



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
DIVORCE CAUSE NO. 54 OF 2014

J A K..... PETITIONER

VERSUS

W O R RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner who **married the respondent on 4th March 2010 under the Marriage Act, Cap 150 of the Laws of Kenya** at Registrar of Marriage's Office at Mombasa filed a petition dated 19th August 2014 for the dissolution of her marriage to the Respondent, on grounds of cruelty and that the marriage has irretrievably broken down. There was one issue of the marriage, N L R born on 15th April 2013.

THE PLEADINGS

2. The petitioner pleaded that the respondent had soon after the celebration of marriage treated the petitioner with cruelty; that the parties had lived separately in different rooms for a period of one year before the petitioner moved out of the matrimonial home and that, consequently, the marriage between the petitioner and the respondent has irretrievably broken down.

3. The respondent filed an Answer to Petition dated 11 September 2014 in which although he denied the cruelty alleged by the petitioner nonetheless avers at paragraph 4 thereof "that as a result of her matters aforesaid the Respondent prays that the marriage celebrated on 4th March 2011 with the petitioner be dissolved" but prays that "Reasons wherefore the respondent prays that the Petition be dismissed with costs to the Respondent."

4. The hearing of the cause took place on 26th March 2015 in the absence of the Respondent service on whom was demonstrated by an affidavit of service filed by Fidelis Omari Abere sworn on 25th March 2015.

THE EVIDENCE

5. The evidence presented by the petitioner was as follows:

"PW 1 ADULT FEMALE CHRISTIAN SWORN AND STATES IN ENGLISH

I am J A K I am the Petitioner. I married the Respondent on 4/3/2010. On 14/4/13, we were blessed with a baby girl, N L R Soon after marriage problems began. The Respondent became such an

argumentative on small issues not been labored for long. The Respondent was temperamental and violent in some cases. Two occasions I had to lock myself in the bedroom to avoid the respondent's violence. At one time, the baby was 2 months and I had to protect my child. The Respondent gets angry real quickly over small issues. We have attempted to reconcile using his American family, the church and through psychologist, after he convinced me that I was mentally disturbed. Love list stopped when he moved out of the bedroom November 2013. We got separated in December 2013, about a month after he moved out. My parents came in November and attempted a reconciliation. My mother was already staying with us because of the child and she invited my sister and my father. Despite talks he moved out of the bedroom and I chose to leave in December 2013. I took a rental house in January 2014. I pray for dissolution of the marriage. After I went out, I had not attempted a reconciliation but he comes to pick the baby every weekend. I take care of the baby. I have not sought any maintenance of the child. He takes care of the baby when he has her and I when I have the baby. He is good with the child. I had walked out 3 times from the marriage. Twice I had been brought back by my parents. I did not report the incident to any police station. I do not wish to involve the police (witness breaks). I think it is the love that is not there anymore. I maintain contact with the Respondent in terms of work. He is doing his PhD in Kenya. Before the break up I used to help in writing proposals. After the break-up the only contact is with the Body. He has done a good job with the child. I tried to reconcile through the parents, the church, a psychological help by phone from a doctor in Nairobi. This was over a period of 3 years 2011 – 2013 with intervals of 6-8 months when I decided to see how things will work out rising from an incident of violence. The violence involved throwing things at the wall, to the ceiling, banging the table, [throwing] the baby plate with food on it against the wall. At one time, he attempted to hit me with his belt. I thought it was a disorder. I asked whether he had history of anger but his mother said he had no such history. When asked whether he still felt love towards me, he said no. I also said the same. This was in 2011. I stayed there hoping things will work out. Both of us have moved on. With respect to the baby, we respect each other's rights. I stay with the baby and he comes to take the baby. He tells me when he is travelling and I also inform him when I am away. There is no issue of the custody or access of the child. I pray for costs. Our marriage was based on love and respect. When love is lost and replaced by hate, the marriage is broken down. I refer to answer to the Petition dated 11/9/14 in which he has also prayed that the marriage be dissolved. That is all.”

THE ISSUES FOR DETERMINATION

6. The issues for determination are whether the matrimonial offence of cruelty has been proved and whether the marriage has irretrievably broken down.

DETERMINATION

Principles of law applicable

7. 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.”

8. 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”.

9. 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.”

10. 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

11. The petitioner’s allegation of cruelty was not proved on the objective test of *Maathai v. Maathai*, supra, so that the court felt sure that the respondent’s guilt for cruelty had been proved. The acts of cruelty by violence were not proved by cogent evidence and the temperamental nature of the respondent was also not proved or its effect on the petitioner. The respondent was to the petitioner’s own testimony good with the child and there was no issue as to neglect or want of maintenance of the child. The standard of proof of beyond the balance of probabilities would require cogent evidence by way of medical reports on the petitioner and or the respondent with regard to the mental state of the respondent and the effect of the alleged acts on the petitioner and police records for any reported acts of violence or threat of violence.

12. However, under the test of cruelty in the formulation by Madan J’s formulation, the parties by their conduct of separating, initially to different rooms under the same roof and later to different individual homes, appear to have reached a conclusion that each could not be expected to tolerate the life with the other on account of matters which though they may appear trivial to the objective observer deeply affects their ability to live together. As the substratum of their relationship - being mutual love and respect – ‘was not there anymore’ when the parties professed that they no longer felt love for each other, the marriage must be taken to have broken down.

13. However, the parties had lived apart since December 2013 and their separation does not therefore qualify as a breakdown of marriage by virtue of length of separation in terms of section 66 of the Marriage Act 2014. Although the parties appeared agreed that the marriage should be dissolved, there was no evidence of collusion in presenting or prosecuting this proceedings for dissolution of marriage.

14. The court finds that the marriage between the petitioner and the respondent has irretrievably broken down, the parties having lived separately for a period of close two years and, despite efforts at reconciliation, they were determined to lead their separate lives and both have conceded the fact of breakdown of marriage and in their respective pleadings sought its dissolution.

ORDERS

15. Accordingly, for the reasons set out above, the court makes the following orders:

- 1. A Decree Nisi for dissolution of the marriage between the petitioner and the respondent of 4th March 2010 is granted.**
- 2. The petitioner and the respondent shall have the joint custody of the child.**
- 3. The petitioner shall have the actual physical custody of the child.**
- 4. The respondent shall have reasonable access to the child for implementation of which the respondent may, as necessary, apply to the Children Court.**
- 5. There shall be 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: -

Petitioner in person

No appearance for the Respondent

Ms. Linda - Court Assistant.