



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
DIVORCE CAUSE NO. 18 OF 2015

I M W..... **PETITIONER**

VERSUS

L W M S.....**RESPONDENT**

JUDGEMENT

1. I M W the Petitioner herein has filed this Petition dated 23.3.15 seeking the dissolution of her marriage to L W M S, **the Respondent herein. The** marriage was solemnised at the [Particulars withheld] Church, Mombasa on 15.8.09.
2. The grounds upon which the Petitioner seeks divorce are cruelty and adultery, the particulars whereof are set out in paragraph 7 of the Petition. The Petitioner avers that as a result of the Respondent's cruelty and adultery, the marriage has irretrievably broken down. The Petitioner prayed for the dissolution of the same, alimony and costs.
3. The Petition is opposed. In his undated Answer to Petition filed on 4.10.16, the Respondent denied all allegations of cruelty and adultery contained in the Petition. He prayed that the petition be dismissed with costs.
4. At the hearing, the Petitioner and the Respondent vigorously gave vent to the allegations in the Petition and Answer to Petition. In her evidence in support of her Petition, the Petitioner confirmed that she and the Respondent got married at the [Particulars withheld] Church in Sparki on 15.8.09 and were issued with a marriage certificate. She produced marriage certificate serial no. [Particulars withheld] as proof of the fact of marriage. Following their marriage, the parties cohabited in Magongo initially and then move to Nairobi where they stayed for 6 months after which they returned to Mombasa. Their child E N was born on 26.12.09. The Respondent has 2 other sons who are in their twenties from another relationship. Their mother is deceased.
5. The Petitioner stated that the Respondent subjected her to cruelty. He failed to support her and the child of the marriage to the extent of failing to provide them with food. She stated that the Respondent refused to support them claiming that because he paid Kshs. 30,000/= for her delivery of their son, he did not have any more money to spend on them. This forced the Petitioner to seek assistance from her relatives. The Petitioner further accused the Respondent of violence. He would follow the Petitioner on his motor bike as she went to work. On one occasion the Respondent went to the Petitioner's house in the pretext that he wanted to see their child and he beat the Petitioner up. The matter was reported at Changamwe Police Station and she was issued with a P3 form. He was charged in Court but the Petitioner withdrew the charges. She further averred that the 2 adult sons of the Respondent also mistreated her and even threatened her with rape. At one time the Respondent without consulting the Petitioner called his parents to a meeting aimed at resolving the matter. However, the Respondent beat up the Petitioner in the

presence of his parents.

6. The Petitioner also accused the Respondent of adultery. He used to bring women to the matrimonial home and also had relationships with the house girls. The Petitioner stated that she did not enjoin one Z as a correspondent in spite of mentioning her in her Petition. She further stated that she did not see any of the women the Respondent had affairs with. She only heard about it. All attempts at reconciliation failed as the Respondent was not interested in resolving the matter. The situation became so bad that she left the matrimonial home on 13.11.11 and has not returned since.

7. The Respondent in his testimony denied treating the Petitioner with cruelty. He claimed that they shopped at the supermarket together. When he was transferred to Nairobi, the Petitioner sold the fridge and TV and followed the Respondent to Nairobi. He stated that he had not settled well and the Petitioner demanded that they buy furniture for which he borrowed to purchase. She further insisted on delivering their baby at the Nairobi women's hospital which he could not afford but had to look for the money. The Respondent accused the Petitioner of having affairs with other men which she did not stop after marriage. He denies ever assaulting his wife or having any affairs with other women. He stated that he did not want the divorce.

8. I have considered the Petition and the Answer to Petition as well the testimony of the parties. The grounds upon which a Christian marriage such as the marriage herein may be dissolved are stipulated in the Marriage Act, 2014 at Section 65. 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;

(e) the irretrievable breakdown of the marriage”

9. Mental or physical cruelty is one of the grounds upon which a Christian marriage may be dissolved. The Petitioner seeks dissolution of the marriage on the ground of cruelty. The Petitioner claims that the Respondent assaulted her. She reported the matter at Changamwe Police Station and produced Form P3, Medical Examination Report. The said P3 form shows that the assault took place on 13.6.14. It would appear that this happened during the separation of the parties. Although the Respondent denied being violent towards the Petitioner, he was unable to rebut the evidence of the P3 form to the satisfaction of the Court. The Petitioner further stated that the Respondent's adult sons also harassed her and even threatened her with rape. This the Respondent did not deny and the same remains uncontroverted. The Court therefore finds that the Respondent is guilty of cruelty towards the Respondent.

10. On the ground of adultery, both parties have accused each other of committing adultery during the subsistence of the marriage. The Petitioner referred to a Z in her Petition as one of the women the Respondent had an affair with but did not enjoin her. The Respondent on his part accused the Petitioner of having affairs with men but offered no names or incidences. Consequently, this Court finds that none of the parties was able to tender any evidence on adultery to the satisfaction of the Court.

11. The Petitioner wants the marriage dissolved while the Respondent is opposed to the dissolution of the marriage. The Petitioner left the matrimonial home on 13.11.11 and has not returned since. On 13.6.14, the Respondent assaulted the Petitioner, which assault was reported to the Changamwe Police Station. For over 5 years since 13.11.11, the parties have not resumed cohabitation. 5 years is a considerably long time for parties to remain apart. Marriage is defined in Section 3(1) of the Marriage Act as the *VOLUNTARY UNION* of a man and a woman whether in a monogamous or polygamous union...” (emphasis mine).

Marriage being a voluntary union, this Court cannot by means of an order compel the parties herein to remain married when one party has stated categorically that the marriage has irretrievably broken down.

12. In view of the foregoing, I do pronounce a decree of divorce and order that the marriage between the Petitioner and the Respondent solemnized at the [Particulars withheld] Church, Mombasa on 15.8.09 be and is hereby dissolved. Decree nisi to issue and the same to be made absolute within 1 month. On the prayer for alimony, no evidence was tendered before me and the same appears to have been abandoned. Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th July 2017

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**