



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO. 5 OF 2013

S. N W.....PETITIONER

VERSUS

M. W. W.....RESPONDENT

JUDGMENT

The Petitioner S. N. W filed a petition together with a verifying affidavit before this court on the 15th January 2013 seeking to have the marriage between him and the Respondent M. W. W dissolved on ground of cruelty.

The Petitioner and the Respondent lawfully married on 20th of January 2012 and their marriage was solemnized in the AG's chambers. The Petitioner attached a true copy of the marriage certificate. The Petitioner resides, domiciles and works for gain as a *[particulars withheld]* in Seattle, Washington, America while the Respondent resides, domiciles and works for gain in Kenya.

The Petitioner and the Respondent resided at Imara Daima Estate within Nairobi until 4th of February 2012 when the Petitioner left the matrimonial home.

The Petitioner, in his petition of 15th January 2013 deponed that since the celebration of marriage, he and the Respondent never consummated the marriage.

The Respondent treated the petitioner with utter disrespect, cruelty causing him great anxiety and depression. The particulars of cruelty as illustrated in the Petitioner's petition are as follows;

- a. The Respondent verbally abused and humiliated the Petitioner in the presence of the his family,
- b. The Respondent never interacted with the Petitioner despite intervention from family and friends,
- c. The Respondent ignored the petitioner and refused to speak to him despite intervention of their families and friends.
- d. The Respondent's cruel behavior caused the petitioner untold anguish and emotional distress.
- e. The Respondent refused to consummate the marriage since celebration of the marriage.

The Petitioner did not condone the acts of cruelty towards him by the respondent.

The Petitioner prayed for orders;

- a. The marriage between the Petitioner and the Respondent be nullified and the celebration of 20th January 2012 be declared void.
- b. Any relief or order the court deems fit.

The Petitioner served the Respondent with the petition together with the notice to appear on the 24th of June 2013. The Respondent filed an answer to the petition and a cross-petition on the 6th of September 2013. In her cross-petition, the Respondent denied all the particulars of cruelty. The respondent informed court that she now works and resides in Kigali, Rwanda. The Respondent alleged that the marriage had irretrievably broken down and all attempts of reconciliation were unfruitful. The Petitioner made communication impossible between them due to his habits of watching movies on the laptop with earphones plugged on. The Petitioner left the matrimonial home on the 6th of February 2012 and informed her that he was never returning back through a text message. The Respondent prayed for orders;

- a. The marriage between the Petitioner and the Respondent be nullified,
- b. The Petitioner bears the costs of the suit
- c. Any relief the court deems fit.

The Petitioner filed a reply to the cross- petition on 12th October 2011 deponing that the allegations adduced by the Respondent intended to mislead this court and were untruthful.

The Petitioner moved court by way of Chamber Summons filed under **Order 29 of the Matrimonial Causes Rules** on the 14th of October 2013 seeking issuance of a certificate for the matter to be heard as a defended case. The Registrar certificate was issued and the matter was scheduled for hearing on the 24th of July 2014.

During the hearing on 30th October 2014, the Petitioner's advocate Ms. Amollo submitted that the Petitioner was absent in court. The Petitioner had a problem to obtain his passport to come to Kenya. He could not be granted permission from his employer to attend court. The Respondent's advocate Ms. Wangui argued that the Respondent works and resides in Rwanda and yet she managed to attend court on that day.

The matter proceeded on a cross-petition. The Respondent gave sworn evidence reiterating the averments in her cross-petition. She testified that she and the Petitioner grew up together and dated since 2009. The Respondent's family and the Petitioner's family were friends. On the 20th day of January 2012, the Petitioner's sisters mistreated the Respondent and that resulted into non-consummation of the marriage. The Petitioner informed the Respondent that he was gay and was leaving the country through a text message.

On the 31st of March 2015, the Petitioner filed an application by way of Notice of Motion under **Order 51 rules 1 of the Civil Procedure Rules** seeking to prosecute his petition by way of affidavit evidence. The Petitioner returned to Seattle where he works and has to secure his new job. The company he works for cannot grant him leave to attend court. Court rejected the application on 30th April 2015, to adduce the evidence by filing an affidavit.

The court has evaluated the evidence adduced by the parties together with the submissions. Now it has to determine whether the Petitioner and the Respondent proved their cases to warrant a divorce?

The Petitioner based his application on cruelty as his primary ground for divorce. 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 court considered the petition before the lapse of the required time. Cruelty is provided under **sub-Section (2)** of the same section as a ground for divorce. Cruelty was defined in the **Black's Law Dictionary** to mean;

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

Mental cruelty to imply;

“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.”

In the present case, the Respondent verbally abused and humiliated the Petitioner in the presence of his family despite attempts of reconciliation. The Respondent’s cruel behavior caused emotional distress and depression to the Petitioner. The Petitioner sought medical attention at Mater Misericordiea Hospital regarding depression and emotional distress. In **R.A.F Vs S.M.L Divorce Cause No. 25 of 2015** Muriithi J stated that;

“The test of cruelty in matrimonial causes is both objective and subjective. The Petitioner is required to prove conduct on the part of the respondent that may be construed to be in an objective sense and to a standard of beyond reasonable doubt or as otherwise put, that the court must feel sure of the commission of the offence....”

Looking at the definition of cruelty from the Black’s Law Dictionary and the evidence on record, it was proved on the balance of probability that the Petitioner was subjected to the mental cruelty by the Respondent. The Respondent did not dispute the existence of the same though the actual cause was not discovered by the hospital.

As regards non-consummation of marriage, the Petitioner alleged that the Respondent denied him conjugal rights as a husband due to her abusive behavior and emotional imbalance. The Respondent alleged that the marriage had irretrievably broken down due to the Petitioner’s perverted sexual behavior. The Petitioner informed the Respondent that he was gay. The Petitioner was not present in court on 30th of October 2014 to adduce evidence to the contrary. Under **Section 66(6) of the Marriage Act**, marriage is said to have irretrievably broken down if;

- 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;***
- f. ***.....***

The marriage between the Petitioner and the Respondent had broken down to an extent that was impossible to salvage it. The Petitioner deserted the matrimonial home through a text message he sent to the Respondent in February, 2012. Being that the Petitioner and the Respondent never consummated the marriage since 20th of January 2012 when they celebrated it until 4th of February, 2012, means that the marriage is a nullity. The Petitioner voluntarily separated from the Respondent two weeks after

celebration of the marriage, indicated that the marriage had broken down from the onset. The Respondent conduct caused mental cruelty to the Petitioner. With these reasons, court is satisfied that the marriage broke down without any possibility of salvaging it.

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

- a. The Cross Petition is upheld, the Petition remains unsubstantiated by oral evidence.
- b. The marriage between the Petitioner and the Respondent that was solemnized on the 20th of January 2012 has irretrievably broken down due to cruelty caused by both parties and resulted in separation.
- c. Decree nisi to issue forthwith.
- d. Decree absolute to issue in six (6) months.
- e. Each party bears its costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2015.

M. MUIGAI

JUDGE

In the presence of;

Ms. Wangui Kimani for Respondent

Ms. Kiniti for the Petitioner