



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

DIVORCE CAUSE NO. 5 OF 2009.

N. W.N.....PETITIONER

VERSUS

J.N.K.....RESPONDENT

J U D G M E N T.

1. The petitioner (wife) petitioned for the dissolution of the marriage by a petition filed on 7th July, 2009 citing grounds of cruelty, desertion and adultery on the part of the respondent. This marriage was solemnized on 11th September, 1998 at the District Commissioner's Kitale. Before the formal solemnization of the marriage the parties were cohabiting or they were marriage under the customary law since 1978. Both parties have been residing at T[...] area within Kitale Municipality. There are four issues of marriage but all the four of them are of the age of majority.

2. This petition was defended; the respondent filed an answer and denied all the allegations. The respondent contended that it is the petitioner who moved out of the matrimonial home on 11th July, 2009 that is the same day the petition was filed and served upon the

respondent. The respondent alleges that on 1st December, 2004 the petitioner moved out of matrimonial home and carted away all the shop business stock worth 2 million and opened another business at M[...] which she was running with her man friend called **E.M.M.** Both petitioner and respondent gave evidence in support of their respective pleadings.

3. The petitioner gave a detailed account of how the respondent has subjected her to cruelty. The petitioner was particularly beaten and threatened with a panga when she questioned the respondent why he was having an affair with other women. The matrimonial disharmony was unsuccessful arbitrated before the parents of both parties and before their local priest. From January, 2004 to June, 2006 the petitioner moved to M[...] shopping centre. The respondent continued to accuse the petitioner of having an extra marital relationship with the said **E.M.M** which hurt the petitioner as the gentleman was a married man. The petitioner denied having had any relationship with the said **E.M.M.**

4. On the part of the respondent, he denied having been cruel to the petitioner as regards the allegations of adultery; the respondent contends that the woman cited as **Mama S** is not his mistress but a domestic worker. He testified that from the year 2002, he had health problems which necessitated an operation that is when the petitioner started complaining that the respondent was not satisfying her sexually and started having sex with **E.M.M.** The petitioner left the matrimonial home in January, 2004 but the respondent sought reconciliation and the petitioner returned, only briefly, as she later left for M[...] Town. The petitioner returned in 2006, but she now lives in a separate house within the premises where their family does business. The respondent lives within the same compound. The respondent admitted that from 1st December, 2004 both he and the petitioner have lived in separate rooms.

5. This petition was highly contested; Counsel for the petitioner filed written submissions and addressed the test that this court should apply in determining whether or not to dissolve a marriage. This is a marriage of 30 years. The petitioner is aged 55 years and the respondent is aged 61 years. According to counsel for the respondent, none of the matrimonial offences that were alleged against the respondent were proved. Those were mere allegations and the casual evidence of the petitioner did not at all prove the grounds of adultery. It was submitted that the petitioner, could did not even know the names of the persons the respondent is supposed to have committed adultery with.

6. Mr. Kiarie, learned counsel for the respondent cited some court decisions and argued that for the ground of adultery to be proved; there must be cogent evidence. One such case was that of; **Buya Vs. Makorani & Another (1990) KLR 232 Page 237**. In that case **Bosire – J** (as he then was) cited the principal enunciated the case of **Preston Johns vs. Preston Johns [1951] AC 391** . Because of the gravity and public importance of each of the matrimonial offences, a high standard of prove is required in evidence although it is not necessary to prove an act of adultery in time or place or the name of the person with whom the act of adultery was committed. The court needs to be satisfied that there was an opportunity before attaching the guilt of the offence of adultery. Moreover, under the provisions of section 10 of the Matrimonial Causes Act, the court must be satisfied that a matrimonial offence has been proved. Although this does not require prove beyond reasonable doubt but prove of a level of certainty. According to the respondent, this marriage is not irretrievably broken down; the grounds of misconduct are not of grave nature. They are mere disagreements and the petition should be dismissed.

7. On the part of the counsel for the petitioner, M/s Arunga learned counsel for the petitioner submitted that the evidence of the petitioner clearly established that the marriage ceased to exist because there has been no cohabitation since 2004. Moreover the respondent admitted that there is a woman who lives in his house but he claimed that she is a domestic worker. That admission clearly shows there is a possibility that the respondent is engaged in an adulterous relationship with this woman who lives in his house as a domestic worker. Counsel cited the case of; **KAMWERU VS. KAMWERU [2003] 2EA page 484** where the Court of Appeal cited with approval the text by *Rayden's Practise and Law of Divorce (10 ed)* where the learned authors expressed themselves as thus:-

“The burden of proof is throughout on the person alleging adultery there being a presumption of innocence. Reference to the statute shows that the standard of proof is that the court must be ‘satisfied on the evidence’. The Act makes no distinction between the standards of proof of adultery and that of any other round of divorce but this has not in the past been reflected in the cases, which have required the same strict proof in respect of adultery as is required in a criminal case before an accused person is found guilty, that is, that the tribunal must be satisfied beyond all reasonable doubt. But it has been held that a suit for divorce is a civil and not a criminal proceeding and that the analogies and precedents of criminal law have no authority in the divorce court, which is a civil tribunal. It is wrong therefore to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other ground for divorce, may be proved by preponderance of probability.”

8. I have considered all the evidence put forward and the issue for determination is whether the petitioner has proved the grounds for divorce which are set out under section 8 of the Matrimonial Causes Act as follows:-...

(a) *Has since the celebration of the marriage committed adultery; or*

(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.*

9. Going back to the evidence on record, the respondent too makes allegations of cruelty and adultery against the petitioner but he has not cross petitioned for divorce. The respondent told the court that he did not want divorce because he believes that at his age, the marriage should subsist for the sake of the children. The petitioner made allegations of cruelty, desertion and adultery. It is common ground that this couple has not cohabited since 2004. The respondent admitted during cross examination that they have not lived together in the same room since 1st December, 2004. The petitioner also made allegations of adultery against the respondent. Although the respondent denied there is any relationship between him and a woman called **Mama S**, who works for the respondent, to my mind even if this was a mere allegation, the respondent also makes allegations that the petitioner was involved in extra marital relationship with **E.M.M**. These disagreements of very serious suspicion and mistrust between the petitioner and the respondent have not been resolved over the years.

10. These allegations on both sides have caused the separation and the petitioner and respondent, have not cohabited since December, 2004. That notwithstanding, the respondent would wish to have the marriage preserved for the sake of the children. Going by the totality of the evidence before court, I find that the ground of desertion has been proved. Accordingly I will allow the petition and pronounce a decree nisi for a period of three months. If no application is made, the decree shall be made obsolete. This being a family matter each party shall bear its own costs.

Judgment read and signed on 4th day of March, 2011.

M.K. KOOME.

JUDGE.