



JMN v SNM (Divorce Cause E084 of 2020) [2024] KEMC 134 (KLR) (9 January 2024) (Judgment)

Neutral citation: [2024] KEMC 134 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
DIVORCE CAUSE E084 OF 2020
PA NDEGE, SPM
JANUARY 9, 2024**

BETWEEN

JMN PETITIONER

AND

SNM RESPONDENT

JUDGMENT

1. This is a Petition for Divorce by the Petitioner against the Respondent for a decree that the marriage between him and the Respondent be dissolved, costs of the Petition and ‘any other relief that thus court may deem fit and suitable to grant’. The Respondent filed an Answer to the Petition and Cross Petition dated 29th July, 2022.
2. The Petitioner petitioned this Court for dissolution of the marriage on grounds specified under paragraphs 17 and 18 of the Petition that the Respondent has treated him with cruelty, has deserted their matrimonial home and engaged in acts of adultery. The acts of cruelty comprised of use of abusive language, show of disrespect to the petitioner thereby causing him disturbance and stress, brutally defaming the petitioner before the public, family members and even his bosses at his work place, abandoning her responsibilities as a mother and wife, failing to provide the petitioner and their children with emotional support, love, care, and consortium rights; and spending most of time away from home, failing to provide the petitioner with emotional support, love, care, consortium rights, being violent, secretive, rendering the union toxic. Further the Respondent has been involved with illicit affairs with other men when the petitioner trusted her with home responsibilities while on a mission and also lately. It is the Petitioners’ contention that the conduct of the Respondent towards him is grave and weighty such that the parties cannot reasonably expected to live together as a couple. On the issue of adultery, the Petitioner claims that the respondent has had several adulterous relationships with several known and unknown men, has persistently denied him his conjugal rights, has left the matrimonial home and lived with another man while they are still legally married yet he has been a



faithful man and that he only left the home in the year 2012 under orders to participate in the peace keeping mission and at all times he was providing for the family.

3. In Answer to the Petition, the Respondent contested the allegations of desertion, cruelty and adultery levelled against her. She specifically denied that she deserted her matrimonial home yet she was raising very young children as the Petitioner was always out of the country on official duties. That she catered to the basic needs of the minors as the Petitioner was mostly out of the country alleging to be on official duties until he brought a Tanzanian lady into their matrimonial home and thereafter chasing her away. That the Petitioner was living with another woman outside marriage and even sired a child with her. That when she raised an objection to the same, the Petitioner abused and told her to work under his instructions.
4. The Respondent in the Cross-Petition accused the Petitioner of adultery and denying her access. She particularized the same in Paragraph 9 of her Answer to Petition and Cross-Petition as follows: -
 - a. The Petitioner has sired children with 2 separate women outside marriage
 - b. In March 2012, after the Petitioner chased the Respondent from their matrimonial home, he brought the Tanzanian lady immediately and prohibited the Respondent from coming back
 - c. The Respondent avers that the Tanzanian lady stayed in their matrimonial home over a month and the Respondent reported the matter to the police station who intervened
 - d. The respondent in attempt to salvage the marriage, resolved to involve elders to try and mediate but the Petitioner was difficult and failed to avail himself
 - e. However, the respondent later found out that the Petitioner has further taken a new woman to the elders and unlawfully married her under the traditional marriage and they even sired a child together
 - f. The Respondent avers that the new woman was also on several occasions invited to the new home
 - g. The petitioner denied the Respondent access to the minors and the respondent would only see them during school functions
 - h. The Petitioner abused his position working in the military and ordered military officers to guard their matrimonial home and never allow the Respondent to gain access
 - i. The respondent has been denied access to her matrimonial home.
5. It is the Respondent's case that owing to the Petitioner's unrelenting marital misconduct, the marriage has irretrievably broken down and all hope of rescue has been shuttered. As a result of these grounds, the Respondent prayed that 'the assets be divided equally among them' and costs of the suit.
6. During the hearing of the Petition, both parties herein adduced evidence in their respective petitions/ cases. They basically reiterated the contents of the pleadings and adopted their respective statements as evidence. Both parties acknowledged that they are in a statutory marriage though no certificate was filed or produced herein. The marriage itself is however not contested.

Determination

7. From the Petition and cross-Petition the following issues arise for Court's determination.
 - a. Whether or not the petitioner has satisfied the criteria under the [Marriage Act](#) for the marriage with the respondent to be dissolved.



- b. Whether the other remedies prayed for by both parties are available at this juncture.
8. The petition as deduced from the pleadings and evidence is grounded on cruelty, desertion and adultery. As a response to the petition, it is clear from the Respondent that she also alleges cruelty and adultery on the part of the petitioner. In the first instance has the petitioner discharged the burden of proof to be granted divorce.
9. It is notable that the kind of marriage being acknowledged by the parties fall within the scope of section 68 of the *marriage Act*. The threshold for dissolution of such a marriage takes the ambit of the following grounds; -
- a. Adultery
 - b. Cruelty
 - c. Desertion
 - d. Exception depravity
 - e. Irretrievably break down of the marriage
10. I have always wondered whether an exhaustive definition of cruelty can be settled and framed with clarity. In the light of this Sir Charles Newbold in *Colarossi V Colagrosi [1965] EA 129* observed; -
- No comprehensive definition of cruelty has ever been accepted as satisfactory much depends on the habits and circumstances of the matrimonial life of husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however that the party seeking relief must prove actual or probable injury to life, lives or health.
11. In *Naveen Kobli v Neelu Kobli* (Air 2004 All 1) the Court made a commentary on what constitutes elements of cruelty thus:
- Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in a day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than 'ordinary wear and tear of married life.' The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions.
12. This definition also reflects our local circumstances as stated in *A.M.A. v G.S.B.* NBI HCDC No. 134 of 2010, Kariuki J. (as he then was) had this to say:
- It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner's health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to



life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see *Russell v Russell* [1895] P. 315, 322. See also D. Tolstoy on *The Law and Practice of Divorce*, Sixth Edn. It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see *Gollins v Gollins* [1964] AC 644, *Williams v Williams* [1964] AC 698, 760 Tolsoy 6th Edn states that the question in all cases is whether the Respondent's conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see *Gollins v Gollins* (supra) at page 670 and *Williams v Williams* (supra) at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see *Jamieson v Jamieson* [1952] A. C. 525, 535. Moreover, a deliberate intention to hurt may turn into 'cruelty conduct' which, without such intention, would not constitute cruelty.

13. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty, though, should that all be serious enough, and result in injury, then the Court will grant the decree. What the law envisages for the grant of divorce on cruelty is prove of conduct complained of by way of evidence. That is grave and weighty for the Court to conclude that human dignity and conscience has been implored. It must be conduct more serious than ordinary wear and tear of married life.
14. Looking at human relations, marriage union is generally solemnized by two people from different social-economic; cultural/customary or even ethnic backgrounds. Although, in very clear vows the parties covenant to move together for worse, ill health, for poor, while solemnizing the marriage that alone has never sustained the marriage. As a vital step each of the parties to marriage union has to address the various inherent personal traits based on the range of possibilities and options to shift the focus on the success of the collation. Conflicts that may arise during the subsistence of the marriage need to be managed through interactive participatory and inclusive approaches for the sake of building interests, power and adjusting parties' expectations to the marriage. There is need to strike a balance among the various components of human relationships namely, goal incompatibility, attitudes, socio-economic status, cultural/customary differences, behavior, etc. to ensure peaceful co-existence to avoid any of the spouses using his or her power to suppress the perceivably weak spouse to the marital union.
15. As such the basis of cruelty as a ground for divorce is case specific within the scope of the [Marriage Act](#). It is sufficient that one spouse or both proves to the Court that the cruelty being explained is of such a type that it is impossible for them to live together. As such the delivering of false allegations by one spouse about the other having alleged that relations with different men or women for that matter outside other recognized marriage can amount to emotional and mental cruelty. Similar circumstances abound when one forms the intention to injure, harass or hurt another's physical, or mental or emotional being without due regard to infringement of his or her human rights.
16. What happens when one spouse gets to a point of being refused sexual intercourse without a just cause. Often, when this occurs the affected spouse becomes emotionally and intimately immobilized usually, they will choose what I believe will be the least painful alternative. The pattern is refusal of sexual intercourse by the spouse has the negative effect on the other spouse. He or she may suffer because of sexual frustration due to lack of it as a normal adult conditioned to meet that sexual life, or he or she may suffer because of the desire for a family. The non-fulfilling of this God given gift amounts to cruelty to the other spouse's refusal to make adequate provision of conjugal rights. In any view, no matter what status of life, the spouses have achieved, they have to deal with these special gifts from the creator, Almighty God.



17. I beg to ask myself some incredibly disempowering questions which may arise within the marital union, 'How come I have no time for intimate connection? Why does not he or she leave me alone? What am I willing to do to make it, the way he or she wants it? How can I enjoy the process while I do what is necessary to make it the way he wants it or the way he wants it or the I want it? Does he or she understand I am not a machine? Why don't I ever get a break. These are the situations which this Court can imagine the sexual frustration checks a kind of emotional state likely to amount to cruelty.

18. The comparative decision in *White V White* [1948] 2 ALL ER 151 remained as follows; -

In this case the husband had insisted on the practice of Coitus interruptus despite his wife's objections to this and despite the advice of a doctor that to continue would have a serious effect on the wife's health, Wilmer J stated that he did not wish to be taken as holding that in all situations the practice of Coitus Interruptus, would amount to cruelty but he continued I feel that a husband must take his wife as he finds her, and if she is a woman of a type who needs the full and natural completion of the act, then to persist in withstanding it from her in the face of her repeated complaints and objections, is in itself an act of cruelty, and if as in this case, it does result in serious injury to health or does contribute in marked degree to the breakdown of health of the spouse, then, in my judgement it is only right that this Court should give relief.

19. From the above statement the truth is sexual intercourse should not be equaled with procreation of children treating it as the only justification for that intimate connection between a man and his wife. If the Court has to consistently look for reasons why marriages are screwed up, denial of consummation or trivializing it is not likely to take the spouses out of a well celebrated marriage. Similarly, in *Knott V Knott* [1955] 2 ALL ER 305 Sachs J held that; -

Permanent and unreasonable starvation of the maternal instinct may to my mind, be of itself a cruel thing. There is the added element, and that a serious one, that injury to the wife's health results from the very practice itself, and is an injury which may be distinct from that caused by starvation of the maternal instinct.

20. This principles in Knott's case seems to hold a clear distinction between the two aspects of sexual intercourse. Once it is accepted that coitus interruptus which injures the wife's or a husband's health because of their sexual needs not being satisfied. That amounts to cruel conduct of either spouse to the marriage the court then approaches the issue only on a question of degree as to whether the victim of the refusal or abstinence complained amounts to cruelty to warrant dissolution of the marriage.

21. In the instant petition, it is alleged by the petitioner that the respondents acts of cruelty involved insulting conducts, desertion, irresponsibility and adultery. The petitioner further deposed that the respondent failed to provide her with emotional support, love, care and consortium. From the perspective of the respondent, it is the petitioner who is guilty of insults, and abusive language to destroy her self-esteem. In respect of conjugal rights commonly referred to as sexual intercourse both parties on oath aver that the each other failed to provide the much-needed love, care and attention that is deserving of a loving spouse. The Petitioner also pitched denial of conjugal rights in the context of the petitioner's misconduct to constitute cruelty and connoting adultery. On the basis of these various points in the petition and cross-petition apparently there is evidence of immeasurable mental agony and torture which constitutes cruelty.

22. The undisputed position is that the marriage of the petitioner and the Respondent has in fact fallen apart as per the averments. Certain key differences cropped up between the petitioner and the respondent in the background of the averments none has stared the other of cruelty. The factual aspects



are indicative of a marriage in the rocks. Restitution of conjugal rights is not tenable as the emotions once positive to each other have grown into full blown crisis of negativity which has turned 'love' into 'hate' on whatever they hear and feel of each other as husband and wife.

23. One of the primary obligations of spouses under the marriage Act is the duty to cohabit and consummate the marriage union. It is an intolerable interference by this Court to insist on sustaining the marriage which is against the rights of the individuals as espoused in Articles 28 and 29 of the Constitution to order that Adults of sound mind continue to live together in a marriage which has irretrievably broken down with no window of a reconciliation.
24. Having put forward these allegations in perspective, the conclusion I reach with regard to this petition is to grant the same. The marriage between the Petitioner and the Respondent be dissolved as prayed for in the Petition. As for the Cross-petition, there was no evidence of any asset or matrimonial property involved herein. I do therefore dismiss the Cross-petition as prayed. The upshot is that the marriage between the Petitioner and the Respondent be and is hereby dissolved. As of necessity a decree nisi be issued to the petitioner. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 09TH DAY OF JANUARY 2024

.....

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Petitioner's Counsel: Tuya/ Njihia

Petitioner: Absent

Respondent: Present

