



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 126 OF 2013**

**C W C ..... PETITIONER**

**VERSUS**

**J P C ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein C W C through her petition dated 21<sup>st</sup> June, 2017 and filed same day sought dissolution of her marriage to J P C celebrated on 21<sup>st</sup> November, 2003 at Registrar of Marriages office Nairobi citing grounds of cruelty and adultery. The respondent entered appearance on 16<sup>th</sup> July, 2013 and a replying affidavit deponed by himself on the 17<sup>th</sup> July, 2013 and filed on even date.
2. Subsequently, the respondent filed his reply to petition and cross petition dated 31<sup>st</sup> July, 2013 and filed same day seeking dissolution of the said marriage on grounds of cruelty and adultery as well.
3. Before hearing commenced, the petitioner vide chamber summons dated 3<sup>rd</sup> March, 2017 and filed same day, sought court's leave to amend the petition. She attached a copy of the draft amended petition to that effect. Equally, on 7<sup>th</sup> March, 2017, the respondent also filed an application dated 2<sup>nd</sup> March, 2017 seeking court's leave as well with a view to amending areply and answer to petition in terms of amended reply to petition and cross petition.
4. On 6<sup>th</sup> April, 2017, parties recorded a consent and both applications were allowed as prayed with their respective pleadings already filed deemed as duly filed.
5. Consequently, upon amendment of the original petition, the petitioner substituted the original grounds of divorce among them cruelty and adultery to a single ground of irretrievable break down of their marriage. It is the petitioner's contention in her amended petition that her marriage to the respondent has irretrievably broken down due to lack of love and affection between the two.
6. The petitioner cited specifically lack of love between her and the petitioner, incompatibility, respondent's relocation to Australia his home country, irreconcilable differences between the two, denial of conjugal rights and lack of interest in reviving the marriage.
7. That despite the petitioner's effort to engage pastors and a counselor by the name of Dr. Gitau to render professional counseling and reconciliation to the two, none of them was successful.
8. Having failed to reconcile and there being no signs of reconciliation, the petitioner sought for dissolution of their marriage and any other directions the court may deem fit.

9. On the other hand, the respondent sought dismissal of the petitioner's petition and dissolution of marriage citing irretrievable breakdown of their marriage. He cited attributable grounds as irreconcilable differences on relation, emotional, psychological and parenting issues.

10. During the hearing, PW1 C W gave her testimony confirming that she got married to the respondent an Australian National sometime in the year 2003. She urged the court to dissolve her marriage to the respondent on grounds that the respondent has deserted their matrimonial home for Australia and that he was too cruel in that he used to beat her regularly. The respondent closed his case without calling any evidence.

11. I have considered the petition herein, reply to petition, cross petition and testimony by the petitioner.

12. There is no dispute that the petitioner and respondent did celebrate their marriage on 21<sup>st</sup> November, 2003 at the Registrar of Marriages office Nairobi and thereafter continued to cohabit within Nairobi. A marriage certificate (PEXh.1) was produced by the petitioner to serve as proof of the existence of their said marriage.

13. The couple is blessed with one living issue known as R M C whose custody was awarded to the respondent by the Children's Court in Children Case No. 710/2013 Nairobi during the pendency of this proceedings.

14. According to the amended pleadings, each party is alleging irreconcilable differences, lack of love or affection. In her evidence, the petitioner claimed that the respondent has since left Kenya for his home country leaving her alone in the country (Kenya).

15. The only issue for determination is whether the marriage herein has irretrievably broken down. When is marriage deemed to have broken down? Section 66(6) of the Marriage Act 2014 provides that a marriage is said to have irretrievably broken down if:

**a. A spouse commits adultery.**

**b. A spouse is cruel to the other spouse or to any child of the marriage.**

**c. A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition.**

**d. The spouse has been separated for at least two years, whether voluntarily or by decree of the court, where it has.**

**e. A spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition.**

**f. A spouse has been sentenced to a term of imprisonment of life or for a term of seven years or more.**

**g. A spouse suffers from irreversible insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is irreversible or that recovery is impossible during the lifetime of the respondent in the light of existing medical knowledge or**

**h. Any other grounds the court may deem fit.**

16. According to the petitioner, there is no love nor affection to the respondent. The respondent equally alleges the same position. In his statement and consent order for the child's custody signed before the Children's court on 30<sup>th</sup> May, 2014, the respondent was to return to Australia by July the same year since his work permit had expired and that he had wanted their son to start schooling in Australia by July same

year.

17. The petitioner and respondent have been living separately since 2014. There cannot be love between two parties living two worlds apart through osmosis. Marriage is a union based on love and affection and above all, sex is a tool of perfection in any working relationship. The couple has been living in an acrimonious life of fighting day in day out as evidenced in their respective affidavits attached including police abstracts on alleged assault against each other in support of petition and reply to petition. The petitioner in her testimony confirmed as such and her evidence is not controverted.

18. Based on those grounds, marriage between the two has irretrievably broken down and nothing can salvage it. Borrowing from the wisdom of Justice Madan in the case of **M.N. vs N (2008) eKLR** his Lordship stated as follows:

**“If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union”.**

19. From the pleadings herein, materials placed before me and testimony of the petitioner, the two parties have not connived nor colluded to file this petition. In any event, parties should not be forced to stay together if such relationship is full of bitterness, mistrust and hatred against each other. In the circumstances, I am inclined to let each party move on with his or her life without being held in a marriage which is akin to servitude or bondage.

20. For the above reasons herein stated, the marriage celebrated between the petitioner and respondent on the 21<sup>st</sup> day of November, 2003 at the Registrar of Marriages office Nairobi be and is hereby dissolved. Decree Nisi order to issue and the same to be made absolute after three months. Considering that this is a family matter, each party shall bear his or her own costs.

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**J.N. ONYIEGO (JUDGE)**

In the presence of:

.....Counsel for the petitioner

.....Counsel for the Respondent

.....Court Assistant