



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO 7 OF 1989**

**G R M M.....PETITIONER**

**VERSUS**

**R N M.....RESPONDENT**

**JUDGMENT**

**G R M M** petitioner married **R N M** (respondent) under cap 150 Marriage Act Laws of Kenya on 6/9/80 at Machakos Town. They lived together but separated on or about 7/12/87. They had 3 children 2 of whom are living with respondent now while the elder daughter J has left respondent and is now living with petitioner. Petitioner cited cruelty, desertion and adultery as grounds for the dissolution of their marriage. He also prayed for the custody of the children, maintenance from respondent with further order that respondent should not interfere in the (now) quiet life of petitioner in any way (together with his wife and children). It was a long petition -15 paragraphs, filed on 16/1/89.

On 3/2/89 respondent filed a short 4 paragraph answer denying all the claims raised by petitioner in the petition. She desired the Court to dismiss it with costs.

On 27/11/91 the hearing of the petition opened before this Court with both sides represented. Both parties gave evidence and petitioner called 2 witnesses. Written submissions were tendered and the Court rose to consider this verdict.

Of the three grounds on which this petition is based the first is cruelty. Petitioner referred to incidents when respondent did not cook meals for him. He would then go hungry. Respondent answered that she prepared meals and offered them to plaintiff but he would decline. He only ate her food when visitors were in. She denied even using bad or abusive language to petitioner or frustrating and humiliating him. As for leaving their bedroom it looked as if when they had a row or something the 2 could sleep in separate rooms and resume later. Nothing exceptional about such conduct in households. Petitioner then alleged that respondent infected him twice in 1984 and 1987 with a venereal disease. Allegedly he told her. Respondent denied such a thing adding that she had even had a child in 1985 about which time she had tested negative for any such disease. Neither did petitioner tell her of such. Well. No medical evidence was exhibited and the Court found it rather difficult to believe petitioner rather than respondent in such a situation.

Petitioner had claimed that respondent treated his parents with disrespect and hostility. When petitioner's father gave evidence he said that he was received and treated properly by his daughter-in-law, the respondent. There was no support for this aspect of claim. Respondent denied treating the children of the marriage violently or sadistically. She lives with two. No proof of violence was given.

When a ground of cruelty is alleged the Court requires proof thereof as it is a matter of fact; cruelty

whether mental or physical must be intended by whoever inflicts it, to cause and must cause injury to health; or this act constituting cruelty must be such that injury is in fact apprehended by the complainant. Petitioner may have suffered what he alleges he suffered from frustration, anguish, humiliation or in his body. But there was no proof to support the claims. This ground must fail.

On the ground of adultery the Court was treated almost to nothing and at least to a mere suspicion. Adultery is a grave basis for a divorce petition. It may not be easy to get direct and hard evidence to support it but situations and circumstances supporting it should be so strong as to point to nothing less than respondent engaging in the practice. Here the petitioner told the Court that he had heard from people that strange men visited his house and spent nights there with respondent. Petitioner is a soldier by profession – a job that did take him to various posts away from home regularly. He himself came to know that a Prof M was very closely known to/by his wife- the respondent. She even had his direct telephone number. No co-respondent was brought in these proceedings. When petitioner's uncle who used to live at his house in issue took the stand to give evidence, it turned out to be of utmost valuelessness. While respondent stated that her family brought up the wife of this Prof M. They were friends. She knew this Prof M on that basis and nothing else. In any case, she added, this Prof M was her employer at the University where she is employed as a nurse. This employer had gone round places of work talking to various staff and she met respondent at her place.

Nothing much turned on this. A suspicion existed; an allegation was raised by petitioner; it was denied and respondent explained her relationship with the alleged co-respondent. No proof is laid. That ground too is dismissed.

The third ground – desertion. It was alleged by petitioner that respondent deserted their matrimonial home on or about 7/12/88 without any justifiable cause. Evidence proved something else. On that date and after a bitter disagreement both parties decided to go and find assistance from both sides of their parents. Petitioner's parents had tried without success to reconcile the two so that they could live with reduced friction. With the children they all went to petitioner's home. They took the 2 parents there. They then went to respondent's home. All efforts and discussions bore no fruit. From the evidence of respondent and that of petitioner's father, petitioner decided to leave respondent in her home from that date. A later meeting never materialized. Apparently she came back to Nairobi and she had not gone back to the matrimonial home again. According to her, she is still waiting to be collected from her parents where petitioner left her. Petitioner seems not quite keen on this as he went off and took another lady with whom they have a child. In fact one of his prayers in this petition is that respondent should not interfere with the two now (probably) living happily at all.

This cannot be called desertion at all. Respondent did not on her own or otherwise leave petitioner's home with an intention to permanently quit cohabitation at all. It cannot even be said that petitioner caused her-by his weighty and grave conduct towards her- to leave the home; they went off to resolve their domestic problems. Petitioner left her in her home with a view to return for a further meeting that was never to be. Respondent did not desert at all. The ground fails.

In any case, the ground would fail again if it was to be considered in law.

S 8 (1) (b) Matrimonial Causes Act (cap 152) to the Court either by the husband or the wife on the ground that the respondent

“a) .....

b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or...”

Respondent is alleged to have deserted on 7/12/88. The petition was filed on 16/1/89. Three years had not passed for desertion as per the law provided. The ground fails. So all in all the petition should fail. There was no cross-petition by respondent. The spouses have been living from each other over the past 4 or so years. Each doing his/her thing.

Petitioner has another lady for a wife. He evinces no intention to let her go. Under the current law that is no marriage. The statutory one with respondent still subsists. As stated above respondent did not raise any proceedings against this situation. She gave evidence that she still loves her husband. That if outsiders stopped interfering with the two, their marriage would, as it were, be revived. It is not dead at all. But looking at all the practical things of marriage, can this one be said to be still "alive" ? Petitioner has one child of the marriage- the elder daughter while respondent lives with the other two. In different homes or houses. Nothing much seems to pass between them. Apparently petitioner has on paying Shs 2500/= in maintenance that the Court earlier on ordered. Respondent has not done much on this at all. What can the Court say in such not-so usual circumstances? Of course, there was no evidence upon which custody of the children should be given to petitioner. An allegation of mistreatment was raised but not proved. Except for the elder daughter who now lives with the petitioner without respondent's resistance, the other 2 children now aged 11 and 7 years should remain with respondent. However the status of this marriage is still a hitch. On throwing out all the 3 grounds of the divorce the marriage is technically still in one place- one man with one wife to the exclusion of all others. But here petitioner has another wife.

On the books it can be called bigamy. Or he is committing continuous adultery and has no wish to terminate the relationship and respondent in her evidence said that she did not want to interfere with them. Once again, is there anything to be served by not dissolving this marriage? Petitioner says he wants to go his way. Respondent says, no way. Their marriage is still on. They have lived separately for 4 years.

At this point there is no prayer, other than that of petitioner, which was thrown out, to dissolve the marriage. In such a situation should the Court leave it as it is? Of what good is it? Should a Court not dissolve it since petitioner has admitted adultery in his testimony although respondent seems only to say that she does not desire to interfere with his wife? Be that as it may. On issues and evidence before it, this petition is dismissed with costs. It was not before this Court to comment on the maintenance sum. Accordingly, no comment. But respondent has the custody of the children as per earlier order when maintenance was being considered. But if the 1st child has moved to stay with the father probably it would be prudent not to push her around at all. But that is not for this Court.

Judgment accordingly.

**Dated and delivered at Nairobi this 18th day of February, 1992.**

**J.W MWERA**

**JUDGE**