



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 24 OF 2015**

**M.N.N .....PETITIONER**

***VERSUS***

**B.N.M .....RESPONDENT**

**J U D G M E N T**

By an action brought before this court by way of a petition filed on 10<sup>th</sup> February 2012, M.N.N, hereinafter “the Petitioner”, seeks to have the marriage between her and B.N.M., hereinafter “the Respondent”, dissolved on the grounds of desertion and cruelty on the part of the Respondent. As per the petition, it is said that the Petitioner and the Respondent solemnized their marriage on 26<sup>th</sup> April 1995 under the Marriage Act Cap 150 (now repealed). A copy of the Certificate of Marriage is annexed to the petition as proof of her marriage to the Respondent. It is on this basis that this court can make a finding that there is a valid marriage between the Petitioner and the Respondent.

In her petition of 10th February 2012, the Petitioner stated that since 26<sup>th</sup> April 1995 the Respondent deserted the matrimonial home and had refused to consummate their marriage thereby denying her conjugal rights. She stated that the Respondent had also treated her with cruelty. For these reasons, the Petitioner stated that the marriage had irretrievably broken down and can no longer be salvaged.

When the Respondent was served, he entered appearance and filed an answer to the petition. He denied the allegations against him in the Petitioner's petition and put the Petitioner to strict proof thereof. He averred that it is the Petitioner who by her conduct has been guilty of constructive desertion. He specified that the Petitioner had on several occasions committed adultery and this was the main reason why he left the matrimonial home. He therefore urged the court to dismiss the Petition with costs.

The Petitioner served the Respondent with a hearing notice for the petition on 6<sup>th</sup> January 2014. Despite service of the hearing notice, the Respondent did not attend court for the hearing of the petition. This court heard oral evidence adduced by the Petitioner. She essentially reiterated the contents of her petition for divorce. She testified that she did not begin cohabitation with the Respondent immediately after the celebration of their marriage. She told the court that when she later went to live with the Respondent, she found that he had moved from the matrimonial home they had rented. In essence, the Petitioner and the Respondent have never lived together since they celebrated their marriage.

From the pleadings and the oral evidence adduced in this case, the first issue for determination by this court is whether the Petitioner has adduced sufficient evidence in her presentation to warrant the grant by this court of a divorce. Second, this court shall determine whether the Respondent should bear the costs of this suit as prayed by the Petitioner.

The evidence on record shows that the Petitioner and the Respondent contracted a civil marriage, and thus the applicable law concerning the dissolution of their marriage is to be found in **Section 66** of the **Marriage Act, 2014** which provides;

1. ***A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.***
2. ***A party to a marriage celebrated under Part IV may only petition the court for separation of the parties or the dissolution of the marriage on the following grounds-***
  - a) ***adultery by the other spouse;***
  - b) ***cruelty by the other spouse;***
  - c) ***exceptional depravity by the other spouse;***
  - d) ***desertion by the other spouse for at least three years; or***
  - e) ***the irretrievable breakdown of the marriage***

The statutory period of three years has lapsed since the parties got married and thus this court has proper jurisdiction to determine the matter. By her application of 10<sup>th</sup> February 2012 the Petitioner seeks to have the marriage dissolved because of the alleged cruelty and desertion by the Respondent. She stated that she has lived separately from the Respondent since the celebration of their marriage. The Petitioner gave evidence at the hearing reiterating the averments made in her petition for divorce.

The grounds of cruelty and desertion are all questions of fact which require this court to evaluate them based on the evidence adduced in court. The standard of proof in establishing the above grounds of divorce is a preponderance of probability. This point was elaborated by the Court of Appeal in the case of **ALEXANDER KAMWERU -vs- ANNE WANJIRU KAMWERU (2000) eKLR**, where it was stated:

***“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”.***

First, the Petitioner accused the Respondent of cruelty. In the case of **DM -vs- TM (2008) 1KLR 5 Chesoni J** (as he then was) stated that;

***“To establish cruelty the complainant must show to the satisfaction of the court:-***

- I. ***misconduct of a grave and weighty nature***
- II. ***real injury to the complainant's health and reasonable apprehension of such injury***
- III. ***that the injury was caused by misconduct on the part of the Respondent, and***
- IV. ***that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word”.***

In the Present case, the Petitioner is therefore required to adduce evidence establishing that the Respondent, without any justifiable cause, deliberately conducted himself in such a manner as to endanger her physical or mental health, or caused her anxiety or imminent danger. From her pleadings, the Petitioner stated that the Respondent treated her with extreme callousness, cruelty and hostility and subjected her to physical torture and psychological trauma. However, no evidence was adduced to support this claim. For this reason, this ground of divorce fails.

Second, the Petitioner accused the Respondent of desertion. She stated in her petition that the Respondent deserted the matrimonial home since 26<sup>th</sup> April 1995. During the hearing of the petition, the Petitioner testified that she did not cohabit with the Respondent immediately after the celebration of their marriage.

She testified that when she later went to the Respondent's house so as to begin cohabitation, he found that the Respondent had moved out of the matrimonial home they had rented. Therefore, the Petitioner and the Respondent have not lived together since the celebration of their marriage. It is important to note that the Respondent did not adduce any evidence in court in response to the Petitioner's petition. Thus, this court will have to rely on the evidence adduced in court by the Petitioner. The Petitioner testified that all attempts at reconciliation had not borne any fruits. The Petitioner and the Respondent have been living separately for the last twenty (20) years. This court therefore finds that the Petitioner proved the matrimonial offence of desertion to the required standard of proof.

### **ORDERS**

In the premises therefore, this court orders;

- a. **That the marriage between the Petitioner and the Respondent that was solemnized on 26<sup>th</sup> April 1995 be and is hereby dissolved:**
- b) **Decree nisi to issue forthwith;**
- c) **Decree absolute to issue thereafter within 30 days;**
- d) **Any aggrieved party is at liberty to apply;**
- e) **No orders as to costs.**

**SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF OCTOBER, 2015**

**M.W. MUIGAI**

**JUDGE**

*In the presence of;*

**Mr. William holding brief Mr. Osoro for the Petitioner.**