



IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 27 OF 2013

R C I.....PETITIONER

VERSUS

1. D M M.....1ST RESPONDENT

2. S.....2ND RESPONDENT

JUDGMENT

The Petitioner **R C I** filed this petition dated 2nd May, 2013 seeking the following orders:

- “(a) The marriage between the Petitioner and the 1st Respondent be dissolved.**
- (b) The Respondent do pay to the Petitioner alimony of Kshs. 20,000/=.**
- (c) The 1st Respondent pay the cost of the Petition.**
- (d) Any further or other relief that this**

Honourable Court may deem fit or just to grant to the Petitioner in the circumstances”

The 1st Respondent **D M M** having been duly served filed his **Answer to Petition** in which he cross petitioned that:

“the marriage between the petitioner and the 1st Respondent be dissolved. And that prayers to pay the petitioner alimony and costs of this petition be dismissed with costs.”

The 2nd Respondent ‘S despite being served did not file any reply. The petition was disposed of by way of *vive voce* evidence. The parties testified before the court on 4th December, 2013. **MS. OKATA** Advocate represented the petitioner whilst **MR. KIRUI** acted for the Respondent. The undisputed facts of the case are that the parties met and began to cohabit as man and wife. On 10th November 1998 they solemnized their union at the office of the Registrar in Mombasa. The petitioner produced copy of their marriage certificate Serial No. xxxx as proof of the marriage **Pexb 1**. Unfortunately the couple did not bear any child together. Indeed it would appear that this fact of childlessness was the genesis of their marital problems. The petitioner apparently had no problem conceiving but was never able to carry a child to term. She told the court that she suffered a total of about ten (10) miscarriages. The respondent

confirms this fact.

The petitioner told the court that due to her inability to bear a child the respondent's attitude towards her changed. He began to bring in women to their matrimonial home and would sleep with them on the matrimonial bed. The petitioner would be banished to sleep on the sofa. The parents were called in to try and resolve the matter to no avail. The petitioner alleges that on 16th June, 2011 the respondent arrived home at 5.00 a.m and beat her up. She reported the assault at Nyali Police station and produced the OB entry as evidence **Pexb 2**. The respondent would also abuse her calling her '*barren*.' The petitioner states that the respondent eventually married a lady called 'S' [the co-respondent] and brought her into the matrimonial home as his second wife. The two have borne a child together. The petitioner claims that in the year 2012 the respondent chased her away from the matrimonial home. She is currently living with an aunt.

On his part the respondent confirms that the petitioner had about ten (10) miscarriages during the course of their marriage but he denies that this caused him to turn against her. He claims that it was the petitioner who was erratic and violent and that it was she who would assault him – he produces in court a P3 form **Pexb 1** as evidence of such assault. The respondent claims that it was the petitioner and her family who brought to him a relative of hers from her home in Uganda called '*Beatrice*' to marry and bear a child on her behalf. His parents rejected the girl as they wished him to marry a Kenyan wife. The respondent concedes that he did marry another woman with whom he now has a child. He too seeks for the dissolution of their marriage.

The Marriage Act 2014 at Section 66(2) provides the grounds upon which a divorce may be granted. These include

- Adultery
- Cruelty
- Desertion
- Irretrievable breakdown of the marriage

On her part the petitioner relies on the grounds of adultery, cruelty and desertion as a basis for her petition. On the first ground the petitioner told the Court that due to her inability to bear a child the respondent began to engage in adulterous relationships with various women whom he would even bring to sleep in her matrimonial home in her presence. The petitioner has not named any one of these women. She does however name the Co-respondent 'S' as a woman with whom the Respondent has married and now has a child. The respondent admits that he is living with this lady as a wife. Under Cross-examination the respondent states:

“It is true I married another wife and we have a child with this other lady. This was during our marriage.”

This amounts to a clear admission of adultery on the part of the respondent. The argument that he married this lady upon a suggestion by the petitioner that he get another woman to bear him a child does not negate the fact of adultery. The statutory marriage entered into by the parties is monogamous in nature. Failure to bear a child is not a ground upon which a marriage can be dissolved. I am satisfied that the ground of adultery by the respondent has been proved.

Both parties allege cruelty against the other. The petitioner has produced an OB report from Nyali Police Station **Pexb 2** where she reported an assault against her by the respondent. Likewise the respondent has produced a copy of a P3 form **Dexb 1** in support of his claim that the petitioner assaulted him. The P3 indicates that the respondent was found to have sustained '*human bites*'. From the evidence available to this court it is not quite clear who between the two was the aggressor. What is clear is that the couple had a tumultuous relationship and the evidence shows that each assaulted the other at some point.

Similarly each party accuses the other of desertion. Again here the evidence is not clear. The Petitioner alleges that the respondent chased her away from the matrimonial home whilst the respondent insists that the petitioner moved out of her own accord taking all the household goods with her. No evidence exists to prove either allegation. What both parties agree is that since 13th January, 2012 they have lived apart. In addition both parties seek the dissolution of their marriage. They both state that there exists no possibility for reconciliation. It is clear that this is a marriage which has irretrievably broken down. Section 66(b) (d) of the Marriage Act 2014 provides that a marriage will be deemed to have irretrievably broken down in cases where:-

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

In this case the couple have of their own volition been separated for over two years. Each of them seeks a divorce. The respondent by his own admission is engaged in an adulterous relationship with another woman. I therefore allows this petition for divorce. Decree nisi to issue to be made absolute after three (3) months.

The Petitioner made a prayer for alimony in her petition. This prayer was not canvassed during the hearing. In the final submissions Counsel for the petitioner prays that a sum of Kshs.40, 000/= per month be awarded as alimony. It is claimed that the respondent is well to do and can afford such a payment. No evidence has been adduced to prove this. The court was not told what the respondent earns nor were we told what the petitioner’s needs were. The Respondent was not invited to reply to this prayer. I am reluctant to make an award of alimony in such a situation where this specific prayer was exhaustively canvassed. I therefore decline to make any award of alimony. This being a family matter, I direct that each party will bear its own costs.

Dated and delivered in Mombasa this 24th day of November, 2014

M. ODERO

JUDGE

In the presence of:

No appearance by either side.

Court Clerk Mutisya