



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO. 111 OF 2012

P M S.....PETITIONER

-VERSUS-

M D S.....RESPONDENT

JUDGMENT

1. By a divorce petition dated 15th June 2012, filed in court on 12th June 2012, the petitioner prays for the dissolution of the marriage celebrated between her and the respondent, sole custody of the children of the marriage (J P S and H P S), maintenance for the children, maintenance for herself after the dissolution of the marriage, orders to restrain the respondent from contacting or physically and emotionally abusing both her and the children, and costs of the suit.
2. The petition is based on the ground that since the celebration of the marriage, the respondent has treated the petitioner with cruelty and adultery. The particulars of cruelty are contained at paragraph 6 of the petition and are that the respondent has failed to be a companion to the petitioner, the respondent is insensitive to the petitioner's needs, the respondent has failed to show love and affection to the petitioner, and the marriage has irretrievably broken down.
3. Upon being served with the petition, the respondent filed an answer to the petition on 6th July 2012. His amended answer to petition and cross-petition was filed in court on 26th May 2014. In it, the respondent has expressly denied that he has been cruel to the petitioner as alleged and he further denies the particulars of cruelty.
4. The cross-petition is based on the grounds that during the subsistence of the marriage, the petitioner has been guilty of adultery and cruelty to the respondent. The particulars of adultery are that the petitioner has been having an extra-marital affair with a man known as A G, the said adultery was admitted by the petitioner when the respondent followed the petitioner and the said A to a hotel in Limuru where they had booked a room, in February 2011 the petitioner and the said A G spent the night in Eldoret, in April 2011 the petitioner travelled with their children and A G to Mombasa, and the petitioner's adultery has caused the respondent unbearable pain and agony and the marriage is thus at an end.
5. On the other hand, the particulars of cruelty are that the petitioner has threatened the respondent by demanding unreasonable sums of money and not accounting for the usage of the same, the petitioner has directed unkind and cruel verbal insults to the respondent which insults were calculated to strip and undermine the respondent's role as a spouse, the petitioner has been emotionally and physically unavailable to the respondent and created such distance and remoteness that the respondent felt alienated

and unwanted, the petitioner has neglected her spousal duties and responsibilities to the respondent, the petitioner frequently stays away from the family home up to late hours of the night during the weekends and sometimes does not come home at all, thereby causing the respondent great distress and worry as to her whereabouts.

6. It is the respondent's position that as a consequence of the petitioner's adultery and cruelty, the marriage has irretrievably broken down and cannot be salvaged. He prays that the petitioner's petition be dismissed with costs, the marriage between him and the petitioner be dissolved as prayed in the cross-petition, the respondent be granted joint custody of the children of the marriage, the respondent be granted equal care and control of the children, and in the alternative reasonable access, the petitioner be ordered to share in the provision of maintenance for the children, the petitioner be restrained from in any manner evicting the respondent from the matrimonial home or interfering with his peaceful occupation of the same, the petitioner be evicted from the matrimonial home and the petitioner be ordered to pay the costs of this suit.

7. Both parties attended court and gave sworn testimony on 5th November 2015.

8. The petitioner's ground for divorce is cruelty, and since cruelty is a serious allegation that borders on criminality and touches on the overall character of the respondent, the petitioner is therefore enjoined to prove the acts of cruelty as she has alleged against the respondent herein.

9. In **AMA vs. GSB HCDC No. 134 of 2010, GBM Kariuki J said:**

"It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner's health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see Russell v. Russell [1895] P. 315, 322. See also D. Tolstoy on The Law and Practice of Divorce, Sixth Edn. It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see Gollins v Gollins [1964] AC 644; Williams v Williams [1964] AC 698, 760. Tolstoy, 6thEdn states that the question in all cases is whether the Respondent's conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see Gollins v. Gollins (supra) at page 670 and Williams v Williams (supra) at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see Jamieson v Jamieson [1952] A.C. 525, 535. Moreover, a deliberate intention to hurt may turn into "cruelty conduct" which, without such intention, would not constitute cruelty."

10. Further, the Court of Appeal in *JSM vs. ENB* (2015) eKLR) observed said:

"The last point, which has been made time and again by various courts, and which is worthy reiterating here, is that there is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves."

11. As regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, this court, in *Kamweru vs. Kamweru* (2000) eKLR, stated as follows:

"Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. 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.”

12. In the circumstance, it was upon the petitioner to satisfy this court by establishing cruelty as a ground. I am afraid the petitioner has failed in that regard. She has merely alleged that the respondent was cruel to her without bringing before court sufficient material to establish her case. Therefore this court is not satisfied that the petitioner has proved the ground for cruelty.

13. On his part, the respondent has alleged in his cross-petition that the petitioner has been having an extra-marital affair with a man known as A G. It is his case that the petitioner admitted to having the adulterous relationship when he followed them to a hotel in Limuru, which adultery has caused him unbearable pain and agony. This court is satisfied that the respondent has proved the said adultery to the required degree. I find that the facts establishing the same have been shown.

14. Apart from the said adultery, the respondent has also alleged that the petitioner has been cruel to him and has indeed given the particulars of cruelty as stated in the amended cross-petition. He cites unkind and verbal insults, the emotional and physical unavailability of the petitioner to him, neglect of spousal duties and responsibilities, among others. To that end, and relying on the above cited cases on cruelty, this court is satisfied as to feel sure that the respondent has established cruelty as a matrimonial offence.

15. On the issue of custody of the children, a perusal of the records reveals that the said children are now adults, and therefore the court is of the considered view that they are at liberty to stay with either the petitioner or the respondent, as they can no longer be subject of custody and maintenance orders.

16. On alimony, it is noted that the petitioner has not adduced any evidence to support her claim. The same is treated as having been abandoned.

17. Finally, this court holds that the issue of cruelty attributed to the respondent by the petitioner has not been proved to its satisfaction and the same is dismissed. However, it is the court's findings that the respondent's claims of adultery and cruelty stand proved to the required standard.

18. Both parties have agreed that the said marriage has irretrievably broken down.

19. Consequently, this court orders that the marriage celebrated between M D S and P M S on the 29th June 1993 be and is hereby dissolved. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 4TH DAY OF MARCH, 2016.

W MUSYOKA

JUDGE