup> December 2015 denying every allegation therein and urged the Court to dismiss the same with costs.

Prior to the substantive hearing the Petitioner filed a notice of motion dated 1<sup>st</sup> December 2015 seeking for the registrar's certificate certifying the suit as properly filed and an order and that the same be fixed for hearing as a defended cause. The Deputy Registrar granted the said prayers on 4-2-2015.

17. During the hearing on 23-3-2017, the Petitioner the only witness who testified in this case, basically reiterated and adapted his averments, and prayers contained in the petition. The respondent did not tender any evidence - Counsels did not file any submissions hence left it for the court to decide.

18. I have considered the pleadings herein and evidence by the Petitioner.

There is no dispute that the couple herein got married under the Marriage Act Cap 156 laws of Kenya and that their marriage was blessed with two Living issues.

Both Parties have agreed that they did not collude nor connive in instituting the suit herein. Equally, save for desertion claimed by the petitioner both parties have cited similar grounds for divorce based on cruelty and adultery with allegations and counter allegations against each other.

19. The law governing divorce relevant to this suit which was filed on 29-7-2015, is the Marriage Act 2014. Section 66 provides that;

***Sub Section (i) " A party to a marriage celebrated under Part IV may not petition the Court for the separation of the marriage unless three years have lapsed since the celebration of the marriage."***

***Sub Section (2) " A Party to a marriage celebrated under Part IV may only petition the court for separation of the parties or dissolution of the marriage on the following grounds.***

- (a) Adultery by the other spouse
- (b) Cruelty by the other spouse
- (c) Exceptional depravity by the other spouse.
- (d) Desertion by the other spouse for at least three years or
- (e) The irretrievable breakdown of the marriage.

20. The first ground raised by the Petition is counter desertion. He averred that sometime the year, 2011 the respondent expressed her desire for the two to live separately. She however actualized the intention by physically moving out of the matrimonial home for unknown destination. That the net effort of their living separately caused the family business a great deal.

21. The respondent denied the allegation instead shifted the blame onto the Petitioner for forcefully kicking her out of their home and consequently destroyed house hold goods. No proof

was tendered to prove forceful eviction and damaged to property.

Both parties are in agreement that the respondent left their Matrimonial home the year 2012 and has since been staying as such. It is therefore an admission that her physical presence at their matrimonial home has been missing since 2012, hence vindicating the petitioners assertion.

On amount of that admission by both parties, I do hold that 1<sup>st</sup> ground has been proved to the required degree.

22. The second ground with cruelty. Both parties accused each other. The word cruelty is defined in the Oxford Advanced learners Dictionary 6<sup>th</sup> Edition as:

***“A behavior that causes suffering or pain to others, especially deliberately”***

Justice Chesoni categorized cruelty into four elements when presiding over the case of: **DM - vs- JM ( 2008) IKLR 5**; The **Hon. Judge stated as follows**

“ To establish cruelty, one, the complainant must show to the satisfaction of the Court that:

(i) Misconduct of a grave insight and weighty in nature.

(ii) Where injury to the complainant’s health and reasonable apprehension of such injury.

(iii) That the injury was caused by misconduct on the part of the respondent and

(iv) That on the whole the evidence of the conduct amounted to cruelty in the ordinary service.

23. In this particular case each party is alleging mistreatment, lack of care and love, harassment and denial of conjugal rights. Save for the testimonial of the Petitioner none of those allegations were proved as it is word of one party against the other without proof or corroboration. To that extent that ground fails.

24. Regarding Adultery, the petitioner said the respondent had marital affairs with other partners but without proof. He did not enjoin the alleged partner. However, on the other hand the respondent alleged that the Petitioner had married another woman known as D with whom they are staying as husband and wife. The Petitioner did not deny that fact but went ahead to justify the same arguing that he could not stay alone since 2012 when the petitioner left the matrimonial home.

25. This is also an admission and indeed a confession that he engaged and continues to engage into an Adulterous relationship before dissolution of marriage. What is the standard of proof required in Adultery? The late Justice Chesoni had this to say in the case above quoted regarding Adultery.

***“..... that the evidence required to establish Adultery must be more than the mere suspicion and opportunity: evidence of a guilty Inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish Adultery.”***

26. The Onus of prove Adultery purely lies on the party alleging it. In the case of: **Alfred Ndogi Mata –vs- Hellen Siemeko Adede, ( 2005) eKLR** the court held that:

***“ Legal disputes are determined on the basis of facts proved by evidence and law applied to the facts.”***

Similar sentiments were echoed in the case of: **Simpson -vs- Simpson ( 1950) IAK ER 40.**

Although Adultery is a matrimonial offence, it may not necessarily require the standard of proof beyond reasonable doubt.

Lord Denning while faced with similar challenge on what is the standard of proof of Adultery, held that Divorce like any other Civil allegation made in Civil case, benefit be proved by ordinary standard of balance or preponderance of probability.”

**(See Blyth vs- Blyth (1996) HC 643.**

In a nut shell, the Petitioner has not proved the element of adultery against the respondent but the respondent proved the same against the respondent.

27. As to whether the couple’s marriage has broken down irretrievably, it is a fact admitted by both parties that their marriage has hit the neck and that it cannot be salvaged. Each party is yearning for distribution. Having stayed apart since 2012, and with no attempt made to restore the relationship, there is nothing remaining capable of restoration.

28. Marriage is a voluntary union, and a sexual contract based on trust, honesty, mutual agreement and understanding of each other’s weakness and strengths tolerance, love and happiness as the bedrock of that Institution. Anything short of that would bleed disaster with serious repercussions which might even lead to death.

29. To insist on a relationship whose love and care for each other has nosedived is an exercise in futility. The most prudent fact and appropriate thing a court should do is to dissolve the marriage so as to let the parties freedom to enjoy their life elsewhere instead of being held in bondage.

30. Based on the evidence adduced before this court, averments in the petition, cross-petition and answer to cross- petition, it is apparent that the marriage between the petitioner and respondent has irretrievably broken down and the same must be dissolved.

31. Accordingly, it is hereby ordered;

(a) That the marriage between the petitioner and respondent celebrated on 22<sup>nd</sup> June, 1996 be and is hereby dissolved.

(b) That A Decree Nisi Order to issue.

(c) That Decree nisi order be confirmed after six (6) months, each contributed to the failure of their marriage.

Regarding costs, I am cognizant of the fact that this is a family matter and considering that each party to some extent did contribute to the failure of their marriage, I will order that each party bears his or her own costs.

DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL, 2017.

**J. N. ONYIEGO**

**JUDGE**

In the presence of;

..... for Petitioner

.....for Respondent.