

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
DIVORCE CAUSE NO. 48 OF 2013

KIRUNGI DOREEN.....PETITIONER

VERSUS

MUGABE RONALD.....RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

This is a petition for divorce filed by the petitioner against the respondent for a decree for a dissolution of the marriage, an order for the maintenance of the petitioner and the issue of the marriage, an order of custody of the issue of the marriage, and other reliefs this court deems fit.

The background is that the petitioner and the respondent wedded in church on 19th July 2008 in accordance with the provisions of the Marriage Act. The couple had their matrimonial home in Massachusetts, Woburn, in the United States of America. They were blessed with one child Evana Busingye now aged three years.

The plaintiff's case is that the marriage has been rocky and has irretrievably broken down on account of the respondent's extreme cruelty and desertion, leading to the petitioner's mental torture.

The respondent did not file any reply within the required time though he was served with the summons to answer petition. An affidavit of service of the process server is filed on the court record. The Registrar of this court, on application by the petitioner, entered an interlocutory judgment against the defendant on 23rd September 2013.

When the matter came up for formal proof the petitioner, through her counsel, prayed to proceed in camera as the matters were sensitive. The prayer was granted by court.

The petitioner testified on oath that she and the respondent wedded on 19th July 2008 at All Saints Cathedral in Uganda, upon which they were issued with a marriage certificate, tendered in evidence as exhibit **P1**. After their marriage they moved to their matrimonial home in Massachusetts, Woburn, in USA. They co habited for only two years in their marriage. They have lived apart for three years. Their marriage was not peaceful. The respondent was cruel to her, beating her all the time within the two years of their marriage, in addition to coming home drunk and abusing her. The respondent deprived the petitioner sexual intimacy from the time they got married. He slept in the sitting room while the petitioner slept in the bedroom. The petitioner decided to leave the matrimonial home but their families and other elders reconciled them.

As a result of the reconciliation the petitioner conceived and produced their only child, a daughter called Evana Busingye. The respondent went back to his old habits when the petitioner conceived. He started sleeping in the sitting room again. He was not involved in the petitioner's pregnancy and did not provide anything for the child. He eventually left the matrimonial home and started living with his mother in Metheun which is forty five minutes drive from Woburn. When life became too hard for the petitioner as a single mother, she talked to her family and they brought her to Muyenga in Uganda where she currently lives with her daughter. She caters for her daughter's needs, including her education, single handedly.

The petitioner eventually submitted pay slips to this court at its request, for purposes of guiding court in making appropriate awards. The two pay slips showed that she paid U.Shs.1, 310,000/= (one million three hundred thousand and ten) on 15/03/2013, and U.Shs.1,300,000/= (one million three hundred thousand) on 27/08/2013 as fees for the child at Swan Academy Muyenga. She asked court to dissolve the marriage and grant her full custody of the child, and to make the respondent pay maintenance for the child. She testified that personally

she did not need alimony from the petitioner and that all she needed was for him to maintain his daughter. She clarified to court that it was her personal resolve. She testified that though the respondent was agreeable to ending their marriage, there was no collusion between them or with any other person.

Learned Counsel Musinguzi Herbert for the petitioner, in his written submissions, reiterated the petitioner's prayers and prayed for judgment on the evidence on record. He argued that a case of cruelty and desertion had been made by the petitioner against the respondent. He cited ***Uganda Association of Women Lawyers (FIDA) & 5 Others V Attorney General Constitutional Petition No 2/2003***; ***Dr. Specioza Wandira Kazibwe V Eng Charles Nsubuga Kazibwe Divorce Cause No. 3/2003***, and ***John Rwabinumi V Hope Bahimbisomwe CACA 30/2007***. He however did not avail this court with copies of the judgements though they were requested by court.

Section 4 of the Divorce Act which set out separate grounds for divorce for men and women was declared unconstitutional by the Constitutional Court in ***Uganda Association of Women Lawyers (FIDA) & 5 Others V Attorney General Constitutional Petition No 2/2003***. This was on basis of Article 31(1)(b) of the Constitution which provides that a man and a woman are entitled to equal rights in marriage, during marriage and at its dissolution. This restates the constitutional prohibition of discrimination on the basis of sex enshrined in Articles 21 and 33 of the same Constitution. The legislature (Parliament) is yet to fill the lacuna created by the Constitutional Court's decision. Since then, courts look at the facts in totality to determine whether a marriage has irretrievably broken down. See ***Julius Chama V Specioza Rwalinda Mbabazi Divorce Cause No. 25/2011***, Kainamura J.

On custody of the child, Article 34 of the Constitution and section 3 of the Children Act provide that the best interests of the child shall be the primary consideration in all matters concerning children. On maintenance of the child, section 5 of the Children Act puts a duty on parents to maintain their children. That duty gives the child a right to education and guidance, immunization, adequate diet, clothing, shelter, and medical attention.

There is evidence adduced under oath by the petitioner that the respondent was on several occasions cruel to the petitioner. This is manifest in his denial of sexual intimacy to her, physical and verbal abuse, heavy drinking, and unreasonable abandonment of the matrimonial bed and home. This conduct caused mental and psychological torture to the petitioner. There is evidence that the parties are no longer living together. This is so despite previous attempts to reconcile them, which resulted in conception of the only issue to the marriage. The respondent moved out of the matrimonial home in Massachusetts, Woburn to live with his mother in nearby Methuen in USA. The parties are living separate lives. There is evidence that the respondent neglected the petitioner when she was pregnant with their daughter Evana Busingye. He never contributed to the child's maintenance when she was born. Evana Busingye is now aged three years which is a tender age. She is in school and the petitioner meets the expenses. She lives with the petitioner.

The foregoing evidence is not denied or rebutted by the respondent. The petitioner's case has been subsequently proved before me to the required standard by the petitioner. Besides, there are case decisions that a party who has not filed a defence is deemed to have admitted the allegations. See ***Eridadi Ahimbisibwe V World Food Programme & Ors [1998] IV KALR 32***, Lugayizi J.

Looking at the evidence in totality, the entire matrimonial relations between the parties, including their conduct and personality, the respondent's conduct amounts to cruelty. This is manifest in his denial of sexual intimacy to the petitioner, physical and verbal abuse, and heavy drinking. He has also unreasonably deserted the petitioner by virtue of his having abandoned the matrimonial bed through his refusal to have sexual intercourse with the petitioner. He further eventually left the home and went to live with his mother in a nearby town.

The petitioner has satisfied court that the foregoing conduct on the part of the respondent has caused mental and psychological torture to the petitioner. It amounts to cruelty and desertion. I also find that the marriage between the

respondent and the petitioner has irretrievably broken down. The two parties are no longer living together neither are they planning on reconciling.

On the issue of custody, this court finds that the petitioner has been caring for the child since it was born, including paying her school fees. The cardinal principle on whom to grant custody of a child in cases of this nature is the welfare of the child. At her tender age of three years, the child needs to live with the parent who has cared for her since she was born rather than the parent who has been absent from her life and has not catered for her. There are also case decisions that where a child is of tender age, custody should be granted to the mother. See ***Kayongo V Sekiziyivu [1973] HCB 24***

I am satisfied that the petitioner has proved her claim against the respondent to the required standards on all the prayers. In the premises, there being no response to the petition and default judgment having been entered by the Registrar on 23rd September 2013, and on the evidence adduced by the petitioner, I find for the petitioner. Accordingly, judgment is entered as prayed against the respondent for the following orders:-

- i) A decree *nisi* is granted for the dissolution of the marriage between the petitioner and the respondent.
- ii) The petitioner is granted custody of Evana Busingye the issue of the marriage.
- iii) The respondent is ordered to pay maintenance to the petitioner in United States dollars 400 (four hundred) or its equivalent in Uganda shillings, per month, as maintenance of Evana Busingye.
- iv) Costs of the petition are awarded to the petitioner.

Dated at Kampala this 21st day of January 2014.

Percy Night Tuhaise

Judge.