



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Divorce Cause 30 of 2009

NMS.....PLAINTIFF

VERSUS

CONRESPONDENT

JUDGEMENT

The Petitioner lodged this petition on 8th May, 2009 seeking the following orders:-

- (a) Dissolution of marriage
- (b) Costs of the Petition

The Petitioner averred that on 17th February, 2000 then a spinster lawfully got married to the Respondent CON then a bachelor at the Registrar's Office, Mombasa under the Marriage Act Chapter 150 Laws of Kenya.

She added that:-

- The Petitioner and Respondent cohabited as husband and wife since the solemnization of their marriage in various places in Ugunja and Mombasa. Both reside in Ukunda currently.
- The Petitioner and the Respondent have been blessed with one child, AN, 9 years old.

The Petitioner pleaded that since the celebration/ solemnization of the said marriage, the Respondent has on many occasions treated the Petitioner with extreme cruelty, hostility and has subjected her to extreme mental anxiety and hardship.

The Petitioner also claimed that the Respondent committed adultery. She set out particulars of cruelty and adultery.

The Respondent was duly served with the Petition on 26th May 2009 at Ukunda and for which he acknowledged service in writing. He chose not to respond or defend the petition in any manner. He did not enter any appearance or file any Answer and/or Cross-Petition.

The trial proceeded on 10th December, 2009 when the petitioner testified on oath. She stated after producing the marriage certificate inter alia as follows:-

- That they lived at Ukunda, Shelley Beach, Likoni and in Ugunja in Siaya.
- That they had started living together in July, 1999.
- She used to work at Barclays Bank. He was a businessman and asked her to join him in Ukunda.
- They got one child aged 9 years old. Birth Certificate produced.
- She has been married for 10 years.
- He was violent and alienated her from her family and friends.

- That he used to disappear and leave her alone.
- That there was no dialogue.
- She tried to resolve the differences through the Church but he did not change.
- He beat her in the course of the marriage including when she was pregnant.
- He embarrassed her in front of the neighbours.
- That he burnt her clothes and documents.
- That he chased her from the matrimonial home.
- On 22nd November, 2008 he beat up their son and threw him out.
- She took the boy and had him treated by a doctor – Medical Certificate produced.
- The matrimonial home is registered in her name. It is in Diani, Ukunda.
- That she lives in a rental house.

With regard to the allegations of adultery, she testified that he is now living with another woman who is pregnant and expecting a child. She said that he was unfaithful and she contracted sexually transmitted disease. This conduct was against her faith. She added that he had another girl friend called B who died. His current girl friend is called Lily. That he declined to take an HIV-test. She was worried for her health. He is a qualified Engineer.

The Petitioner said that she is the one now maintaining the child including paying his school fees. He goes to W Christian Academy. She produced school fees receipts. She also produced bills to show that she pays for electricity in the rented premises. She testified that the marriage lacked intimacy and had broken down irreparably.

I have considered the Petition, the particulars of cruelty and adultery. I have considered the testimony of the Petitioner on oath.

The evidence of the Petitioner was clear and consistent with her Petition. The Respondent was duly served with petition and acknowledged service in writing. Despite the serious and grave allegations of cruelty and adultery, he did not file any Answer or oppose the Petition. That by itself says volumes. This suggests by itself that he has no answer or evidence to rebut the allegations. On the other hand it suggests that he does not care for the marriage and does not oppose dissolution.

However, there is no summary procedure for dissolution of marriages under the Marriage Act. The court then has to consider the evidence. I do find that the Respondent has mistreated the Petitioner and humiliated her in the presence of neighbours. He has alienated her from her family and friends. He physically assaulted her and the child and threw them out of the matrimonial home. He has failed to maintain and provide for the Respondent and their son.

I do find that on a balance of probability that the Respondent has committed acts of cruelty against the Petitioner. I also do find that he committed adultery and infected the Petitioner with sexually transmitted diseases.

On the basis of the evidence and all material before the court including the failure to provide for and maintain the Respondent and the child of the marriage, I hold that the petitioner has proved her case and I do hereby without any hesitation do order the dissolution of the marriage. The marriage has broken down irretrievably. The Petitioner deserves a better life for herself and her son. Upon dissolution of the marriage, the Respondent is ordered to pay the costs of the petition.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 2nd day of March, 2010.

M.K. IBRAHIM
J U D G E

27/01/2010

Coram:
Ibrahim, J
Court clerk – Kazungu
Mr. Omolo holding brief for Ms. Oketch for the Petitioner
Undefended

ORDER

Ruling delivered in their presence.
IBRAHIM, J.