



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

DIVORCE CAUSE NO. 35 OF 2012

M A M APETITIONER

VERSUS

F S BRESPONDENT

JUDGMENT

1. The **M A M A** has filed this Petition dated 9.7.12 seeking the dissolution of his marriage to the **F S B**. **The marriage was solemnized at the Registrar's Office in Mombasa on 28.2.09**. The Respondent filed a Reply to Petition and Cross Petition dated 12.11.12.
2. The ground for divorce as stated in the Petition is cruelty, the particulars of which are set out in paragraph 10 of the Petition. The Petitioner claims that he and the Respondent cohabited in [particulars withheld] until January 2011 when the Respondent's mother died. The Petitioner alleges that after the funeral, the Respondent failed to return to her matrimonial home and only returned later to collect her belongings. He further claims that his attempts to get the Respondent to return to the matrimonial home have been unsuccessful as she claims that she has siblings to take care of following the death of their mother. The Respondent has thus denied the Petitioner his conjugal rights and she has also failed to mind the welfare of the Petitioner. By reason of the Respondent's conduct, the Petitioner's mental and physical health has suffered.
3. The Respondent in his Answer to Petition denies the allegations of cruelty and accuses the Petitioner of deserting the matrimonial home himself. She claims that he moved to Likoni to where she believes he is cohabiting with another woman. In her Cross Petition, the Respondent prays for dissolution of the marriage on grounds of cruelty, adultery and desertion. On cruelty, the Respondent alleges that the Petitioner subjected her to continuous quarrels, beatings and threats and that he has denied her conjugal rights by deserting the matrimonial home. She claims that these acts of the Petitioner have caused her emotional stress and mental anguish. The Respondent further claims that the Petitioner committed adultery with two maids, E and A and another woman named N. She also alleges that the Petitioner vacated the matrimonial home in January 2011 to an unknown place at Likoni. She prays that the marriage which has irretrievably broken down be dissolved.
4. The Respondent further claims that an unregistered 3.5 acre plot at Tiwi, Kwale County be retained by her and that the Petitioner be restrained permanently from dealing with the same. She further prays that the Petitioner be restrained permanently from using the respondent's name in his work permit and from controlling, threatening, abusing, assaulting, shaming or doing anything that is detrimental to the dignity and honour of the Respondent.

5. Although the Respondent was duly served with the hearing notice, she did not make an appearance on the hearing date.
6. The Petitioner in his brief testimony in Court testified that he and the Respondent got married on 28.2.09 at the Registrar's Office in Mombasa and were issued with a marriage certificate. Following their marriage, the couple cohabited in [particulars withheld], Bamburi but were not blessed with any children. He further testified that the Respondent's mother died in January 2011 and the Respondent went to Mishomoroni to mourn her mother but did not return claiming that she was taking care of her siblings. He alleged that he suggested to the Respondent to bring her siblings to stay with them at the matrimonial home but that the Respondent declined saying she wished to take care of them at their late mother's home. The Petitioner told the Court that he stayed in the matrimonial home alone for nine months before moving out. He claimed that at his age, he needed companionship as well as conjugal rights which the Respondent denied him thereby subjecting him to cruelty. He said that it has been four years since the Respondent left him and she has never contacted him. He prays for the dissolution of the marriage.
7. I have considered the Petition, answer to 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 her Cross Petition. It was therefore not possible to prove the veracity of the allegations contained in her Answer to Petition. Further, the Cross Petition is hereby dismissed for want of prosecution.
8. The Petitioner met and married the Respondent on 28.2.09 at the Registrar's Office in Mombasa. The marriage certificate serial number [particulars withheld] is sufficient proof of the fact of the marriage. The Petitioner testified in Court and more or less stated what was contained in his Petition.
9. The Marriage Act, 2014 at Section 66(2) provides for the grounds upon which a civil marriage may be dissolved. These include:
 - 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"**
- a.
10. The Petitioner seeks dissolution of the marriage on the ground of cruelty. From his uncontroverted testimony, the Respondent deserted the matrimonial home in 2011 and refused to return. By reason of the desertion, the Respondent who is well advanced in age has lacked companionship. He has also been denied his conjugal rights. This has no doubt caused him emotional and mental anguish. I find that ground of cruelty has been proved.
11. The Marriage Act also provides that desertion for at least three years is a ground for divorce. Though not specifically pleaded as a ground for divorce, it is clear that the matrimonial offence of desertion has contributed to the cruelty suffered by the Petitioner and to the breakdown of the marriage herein. I find that the ground of desertion has also been proved.
- b.
- c.
12. It is clear from the Petition and Answer to Petition that neither of the parties herein who have been separated for four years is interested in the marriage. Accordingly, I pronounce a decree of divorce and order that the marriage solemnised on 28.2.09 at the Registrar's Office in Mombasa 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 11th day of FEBRUARY 2016.

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**