



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
DIVORCE CAUSE NO. 76 OF 2013

E N B.....PETITIONER

VERSUS

J S M.....RESPONDENT

JUDGMENT

The petitioner **E N B** has filed this petition seeking the dissolution of his marriage to the respondent one **J S M**. On her part the respondent filed her Answer to petition dated 12th November, 2013 in which she sought the following orders

- “(a) **THAT** the marriage between the respondent and the petitioner be dissolved.
- (b) Maintenance be ordered to cover accommodation, medical and monthly upkeep of Kshs. 40,000/=.
- (c) The property acquired during the subsistence of the marriage be shared.
- (d) **THAT** the cost and incidentals due to this petition be provided for.
- (e) **THAT** any other relief this Honourable court may deem fit to grant to meet the ends of justice.”

The matter proceeded by way of ‘*vive voce*’ evidence. **MS. MOMANYI** Advocate acted for the petitioner whilst **MR. KADIMA** appeared for the respondent.

The undisputed facts of the case were as follows. The petitioner and the respondent first met in Mombasa in the year 1977 when she was a 16 year old student and he was in college. A friendship developed between them. In 1978 the respondent conceived and bore their first born daughter **V K B**. By then the two were not married so after she delivered the respondent continued to reside with the child in her parents’ home. It appears that the couple parted ways but then met up again in 1989. The petitioner again began to court the respondent and this time their relationship culminated in a marriage which was conducted on 3rd August, 1990 at the District Commissioner’s Office in Kilifi. Evidence of the fact of this marriage is availed by a copy of the marriage certificate serial number [Particulars Withheld] produced by each party. After the marriage the couple set up their matrimonial home in Tononoka. They later moved to reside in company housing at [Particulars Withheld] when the petitioner secured a job with [Particulars Withheld]. The couple went on to bear two more children together namely

– E B

– E B

It would appear that the couple lived in harmony except for the usual ups and downs of married life until their eldest child became an adult and sought to get married. The petitioner claims that he raised objection to the marriage of his daughter where upon the respondent acting behind his back and without his knowledge proceeded to welcome the intended fiancé into her parents' home where dowry was paid and received by the respondent's parents. The petitioner stated that this action belittled him as the girl's father and exposed him to ridicule amongst his kinsmen and peers. Due to this disagreement the relationship between the couple became strained. In 2012 the petitioner moved out of the matrimonial home and went to live in the rural home in Mazeras from where he commutes daily to work. On her part the respondent remained in the family home in Ganjoni which she occupies together with their two college going children. The petitioner has filed this divorce basing it on cruelty exhibited by the respondent to himself.

In her Answer to petition the respondent denies the allegation of cruelty. On her part she seeks dissolution of the marriage on the basis of the petitioner's adultery. As stated earlier both parties did testify on their own behalf before me.

Section 66(2) of the Marriage Act, 2014 provides for the grounds upon which a civil marriage (such as the present one) may be dissolved. This section provides as follows

“(2) A party to a marriage celebrated under part IV may only petition the court for the 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 petitioner has alleged that the respondent has been secretive by failing to disclose to her the amount she received as terminal dues when she left her job at the Diani Reef Hotel. The petitioner has not indicated whether he asked her how much she was paid and she declined to disclose nor has he indicated that the said terminal benefits were required for use to benefit the family and the respondent declined to avail these funds. In short, secretiveness though a flaw in character cannot be said to amount to cruelty. The petitioner also claims that he was informed by a friend in Mazeras that the respondent had a parcel of land in Shanzu which she was offering for sale. The said friend was not named nor has he come to testify as to how he came about this information. The plot number has not been mentioned and no proof is tendered to show that the respondent did actually own any land in Shanzu. Again it is not clear if the land was jointly owned and she was attempting to sell it behind his back or if it was the respondent's own land. Once again there is no evidence of cruelty here.

On her part the respondent has accused the petitioner of adultery. She has not named any woman in her evidence though mention was made of a certain lady called 'Ethel'. This Ethel has not been named as a co-respondent. It is not enough to simply throw about names when alleging adultery. There must be proof beyond a preponderance of doubt that adultery has actually occurred. No such proof is tendered here. I find that the allegations of adultery are not proved.

The main point of disagreement between this couple appears to be their eldest daughter and her plans to marry. The petitioner declined to give his consent to the marriage. His reason was that the family of the intended groom was known to engage in witchcraft. It may be argued that this was not sufficient and/or valid grounds to reject his daughter's suitor, but that is not the issue which this court is being called upon to determine. The petitioner went on to testify that after his disapproval of which the respondent was fully aware, she proceeded to arrange for their daughter's suitor to pay a visit at her own parents home. The

respondent does not deny this allegation. She concedes that the said suitor paid a visit to her parents' home in Mombasa and even paid dowry to her parents. Where the father of the girl is alive and is known it is usual practice that suitors of his daughter will visit his home and pay dowry to him. What happened here was unusual to say the least. The implication here would be that this child (and by extension her mother) did not recognize the role of the petitioner as a girl's father. It is not difficult to see how this occurrence would subject the petitioner to ridicule amongst his family and peers. In her defence the respondent claims that it was the child who herself made these arrangements. However without the respondent's active participation (she concedes that she was present during this function at her parents' home) I doubt whether it would have taken place. The respondent's actions amounted to a '*slap in the face*' of her husband. Her participation, encouragement and tacit approval of her daughter's plans were certainly aimed to reject and despise the petitioner who was the child's father. To participate in a ceremony which is designed to put her own husband into ridicule certainly does amount to cruelty especially in the patriarchal Kenyan society. A good and loving wife would have dissuaded her daughter from such action, would have sought a middle ground or would have worked harder to bring round her husband. By her actions the respondent was making it clear to all and sundry that she did not respect her husband and his role as their child's father. This amounts to cruelty of the emotional kind and indeed is what led the petitioner to move away from the matrimonial home in Mombasa to his rural home in Mazeras. I am satisfied that the ground of cruelty has been sufficiently proven so as to warrant the granting of the divorce.

Even if this ground of cruelty had not been proven it is quite evident that the marriage has broken down in terms of section 66(2) (e) of the Marriage Act. The couple have lived apart since 2012. Section 66 (6)(d) provides that a marriage is deemed to have irretrievably broken down where

“the spouses have been separated for at least two years whether voluntary or by decree of the court.”

This is a case where the couple do not live in the same town, there is no communication and no consortium between them. Both parties have expressed a desire to have the marriage dissolved. Based on the foregoing I do hereby direct that a decree nisi to issue to be made absolute within three (3) months of today's date.

The respondent did additionally pray for maintenance in the sum of Kshs. 40,000/=. However she concedes that she is in paid employment and also concedes that the petitioner solely caters for the school fees for their two children who attend college. The petitioner has testified that he spends Kshs. 655,000/= annually to this end. In addition the respondent still lives in a house provided courtesy of the petitioner's employment. The petitioner states that he is willing to allow the respondent to continue to live there with the children. In the circumstances the respondent only needs to cater for her food. I am sure that she is able to do this even with a casual job. The respondent herself appears to have abandoned this prayer for maintenance when she states under cross-examination

“With my salary I can take care of myself fully.”

I find that the petitioner is already making adequate provision for the respondent (housing) and the children of the marriage. Parties to a marriage are deemed by our Constitution to have equal rights. I therefore disallow the respondent's prayer for maintenance.

Finally the respondent did pray for division of matrimonial property. However this prayer was never pursued. She did not tabulate what this matrimonial property was, location or its value or how it was acquired. Effectively this prayer was not canvassed and can be deemed to have been abandoned. This being a matrimonial matter, each party is to pay their own costs.

Dated and delivered in Mombasa this 16th day of July, 2014.

M. ODERO

JUDGE

In the presence of:

No Appearance by Petitioner

Ms. Rajab h/b Mr. Kadima for Respondent

Court Clerk Mutisya