



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO.102 OF 2010

K R S.....PETITIONER

VERSUS

R R S.....RESPONDENT

JUDGMENT

1. The petitioner got married to the respondent on 11th October 1991. After the said marriage, the parties cohabited as husband and wife both in Nairobi and Mombasa. There is one issue of the marriage. The petitioner is a housewife based in Nairobi while the respondent works at *[particulars withheld]* in Mombasa. The petitioner avers that since the celebration of the marriage the respondent has treated her with utmost cruelty, negligence and contempt resulting her to suffer mental anguish, pain, misery and loss of health and wellbeing.

2. She particularized cruelty as follows; that the respondent has exhibited utmost contemptuous and disrespectful attitude towards the petitioner since the said marriage and neglected to cater for the petitioner's financial, economic and psychological welfare and wellbeing. The respondent has failed to be a caring husband and has totally neglected to cater for the petitioner's feelings and self-respect. That the respondent has subjected her to a lot of verbal and physical abuse and has used abusive language when referring to the respondent during quarrels and fights with the petitioner, which has led the petitioner to have low self-esteem and dignity and made her social recluse. The respondent has subjected the respondent to abusive and taunting language in the presence of his parents and her son leading them to strain relations with the respondent. That the petitioner is a dutiful wife and daughter in law and tried her best to make the marriage work but the respondent's treatment was so bad that it led her to the ultimate breakdown of the marriage and she was forced to leave the matrimonial home for the sake of her son and personal safety and security. That the respondent physically abusing her in the presence of her son made him petrified and traumatized that he shied away from the respondent. That the physical abuse left her with bruises, loss of memory, black out spells and severe headaches. That the cruel treatment meted on her by the respondent has left her very timid and unsure and she would tremble at the mention of the respondent's name. Due to the respondent's waywardness, she was forced to leave the matrimonial home without her belongings to seek refuge at her sister's place in Nairobi. That as a result of the aforementioned acts the petitioner has suffered mental stress, pain and suffering and has suffered deteriorating mental and physical health. As a result of the above the marriage has irretrievably broken down and the respondent. The petitioner prays that;

i. That the marriage between her and the respondent solemnized on 11th October 1991 be dissolved.

- ii. That the respondent be ordered to pay a lump sum amount to the petitioner.
- iii. That the petitioner be granted sole legal custody of her son
- iv. That the respondent be ordered to pay alimony to the petitioner.
- v. That the petitioner be ordered to pay maintenance of his son.
- vi. That the petitioner be given cost of the suit.

3. The respondent in his amended answer to the petition and cross petition dated 22nd September 2016 denies allegations of cruelty levied against him by the petitioner. He instead raises a cross petition on ground of cruelty. He avers that the petitioner deserted the matrimonial home with all her belongings on or about December 2008 without any reasonable cause with the intention of never cohabiting with the respondent. That the respondent refused attempts to resume cohabitation. Abandoning both the respondent and issue of the marriage hence depriving them care and love as a result of which the respondent suffered untold depression, suffering and anguish. Neglecting her marital/motherly obligations expected of her to the respondent and issue of the marriage.

4. The respondent seeks the court to;

- i. Reject the petition and allow the cross petition.
- ii. The petitioner bears the cost of the petition/cause and cross petition.
- iii. That he be granted custody of the issue of the marriage.
- iv. That the Court declares that since it was the petitioner that deserted the matrimonial home she is not entitled to maintenance sought.

5. The petitioner did not testify. The respondent testified stating that the petitioner is his wife and they got married on the 11th October 1991 and they have lived in Mombasa and Nairobi but they no longer live together as the petitioner deserted their matrimonial home in December 2008. He tried to persuade her to return back to the matrimonial home but she did not and she is currently in India. Their community too tried but their attempts to get her back was futile. He confirmed the particulars of cruelty as per his cross petition and adopted the grounds of divorce as his evidence. He indicated that their child is now 23 years and that there is no possibility of resuming the married and he seeks the dissolution of the marriage. This evidence was not challenged.

6. Cruelty and desertion are grounds for divorce under the Matrimonial Causes Act Cap 152 (now repealed) and also the Marriage Act 2014 under Section 66. For the court to grant the orders sought it must be satisfied that the petitioner has established a case on cruelty and or desertion. In the case of ***Alexander Kamweru v Anne Wanjiru Kamweru [2000]eKLR***, It was held that, “*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*”.

7. The Respondent testified that the Petitioner deserted their matrimonial home in December 2008 and has not returned since then, despite request to resume cohabitation and has moved to India and has not returned since then. This caused him anguish and depression. The marriage according to him has irretrievably broken down. From the foregoing, I find that the Respondent has adduced sufficient proof of desertion which is a ground to dissolve a marriage. The respondent and the petitioner have not lived together for the last 8 years and in my view the marriage has irretrievably broken down. I therefore dissolve the marriage between the petitioner and the respondent that was celebrated on 11th October 1991 as prayed in the Cross-Petition. The petition by the petitioner is dismissed for failure to adduce evidence to support the allegations made.

8. The respondent seeks legal custody of the issue of the marriage. Issues pertaining to Custody and maintenance which falls under part VII of the Children's Act and as such the same falls within the jurisdiction of the Children's Court and not this court. This matter I find should be dealt with at the children's court and should lie as a matter of appeal in this court as such I will refrain from making a determination on the same. From the Respondent's testimony in court it is stated that the issue of the marriage they seek custody over is 23 years old and hence already an adult who can make up his own decision on whom he wishes to stay with. The petitioner's petition is dismissed. Each party to bear their costs. A decree nisi to issue and to be made absolute within 30 days. It is so ordered.

Dated signed and delivered this **12TH** Day of **May** 2017.

R. E. OUGO

JUDGE

In the presence of:

Mr. Momanyi holding brief for Mrs Samnakay For the Petitioner

Absent

For the Respondent

Ms. Charity

Court Clerk