



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

DIVORCE CAUSE NO 7 OF 1987

B M..... PETITIONER

VERSUS

R M

MUZUNGU C JOHNRESPONDENT

JUDGMENT

This is a petition for divorce by the husband grounded on adultery. The parties were married on 18th May 1984, and there are two children of the marriage, G Z M, born on 21st September, 1985, and C M. The husband served as a medical intern at the Coast provincial General Hospital and as a medical officer of health at the Kilifi District Hospital before he left to join the military in the early part of 1986. He went for military training in March 1986, which training was completed in or about July 1986, after which he was posted in Nairobi. The parties cohabited at Kilifi while the husband worked as a medical officer of health, and at Nairobi soon after his graduation from the military training college, Lanet, in Nakuru District.

The wife used to work with Express Kenya Ltd, but was dismissed from that employment on grounds of frequent absentism and indiscipline. She thereafter remained as a housewife. Apart from the normal wear and tear of a marriage the marriage between the parties was a happy one until after the husband finished his military training when signs of incompatibility started showing. A big crack in their marriage developed in April 1987. The parties had traveled to Mombasa, because the husband was on two months leave. They were accommodated at the residence of the husband's brother at Likoni, Mombasa. One day the husband was searching in one of their boxes when he found a letter addressed to the wife, with the postal address of the School For the Deaf, Kwale. Its author was one John. The husband was seized by a fit of tantrums and terminated his cohabitation with the wife. The letter had a map and directions as to how to reach the writer's residence in the Tiwi area of Kwale District.

The letter was tendered in evidence (Exht 1). The husband used the map and in the company of one Hussein Baiba, traced the residence. In a Swahili type house he found Muzungu C John, the co-respondent, washing dishes. He was alone. The husband's visit there was intended to get a confirmation or confession from the correspondent that his wife had been committing adultery with him (corespondent). The husband was acting on advice he had received from an undisclosed advocate, not his present one, that a confession would be necessary either from his own wife or from the author of the letter, above, to support a petition for a *decree nisi* .

The husband introduced himself to the occupant of the house and he in turn introduced himself as Muzungu C John. There and then the husband introduced the purpose of his visit. He started by telling Muzungu, that he, Muzungu, had been "having an affair with my wife." There was debate as to what

followed, but it was common ground that after some discussions the husband demanded a written confession that he, Muzungu, had been committing adultery with his wife.

The husband gave evidence that Muzungu voluntarily obliged. Muzungu gave evidence to the contrary. He said that he made the statement (Exht 2) under fear because the husband used language pregnant with threats. The statement is important and I consider it appropriate to reproduce it here. It says:

“While here at Tiwi – (particulars withheld) M comes. He is the husband of Mrs RM. I, Muzungu have known Mrs M (former Miss R K) from 1975 as students of (particulars withheld)

Last year (1986), R visited me here (Tiwi) twice. We met for the first time in 1986 since I had left school – 1976. While she came here visiting me, I hadn’t known of her marital status. A little later I knew she was to get married.

While she visited me here – but prior to my knowing of her marital status we had started developing an affair which didn’t continue for long as I came to learn of her marital position. This is all I wish to state – This statement is voluntary under no coercion or duress.

Signed (Muzungu C John).

22/4/87

Witnessed: Mr Hussein O Baiba – Signed.

Handed over to me

Capt (Dr) M at 1600 HR at Tiwi

Signed.

Capt 22/4/87”

The statement was exhibited. Upon obtaining the statement the husband left. He has never resumed cohabitation and does not intend to. Exactly two months after obtaining that statement he filed this petition. The co-respondent gave evidence that he was threatened to record the statement, that two days later he went to the nearest police station and retracted it and apart from the fact that the respondent visited him twice at his residence at Tiwi, and that they had been school mates once upon a time there was no truth in the statement. The letter which contained the map and directions on how to get to the co-respondent’s residence reads in pertinent part as follows:-

“Dear R,

Hi

I’m fine.

Thanks for you two letters dated 5/6 and 5/6 at 5.30 pm. I’ve just received them 19/6/86 at 7.30 pm. *Pole sana kwa msiba uliyowapata – Yaya ni mambo ndani ya mpango wa Mungu Mwenyewe* - none on earth can or shall ever escape it. It’s the bridge between Him

and us – *Poleni*.

Well the letters have taken long to reach me but thank God you were not to come only to bounce. I’m still at Tiwi residentially as I told you but the most convenient address is the above one – Box and Tel Numbers. I don’t know which other dates are convenient for your coming but so long as it falls on a Saturday or Sunday– surely I should be able to suspend my any other business and await you. But

because I'll be going home and you get this in good time – let it not be this month end weekend ie 28th/29th June. Choose any other and let me know at your earliest.

I hope you still know how to reach me here at Tiwi – if not then get a *matatu* at Likoni – (those bound for Ukunda/Beach) as *Matatus* will always shout the names of places – Ask to alight at Spoti or Twiga (then at the margin it states “It's 4/- from Likoni to Tiwi).’

Then there follows the map. The letter concludes with the remarks:

“So until then Rose, I'm awaiting for your arrival here.

You're most welcome.

See you then.

John.”.

The husband gave the letter the worst construction. It was his evidence that the letter was evidence of an intimate relationship between its author and the addressee, that when he showed his wife the letter she denied having visited Muzungu, that the letter suggested she had visited him, that since he discovered the letter he no longer has any warm feelings to his wife and does not presently consider her to be his wife, and that the letter coupled with the co-respondent's confession leaves no doubt that the wife had committed adultery. He therefore prayed for a *decree nisi* and an order that the co-respondent meets the costs of this litigation. The wife responded. She admitted the co-respondent was some time back learning in the same school with her, although he was two classes ahead of her, that after he left the school they did not meet until about two years after her marriage, that she visited him twice at his residence at Tiwi, the first time to know his fiancée one Sara, and the second time to invite him and his fiancée to visit her and her family, that on the both occasions he met him at his residence with his fiancée, his present wife, that she had neither the opportunity nor the inclination to have a sexual affinity with Muzungu, that her husband had always been suspicious that she was committing adultery and that he did not hide his feelings in that regard, that her husband rejected all efforts at reconciliation, that the letter exhibited did not suggest any intimate relationship between her and Muzungu, and that she had kept it with other documents, a fact which the husband confirmed. She prayed that this petition be disallowed, otherwise an order be made that her husband provide her maintenance for herself and the children of the marriage.

Muzungu, like the respondent denied he had any sexual familiarity with the respondent although he admitted she visited him at his residence at Tiwi on two separate occasions. He admitted also that he wrote the exhibited letter and the confession statement, but denied the confession statement was voluntary. He recounted the circumstances under which it was recorded as follows: That the petitioner started by asking him to confirm that he had had a sexual affair with his wife severally, and proceeded to explain that he wanted to divorce his wife and wanted evidence for that purpose, that he had been to see an advocate, who he did not name, who told him he needed concrete evidence to support a petition for divorce, and that a confession from him will suffice, that when he refused he remarked “once a soldier always a soldier”; and later “had you been a senior officer I would have come armed and I would have roughed you up”, that the statements were full of menaces which prompted him to record the statement, that the statement was in fact dictated more or less word by word, that he was constrained to refuse to record certain dictated sentences because he did not think it was fair to do so. He denied his relationship with the respondent was anything other than family friendship.

He was then a bachelor although he gave evidence that he then had a fiancée whom he later married. She testified to that effect and the fact that on two occasions the respondent found her at the co-respondent's residence.

The only issue is whether adultery has been established by the husband petitioner to entitle him to a *decree nisi*. I am enjoined by the law to be satisfied that the wife committed adultery although not necessarily with the co-respondent before I grant the divorce. For long there has been debate as to the

standard of proof in matrimonial offences. Authorities are conflicting. In *Preston Jones v Preston Jones* [1951] AC 391 it was held that because of the gravity and public importance of the issues with which each matrimonial offence is concerned a higher standard than on a preponderance of evidence is required. I accept and adopt that principle. It is not necessary to prove an act of adultery in time and place. Nor is it essential to name the person with whom the act of adultery was committed [*Russell v Russel and Mayer* (1923) 29 TLR 287]. It is rare that a woman with her paramour or a man and his paramour are surprised in the act. In most cases the fact of adultery is inferred from circumstances which lead to it. The court must be satisfied that there was more than mere opportunity before it can attach guilt. There must be in addition proof of inclination to commit the act of adultery.

The evidence in support of the petition comprises of the exhibited letter, the confession statement, if confession it is, and the oral admissions of both the respondent and the co-respondent that the former visited the latter at his residence at Tiwi he was still a bachelor.

The sufficiency or otherwise of evidence to support a petition for divorce on account of adultery will, to my mind, vary from one jurisdiction to another. In England for example evidence of amorous dalliance intended to achieve sexual excitement was held in the case of *Cox v Cox* [1958] 1 ALL ER 569 not to be sufficient to raise an inference of adultery. In other jurisdictions, however, such evidence will be construed as the strongest evidence of a more personal relationship and suggestive of adulterous association on another occasion. The governing consideration appears to me to be nature and behaviour of the people of any jurisdiction, their customs and moral taboos, their lifestyle and other related matters. It will not, for instance, be open to a married woman or man in any Kenya community, in particular Kenyans of African origin, to kiss another person's husband or wife whether in private or in public. It is not approved to be done in public even as between spouses. In England, America, and most of the European countries that is part and parcel of their lifestyle. It is an expression of affection not necessarily intended to produce sexual excitement. These are matters which a court is entitled to take judicial notice of.

The evidence in this case has to be looked at under that light. The respondent was at the time of her visit to Tiwi to see her co-respondent, a married woman. The co-respondent was then a bachelor. They were not and are not blood relatives nor were they related to each other in any other way to have made her visit ordinary. The only known common factor was that they were former pupils of (particulars withheld) . They were not neighbours to have had social intimacy and familiarity as to have constrained the respondent to visit her co-respondent. Even then a visit to an unmarried man's residence by a married woman would raise eyebrows. Yet the respondent and the co-respondent would want us to believe that their admitted get together at a place far removed from the former's residence, where she was if at all little known, in a house where only the bachelor was the occupant, and in at least two occasions at a short span of each other, was innocent. What business did the respondent, a married woman, have with a bachelor with whom she had not met for over ten years, if their testimony is to be believed respecting the period? The respondent according to the exhibited letter wrote two letters on the same day both addressed to the co-respondent. They were received by him on the same day. They had been addressed to the same address. In one or both of them she had expressed the desire to visit him. Muzungu wrote.

"Well the letters have taken long to reach me but thank God you were not to come only to bounce" What other reason would she have had to desire to visit a bachelor except to have a jolly good time with him and to have opportunity to be cuddled by him.

The respondent's explanations for the two visits offend common sense. If truly the co-respondent was desirous of introducing his fiancée to her, whatever interest she had, had it to be done at his residence? Could it not be anywhere else? As for the second visit, did she have to go to the corespondent's residence to invite him and his fiancée to visit her family? I am prepared to assume for purposes of argument that the second visit was for the stated purposes. There was no statement from either the respondent or the co-respondent that during their school days they were intimate to each other. All they said is that they were school mates once upon a time. What then gave rise to sudden fondness between them to the extent that there was a strong inclination on either side to meet each other? According to the evidence they met only once at Mombasa. The meeting was casual. It was on a street. It is not natural for people who have met

for the first time after a long separation to start arranging home visitations of each other as the respondent would have us believe. People do not make invitations to each and every school mate whenever they meet unless of course there was in existence prior thereto or during their school life special fondness between them.

To my mind it was with justification that the husband was disposed to give the relationship between his wife and her co-respondent the worst construction. A reasonable inference could be drawn that she had committed adultery with the co-respondent. The evidence of Sara, the co-respondent's wife, can be disposed of easily. She may have met the respondent as she said. The possibility of the respondent having made more than 2 visits to Tiwi cannot be ruled out. She was prepared to visit the co-respondent uninvited, according to the contents of Exhibit 1.

I now turn to the confession statement. The co-respondent admitted he made it, but lamented that he was forced to write it for fear that if he didn't the petitioner, a captain in the Kenyan Military, would have dealt with him. The wording of the statement to some extent shows the statement was written in a guided fashion. The petitioner wanted a statement which would show that the wife had committed adultery. He had been told by an unnamed advocate to get such a statement. Like in criminal cases it required to be voluntary and to be corroborated in material particulars.

The circumstances under which it was written suggest it was obtained by implied threats. The petitioner daringly went to visit a man who, previous to the visit, had met with his wife in circumstances which were, to say the least, very suspicious as at the time. He was accompanied. He was then and still is a captain in the military. He demanded a confession. He was possessed with the desire to divorce his wife. It is not the sort of statement, which a judge can safely say it was voluntary. It is of little probative value. I do not have to look for any corroborative evidence to it in light of the conclusion I have reached about it.

In all the circumstances of the case the presence of intent on the part of the respondent to commit adultery with the co-respondent is clear from her conduct, and, it is so much the most probable inference to draw from that conduct, and appears to me to be the only probable one – I am satisfied and find that the matrimonial offence of adultery has been established against the respondent, with the co-respondent as her paramour. I find no evidence of collusion either between the respondent and the petitioner or between the co-respondent and petitioner. Nor is there evidence of condonation by the petitioner of his wife's adultery. In arriving at that decision I had borne in mind all along that I am supposed to and in fact did look at the evidence with the distrust and vigilance with which it should be regarded.

The issue I must now grapple with is whether I should decree divorce in light of the petitioner's admission that ever since he ceased cohabitation with his wife he has committed adultery with several women. He did not make any discretionary statement under S10 of the Matrimonial Causes

Act, Cap 152 Laws of Kenya. Under sub section (2) thereof the Court possesses the discretion to grant or not grant a *decree nisi* if evidence has been tendered before it that the petitioner has during the marriage been guilty of, *inter alia*, adultery. Such discretion is not to be exercised upon whims. Mr JV Juma, counsel on record for the petitioner submitted that the section leaves the Court with a free and unfettered discretion to excuse the petitioner's adultery. He invited me to excuse the petitioner's adultery, on amongst other grounds, that the petitioner was honest about his adultery with several unnamed women, that he had lived apart from his wife for about 2 years, and in effect that he could not bear doing without a woman, for that long and, that he is still a young man. Those are not, however, the considerations for the exercise of judicial discretion.

Some of the grounds for exercising judicial discretion in favour of a guilty petitioner were spelled out in the old case of *Morgan v Morgan and Porter* [1865-9] Vol 1 L.R. P & D. 644. These are, firstly, a petitioner acting on the mistaken belief that his spouse was dead. Secondly, where a spouse had been compelled to submit to prostitution to earn money from which he derived benefit. Thirdly, where acts of adultery have been condoned by the other spouse. I could add other grounds, namely, where from the evidence and inordinately long lapse of time it becomes clear that the marriage between the parties has

irretrievably broken down; cases of rape, and generally where the act of adultery had not been committed with impunity. There may be and probably are other instances, in which the Court's discretion may be fitly exercised.

What were the circumstances under which the petitioner committed the acts of adultery? He said this in answer to questions which were put to him by the respondent's counsel:

"True I have been having affairs with several ladies since my wife and I parted. I intend to resume a married life under Muslim law, yes – I have not talked to my wife about that for as far as I am concerned she is not my wife. I go to her residence but only to see my children."

To my mind the only reason, which I can make out, why the petitioner committed adultery was because he did not consider himself any more bound by his marriage vow. He knew his marriage with the respondent was subsisting. Granting a decree will be tantamount to condemning one spouse and not the other for precisely the same matrimonial offence and for no good cause. The fact that the wife was first to commit adultery did not provide a license for the man to do likewise. It is the policy of the law that spouses be loyal to each other, but if one strays the other should not use that as an excuse for straying in like manner. I am disinclined to exercise my judicial discretion in favour of a *decree nisi*. Equity detests unfair play.

The petition fails and is dismissed.

There is the question of costs. The co-respondent was found guilty of having indulged in an illicit sexual relationship with the respondent. I will condemn him to pay all the costs of the petitioner, to be taxed if not agreed. The respondent will bear her own costs.

Dated and Delivered at Mombasa this 14th Day of July, 1989

S.E.O BOSIRE

.....

JUDGE