



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 9 OF 2015

P M MPETITIONER

VERSUS

V C.....RESPONDENT

JUDGMENT

1. The Petitioner **P M M** has filed this Petition dated 11.2.15 seeking the dissolution of her marriage to the Respondent **V C**. **The marriage was solemnized at the Mariakani Catholic Church, Kaloleni on 5.12.09. The couple cohabited in Mariakani but was not blessed with any children.** The Respondent filed an amended Answer to Petition and Cross Petition on 22.5.15.
2. The ground for divorce as stated in the Petition is cruelty on the part of the Respondent against the Petitioner particulars of which are set out in paragraph 5 of the Petition. The Petitioner claims that the Respondent has since the celebration of the marriage subjected her to mental torture by accusing her of being promiscuous after seeing text messages in her phone from one S; that the respondent a 30 year old man took advantage of her young age of 18 years and hurriedly organised a wedding 3 months after they met; that when he visited her at medical college, the Respondent used to boast that she was an asset because of the money he gave her in order to abuse her; that in 2013, the Respondent beat her up claiming that she had denied him conjugal rights and accused her that she was only after his money since he had sponsored her to medical college; that the Respondent has failed to fulfil his obligations as husband to the Petitioner; that as a result of the Respondent's conduct the Petitioner has been lowered in the eyes of the Respondent's parents and has lost respect. She claimed that the marriage has irretrievably broken down and prays for the dissolution of the same.
3. The Respondent in his Amended Answer to Petition and Cross Petition denied all the allegations of cruelty. He claims that he empowered the Petitioner by sponsoring her to undertake a Diploma in Community Health Nursing at the [Particulars Withheld] Medical Training College in Kericho from March 2010 to May 2013. He further claims that throughout the duration of her program he paid her tuition fees and for her maintenance and upkeep and continued to take care of the Petitioner thereafter.

In his Cross Petition, the Respondent accuses the Petitioner of cruelty and desertion. He claims that upon her return from college, the Petitioner developed a very negative and disrespectful attitude towards him. He alleges that the Petitioner was having an affair with one S O, her college boyfriend. He further claims that the Petitioner has on various occasions denied him conjugal rights and that she would lie to him to solicit money from him. It is the Respondent's assertion that he

tried to make the Petitioner happy by providing for her every need even after he discovered her unfaithfulness but that the Petitioner was ungrateful. The Respondent states that the aforesaid conduct of the Petitioner had caused him untold mental, physical and psychological torture.

5. The Respondent alleges that the Petitioner deserted the matrimonial home in Mariakani in February 2014 and went to live with a certain man in Mikindani. He claims that as a result of the Petitioner's conduct, he has suffered irreparable loss and damage and claims a total of Kshs. 476,000/= made up as follows:

Dowry	Kshs. 40,000/=
Tuition fees	Kshs. 244,000/=
Monthly upkeep	Kshs. <u>192,000/=</u>
Total	Kshs. 476,000/=

6. At the hearing of this matter, the Petitioner who was unrepresented testified that she completed school in 2008 and while awaiting her results, she went to stay with her cousins in Mariakani; that while in Mariakani, she met the Respondent who proposed to her; that when she told him she was not yet 18 years and did not want to get married young but wanted to continue with her education, he told her that he would marry her and educate her; She further testified that she was an orphan and that out of desperation and at the prospect of continuing with her education, she got married to the Respondent; that she had tried to get the Respondent to postpone the wedding and even spoke to the Priest about it, but the Respondent went ahead with the wedding;
7. The Petitioner testified that in spite of trying, she was unable to love the Respondent and could not respond to him sexually; that the Respondent beat her up for denying him conjugal rights and kept reminding her of her home situation because they are poor; that she felt she was giving sex in exchange for school fees; that she was happy when she was away in college; that the Respondent threatened her telling her that denial of conjugal rights often leads to death in homes; that this made her fearful and she ran away from her matrimonial home at the end of 2013. She ended by stating that she wants a divorce so that she can continue with her studies and so that the Respondent can get someone else to love him.
8. On cross examination, the Petitioner conceded that the Respondent paid for her college education. She further conceded that she had an affair with S O but the relationship ended when the Respondent threatened him. That she met him in 2011 in her second year of college. She further stated that when she left the matrimonial home in February 2014, she went to stay with one F O but that they are no longer together. She conceded that she left her matrimonial home as she had achieved her goal of education. She stated that she was forced by circumstances of poverty at home to get married. She reiterated that she did not love the Respondent and that he did not satisfy her sexually. On further questioning, the Petitioner said she does not know how much was paid as dowry. She said she would want to refund school fees but that she did not wish to pay costs. On upkeep, she said that she too contributed by cooking for the Respondent. She then sought the help of the Court as she felt psychologically tortured.
9. The Respondent on the other hand testified that he and the Petitioner courted for about one year before getting married on 5.12.09. He then took her to medical college in Kericho in 2010. Everything was fine in the first year. In 2011 however when the Petitioner came home from college she did not have her wedding ring and could not quite explain what happened to it. He claimed that the Petitioner denied him his conjugal rights and kept giving him excuses including alleging that he had bad breath. He gave details of how he discovered that the Petitioner was having an affair with S O and that when he confronted him S O apologised and he forgave him. The Petitioner finally completed college in December 2013 and he attended the graduation ceremony. They returned home together and life was good again but for a short period.

10. The Respondent further testified that he travelled to Taita on 27.12.13 but upon his return on 29.12.13, he found the Petitioner was not home as she too had left on 27.12.13. She returned on 30.12.12 and informed the Respondent that she wished to do her Nursing Council exams in Kericho for which the Respondent gave her Kshs. 10,000/=. He testified that the Petitioner left on 2.1.14 and never even called the Respondent to inform him that she had arrived in Kericho. She only called him to ask for Kshs. 5,000/= for a family planning course that would take one week. That she did not return to the matrimonial home until 17.2.14. The Respondent claims that the Petitioner came home and collected her belongings and went to stay with a man in Mikindani. That all efforts at reconciliation have failed as the Petitioner has never availed herself.

11. The Respondent stated that the marriage had irretrievably broken down as a result of the Petitioner's adultery and cruelty and he prayed for the dissolution of the same. He further claims that thanks to the training he sponsored her for, the Petitioner works at [Particulars Withheld] Hospital, Tana River County where earns Kshs. 51,000/=. On cross examination, the Respondent conceded that there was no agreement that the Petitioner would repay him for what he spent on her if the marriage failed. On re-examination, he told the Court that his expectation was to empower the Petitioner as his wife and that if he had known she would divorce him he would never have taken her to college. He prayed for compensation given that the reason he took her to college had been defeated.

12. I have considered the Petition, the Amended Reply to Petition and Cross Petition as well as the testimony of the parties. Both the Petitioner and the Respondent in their pleadings and testimony were keen on proving the other as the cause of the break down in the marriage.

13. 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;***
- e. ***the irretrievable breakdown of the marriage"***

14. In her Petition the Petitioner cites the ground of cruelty. The Petitioner claims that the Respondent has since the celebration of the marriage subjected her to mental torture by accusing her of being promiscuous after seeing text messages in her phone from one S O. From the evidence, this is not an idle accusation. It is clear that the Petitioner did indeed commit adultery with two men during the subsistence of the marriage, a fact that she herself admitted. The Petitioner further claims that the Respondent took advantage of her young age of 18 years and hurriedly organised a wedding 3 months after they met. On this allegation, I am not persuaded. The Petitioner was an adult and could easily have rebuffed the Respondent's marriage proposal. From the evidence, the allure of having someone to sponsor her for higher education is what in my view drove the Petitioner to marry the Respondent. In a word, the Petitioner took advantage of the Respondent and abused his kindness. I find that the ground of cruelty cited by the Petitioner has not been proved. Consequently dismiss the Petition.

15. The Respondent in his Reply to Petition and Cross Petition accused the Petitioner of cruelty and adultery. The Respondent claimed that he took the Petitioner to medical college and provided for all her needs and tried to make her happy. What did he get in return? Rejection by his wife. She denied him conjugal rights and even alleged that he had bad breath. She then deserted the Respondent and went to live with another man. She admitted that she left her matrimonial home as she had achieved her goal of education. I find that the ground of cruelty has been proved.

16. On the ground of adultery, the Respondent further how he discovered that the Petitioner was

having an affair with S O. The Petitioner admitted committing adultery with the said S O and yet another man by the name F O. The Petitioner attempted to paint a picture of herself as an innocent young woman who was forced into a marriage with a much older man against her will. This innocent young woman however went ahead and committed the marital offence of adultery with not one but two men in a short period of three years. I am satisfied that the ground of adultery has been proved.

17. It is clear from the foregoing that the marriage herein has cannot be salvaged.

18. *I now turn to the issue of reimbursement of the amounts claimed by the Respondent in his Cross Petition. The claim is in three limbs, namely dowry, tuition fees and upkeep. On dowry, the Respondent claims he paid Kshs. 40,000/=. While he did not give details as to whom this amount was paid, this Court takes judicial notice of the fact that dowry is never paid to a bride. The claim for dowry has been directed at a party to whom it was not paid. Consequently, the prayer for reimbursement in this limb must fail.*

19. *Due to their conceptual similarities, the next two limbs of tuition fees and upkeep will be considered together. The Respondent has given a breakdown of the amount he spent on the Petitioner. The parties got married in December 2009. In March 2010 the Respondent, true to his word, sponsored the Petitioner for a three and a half year nursing program at [Particulars Withheld] Medical Training College, Kericho. He paid her tuition fees and sent her money for her upkeep during this period. The diploma in Community Health Nursing that the Petitioner now has, courtesy of the Respondent, is personal property owned solely by her. The Petitioner had no qualms about having her tuition fees paid by a man she did not love; she had no qualms about receiving money for her upkeep from a man for whom she felt nothing; she had no qualms about demanding and receiving money from a man she could not have sex with because he had bad breath and did not satisfy her. She clearly took advantage of the Respondent and her conduct is truly reprehensible.*

20. Should the Petitioner reimburse the Respondent for the amount spent on her? This Court is of the view that it would be unjust enrichment to allow the Petitioner to just walk away from the marriage without reimbursing the Respondent for his financial contribution to her diploma which has clearly empowered her and she now has a job at [Particulars Withheld] Hospital. The Petitioner received a diploma at no cost while the Respondent got nothing in return. The Respondent perhaps wanted to empower the Petitioner so that together as husband and wife they could have a good life. This original intention has however been frustrated by the breakdown in the marriage as a result of the Petitioner's conduct.

21. This is a situation where a husband sponsors the wife through nursing school and shortly after completion, the wife petitions this Court for a dissolution of the marriage. The Respondent invested in the Petitioner's education in the hope of future family prosperity but now has no hope for a return on investment while the wife has received the advantage of an earning capacity which she may not otherwise have had. There is a clear injustice in this matter which ought to be redressed.

22. *Accordingly, I make the following orders:*

- i. *The marriage solemnized at the Mariakani Catholic Church, Kaloleni on 5.12.09 be and is hereby dissolved. Decree nisi to issue and the same to be made absolute within one month.*
- ii. *The Petitioner to pay to the Respondent the sum of Kshs. 336,000/= being a reimbursement of the amount paid by the Respondent for the Petitioner's tuition fees and upkeep.*
- iii. *Each party shall bear its own costs.*

DATED, SIGNED and DELIVERED in MOMBASA this 9th day of FEBRUARY, 2016.

M. THANDE

JUDGE

In the presence of: -

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

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

..... **Court Assistant**