



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

DIVORCE CAUSE NO. 1 OF 2007

R. J. B PETITIONER

VERSUS

J. R RESPONDENT

JUDGMENT

The Petitioner R. J. B filed this divorce Petition on 6th January, 2007 seeking the following reliefs from the Respondent;

- (a) That the marriage between herself and the Respondent be dissolved.
- (b) That the Respondent be condemned to pay costs.
- (c) That the court do grant an order requiring the Respondent to pay monthly maintenance to her as shall be assessed by the court.

She relied on the following grounds:

- (a) Cruelty
- (b) Adultery
- (c) Desertion

In an Answer to the Petition filed on 9th August, 2007, the Respondent denied having committed the accusations levelled against him. He avers that instead it is the Petitioner's relatives who have tried to do harm to him. He states he has never threatened to kill the Petitioner, or assaulted her, or even forced her to flee to her parent's home.

He also avers that on 18th April, 2005 he went to plough the farm and on returning home at about 5.00 p.m. found the Petitioner had fled their matrimonial home.

It is also the Respondent's case that he is not guilty of adultery and has never cohabited with one P. M.

He maintains that he still loves the Petitioner and it is his wish that the marriage is not dissolved.

In a Reply to Answer to Petition filed on 29th August, 2007 the Petitioner denies all the averments contained in the Answer to the Petition, and reiterates the contents in her Petition and urges the

court to dissolve her marriage with the Respondent.

The Petitioner was the only witness in her own case. She testified before the then Hon. Justice Mwilu on 30th November, 2009. She produced the marriage certificate as P. Exhibit 1. Although neither the original nor a copy of the marriage certificate is available in the court file, from the pleadings of both parties, there is no doubt that the two were formerly married sometime in 1972.

She testified that the Respondent so often beat her up and at one time reported the assault at Plateau Police Station vide Occurance Book (O.B) No. 5/25/4/05. She was thereafter treated at Plateau Mission Hospital and she produced the treatment chits as P. Exhibit 2. She said she lost some teeth as a result of the assault. She testified that the Respondent would desert the matrimonial home for other women. That as a result, she left the matrimonial home on 18th April, 2005 and has never returned.

She said they had seven children namely;

- K. R
- K. R
- N. K
- K. R
- K. R
- J. R
- C. R

She said they lived on a 10 acre piece of land and they had a tractor, harrow and household goods.

According to the Petitioner the assertions by the Respondent that they lived peacefully is untrue. She asked the court to find that she is entitled to a share of their property for which she contributed to its acquisition for the 34 years she lived with the Respondent. She also urged the court to meet the cost of education of the issue C. R.

The Respondent testified before me on 10th December, 2012. He said that their marriage was celebrated on 24th April, 1972. He denied that he used to assault the Petitioner and said that their marriage was cordial until 2006. His testimony was that one day while in the company of his friend, A. L, went to take his father-in-law at home. That while on arrival at the latter's home, his father-in-law entered into the kitchen and never came out again which according to him (Respondent) was not a good gesture. He said that this behaviour by his father-in-law marked the beginning of his marital problems with the Petitioner.

The Respondent further testified that his marriage was strained by the fact that he returned a cow given to them during their marriage by his father-in-law on learning that the cow had been stolen before it was given to them.

It was his testimony that the Petitioner got injured when she fell down as she ran away, on a day the Respondent had gone to her (Petitioner) parent's home to collect the house keys after she deserted the matrimonial home. That as a result of the injury, she went to hospital for treatment as reflected in the treatment notes produced as exhibits by her.

He said that the Petitioner has a dental problem with her teeth as a result of which some of the teeth have been removed.

As regards adultery, the Respondent stated that P. M only offered him a location to rear chicken as her home is nearer to the main road thus conducive for marketing the chicken products. He denied cohabiting with her.

He said that none of their children is in school with, the last born being married and working with the Ministry of Health.

It was also his evidence that himself and the Petitioner had not acquired any matrimonial property. That land on which they lived belonged to his late father. As for the tractor, he said he continues to pay a loan through which he acquired it. He further said that it was the Petitioner who should maintain her as she works and he does not. He urged the court not to dissolve the marriage.

From the foregoing positions taken by the parties, the court must determine the following issues:-

- Adultery
- Cruelty
- Desertion
- Monthly maintenance to the Petitioner
- Whether marriage should be dissolved

It must be borne in mind that "**he who alleges must prove**". But again, what is the burden of proof in a divorce cause?

In the case of ALEXANDER KAMWERU -VS- ANNE WANJIRU KAMWERU (2000) e KLR, which was an appeal from the High Court Judgment in DIVORCE CAUSE NO. 75 OF 1992, the Court of Appeal gave guidelines on the applicable burden of proof in a divorce cause as follows:-

“Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. 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.”

That is to say that as long as the court is satisfied as to believe that the Petitioner is telling the truth, it should hold for the Petitioner respectively.

In this respect, the Petitioner called no witness or tendered no evidence in prove that the Respondent had committed adultery with P. M. She neither joined her as a Co-Respondent. But in N -VS- N & ANOTHER (2008) 1 KLR, 17 learned Madan, J as 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.”

Again 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 was candid that she knew that the Respondent cohabited with P. M. To the extent that he (Respondent) admitted that he had a business relationship with P. M, I am convinced that that business relationship that excluded his spouse was more than he explained. I am therefore convinced without a doubt that he had sexual relationship with the said P. M and probably cohabited with her.

In the same spirit, the acts of verbal abuse and physical assault against the Petitioner amounted to cruelty. P. Exhibit 2 is a clear demonstration that the assault caused the Petitioner physical injuries for which she sought medical attention. Although the Respondent stated that the Petitioner had dental problems and he had taken her to a doctor, he was unable to discharge the Petitioner's strong evidence that he used to physically assault her. It is indeed frustrating and annoying to call a person a prostitute without prove. This, according to the Petitioner caused her a lot of mental anguish which she is no longer willing to tolerate.

The ingredients of cruelty were well laid down in **DM -VS- TM (Supra)** at Pages 4-5 as:-

“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, an**
- (iv) that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of thatword.”**

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.”

The Petitioner opted out of the matrimonial home due to the cruelty inflicted upon her by the Respondent. Such cruelty has made it practically impossible for her to live with the Respondent. And as held in the two cited cases above, it may be hard to measure cruelty but the passion with which the Petitioner told of her suffering, leaves no doubt in my mind that she has suffered immensely and that she is not ready to go back to her marriage.

On desertion, it is no doubt that it is the Petitioner who deserted the matrimonial home sometime in 2005. But she left the matrimonial home due to the agony she was going through in the hands of the Respondent. Strictly speaking she was pushed out of the matrimonial home by the Respondent.

This fact withstanding, though, the other two grounds upon which this Petition is filed would stand on their own.

I am, in this regard persuaded by the words of P. J. Kamau, J in **JOHN GICACI GITURWA - VS- KARERI SHIMULI MUSUNGARI HIGH COURT DIVORCE CAUSE NO. 71/2002** who said as follows:-

"I am satisfied that it was as a consequent of the Petitioner's cruelty and intolerable conduct towards the Respondent that the Respondent was compelled to leave the matrimonial home. As was held in GOLLINS -VS- GOLLINS (1963) 2 ALL E.R, 966, one is which will probably not tolerate and which no ordinary woman would tolerate whatever your intention may have been'."

Based on the above observations, when considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, I am satisfied that the Petitioner has discharged her burden beyond all doubts, that I am sure the Respondent committed the offences levelled against him. I am convinced the Respondent committed the offence of adultery and undoubtedly was also cruel to the Petitioner. Even the mere fact of leaving the matrimonial home without an explanation to the spouse amounts to cruelty. That is to say, the conduct of a spouse that subjects the other spouse to mental anger is in itself cruelty.

In the circumstances, I find the Respondent as untruthful in his attempt to justify that the marriage is retrievable. In my view the same is irretrievable and should be dissolved.

I am further convinced that the Petitioner has not connived, condoned or been accessory to the Respondent's behaviour. She secured her life by leaving the Respondent who had abused her for far too long. She no longer wishes to go back to a cruel marriage. She has not colluded with the Respondent in bringing this Petition and she thus deserves the order of dissolution of the marriage.

As for the prayer for maintenance, it was imperative upon the Petitioner to provide prove of justification of the request made. For instance, she did not indicate if she works and if she does, what she earns. She did not also demonstrate against her income, what her maintenance cost would be. At the same, she did not also demonstrate that one of the issues namely, C. R is in school and what her school fees is. Furthermore, the Respondent was categorical that the said issue is now an adult working and married, which assertion the Petitioner did not rebut.

In this regard, I am not inclined to grant the prayer for maintenance.

In the same spirit, I recommend that a separate suit should be filed seeking the sub-division of the matrimonial property which the Petitioner claims ownership as per her evidence in chief.

In the end, I hereby dissolve the marriage between the Petitioner and the Respondent. I order that a decree Nisi do forthwith issue. Each party shall bear its own costs of this Petition.

It is so ordered.

DATED and DELIVERED at ELDORET this 8th day of October, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

No appearance for M/s. Isiaho for the Petitioner

Mrs. Khayo for the Respondent