



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 38 OF 2010

L M MPETITIONER

VERSUS

P M MRESPONDENT

JUDGMENT

1. The petitioner, LMM has filed a petition seeking dissolution of her marriage to the respondent, PMM. The parties solemnized their union at Shrine of Mary Help of Christians, [Particulars withheld] Church on 30th September, 2000 under the Marriage Act, Cap 150, Laws of Kenya. They cohabited as husband and wife at Imara Daima, Nairobi and were blessed with one child, A M, born on 18th June, 2001 and whose custody the petitioner is praying for.

2. The petition was dated 10th March, 2010 and the grounds on which dissolution of marriage was based included cruelty and adultery. The respondent was served with the petition and Notice to Appear on 6th May, 2010. He subsequently filed an Answer to Petition and Cross Petition dated 14th April, 2011 in which he also sought custody of their child and his marriage to the petition be dissolved on the grounds of cruelty and adultery.

3. It was the Petitioner's averment in her petition that her marriage to the respondent had been a tumultuous one, marred with a lot of anguish as the respondent was cruel and adulterous during the subsistence of their marriage. The particulars of cruelty were listed in paragraph 6 of the petition while the ground of adultery was particularized under paragraph 7.

4. The respondent in his Answer to Petition and Cross Petition averred that their marriage broke down because of their incompatibility and that since the celebration of their marriage, the petitioner had treated him with animosity and cruelty, the particulars of which were listed in paragraph 11 of the Cross Petition. He also alleged that the petitioner had been adulterous as she was involved with her former boyfriend, by the name K M, the conduct of which brought the respondent "mental anguish, disillusionment, psychological trauma and humiliation".

5. Both parties appeared in court and testified on 9th March, 2017. The petitioner reiterated the contents in her petition and stated that they were married at [Particulars withheld] church and produced a marriage certificate bearing serial number [Particulars withheld] (PEX1) to serve as evidence of the existence of the said marriage.

6. It was her case that during their marriage and after their son's birth, the respondent became

cruel and started laying claims of her being adulterous. She claimed that the respondent could not allow her to visit her parents; he would physically and verbally abuse the petitioner; forcing her to flee to her parents' home. Efforts that were put into trying to reconcile her with the respondent were futile and further that the respondent brought in another woman after she left the home in 2005. It was also her case that they have been living separately ever since and that she was the one who has been staying with their son hence her prayer to have physical and legal custody of the child.

7. The respondent in his testimony confirmed his marriage to the petitioner. He stated that the petitioner was an adulterous woman as she was in constant communication with her former boyfriend, K M. He narrated a particular incident, when the petitioner came home drunk at around 10.00pm and after she slept, the respondent went through her phone and he was able to find text messages exchanged between the petitioner and K M regarding their affair.

8. The respondent admitted to living with a 'friend' with whom he has a child with. He prayed for dissolution of the marriage and for him to be given custody of their child. He however withdrew his prayer for custody during re-examination, stating that he did not want to disturb his child whose custody is with the petitioner.

9. The parties' counsels filed written submissions which I have carefully considered when making this judgment.

10. Under the Matrimonial Causes Act Cap 152, Section 8 (1) provides grounds of petition for divorce as follows:

(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent-

(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.

and by the wife on the ground that her husband has, since the celebration of the marriage been guilty of rape, sodomy or bestiality.

11. In her petition and evidence, the petitioner alleges that the respondent was cruel to her; assaulting her; hurling insults and being oppressive to her; being denied her conjugal rights just to mention a few. Cruelty as was quoted by Justice S.J. Chitembwe in **KAS vs MMK (Divorce Cause No. 10 of 2016)** from the Black's Law Dictionary is defined to be:

“the intentional and malicious infliction of mental and physical suffering on a living creature”.

Mental cruelty was further defined to be:-

“.....one spouse’s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse...”

12. It is noted that both parties rely on the ground of cruelty. To point out examples of the particulars of each party; the petitioner has been verbally and physically abused, been denied conjugal rights, been disrespected and generally feeling as if she’s being oppressed. The respondent on the other hand, alleges the petitioner has insulted him, mistreated him, has suffered disrespect and has been denied conjugal rights since 2005.

13. From both particulars, it is evident that the actions as alleged by each party as against the other are capable of qualifying as cruelty (mental or otherwise) as defined by the Black Laws Dictionary. Being physically assaulted is likely to inflict bodily harm thus endangering someone’s health. Having to endure constant insults, disrespect and ungovernable temper in a marriage is likely to cause one distress and great torment.

14. Cruelty has no standard definition in law but it can be proved by a preponderance of probability as it varies with the circumstances of each case. In the instant case, this court has not been convinced that cruelty had been meted out against each other and equally do find that the ground has not been proved.

15. It is not enough for one to allege that he or she has been tortured, assaulted or abused without proof. What is before court is a word of mouth by the petitioner against that of the respondent. This court has not been persuaded sufficiently to arrive at a conclusion that either party assaulted, abused or humiliated the other thus exerting physical, mental or psychological injury. The ground of cruelty alleged against each other cannot stand in the circumstances and the same is dismissed.

16. With regard to allegations of adultery, the petitioner alleged that the respondent had an affair with one woman whom he lives with and have one child. The respondent admitted the same in court. This is indeed an admission of adultery on his part as the parties are still married and therefore bound by their vows. To that extent, the petitioner has proved that the respondent has been engaging in adulterous relationship during the subsistence of their marriage.

17. The respondent’s allegation that the petitioner had an extra marital affair with her former boyfriend one K M has not been proven. The respondent did not furnish the court with any evidence to prove that the petitioner used to exchange love affairs messages on phone. He did not seek to enjoin one K M as a party to the suit in his cross petition.

18. As to the ground of desertion, both parties admitted that they have separated for a period of 10 years. Under Section 8(1) (b) of the Matrimonial Causes Act, if a spouse has been living separately from the other for a period of 3 years preceding divorce petition, such spouse shall be deemed to have deserted his or her matrimonial home. In this case the petitioner left their matrimonial home 10 years ago which is not in dispute. Effectively, the ground of desertion has been proved.

19. Has the marriage broken down irretrievably" In this case, both adultery and desertion have been proved. Obviously there cannot be a marriage by remote control. Based on the two grounds, this marriage has definitely broken down irretrievably.

20. As to whether there was collusion and or connivance in filing this suit, the petitioner has categorically stated that there was none before and during the filing of this suit. In the absence of any evidence to the contrary, I would hold that there was no collusion nor connivance.

21. Having found that, the parties did not connive nor collude to file these proceedings, this court has no reason not to dissolve their marriage. Marriage is a voluntary union based on mutual love and trust. In this case none of the two is interested. Accordingly, I do hold that the marriage

herein has irretrievably broken down and the same is dissolved. A decree nisi order to issue and same be declared absolute after 3 months. This being a family affair, each party to bear his or her own costs.

DATED AND DELIVERED IN OPEN COURT THIS 1ST DAY OF AUGUST, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

.....Counsel for the petitioner

.....Counsel for the respondent

.....Court Assistant



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