

UGANDA / JUDGMENT

Kiyemba v Batte (Divorce Cause No. 127 of 2018) [2019] UGHCFD 46 (10 May 2019)

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COURT

HC: Family Division (Uganda)

BEFORE

Kitariisibwa-Katunguka, J

CASE / FILE NUMBER

Divorce Cause No. 127 of 2018

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA- MAKINDYE (FAMILY DIVISION)

DIVORCE CAUSE NO. 127 OF 2018

SARAH KIYEMBA PETITIONER VERSUS ROBERT
BATTE RESPONDENT

RULING

BEFORE HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

15 Introduction:

[1] This petition is brought by Sarah Kiyemba (hereinafter referred to as the petitioner). The Petitioner's prayers are that a decree nisi be granted dissolving the marriage between the petitioner and the respondent; custody of the children be granted to the petitioner; the respondent be ordered to pay maintenance and 20 school fees for the children; costs of the petition and any other and further relief this court deems fit to grant.

Background:

[2] The petitioner's case is that she and the respondent were lawfully married on the 6th 25 of May 2006 at Our Lady Queen of Virgins Kisubi; that after the said marriage the petitioner and respondent cohabited at Kisubi Nabulagala in Kampala and were blessed with two issues, Arabella Nanteza (13 years) and Isaiah Ssozi (8 years); that since the solemnization of the marriage the respondent has committed several acts of cruelty against the petitioner to wit –

denial of 30 conjugal rights without explanation, neglect of the petitioner while she was sick, expecting the petitioner to work and handle daily chores while sick and in the event of failing to do so would shout at the petitioner in the presence of the children and the maid, braggingly and arrogantly introducing other women he was having relations with to the petitioner in disregard of her feelings hence

psychologically torturing her and as a result of such torture they have not cohabited for the last four years; further that since solemnization of the marriage, the respondent has been committing acts of adultery with different women including a one Nancy; that whenever she had access to the respondent's phone 5 she discovered love and sexual text messages from his workmate in Mbarara called Grace; that when working in Mbarara the respondent used to come back home late every Friday night and would sleep the entire day due to hangover and then leave early Sunday for Mbarara and so barely spent time with the petitioner and his children; that the respondent would send the petitioner x-rated messages 10 meant for someone else and call the petitioner another woman's names while in bed and as a result of his adulterous nature they have not cohabited for the last 4 years. That there is no collusion or connivance with the respondent.

[3] The respondent in his reply states that he was married to the petitioner and that 15 they had two children and that the marriage has irretrievably broken down but he denied all the rest of the claims by the petitioner.

Representation:

[4] The petitioner is represented by Counsel Jane Frances Akiteng of M/S Katende, 20 Ssempebwa & Company Advocates, Solicitors and Legal Consultants while the respondent is represented by Counsel Murangira Arthur of M/S Arthur-Arutha Legal and Co Advocates and Solicitors.

The petitioner kept appearing in court and expecting the respondent to appear in 25 vain. At one point she informed court that the respondent had told her to go ahead and petition for divorce and did not think he would challenge it. Court chose to give opportunity to the respondent to respond and finally in his reply concedes that the marriage has irretrievably broken down but denies cruelty and adultery.

On 13th July 2018 when the matter came up court directed that written submissions be filed as follows; for the petitioner by 31/08/2018, for the respondent by 19/09/2018 and rejoinder if any by 28/09/2018. Counsel for the petitioner filed written submissions on 6th November 2018. The respondent's counsel filed submissions on 29 5 th April 2019.

Court shall go ahead and resolve the matter in spite of the delays in filing submissions since they are not evidence but just a guide. **(The Uganda Civil Justice Bench Book Page 163 citing George V. Odunga, Odunga's Digest on 10 Civil Case Law and Procedure)**

Resolution of the case:***Facts***

[5] The gist of the petition is that the petitioner and the respondent wedded in church on 6 th 15 of May 2006 at Our Lady Queen of Virgins Kisubi and afterwards cohabited at Kisubi Nabulagala in Kampala and were blessed with two issues ; that the marriage has irretrievably broken down on account of the respondent's cruelty and adultery, and the parties have not cohabited for the last 4 years, leading to the petitioner's psychological torture; that the issues to the marriage 20 stay with the petitioner and she prays for custody and maintenance. The respondent admits that the marriage had irretrievably broken down and that they are separated but denied all the allegations of cruelty and adultery as falsehoods, and prayed for the petition to be dismissed.

- 25 Both parties filed witness statements.

[6] Counsel for the Petitioner framed the following issues;

- i. Whether there are any grounds for divorce.
- ii. Whether the petitioner should be granted custody of the children with 30 maintenance.

iii. What remedies are available to the parties.

- [7] The first issue would ordinarily be whether there is a marriage. There is a copy of the Marriage Certificate that shows that the parties got married on 6th May 2006 at Our Lady Queen of Virgins- Kisubi; the respondent concedes that he is married to the Petitioner.

- 5 There is therefore a valid marriage.

Position of the Law

- [8] Section 4 of the Divorce Act provides the grounds for divorce but was found unconstitutional in **Uganda Association of Women Lawyers (FIDA) & 5**

- 10 **Others v Attorney General, Constitutional Petition No. 2/2003** on grounds of discriminatory application of the provision to men and women on the ground of sex, contrary to Article 31 (1) (b) of the Constitution. The legislature is yet to fill the lacuna but courts have gone ahead to hold that each of the grounds for divorce as set out in the Act are available equally to both men and women and 15 that both adultery and cruelty are distinctive grounds each in its own right upon any of which a decree nisi could issue (see **Specioza Wandera Kazibwe vs Engineer Charles Nsubuga Kazibwe DC No.3/2003**) also cited in **Namuyimbwa Proscovia vs David Ralph Pace; DC No.14 of 2017**.

Court may also look at the facts and circumstances surrounding the case and see 20 if there is a marriage or not (see **Julius Chama v Specioza Rwalinda Mbabazi DC No. 25/2011**)

Issue 1. Whether there are any grounds for divorce. Decision of court on cruelty:

25 [9] The petitioner claims that the respondent since the solemnization of the marriage committed several acts of cruelty by denying her conjugal rights without explanation and neglecting her while sick while also expecting her to handle daily chores when sick; and also shouting at her in the presence of the children and the maid; that the respondent also braggingly introduced women he was 30 having intimate relations with to her without any regard to her feelings and that the respondent's conduct has caused her humiliation as well as psychological torture. The respondent denies the allegations.

[10] The dictionary definition of the word Cruelty is '**readiness to give pain or 5 cause suffering to others.**' According to **Merriam Webster**, 'conjugal rights are the sexual privileges implied by and involved in the marriage relationship- the right of sexual intercourse between husband and wife.'

The respondent does not deny that he is a resident of Kasubi Nabulagala which 10 implies that he does not stay with the petitioner and the issues of the marriage. This is confirmed in his witness statement where he states that he and the petitioner are separated but refutes denial of conjugal rights although he concedes that the marriage has irretrievably broken down. In **Mayambala v Mayambala DC 3/1998**, court relied on **Russell v Russell (1897) AC 395** for the definition of 15 cruelty as willful and unjustified conduct of such character as to cause danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger.

- [11] Denial of companionship and a right to conjugal rights, both imbedded in the 20 marriage contract, without reason would in my opinion cause suffering and mental torture and therefore amounts to cruelty (see also the case of **Doreen Kirungi v Ronald Mugabe DC 48/2013** where it was held that the respondent's denial of sexual intimacy to the petitioner amounted to cruelty.
- 25 In the case of **Habyarimana v Habyarimana (1980) HCB 140** court held that it is the effect of the conduct rather than its nature which is of paramount importance in assessing a charge of cruelty. In determining whether conduct amounts to cruelty, the general rule is that the whole matrimonial relation must be considered. The respondent stated that he has separated from the petitioner.

[12] This amounts to desertion which I believe has caused anguish and mental and psychological torture.

It is the holding of this court that the acts of the respondent by deserting the 5 petitioner thereby withholding marital rights amounts to cruelty.

Decision of court on adultery:

- [13] The petitioner states in her witness statement that the respondent braggingly introduced and still introduces women he had an intimate relationship with to her 10 and that he has continuously committed acts of adultery with different women including a one

Nancy and a workmate called Grace. She further states that she frequently received sexual text messages mistakenly sent to her phone meant for someone else and often called her by another woman's names in bed. The respondent denied the allegations and also stated in his witness statement that the 15 messages were meant for the petitioner out of love and affection for her and that he has never had any relationship with any woman outside the marriage.

- [14] It was held in **Dr. Specioza Wandira Naigaga Kazibwe v Eng. Charles Nsubuga Kazibwe Divorce Cause 3/2003** that adultery can be proved by the 20 petitioner by adducing direct or circumstantial evidence to prove it. However, such circumstantial evidence must be corroborated (**Ruhara case supra**) so as to be sufficient to lead to an order to dissolve the marriage. (**Kasingye Emmanuel v Genevieve Kasingye Civil Appeal No. 096 of 2014**). In the **Kasingye case**, court held that 'the respondent's testimony was her uncorroborated evidence. I 25 am aware that no number of witnesses are required to prove a fact. However, in the circumstances of this case, it was necessary for the petitioner to have produced additional evidence or witnesses to back up her story. She may have had good reason to protect her children from testifying, but the couple's long term disagreements were allegedly reported to various police stations, Church

elders, and even her work mates had some knowledge of the marriage discourse. These were vital witnesses who could have been called to back up the claims . . .'

- [15] The petitioner states that the respondent introduced her to other women and also 5 sent her text messages meant for other women. Having relied on circumstantial evidence, the evidence ought to be corroborated at least with additional evidence through the text messages that were allegedly sent to her. The respondent has not proved the adultery alleged to the satisfaction of court.

10 Decision of court on Issue 1.

Having said that however cruelty has been proved and more so, a marriage without companionship and intimacy unless by consent of parties, in my view, does not exist. Also considering the indifference by the respondent in filing his pleadings and the circumstances surrounding the case this court finds that the 15 marriage has irretrievably broken down and I would answer issue No.1 in the affirmative.

Issue 2. Whether the petitioner should be granted custody of the children with maintenance.

20 [16] **Article 31(4)** of the Constitution provides that it is the right and duty of parents to care for and bring up their children. **Art. 31(5)** further provides that children may not be separated from their families or persons entitled to bring them up against the will of their families or those persons, except in accordance with the law. **Article 34 (1) of the Constitution** provides that children shall have the 25 right to know and be cared for by their parents or those entitled by law

to bring them up subject to laws enacted in their best interests. **Section 29** of the Divorce Act is to the effect that in suits for dissolution of the marriage, the court may at any stage of the proceedings, or after the decree absolute has been pronounced, make such order as it thinks fit, and may from time to time vary or discharge the orders, with respect to custody, maintenance and education of the minor children of the marriage.

- [17] It is now a settled principle of the law that when making decisions concerning children, their welfare must be of paramount consideration; (See Article 34 of 5 the Constitution of the Republic of Uganda, **Section 3(1) of the Children Act and the First schedule to the Children Act, Article 3(1) of the United Nations Convention on the Rights of the child (which Uganda ratified in 1990); Article 4(1) of the African Charter on the Rights and the Welfare of the Child (which Uganda ratified in 1992).** (See the fortification of the 10 principle by courts in the case of **Mark Siduda Trevor (an infant) Family Cause No. 213 of 2014** and the case of **Deborah Joyce Alitubeera Civil Appeal No. 70 of 2011.**In *re M an infant SCCA No. 22/2004).*
- [18] The petitioner prays for custody of the children since, she claims the respondent 15 does not have time to look after them because of his busy social life; that whenever he takes the children he leaves them at his parent's house and that he works in Wobulenzi during the week which is a distance away from the children's school and so she is the better parent to have custody.

20 Counsel for the applicant submitted that the children are aged 9 and 14 years according to the witness statement and petition and that the petitioner is a caring mother and well placed to provide the children's upkeep and to cater for their needs. Counsel relied on the authority of **Namukasa Joweria v Kakondere Livingstone Family Cause No 20/2013** to support her submission. The 25 respondent did not rebut the position that he worked at Wobulenzi far away from the children's school and agreed that the children live with the petitioner. Counsel for the respondent submitted that the respondent is a banker with a stable source of income and thus should be given custody and relied on the case of **Teopista Kayongo v Richard Sekiziyivu [1973] HCB 24** to support his 30 position.

Decision of court on custody.

- [19] Parents hold the primary right to custody of their children and both parents have similar and equal rights with regard to their child; (*See the case of **Rwabuhemba Tim Musinguzi vs. Harriet Kamakune (Civil Application No. 142 of 2009)* 5 *[2009] UGCA 34)*. The case of **Teopista Kayongo** (supra) cited by counsel for the respondent is distinguishable since the appellant in that case was not a fit and proper person and had even given the children away. In the instant case, it is not disputed that the children are being actively cared for by their mother who has stayed with them without the father, for the last four years; that the respondent 10 has also continued to care for and provide for the children's needs in terms of medical insurance and school fees and he picks them albeit leaving them with his parents which he does not dispute.**

Both parents appear to complement each other in the provision of their children's 15 needs.

[20] In my opinion the welfare principle governing decisions concerning children would demand that financially capable parents must cater for the needs of their children irrespective of where the children are, and depending on the 20 circumstances of each case. All other considerations fall back to the position of mere guidelines compared to what will ultimately preserve and uphold the children's welfare. The factors that contribute to sustainable, safe and stable environment suitable for the upbringing of children must be considered. In this case the mother seems to have provided those while the father provides the 25 financial aspects and this appears to have worked. While both parents are entitled to being with their children, children are not chattels that can safely be moved from one place to another in a 'ping pong' way. Their emotional and psychological concerns can not be sacrificed at the altar of the parents' rights and differences. While financial capacity for any one or both parents is an advantage, courts have held that financial capability is not the key issue in custody matters. (see the **Rwabuhemba case supra**)

- [21] One of the children is a young adolescent girl (16 years now Arabella Nanteza) 5 and the other is 11 years now (Isaiah Ssozi). The petitioner alleges that the Respondent leads a busy social lifestyle and has no time for the children; this however was not proved.
- I have considered the facts of this case, the age of the children and the time they 10 have stayed with their mother. I have also considered the fact that the father has been picking them but living them with his parents. While my considered view is that the welfare of the children is best served if both parents are involved in their upbringing, their way of life should be kept as stable and consistent as possible to ensure discipline and in this, the roles of both parents should be complimentary. 15 It was not disputed that they have lived with the petitioner for 4 years with some visits with their father. It is crucial that their way of life, now for 4 years should be maintained.
- [22] I therefore grant custody to the Petitioner; the respondent shall have the right to 20 see the children as and when he needs to but with prior notice to the petitioner and he shall have the right to pick them and spend time with them during their holidays and on any other day with prior arrangement with the petitioner.

Maintenance.

25 [23] It is not disputed that the respondent caters for the children's maintenance to cover school fees and school requirements, and medical care. The petitioner however prays that the respondent should contribute to some expenses of the children's upkeep namely: school fees and related costs (at 2,540,200/=); clothing and entertainment (at 360,000/=); food (at 859,000/=); medical care (30,000 over 30 and above the medical insurance); house rent, utilities and house maintenance (half of the total cost of 1,375,000/=); and transportation and miscellaneous expenses (at 1,030,000/=).

The petitioner attached annexure 'B' as proof of her monthly expenses towards 5 caring for the children for all the four years that they have been living with her. She prayed for a contribution to those costs.

[24] It is the opinion of this court that the welfare principle governing decisions concerning children would demand that financially capable parents must cater for 10 the needs of their children irrespective of where the children are, and depending on the circumstances of each case. Both parties are gainfully employed and have the capacity to look after the children;

Therefore maintenance of the children will be a shared responsibility between the 15 Petitioner and Respondent whereby each party shall bear 50% of the cost of maintenance of the children including school fees, medical expenses, shelter, clothing, entertainment; among other needs.

Costs of this petition

20 [25] Court had to adjourn on 9/11/2017, 5/2/2018 and finally 13/7/2018 and on all the days the Petitioner was present while the respondent never appeared and his counsel appeared once; For those reasons I shall grant costs of this case to the Petitioner;

25 Summary

- 1) The acts of the respondent by deserting the petitioner thereby withholding marital rights including conjugal rights amounts to cruelty which is a distinctive ground for divorce;
- 2) The marriage between the Petitioner and the Respondent has irretrievably 30 broken down;
- 3) For the welfare of the children and stable lifestyle the children need to stay with their mother where they have been for the last 4 years but their father shall stay in their lives;
- 4) Both parents are gainfully employed and should meet the needs of the children 5 equally;
- 5) Costs of the petition shall be borne by the respondent;

On the premises I make the following Orders;

1. The marriage between the Petitioner and Respondent has irretrievably broken

10 down;

- 2. A decree Nisi hereby issues;
- 3. Custody is hereby granted to the Petitioner;
- 4. The respondent shall have the right to see the children as and when he needs to but with prior notice to the petitioner; and he shall have the right to pick them 15 and spend time with them during their holidays and on any other day with prior arrangement with the petitioner;

- 5. Both parties shall equally contribute (50%) to the costs of bringing up their children including medical, education, entertainment, shelter and clothing; among others.
- 20 6. The Petition succeeds with costs to be borne by the respondent.

25 Ketrah Kitariisibwa Katunguka Judge. Dated this 10th day of May 2019

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