



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**DIVORCE CAUSE NO. 109 OF 2008**

**DKK.....PETITIONER**

**VERSUS**

**RMK.....RESPONDENT**

**JUDGMENT**

1. The petitioner and the respondent who are Kenyan citizens celebrated their marriage on the 16<sup>th</sup> June, 2001 in [particulars withheld] in the United States of America. Pursuant to their union, the couple settled in the U.S.A until March 2007 when they moved back to Kenya. The parties cohabited as husband and wife in Westlands within Nairobi until the Petitioner returned to the U.S.A. In May 2008, the petitioner returned to Kenya but the parties no longer cohabited. They have been separated since then.

2. By way of a petition dated 15<sup>th</sup> September, 2008, the Petitioner sought to have the marriage between him and the respondent annulled on grounds that the marriage had not been consummated due to refusal by the respondent and that the respondent lacked capacity to enter into the union as she was already married. The Petitioner also claimed that the respondent fraudulently procured his consent to enter into the union. The Respondent on the other hand filed a cross-petition for dissolution of the marriage on the grounds of cruelty and adultery. She also sought for the dissolution of the marriage and an order for maintenance.

3. The grounds of the petition were that at the time of celebration of the marriage between the parties hereto, the Respondent's marriage to her previous husbands was still in force, having not been conclusively dissolved in law. Secondly, that the Petitioner's consent to the marriage was obtained by fraud, by virtue of the false depositions that were made to the Registrar of Marriage, by the Respondent.

4. The respondent in her answer to Petition and Cross Petition averred that the Petitioner was not only aware of her former husband but also the fact that the said former husband was deceased at the time of their union. That, the only reason the Petitioner had applied for annulment was to enable him deprive her of the matrimonial property acquired through her sweat. Further that the reason for this cause is the Petitioner's cruelty and adultery. The Respondent put forward the following particulars of cruelty and adultery against the Petitioner:

**Particulars of Cruelty**

(a) The Petitioner has since the celebration of the marriage directed unkind and cruel verbal insults to the Respondent which insults were calculated to strip and undermine the Respondent's self-worth.

(b) The Petitioner used to come late frequently without any explanation.

(c) On 5<sup>th</sup> May, 2007, the Petitioner abandoned the matrimonial home and left the respondent to take care of the children thus causing anguish to both the Respondent and the Children.

(d) During the subsistence of the marriage the petitioner has had several adulterous relationships with several known and unknown women to the Respondent thus causing the respondent unbearable pain and agony.

(e) Between 2002 and 2007 the Petitioner drank excessively and spent most of the time expending on luxurious activities like playing golf and at the gym, thus using the family's time and resources irresponsibly.

(f) The Petitioner has been guilty of willful neglect to provide for the respondent and the children, leaving the respondent to shoulder the burden of meeting the needs of the family single handedly.

(g)The petitioner has persistently denied the Respondent conjugal rights.

**Particulars of Adultery.**

(a) The petitioner has had extra marital affairs with women known and unknown to the respondent.

(b) The petitioner is currently having an extra-marital affair with a woman known as SM.

It was also contended by the Respondent that as a consequence of the cruelty and the adultery the marriage has irretrievably broken down.

5. During the hearing, the petitioner gave evidence in court adopting and reiterating averments contained in his petition. He prayed for the annulment of the marriage. The petitioner further stated that it was not until May 2008, that he discovered that at the time he got married to the Respondent, she was still married to two other individuals; GF and MN. He claimed that she therefore lacked capacity to enter into marital union.

6. He further stated that they did not consummate their marriage due to the willful refusal by the Respondent. He averred that she adopted two children without his consent when he was away in the U.S.A. Further, that the Respondent represented herself as the daughter of PKT yet he came to learn that she was a daughter to JKG. This he stated, was a material factor in acquiring his consent and therefore constitutes fraudulent procurement of consent.

7. In response, the Respondent accused the Petitioner of committing adultery and being cruel towards her. It was her testimony that, in 2008 the Petitioner brought another woman (SM) to their matrimonial home which was yet to be completed with whom they lived together. On the issue of her previous marriages, she insisted that she was not married at the time of their union to the Petitioner. She affirmed that GF died in 1999 and the Petitioner was well aware of this having attended his funeral.

8. It was her testimony that their union with the Petitioner was not blessed with biological children thus they agreed to adopt. She asserted that she Petitioner was fully aware and participated in the adoption process of their children.

9. After careful examination and analysis of the pleadings and oral evidence of the parties in this case, the following issues arise for determination:

a. Whether there was a valid marriage between the Petitioner and the Respondent or it was a nullity as averred by the Petitioner.

b. If there existed a valid marriage between the parties whether it has irretrievably broken down.

10. On the first issue, the Petitioner alleged that the Respondent lacked capacity to contract the marriage. He stated that prior to their union, the Respondent was married to two other individuals and those Unions were never dissolved. He accused her of providing forged documents of divorce. In response, the Respondent averred that she was not the one who filed the divorce proceedings and was therefore unaware whether the documents were forged or not. She said that she received the documents presented from her former husband.

11. From the evidence, the Respondent admitted to being married to one GF. It was also alleged that she was also married to MN a claim which she denied. However, there is no evidence advanced by the petitioner of proof of the Respondent's alleged marriage to one MN. On her marriage to GF, the Respondent claimed that the said husband passed on before she entered into a union with the Petitioner. This was not refuted by the Petitioner. This therefore has the implication that the Respondent had capacity to enter into a union with the Petitioner. I therefore find that there was a valid marriage between the Petitioner and the Respondent.

12. The next issue is whether the parties have adduced sufficient evidence to warrant the grant by this Court of a divorce on the ground of cruelty and adultery.

Under the Matrimonial Causes Act Cap 152, Section 8 (1) provides grounds of petition for divorce are 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.**

13. The Petitioner alleged that his consent to marry the Respondent was procured through fraud. He alleges that the Respondent

misrepresented herself as being a daughter to one PKT yet she was a daughter to JKG. It was not clear how this affected his consent. He also alleged that the marriage was not consummated but no evidence was adduced to support this allegation.

14. In her cross petition and evidence, the Respondent alleged that the Petitioner was cruel to her. That he assaulted her, directed verbal insults at her and the children and being denied conjugal rights among others. Cruelty is defined in the Black's Law Dictionary(10<sup>th</sup> Edition)to be:

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

Mental cruelty is further defined to be:-

**“As a ground for divorce, 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...”**

15. It is noted that from the evidence, the Respondent relied heavily on cruelty as a ground for divorce. To point out examples of the particulars of the cruelty, she cited verbal abuse, denial of conjugal rights and disrespect by the actions of the Petitioner of bringing another woman into their home. She stated that generally, she felt oppressed and humiliated.

16. From these particulars, it is evident that the actions as alleged are capable of qualifying as cruelty (mental or otherwise) as defined by Black Law Dictionary. Being physically assaulted is likely to inflict bodily harm thus endangering someone’s health. Having to endure constant insults, disrespect and humiliation in a marriage is likely to cause one distress and great torment or mental anguish.

17. Cruelty can be proved by a preponderance of probability as it varies with the circumstances of each case. In the instant case, this court has been convinced that the Respondent/Cross Petitioner suffered cruelty at the hands of the Petitioner and I therefore do find that the ground has been proved.

18. With regard to allegations of adultery, the Respondent alleged that the Petitioner had several adulterous liaisons and in particular an affair with one woman whom he lives with and together have sired children. The Petitioner admitted this union in court, which is indeed an admission of adultery on his part as the parties are still married. To that extent, the Respondent has proved that the Petitioner has been engaging in an adulterous relationship during the subsistence of their marriage.

19. I have perused the evidence of the parties to establish whether the matrimonial offences set out in the grounds of the petition and cross petition have been proved. Matrimonial offences as provided under section 66(2) of the Marriage Act, 2014 are as follows:

- “ (a) adultery by the other spouse;
- (b) cruelty by the other spouse;
- (c) exceptional depravity by the other spouse;
- (d) desertion by the other spouse for atleast three years; or
- (e) the irretrievable breakdown of the marriage”

20. It is not denied that the parties have not cohabited since the year 2008 todate. From the foregoing the Respondent/Cross Petitioner has proved the matrimonial offence of cruelty and adultery. It is evident therefore that the marriage between the parties herein celebrated on 16<sup>th</sup> June, 2001 cannot work and has irretrievably broken down with no hope of being salvaged. In the premise, I find that the Cross Petition has merit and I allow it with orders as follows:

- a. That the marriage celebrated between the Petitioner and the Respondent in Lowell Massachusetts in the United States of America on 16<sup>th</sup> June, 2001 is hereby dissolved.
- b. That a Decree Nisi dissolving the said marriage is hereby issued to be made absolute thirty (30) days from the date of this judgment.
- c. There shall be no orders as to costs.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of ..... Advocate for the Petitioner**

**In the presence of ..... Advocate for the Respondent**