



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 77 OF 2014

S M KPETITIONER

-VERSUS-

P N K.....RESPONDENT

JUDGMENT

S.M.K, the Petitioner herein filed a petition on 7th April 2014 seeking that the marriage between her and the Respondent P.N.K be nullified on the grounds of desertion and cruelty on the part of the Respondent. The Petitioner and the Respondent were lawfully married on 1st May 2011, and their marriage was solemnized at Mutune Church in Kitui under the **African Christian Marriage and Divorce Act (now repealed)**. This is not disputed by the Respondent who admitted the same in his answer to petition and cross petition that was filed on 13th May 2014. A copy of the Certificate of Marriage is annexed to the petition as proof of his marriage to the Respondent. It is on this basis that this court can make a finding that there is a valid marriage between the Petitioner and the Respondent. After the celebration of the marriage, the Petitioner and the Respondent cohabited together as husband and wife in Nairobi. The marriage was blessed with one child, D.N. born on 31st October 2011.

In her petition, the Petitioner alleged that since the celebration of the marriage, the petitioner has deserted the matrimonial home. In her particulars of desertion, the Petitioner alleges that the Respondent deserted the matrimonial home on 7th April 2013 and has not returned to the said matrimonial home since then. The Petitioner also alleges that during the subsistence of the marriage, the Respondent has treated her with cruelty. In her particulars of cruelty, the Petitioner alleges that the Respondent had indulged himself in chewing of miraa thereby subjecting the Petitioner to torture and anguish. The Petitioner accused the Respondent of leaving the matrimonial home without notice thereby neglecting the Petitioner and the child of the marriage. It is for these reasons that the Petitioner has petitioned this court to have her marriage to the Respondent dissolved.

On 13th May 2014, the Respondent filed his answer to the Petitioner's Petition. The Respondent also cross petitioned to be divorced from the Petitioner. In his answer to the Petition, the Respondent denied the allegations of desertion and cruelty made by the Petitioner against him. In his cross petition, the Respondent stated that the Petitioner was guilty of cruelty. In his particulars of cruelty, the Respondent averred that the Petitioner had since the celebration of the marriage treated him in a hostile, abusive and violent manner. He further accused the Petitioner of desertion. According to the Respondent, the Petitioner left the matrimonial home on 7th April 2013 and has since then been living at her sister's house. For these reasons, the Respondent urged this court to dissolve his marriage to the Petitioner. The Respondent also sought an order from this court granting him the custody of the child of the marriage.

The matter was heard on 12th November 2015. During the hearing, the Petitioner gave oral evidence reiterating the averments in her petition for divorce. She testified that after the celebration of the marriage, she cohabited with the Respondent in Nairobi. She testified that she is currently living with the child of the marriage. She testified that the Respondent had neglected his parental responsibility towards the child of the marriage as also his responsibilities as a husband to her. According to the Petitioner, her marriage to the Respondent has not been a peaceful one. For these reasons, the Petitioner left her matrimonial home. On his part, the Respondent opted not to adduce any evidence in court since according to the Respondent the Petitioner had admitted to deserting the matrimonial home.

From the pleadings and oral evidence of the parties in this case, this court finds that the following are the issues for determination to which the court will focus its legal analysis.

- a. Whether the Parties herein have adduced sufficient evidence in their respective presentations to warrant the grant by this court of a divorce;
- b. Who should bear the costs of this suit as prayed by the parties.

This court shall first examine the Petitioner's petition of 7th April 2014. The evidence on record shows that the Petitioner and the Respondent contracted a Christian marriage under the **African Christian Marriage and Divorce Act (now repealed)**, and thus, the applicable law concerning the dissolution of their marriage is to be found in **Section 66** of the **Marriage Act 2014** which provides:

“(1) A party to a marriage celebrated under Part IV may petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.”

The Respondent and the Petitioner contracted a Christian marriage on 1st May 2011. The Petitioner filed a petition in this court on 7th April 2014 seeking to be divorced from the Respondent. Three years had not passed since the celebration of the marriage when the Petitioner petitioned to be divorced from the Respondent. From the foregoing, the Petitioner's petition for divorce of 7th April 2014 was therefore premature. It was filed a month to the 3 years period. Since this has no prejudice on any of the parties the Court will allow as it was filed on the borderline 3 years year period.

On his part, the Respondent filed his cross-petition 13th May 2014 seeking to have the marriage between him and the Petitioner dissolved. **Section 66** of the **Marriage Act** provides as follows;

“(2) A party to a marriage celebrated under Part IV may only petition to court for the separation of the parties or the 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.”***

In his cross petition for divorce, the Respondent accused the Petitioner of committing the matrimonial offences of desertion and cruelty. However, during the hearing of the petition, the Respondent failed to adduce any evidence in support of his cross- petition for divorce. This court therefore finds that the Respondent did not prove his case against the Petitioner on the grounds of desertion and Cruelty. Therefore, the Respondent's cross-petition for dissolution of the marriage is therefore dismissed.

The petitioner's petition is allowed and dissolution of the marriage is granted. Her evidence on cruelty and desertion was controverted by oral evidence by the Respondent.

FINAL ORDERS

1. The Court grants the dissolution of the marriage between the Petitioner and Respondent solemnized on 1st May 2011.
2. A decree nisi to issue in 30 days and decree absolute in 60 days.
3. The Respondent to pay school fees and school expenses for the child of the marriage.
4. The Petitioner to pay for the child's food, clothing and school fees.
5. No orders as to costs.

M.W. MUIGAI

JUDGE

In the presence of:

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