



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
DIVORCE CAUSE NO. 20 OF 2012

S. J .T PETITIONER

VERSUS

E. K.K RESPONDENT

JUDGEMENT

Vide a Petition dated 8th November, 2012, the Petitioner, S.J.T seeks the following reliefs:-

- (a) That the marriage between herself and the Respondent be dissolved.
- (b) That she be given the full custody of her two children I. C and I.K.
- (c) That the Respondent be ordered to maintain the issues of the marriage.
- (d) That costs be provided for.

In seeking the dissolution of the marriage, she relies on three grounds:-

- (1) Adultery
- (2) Cruelty
- (3) Desertion

The Respondent filed a Notice of Appearance on 20th November, 2012 but failed to file a response to the Petition.

Directions were given on 21st March, 2013 that the matter proceeds as an uncontested petition, the Respondent having failed to file an answer to the petition within the stipulated period.

Petition came up for hearing on 29th April, 2013.

Section 8 of the Matrimonial Causes Act sets out grounds under which a party may seek divorce. They are, that the Respondent;

- (a) has since the celebration of the marriage committed adultery;**
- (b) has deserted the Petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or**

(c) **has since the celebration of the marriage treated the Petitioner with cruelty; or**

(d) **is incurably, of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.**

And by wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

The Petitioner testified was the sole witness in her case. She produced as exhibit a copy of the marriage certificate which shows that her marriage with the Respondent was celebrated on 25th February, 2002 at [Particulars withheld] in Kitale. Thereafter the couple lived together in Kitale until they separated in the year 2009. They were blessed with two issues namely, I. C and I. K aged 9 and 4 ½ years respectively.

With respect to adultery, the Petitioner testified that the Respondent severally had sexual relationships with house helps and one A. N with whom he sired three children.

In N-VS- N (2008) 1 KLR, 17, Madam, J. as he then was said:-

“Adultery is that physical act of sexual union between two married persons of the opposite sex not lawfully wedded to each other. To prove adultery, it is not necessary to have direct evidence of the same. Association coupled with opportunity illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling.”

In DM -VS- TM (2008) 1 KLR, 5, Chesoni, J. as he then was, held:-

“ that the evidence required to establish adultery must be more than the mere suspicion and opportunity; evidence of guilty inclination or passion was necessary, nevertheless the evidence of a single witness might suffice to establish adultery, unless that evidence aroused the suspicion of the court when corroboration would be required. The husband in the present case, having raised no more than a state of facts consistent with adultery beyond reasonable doubt.”

The Petitioner herein was candid of the relationship the Respondent in particular had with A .N, which particulars she pleaded as well. M, the Respondent failed to file an answer to the Petition, hence the Petitioner's word remains unrebutted. I would have no reason, in the circumstances to disbelief her.

On cruelty, the Petitioner pleaded the same under paragraph 7 of the Petition. She gave the particulars as:-

(a) The Respondent has inflicted the Petitioner with emotional distress hence causing her untold mental and emotional torture.

(b) That the Respondent did not only carry on with open adultery but was also verbally abusive to the Petitioner. This caused a lot of mental anguish and pain to the Petitioner.

In her testimony she said the Respondent would insult her by calling her a prostitute. That twice, he beat her and that due to his relationship with house helps, she would change the house helps very frequently. That a combination of these factors caused her a lot of mental anguish.

Chesoni, J. (as he then was) laid down the ingredients of cruelty – DM -VS- TM (Supra) at page 4 – 5 as follows:-

“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 N -VS- N (Supra), the court held:-

“Any intention on the part of one spouse to injure the other is not necessary element of cruelty as a matrimonial offence though the presence of such an intention, if it exists, is material and may be crucial whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard ... The law does not require or wait for tangible manifestation of cruelty before granting relief ... 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 vital effects upon their love 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.”

In the instant case, the major factor in the cruelty is the emotional distress inflicted upon the Petitioner. Such distress has no measuring scale. It is left to the court to discern whether it weighs heavily on the marriage. In this case, the Petitioner and the Respondent no longer live together due to the cruelty combined with other factors. I would have no reason to doubt what the Petitioner told the court. And even in the absence of any evidence of assault, she has immensely suffered psychologically, making it practically impossible for the couple to live together. M, this marriage has irretrievably broken down and would serve no purpose not to allow the petition on account that the allegation of assault was not proved.

On desertion, the Petitioner has averred that, since the year 2009, the Respondent deserted the matrimonial home and has never come back. That the result of such desertion has been to deny the Petitioner conjugal rights. She testified that the marriage has irretrievably broken down. I find the same as factual as marriage cannot be termed as marriage when parties have had no intimacy for a period of over four years.

The Petitioner also testified on oath that she has not connived with the Respondent in bringing this Petition. In the end, I hold that this marriage must be dissolved.

The Petitioner has also prayed for the custody of the issues and that the Respondent be ordered to maintain them.

The two parties were blessed with two issues namely:-

- (1) I. C – aged 9 years
- (2) I .K – aged 4 ½ years

The Petitioner testified that she currently has the custody of the two minors. The law demands that the custody of children of tender years should be granted to the mother unless in such exceptional circumstances when it should be granted to the father.

Her testimony was that the Respondent already has another family. He has not come to court to claim an interest in having their custody. It is thus only fair that the Petitioner continues to live with the issues.

On maintenance the responsibility lies with both parents depending on their ability. The Petitioner works for Kenya Agricultural Research Institute (KARI) while the Respondent is a Lecturer at K. T. I. My greatest concern is that, in as much as the court would wish to order the Respondent to contribute to the issues' maintenance, the Petitioner failed to give an estimate cost of such maintenance. She ought to have tendered evidence of the particulars of expenditure by the children vis a vis what the Respondent should be ordered to contribute towards such costs. I have nothing against which to gauge whether such maintenance is deserving or from what earnings of the Respondent it should be deducted. On the ground of failing to tender evidence to justify the prayer for maintenance, prayer (c) of the Petition must fail.

In the result, I dissolve the marriage between the Petitioner and the Respondent and hereby order that a Decree Nisi do forthwith issue. That the custody of the issues of the marriage be and is hereby granted to the Petitioner. Each party shall bear its own costs of this Petition.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 9th day of July, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Ms. Kiptoo Advocate for the Petitioner

No appearance for the Respondent