

Be that as it may, the parties were married under the Marriage Act (Cap 150 LOK) thereby falling under the Matrimonial Causes Act (Cap 152 LOK) which provided under section 8 (1) for grounds of petition for divorce or dissolution of a marriage. Such grounds include adultery, desertion and cruelty. These are the factors that have been invoked in this petition and the answer thereto.

The burden of proving adultery and cruelty if not desertion lay with the petitioner in as much as she had accused the respondent of such matrimonial offences. She also accused him of desertion during the hearing of the petition even though the respondent averred that she was the one who actually deserted the matrimonial home.

However, there was no cross-petition by the respondent.

Cruelty is a question of fact and degree dependant on the circumstances of each individual case. It is however, defined as a wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger. The court must be satisfied that the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel and that such conduct has caused injury to health or reasonable apprehension of such injury (see, **DM VS. TM (2008) 1 KLR (G & F) 3**).

Herein, allegations of cruelty made against the respondent have not been established by the petitioner to the satisfaction of this court.

Foul and vulgar language such as calling one a prostitute may not by itself amount to cruelty unless it was shown to affect one's health.

The allegation of assault was not supported by any medical report nor was there any evidence to support the allegation that the petitioner was on several occasions denied food and other provisions by the respondent.

With regard to adultery, it is apparent that the suspicion cast upon the respondent by the petitioner was based on alleged telephone calls made to the respondent by various women not known to the petitioner and the alleged cohabitation of the respondent and a woman known as "Mama Seth or Seith" leading to the birth of two issues. These factors were not established by cogent evidence to establish guilty inclination or passion on the part of the respondent or an opportunity by him to commit adultery.

The evidence required to establish adultery must be more than mere suspicion and opportunity and the standard of proof required is on a higher side.

Herein, there were no cogent surrounding circumstances to infer adultery such as confessions and admissions, improper behaviour, undue familiarity or suspicious circumstances. In particular, there was no evidence of the respondent's alleged cohabitation with the said "Mama Seth" resulting in the birth of two issues. There was no evidence that the two issues belong to the respondent.

The allegation of desertion on the part of the respondent was more or less an afterthought as it was not pleaded by the petitioner in the petition.[]

In sum, the petitioner has failed to establish to the required standard the allegations of cruelty and adultery made against the respondent.

However, it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it (marriage) would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives and because the marriage did not produce any issues, they have nothing to worry about.

Consequently, the petition succeeds in terms of prayer (a). Each party to bear own costs. A "decree nisi"

shall forthwith issue to be made absolute within a period of three (3) months instead of the prescribed six (6) months.

Ordered accordingly.

[Delivered and signed this 5th day of June, 2014.]

J.R. KARANJA.

JUDGE.