



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
DIVORCE CAUSE NO. 49 OF 2012

F F A PETITIONER

VERSUS

S M F P V P RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner who **married the respondent on 24th February 2009 under the Marriage Act, Cap 150 of the Laws of Kenya** at Registrar of Marriage's Office at Mombasa filed a petition dated 19th September 2012 for the dissolution of his marriage to the Respondent, on grounds of desertion. There was no issue of the marriage.

THE PLEADINGS

2. **The petitioner simply pleaded that “soon after the marriage herin the respondent deserted the petitioner and has continued to do so upto date” and that “the marriage between the petitioner and the respondent has irretrievably broken down as the parties lead separate independent lives”.**
3. **Despite service of the court process in this matter the respondent did not enter appearance, file an answer with or without cross-petition or attend court for the hearing of the petition, and the hearing proceeded as an undefended cause.**

THE EVIDENCE

4. **The evidence presented by the petitioner was as follows:**

“PW1 ADULT MALE MUSLIM SWORN AND STATES IN ENGLISH

I am F F A I am the petitioner. I live at Mtwapa, Kilifi. I pray for dissolution of marriage on the grounds of desertion for a period of three years since 2009. We married on 24th February 2009. Certificate of Marriage PEx. No. [Particulars Withheld].

The respondent deserted about two years after the marriage in 2011. There has been no communication between us since 2012. In 2012, we spoke about divorce. The respondent has not shown any interest of continuing with the union. I tried to reconcile by meeting, telephone messages.

She said she need anybody to tell her what to do. She has not communicated to me since. We are agreed that the marriage has broken down. She is from Belgium. After she came back, she had changed and had no feelings towards me and she even moved from our bedroom to another room. This obtained for a period of over 9 months before she eventually left. We have no children. I am 33 years. ”

THE ISSUES FOR DETERMINATION

5. **The issues for determination are whether the matrimonial offence of desertion has been proved and whether the marriage has irretrievably broken down.**

DETERMINATION

Principles of law applicable

6. **The court is required to be satisfied that the matrimonial offences have been committed in terms of section 10 (2) of the Matrimonial Causes Act, [which is applicable at the time the petition was filed but subsequently repealed by Marriage Act of 2014, which is in terms as follows:**

“10 (2) If the court is satisfied on the evidence that -

(a) the case for the petitioner has been proved; and

(b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition:

Provided that the court shall not be bound to pronounce a decree of divorce, and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty -

(i) of unreasonable delay in presenting or prosecuting the petition; or

(ii) of cruelty towards the other party to the marriage; or

(iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.”

7. **The degree of proof of matrimonial offences is beyond the standard in civil litigation of balance of probabilities. See *Maathai v. Maathai* (1980) KLR 154, (1976-80) KLR 1689, where Law JA set the standard of proof as follows:**

“[W]hen considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the court must feel satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved”.

8. **However, Madan J A. in *N v N* [2008] 1 KLR [G & F] 16 held that there are instances where**

although the objective standard of cruelty is not achieved, the parties may on account of what appear otherwise trivial subjectively feel justified to be released for their matrimonial obligations, and observed that -

“if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.”

9. Section 66 (6) (d) of the Marriage Act 2014 provides that a marriage has irretrievably broken down where the spouses have separated for a period of 2 years. The provisions of the Marriage Act 2014 are applicable by virtue of section 98 (2) of the Act which is in the following terms:

“98. (1) A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.

(2) Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.”

Section 66 (6) of the Marriage Act 2014, which came into force on 20th May 2014 repealing the Matrimonial Causes Act under which this cause was filed provides as follows:

“66 (6) A marriage has 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 wilfully 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 for at least three years immediately preceding the date of presentation of the petition;

(f) a spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;

(g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or

(h) any other ground as the court may deem appropriate.”

Findings of fact and law

10. The petition for divorce was filed on 19th September 2012 when the desertion was said to have taken place two years after marriage in 2011. The parties had before the presentation of the petition not lived separately for a period of three years since the respondent’s alleged desertion and the cause of action in desertion under the Matrimonial Causes Act had not materialized. Section 8 (1) (b) of the Matrimonial Causes Act provides as follows:

“8. (1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent -

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or”

K. However, as there is evidence that since the separation in 2011, the parties had not lived together to the date of the hearing of the Petition, the marriage must be taken to have irretrievably broken down within the meaning of section 66 of the Marriage Act 2014.

L. Although it was said that the parties were agreed that the marriage had broken down there was no evidence of collusion in presenting or prosecuting this proceedings for dissolution of marriage.

M. The court finds that the marriage between the petitioner and the respondent has irretrievably broken down in terms of section 66 of the Marriage Act 2014, the parties having lived separately for a period of over two years.

N.

N. Accordingly, Decree Nisi for dissolution of the marriage between the petitioner and the respondent of 24th February 2009 is granted with no order as to costs of the proceedings.

DATED SIGNED AND DELIVERED ON THE 16TH JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Wacheiya for Petitioner

No appearance for the Respondent

Ms. Linda - Court Assistant.