



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 152 OF 2014

S.J.W.....PETITIONER

VERSUS

J.P.L.W.....RESPONDENT

JUDGMENT

The Petitioner S.J.W filed a petition together with a verifying affidavit before this court on the 4th of July 2014 seeking to have the marriage between her and the Respondent J.P.L.W dissolved on ground of desertion and cruelty.

The Petitioner stated in her petition that on 3rd of April 1998, she and the Respondent were lawfully married. Their marriage was solemnized in the Registrar of Marriages Office in Kisumu. The Petitioner attached a certified true copy of the marriage certificate. The Petitioner cohabited with the Respondent as husband and wife in Kisumu.

During their subsisting marriage, they had one child K W aged 11 years. The Petitioner and the Respondent now reside in Nairobi County but in separate homes.

The Petitioner deponed that the Respondent deserted the matrimonial home since 2012 without justification. The Petitioner suffered emotional cruelty when the Respondent deserted the matrimonial home in 2012. The particulars of cruelty are as follows;

- a. Psychological torture to the Petitioner arising from the
- b. No communication with the Petitioner and the child of the marriage and
- c. Refusal to eat the food prepared by the Petitioner toward the beginning from year 2012, and
- d. Spending several days away from the matrimonial home.

The Petitioner prayed for orders that;

- a. The marriage be dissolved,
- b. The Petitioner be granted the custody of the said child of the marriage,
- c. The Respondent pays the costs of the petition,
- d. Any other relief court deems fit.

The Petitioner served the Respondent with the petition together with the notice to appear on 26th of August 2014. The Respondent entered appearance and filed an answer to the petition together with the cross-petition on 11th of September, 2014. In his answer to the petition, the Respondent denied the particulars of cruelty and desertion. He however alleged that the Petitioner's cruelty towards the

Respondent greatly contributed to the breakdown of the marriage despite efforts of reconciliation by family members. The particulars of cruelty as illustrated in the cross-petition are as follows;

- a. The Petitioner verbally abused the Respondent in the presence of family members and the child of the marriage without any justification.
- b. The Petitioner denied the Respondent conjugal rights
- c. The Petitioner refused to share food with the Respondent
- d. The Petitioner refused to talk and ignored the Respondent
- e. The Petitioner partied and went out to clubs all nights during marriage
- f. The Petitioner misappropriated matrimonial properties with her boyfriend Mr. S.
- g. The Petitioner showed public displays of affection in public areas with the boyfriend.
- h. The Petitioner disparaged the Respondent.

The Respondent deponed that sometime after celebration of the marriage and birth of their child, the Petitioner committed adultery. The particulars of adultery are as follows;

- a. There were visible display of affection and intimacy between the petitioner and a male Asian called Mr. S in the matrimonial home in the presence of the child and the house help.
- b. The Petitioner was picked and dropped from their matrimonial home by her boyfriend Mr. S.
- c. The Petitioner constantly denied the Respondent conjugal rights during marriage.
- d. The Petitioner constantly pleaded for love from her boyfriend Mr. S and showed affection in public places.
- e. The Petitioner admitted to having sexual affections of Mr. S to the Respondent.

The Respondent has not condoned to the cruel and adulterous behavior of the Petitioner.

The Respondent prayed for orders;

- a. The marriage between the respondent and the Petitioner be dissolved
- b. Joint legal custody of the child of the marriage with care and control of the Respondent.
- c. The Petitioner to bear the costs
- d. Any other relief the court deems fit.

The Petitioner filed a reply to the answer to the petition and cross-petition on 18th September 2014. She denied the particulars of adultery. She alleged that it was the respondent who actually committed adultery during marriage. The Petitioner denied the particulars of cruelty and maintained that it was the Respondent's cruel behavior that resulted into the breakdown of the marriage. The Petitioner alleged in her reply to the cross-petition that the Respondent frustrated the efforts done by family members to reconcile them. The Respondent filed a reply to the Petitioner's answer to the cross-petition on 2nd October, 2014. The Respondent reiterated whatever he stated in the cross-petition.

The Petitioner moved court by way of Chamber Summons filed under **Order 29(1), (2) and 30 of the Matrimonial Causes Rules** on the 26th of September, 2014 seeking issuance of a certificate for the matter to proceed for hearing as a defended cause. The Registrar certificate was issued and the matter was scheduled for hearing on the 23rd of October, 2014.

During the hearing, the Petitioner gave sworn evidence and stated that she works as a coordinator at **[particulars withheld]** Company. The petitioner and the respondent lawfully married on 3rd April 1998. The Petitioner alleged that the Respondent deserted the matrimonial home in 2012 and never came back. She suffered mental anguish especially the child of the marriage. The Respondent denied the Petitioner conjugal rights and the marriage could not survive. The Petitioner never had any marital affair with Mr. S and does not know him. The Petitioner cooked food and the Respondent refused to eat. The Respondent would spend a week more so from home and inform the Petitioner that he had gone meetings. The Respondent committed adultery at some point but they reconciled. The Petitioner neither cohabited with Mr. S and nor did she deny the respondent conjugal rights.

The Petitioner depones that the marriage has irretrievably broken down. The Petitioner had a mutual agreement with the respondent to pay Ksh. 45,000/= each month to the petitioner. The Respondent agreed to increase the amount every year but failed to respect the agreement. The Petitioner allowed the Respondent to visit the child. The Respondent barely came nor communicated with the child. The Petitioner pays half of the school fees for the child and the Respondent pays the balance. The Petitioner prayed to court to dissolve the marriage and grant her custody of the child.

The Respondent in his oral submissions admitted to deserting the matrimonial home. The Petitioner's insulting and abusive behavior towards the respondent in the presence of the child and house help resulted to the breakdown of the marriage. The Respondent sent 45,000/= every month to the Petitioner. The Respondent sought the courts to dissolve the marriage and grant him custody of the child.

The court has evaluated the evidence adduced by both parties together with their submissions. The Petitioner based her petition on cruelty and desertion. According to **Section 66(1) of the Marriage Act**, a party to a civil marriage may not petition the court for separation of the parties or for the dissolution of the marriage unless three years have lapsed since the celebration of marriage. The Petitioner and the Respondent had lived separately since 2012 and their marriage was celebrated in 1998. The required period has lapsed and the petition was thereby accepted by court.

The grounds for dissolution of a marriage are as stated under **Section 66(2) of the Marriage Act** to include; adultery, cruelty, exceptional depravity by the other spouse, desertion for at least three years, and irretrievable breakdown of marriage.

The **Black's Law Dictionary** defines cruelty to mean;

“ the intentional and malicious infliction of mental and physical suffering on a living creature.”

The dictionary further defines mental cruelty to mean;

“one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”

The case before this court, the Respondent deserted the matrimonial home in 2012 and never came back. This fact was admitted by the Respondent. The Petitioner and mostly the child of the marriage suffered mental anguish due to desertion by the Respondent. The Respondent barely came to visit nor communicated with the child. The Respondent refused to eat the food that was cooked by the Petitioner. The Respondent suffered mental anguish as a result from the abusive behavior of the Petitioner. The court has proved to the balance of probabilities that both parties in this matter were cruel to one another.

As regards the adulterous behavior of the petitioner, it is alleged by the Respondent in his cross-petition that the Petitioner had a marital affair with one Mr. S while still married to the Respondent. The Respondent stated in his oral submissions that he was told by his friends and the house help about the alleged affair. Which fact is considered by this court to be hearsay evidence and cannot be admitted. The alleged adultery was denied by the Petitioner in her reply to the cross-petition and in her oral submissions. In **N V N (2008) 1 KLR 17** Hon Justice Madan(then was) stated that;

“To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, elicit affect undue familiarity and guilt attachment are some of the instances that create an inference upon which court can act. Circumstantial evidence can prove and establish adultery provided that the circumstances are relevant, cognate and compellable”.

The allegations by the Respondent were backed up by hearsay evidence from his friends and the house help which evidence is not considered by this court as the best evidence. This proves that the Respondent failed to prove the allegation of adultery.

The marriage is said to have irretrievably broken down when one the conditions under **Section 66(6) of the Marriage Act** is present. The conditions are as follows;

- a. **A spouse commits adultery;**
- b. **A spouse is cruel to the other spouse or to any child of the marriage;**
- c. **A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;**
- d. **The spouses have been separated for at least two years whether voluntary or by decree of the court where it has;**
- e. **A spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;**

In this case, the marriage between the Petitioner and the Respondent had irretrievably broken down because the Respondent deserted the matrimonial home since 2012 and never returned back. This fact was admitted by the Respondent in his oral submissions. The Petitioner and the Respondent voluntarily separated in 2012. The Petitioner had a mutual understanding to with and the Respondent to give her and the child Ksh. 45,000/= as maintenance. Both the Petitioner and the Respondent caused mental or emotional cruelty to each other. In this case, the marriage between the Petitioner and the Respondent had broken down with no possibility of salvaging the marriage and no likelihood of reconciliation.

On the basis of the foregoing, the court hereby orders as follows;

- a. The petition is upheld.
- b. The marriage between the Petitioner and the Respondent that was solemnized on the 3rd April 1998 has irretrievably broken down due to desertion of the matrimonial home by the Respondent since 2012. Voluntary separation of the parties to this case since 2012 and cruelty by both parties towards each other.
- c. Custody of the child K W is granted to the Petitioner with access rights to the Respondent.
- d. The Respondent to continue paying to the Petitioner **Ksh. 45,000/=** subject to court's review as maintenance and upkeep for the child of the marriage.
- e. Decree nisi to issue forthwith.
- f. Decree absolute to issue in six (6) months.
- g. The Respondent shall bear the costs of the case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2015.

M. MUIGAI

JUDGE

In the presence of;

Mr. Agwara holding brief for Mr. Oduor for the Petitioner

Ms. Khisa holding brief for Mr. Morara for Respondent