



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

**DIVORCE CAUSE NO.111 OF 2011**

**P M A V.....PETITIONER**

**VERSUS**

**E G M L .....RESPONDENT**

**JUDGMENT**

1. The petitioner via petition dated 4<sup>th</sup> July 2011 seeks dissolution of her marriage to the respondent. The petitioner got married to the respondent on 23<sup>rd</sup> April 2008 at the Registrar's office Nairobi under the Marriage Act Cap 150. During the marriage, the petitioner and respondent cohabited as husband and wife at Ndoto Road No.[Particulars withheld], Lavington. Their union blessed with one child I L born on 13<sup>th</sup> May 2007. The petitioner was a housewife while the respondent was a chief pilot by profession. The petitioner alleges that during the subsistence of the marriage the respondent has treated the petitioner with cruelty.

2. She particularized the same as follows; that since the celebration of the said marriage, the respondent has directed unkind and cruel verbal insults to the petitioner calculated to undermine the petitioner's selfworth. That the respondent has failed to provide emotional and financial support to the petitioner and has failed in his duty as a husband and father causing the respondent emotional stress and anguish. The respondent has restricted the petitioner's social life and curtailed her fundamental freedom of association by refusing her to socialize with her friends. That the respondent has been threatening to kill himself hence causing the petitioner untold mental pain and anguish. That the respondent has used abusive language in the presence of their daughter and stepchildren causing the petitioner and the children great anxiety and fear. The respondent has slapped her twice in public causing her untold humiliation, embarrassment, and anguish. The respondent abdicated his responsibility as a spouse and father leaving the petitioner to shoulder the financial burden of taking care of the matrimonial home. That the petitioner has not been an accessory to connived with or condoned the respondent's cruelty. The petitioner in this regards prays that;

- **The marriage between the petitioner and respondent be dissolved**
- **That the respondent do pay the petitioner alimony**
- **That the respondent does pay in addition Kshs.250,000 as maintenance every month.**
- **That the petitioner be granted custody and control of the issue of the marriage I L.**
- **That the respondent be condemned to bear cost of this cause.**

3. The respondent upon being served with the said petition filed an answer to petition and cross petition dated 30<sup>th</sup> August 2011. He denied allegations of cruelty against the petitioner or directing any unkind and cruel verbal insults to the petitioner. He added that the petitioner is an overly sensitive person who cannot be objective and does not accept any criticism. That on two occasions when he criticized her

inability to cook for him since all meals were prepared by the maid she being a strict vegetarian sought to impose the same on him. He denied abdicating his duties as a spouse and father stating that he, the petitioner and the children were living in a house owned by the petitioner and that he and the petitioner had an agreement that she would care to the household expenses whilst he paid for I's school fees and medical expenses and the family's considerable entertainment and vacation expenses. That he also catered for the petitioner's nominal contribution for the purchase of the joint property in Kihingo Estate on L.R. No. [Particulars withheld]. He denied that the petitioner suffered any emotional stress and anguish and if any was suffered as claimed was due to her over sensitive nature. He stated that he is a caring father to I and has always shown consideration love and affection to her and the petitioner's children from her first marriage and that he has been nothing but supportive and encouraging the petitioner to have a social life. That the petitioner conducted counseling and therapy sessions with her friends in the matrimonial home at most unsociable hours despite the respondent's displeasure. That the petitioner visited nightclubs in a taxi to return in the early hours of the day. Though he admits to having threatened to kill himself, he stated that such behavior was because of provocation and constant verbal insults of the petitioner, which were demeaning and causing him emotional stress. He denies using abusive language before their daughter but admits to having asked her to keep quiet during one of her emotional outbursts.

4. In his cross petition the respondent argues that the marriage has irretrievably broken down because of the petitioner's alleged behavior and that, the petitioner has been guilty of cruelty towards the respondent and cannot be reasonably expected to live with the petitioner. He alleges that throughout the marriage the petitioner displayed violent ungovernable temper in her treatment by using strong abusive language and profane language in the presence of the children claiming she is a Sicilian and that was how Sicilian express them. That from 2009 the petitioner treated the respondent with total lack of affection, consideration, and sensitivity and was not emotionally or morally supportive towards the respondent causing him distress. That she refused to cook meals for him and insisted he be a vegetarian like her and served him only vegetarian meals; that the petitioner alleged infidelity and would sniff him to trace any woman scent. That on 2 occasions the petitioner has abused and insulted the respondent in the presence of their daughter Isabelle and went into a rage throwing crockery in the kitchen.

5. In 2009 in two separate occasions the petitioner approached the female colleagues she was talking to by pocking on their backs with her index finger causing him untold embarrassment and it became common knowledge at his work place that his wife was jealous and over possessive.

6. That the petitioner during the subsistence of the marriage continuously subjected the respondent to verbal threats of divorce which cumulative effect coupled with her dominating attitude caused the respondent immense mental anguish resulting in him being driven to threaten the petitioner that he would rather kill himself than continue with the relationship. He stated that the petitioner had an aggregate income from her solely owned property **L.R. No. [Particulars withheld]** and from her part time vacation in excess of Kshs. 300,000 per month.

7. P M A V testified that she got married to the respondent on 23<sup>rd</sup> April 2008 and they have one child of the marriage I L born on 13/5/2007. She separated with the respondent and they were no longer living together. They cohabited from 2006 to 2011 in her house in Lavington L V. She was working at home. She had 2 children from a previous marriage a 21 years old daughter and 16 years old whose father died in a road accident before she remarried. That the respondent was cruel to her many times and used to shout at her and throw things. At the time he was going through some tough times at work, he used to drink a lot, and even slapped her severally. At one time when her parents were visiting he took a knife, threatened to kill himself, and stabbed the quilt. That when a friend was helping her he pushed her down the stairs and this is when her parents asked her to check what was happening. That he once slapped her in public at Dormans and before her elder daughter. She stated that the fits of anger were unprovoked, that though she did not want the marriage to fail but the respondent became more and more abusive and she did not know how to control him. At the time when she was not in a job she used the money for her children given to her by her father in law to maintain them. She had no social life as he would come home tired and did not want to go out. That they had an agreement that she takes care of the household while he takes care of I. Before I was born, they had agreed that she would look after the house and he would look

after entertaining since he was a pilot. That there was a house in Kihingo that he convinced her they buy together, that she used all the rent from the house her late husband left her for the kids as she thought the same was a good investment for the children. That there was no much relationship between the respondent and her older children. That she learnt that he earned a million shillings while she was a housewife. She testified that the marriage began to breakdown when he started drinking and making scenes. That they discussed the issue and he left the house in 2011 after paying maintenance for a year towards I L 's maintenance. That she had no money in the account and decided to take a job after he left and was earning Kshs. 20,000/- . That she could not work as her work permit expired in 2015. The job is physical and hard job where she got tired easily. That she was already 50 years going on to 51 years. That her expenses are about 150,000/- a month sum which she gets from the children's account because the said house has not had a tenant since June as the rent is what she used to use for herself and the children. She stated that the respondent was not maintaining I L yet he had enrolled I L in Kempton. That the marriage has broken down and there is no love between them. She urged the court to dissolve her marriage and she be granted maintenance.

8. On cross-examination, she stated that the depression caused a rift between them. She denied being overbearing towards the respondent. She stated that the respondent was a pilot based in Kigali and was away 15 days at a time. That she felt insecure and that the respondent could not be a father. That at one time he smelled perfumed and she asked him about it but she did not go to his office and embarrass him. That a lady called J told her that the respondent was behaving badly with the ladies. That at one time she found a lady all over him, she told her she was his wife and did not shout. That she even kissed her but the respondent threw tantrums. That she massaged him every time he got home. She stated that she did not fail as a wife and that she wanted to heal the respondent of his gout. She denied abusing him in her daughter's presence. That when he abused her she did not react. That she reported to the police when she could not find him. That he had repaired the house but he repaid him and he also bought a tank, which has been in her house for long. That he used to pay for 7000 for Dstv, she denied that she bought beds for the servant quarters. She admitted that he bought the big mirror for her classes but did not do the basement but only did the small terrace and paid about 70,000/- for the house insurance. She denied that he brought her airtime. She stated that the respondent was no longer in employment but he can easily get freelance work. That he spends Kshs. 400,000/- for the children's school fees. She stated that the respondent refused to care for their daughter and still gets rent from Kihingo town house and another house in Spain. She denied being a calculating woman stating she knew what she needs. She stated that they were to share the cost of the house in Kihingo and she gave 50% and she spent years with him. That they had interests to sell but it did not work out as the advocates advised her to wait. She admitted that the respondent's father gave him a loan for the house in Kihingo and he was able to pay for the town house. She stated that the house he referred to was left in trust for her children. She added that her late husband trusted her and she was also a beneficiary of the said small house. That the same is an old house and she gets 200,000/- to 250,000/-. She stated that she did pilate lessons but lost it as many girls aged 20 years have taken it. She admitted that both she and the respondent do not have jobs. She added that the respondent can work for it. She argued that she only had the house and has to cater for her 3 children that she does not receive any dividends and also that she did not get a lot from the said will.

9. In re-examination, she stated that she did not report the assault to the police as the respondent is the father to her child and he should be seen as good. That she did the pilate classes with him in the basement. That the respondent is the one who benefitted most from the tank as he could have long showers. She added that the rent now was about 210,000/- up from 150,000/- when she lived with the respondent. That since the respondent lived in her house he had no expenses adding that she did not insist that the respondent takes her daughter to an expensive school. That he has housed the respondent since 2006. That she only has a formal relationship with the Vohra family but in case of any problems she is on her own since they wanted her late husband to marry an Indian. That there was about 100,000/- to 150,000/- in Giro Bank which money she used until 2007 as she was not allowed to rent out the house and that she had 3 tanzanite stones and she did not receive anything out of it adding that she was waiting for the release of that money. That the only thing she has is the tender drive house which is about 25% of various shares and the dividend went into the investment.

10. E G M testified that he is a pilot by profession but has been unemployed since 2014. That he and the

petitioner got married on 23/4/2008 and cohabited in Lavington but later separated in 2011. He stated that he was a victim of constant mental abuse, which led to physical abuse and he was subjected to cruelty. That the petitioner constantly suspected him of being unfaithful and would smell him when he returned home. That she never cooked and his meals were made by the maids and they constantly ate brown rice and vegetables and if they wanted anything else, they had to cook for themselves. Being a pilot, he would go on night trips and he would be told that she could be seen going out at night, which happened for 2-3 years. He denies claims that he did not contribute in the house adding that he took care of majority of the bills as he paid for DSTV, renovations of the house, Safaricom, insurance for 3 houses. He submitted expenses of 1.38 million he spent on family outings. That from February 2009 to December 2010 he made payments of 47 million towards the house while she was supposed to pay 50% towards the purchase of the house but she did not. That the first house was small and they decided to move to a bigger house. That there was cruelty and he was under constant verbal abuse and mental harassment as she maintained hot tempers. That they once had an argument and she threw a phone at him and hit his left eye, which could have lost his eye and career as a pilot. That in 2009 during a company function the wife could poke female colleagues and introduce herself as his wife, which he says, was very embarrassing since he was in charge of training. That it was common knowledge that he had a very jealous wife. That the petitioner has very specific beliefs which she wanted him to abide by. That she did prayers twice a week in the house which involved breaking glass on the floor to dispel negativity which he objected as it could have hurt their young daughter. That early in the marriage there was an argument to the sale of the matrimonial home and they engaged a real estate to sell L V house as he could not buy a 50 million house alone. That the total cost of the Kihingo house was 55 million and he had to take a personal loan from his father of 9.5 million. In addition, the monthly rent was used to pay up this loan and other expenses. Out of jealousy, the petitioner had threatened to seek a divorce and so he wrote to his boss to remove him from night shift which led to his dismissal 2 months later. Other times he would be told to go sleep elsewhere and he ended up sleeping at the office. That since he was unemployed from November 2014 he did not have a source of income and still has to pay all of his daughter's expenses which is 220,000/- per month and that he had spent 10.8 million on her since May 2011. That he also pays I's school fees which is ksh.220,000/- for tuition. That he had to take a loan of 3 million for his expenses and was servicing interest only; that he has only managed to pay 90% of the loan he got from his father to pay for the Kihingo house. That for the last 4-5 months the house has not been rented service charge of 85,000/- whether the same is occupied or not. That the petitioner was in a far better off position as she owns a house in Lavington called Tender House which she rents out. In 2009, it was about 230,000/- per month but now it is about Kshs. 400,000/-. That the house is valued at 350 million that she also owns Luna Village where they used to live together. That from her late husband's will she is a shareholder of AS4 aviation company where she gets dividends, she doesn't pay rent, her first husband's in-laws gave her a car and driver and she can go to the Sarova hotel free of charge. That she does not pay any expenses for her first 2 children that he is indeed the one who requires the help. He stated that he wanted dissolution of the marriage since the same was beyond reconciliation.

11. On cross-examination he stated that she was dictatorial and a jealous woman. He denied that he neither suffered from gout nor did take a lot of alcohol. He denied that the petitioner spent nights looking for him, when he was home it was the maids that prepared the meals. That she was no good in maintaining the paperwork and trusted him in keeping the documents. That she was overbearing and there was no relationship of husband and wife. He stated that the petitioner should show that he refunded him the money he spent. He stated that he lived with the petitioner in Kihingo house and he paid expenses though he was not paying rent then. He said he was not sure that the respondent as working but knows that she did a course and got an international certificate. That in 2009 they had agreed to sell the house so that she could raise 50% for the new house but she later declined and though they had gotten offers, the sale fell through. He denied allegations that he wanted to read the petitioner's messages incidence that led to the phone being thrown at him. That though he wanted to spend time with her he also wanted to mingle. He stated that his job was stressful and he did not want to go home and take out the stress on her. He denied wanting to commit suicide stating and that it was taken out of context having said it in anger. He denied being violent towards the petitioner. He denied knowledge of the petitioner's spiritual beliefs stating that when they got married both of them were Catholics and only got to know about them after the marriage. He stated that the petitioner had an adulterous relationship with a Muslim man who went to their house and once saw the man leaving the house while dropping their daughter. He admitted that at

some point he stopped maintaining his daughter as he had no money and did not know the outcome of the maintenance cause as he thought they might come to a compromise. He added that the respondent decided to take the children to the current school.

12. I have considered the evidence adduced and the written submission filed by the parties. Parties filed written submissions. The petitioner on cruelty submitted that Section 66(2)(b) provides that , “ **(2) A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—**

**(b) cruelty by the other spouse;**

**Under section 66 (6) of the Act, irretrievable breakdown of the marriage can be proved by evidence of one or more of the following facts:**

**a. commission of adultery;**

**b. cruelty to the other spouse or any child of the marriage;**

**c. willful neglect of one spouse by the other for at least two years immediately preceding the presentation of the petition;**

**d. separation of the spouses, voluntarily or by decree of the court, for at least two years;**

**e. desertion for at least three years immediately preceding the presentation of the petition;**

13. That the definition of cruelty was settled in *Meme –vs-Meme [1976] K.L.R.* where it was held that, “**For cruelty to be established two tests must be satisfied. These are: First whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel: and, secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury.**”

**MEME V. MEME (Supra) held that, “to establish cruelty, the petitioner must show to the satisfaction of the court:**

**i. Misconduct of a grave and weighty nature;**

**ii. Real injury to the complainant’s health or reasonable apprehension of such injury;**

**iii. That the injury was caused by misconduct on the part of the respondent; and**

**iv. That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.**

14. It was submitted that it is trite law that he who alleges must prove. *For cruelty to be established two tests must be satisfied whether Misconduct complained of is sufficiently grave and weighty nature to warrant the description of being cruel and secondly whether the conduct has caused injury to the complainant’s health or reasonable apprehension of such injury”*

15. That the court in establishing the standard of proof they held that, “**on a charge of cruelty, the above elements four elements must be proved to the satisfaction of the court. I have deliberately used the phrase to the satisfaction of the court instead of all reasonable doubt because the latter gives the impression of the case being of a criminal nature whereas matrimonial proceedings are civil.**”

16. That in the case of *KAMWERU -VS- KAMWERU (2003) EA 484 (CAK)*, the court held that, “Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of

probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”

17. It was submitted that the evidence tendered by the petitioner establishes various incidents of cruelty from the respondent. From his uncontrolled fits of anger, drinking heavily, threatening to commit suicide and physical abuse all amounts to cruelty meted out on her by the respondent and these acts created a reasonable apprehension of injury which finally led her to invite him to leave the matrimonial home in May 2011.

18. On adultery the petitioner submitted that a party to a marriage may only petition to the court for the separation of the parties or dissolution of the marriage on the following grounds:

a) Adultery by the other spouse, the petitioner on the relied on the case of **Meme vs Meme** where it was held, *“I am aware of the fact that it is not necessary to adduce direct evidence to prove adultery. The practice is infer evidence of adultery from the surrounding circumstances, e.g. confessions and admissions, improper behavior, undue familiarity, suspicious circumstances etc. But the standard of proof required of adultery is very high.....the evidence must therefore go beyond establishing mere suspicion to commit adultery....As stated by Willmer J in **Beer vs Beer [1948]** mere suspicion is not sufficient to justify a finding of adultery. An allegation of such gravity must be proved to the satisfaction of the court; and where the evidence is pointing to the guilt is entirely circumstantial it seems to me that it is quite impossible for the court to draw inference of guilt unless it is clearly satisfied that the facts relied on are not reasonably capable of any other explanation.*

*“Adultery is a serious matrimonial offence and it must, where it is alleged be proved clearly. To prove adultery evidence of a guilty inclination or passion is needed in addition to the opportunity to commit it.”*

19. The petitioner submitted that the respondent smelled of female perfume and that he was flirting with female colleagues at the end of year party she submits that all these meet the requirements of improper behavior, undue familiarity and suspicious circumstances as set out in **Meme vs Meme**. She further submitted that the respondent had not satisfied these requirements in regards to his allegations of her having an affair with Maysam Z Kimji a representative sent to her by the Sheikh to assist her in prayer.

20. It was submitted that Section 66(2)(e) which provides that a party to a marriage celebrated under part IV may only petition the court for the separation of the parties or a disillusion of the marriage on the following;

*e) irretrievable breakdown of the marriage”*

Madan J. (as he then was), eloquently painted the classic picture of a marriage that has irretrievable broken down in the case of **JSM vs ENB**, *“As regards to irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2)(e) of the Marriage Act 2014 and was recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of marriage is understood to mean the situation where one or both spouses are no longer able and willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hopes of spousal resumption of spousal duties.*

*Under section 66 (6) of the Act, irretrievable breakdown of the marriage can be proved by evidence of one or more of the following facts:*

*a. commission of adultery;*

*b. cruelty to the other spouse or any child of the marriage;*

- c. willful neglect of one spouse by the other for at least two years immediately preceding the presentation of the petition;
- d. separation of the spouses, voluntarily or by decree of the court, for at least two years;
- e. desertion for at least three years immediately preceding the presentation of the petition;
- f. the sentencing of a spouse for a term of life imprisonment or a term of seven years or more;
- g. certification by two doctors, one of whom is a psychiatrist, that a spouse suffers from incurable insanity; and
- h. any other ground as the court may deem fit.

That although adultery, cruelty, and desertion are distinct and separate grounds for divorce, those matrimonial offences also continue evidence of retrievable breakdown of a marriage.

On maintenance, the petitioner submitted that section 77 of the Act provides that, “ *Grounds for order of maintenance*

(1) *The court may order a person to pay maintenance to a spouse or a former spouse—*

(a) *if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;*

(b) *if the person has deserted the other spouse or former spouse, for as long as the desertion continues;*

(c) *during the course of any matrimonial proceedings;*

(d) *when granting or after granting a decree of separation or divorce; or*

(e) *if, after making a decree of presumption of death, the spouse or former is found to be alive.*

She relied on the case of **RMP vs PKM** where it was held that , “***The court has been granted wide discretion in determining the maintenance to be paid to a spouse during divorce proceedings and after the granting of the decree of divorce. The Marriage Act 2014 does not however give the parameters upon which the court may assess maintenance to be paid to a spouse. This is unlike the situation in South Africa. To some extent, the South African law is the codification of the principles that have been accepted and applied by courts within Commonwealth countries that apply the common law tradition. Some of the above principles have been applied by Courts in Kenya. In view of the above authorities, I am persuaded that in exercising its discretion to make orders for post-divorce maintenance, it is the duty of this court to be guided by the objectives sought to be achieved by such orders. These include, but are not limited to, the following:***

***Identify the economic advantages and losses to the spouses as have been contributed by the subsistence of the marriage or its breakdown;***

***Apportion between the parties the attendant expenses of maintaining the issues of the***

**marriage;**

***Provide relief to cover the negative consequences for the spouses as may likely arise from the breakdown of the marriage;***

***Make sufficient provision to enable the parties to become economically self-sufficient within a reasonable duration of time.***

***Moreover, the common law rules that govern post-divorce maintenance derived from Kenyan as well as comparative case law indicate that the exercise by this Court of its discretionary power to award maintenance must be informed by an examination of all the circumstance of the case including: the present and future assets, income, and earning potential of the parties, taking into account their ages and professional qualification; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family; and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage.”***

21. That there is a presumptive duty on the spouse with a higher earning capacity to pay alimony to the other spouse. *“while there is a presumptive duty on the spouse with a higher earning capacity to pay alimony to the other spouse , the position as can be gleaned from decided cases is that the spouse who is seeking to be maintained should not seek the court’s intervention to be granted maintenance without providing evidence that he or she has made efforts or is making effort to secure a livelihood to secure a livelihood for himself.”*

22. That in the case of *WMM-V- BML (2012) eKLR* it was held that *“...No spouse who is capable of earning should be allowed to shirk responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much.”*

23. While the petitioner’s capacity to earn is one of the factors to take into account in assessing ancillary relief, the important point is whether any income that she is likely to earn would be sufficient. It was common ground that the petitioner has not been working since 2011 when she left her job in Sudan. She was then aged 51 years. At her age, it may not be easy for the petitioner to get back into employment, and this has a direct impact on her earning capacity which has since diminished. It is therefore just and equitable to award alimony to the petitioner because this will compensate her for the loss of her earning capacity, supply relief for the negative post-divorce consequences and improve her chances of attaining self-sufficient in the longer term.

24. The petitioner argues that the respondent as a pilot was earning Kshs. 1,000,000 per month and has a rental income of Kshs. 500,000/- as such is she claims that she is deserving of spousal support in the amount of Kshs. 250,000 per month and that the respondent is capable of paying the maintenance of Kshs. 250,000 for 15 years or in the alternative he pays her a lump sum of Kshs. 45,000,000. Further that the court orders the respondent to pay an initial sum of Kshs. 5,000,000 to enable her get back on her footing financially.

25. The respondent in his submissions stated that despite the petitioner alleging she was assaulted by the respondent she has not adduced any evidence to support the same. The respondent denied not taking care of any bills in the house adding that he took up hugely expensive bills in the house and also pays school fees of their daughter I despite being unemployed. That the petitioner also had her own money and it was not right on her part not to shoulder any bills.

26. He denied lacking time for the petitioner and the family adding that during his free time he took the

petitioner and the children for dinners and holidays. On allegation of being a habitual drunk he submitted that his work did not afford him such pleasure as he had a tight flight schedule. That the petitioner is a woman of ungovernable tempers constantly verbally abusing him using profane language, embarrassed him in May 2009 before his female colleagues and had physically abused him by throwing a mobile phone at him. That the petitioner jealous nature pressured him to refuse night jobs resulting to 4 months un employment which gave him a lot of emotional and mental stress. That the petitioner kicked him out of the matrimonial home forcing him to sleep in the attic and finally gave him an ultimatum to move out forcing him to incur millions to re-establish his home. That the petitioner renegaded on her agreement to refund 50% of the purchase price of Kihingo property.

27. On issue of maintenance, he states that he has to maintain two of his children leading him to incur more liabilities which forced him to obtain a loan of 3,000,000. That since the separation he has had to spend over Kshs.10,800,000 on the issue of the marriage cost which included school fees, medical, transport and entertainment without any significant contribution from the petitioner. Noting that the petitioner lives in her own house does not pay rent her car expenses are catered for and still enjoys a rental income of over Kshs.500,000 every month from her lavington tender Drive property and is also eligible to dividend from ASL as she is a shareholder. That the petitioner's children from her first marriage are catered for by her late husband's family and she receives Kshs.75,000 to maintain each child unlike he that him who has to pay school fees for his child Talisa from his first marriage and Isabelle despite his current financial situation.

28. The petitioner's ground for dissolution of the marriage is cruelty only adultery was not pleaded; the respondent too has pleaded cruelty. In **J.S.M vs. E.N.B [ 2015] eKLR** the Court of Appeal held that, ***there is no comprehensive definition of cruelty. That each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of facts and degree. That the conduct complained of must be looked at holistically and in the light of the parties themselves.*** The law on what constitutes cruelty was set out in the case of **Meme vs. Meme [1976-80] KLR** ,as submitted by the petitioner in her submissions The petitioner avers that the respondent treated her with cruelty during the subsistence of the marriage, which ranged from verbal insults, failure to give the petitioner and the children love and affection the respondent's neglect to take care of the household and the petitioner threatening to kill himself facts that he himself admits to have doing in rage these I find that these acts as narrated add up to cruelty and as such the petitioner's petition succeeds on this ground. The respondent on his part too has narrated instances of cruelty alleging that he was under constant verbal abuse and mental harassment as the petitioner maintained hot tempers; being constant accused of infidelity and the wife public display of jealousy these facts too I find that the same could have caused the respondent mental anguish and as such they amount to cruelty. In this regard I allow the respondent cross petition. From the foregoing it is very clear that the marriage between the petitioner and respondent has irretrievably broken down the parties have not lived together since 2011 they both testified in court that their marriage in no more and that there is no chance of them getting back again.

29. The petitioner has sought that the respondent pays her alimony. Maintenance or alimony payment provides a means for a spouse who was financially dependent on the other spouse to support themselves either before or after the dissolution of marriage. Maintenance seeks to protect the formerly dependent spouse from the adverse consequences of the breakdown of marriage before they acquire self-sufficiency. In ascertaining the same the court shall have regard to the existing or potential means of each of the parties, their respective earning capacities, financial needs and obligations, the duration of the marriage, the conduct of the parties prior to the divorce, their conduct that led to the breakage of the marriage. It is important to remember that both parties have equal rights before the law. Article 45(3) of the Constitution, 2010 provides that,

***“(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

This was expressed by Justice G.B.M Kariuki in the case of **WMM-V- BML (supra)**

Where it was held that ***“...No spouse who is capable of earning should be allowed to shirk***

***responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much.”***

30. It is not in dispute that both the petitioner and respondent are not employed. They currently rely on income from their rental properties. The respondent has adduced voluminous bundles of documents to show that his income so obtained is used to cater to his children and he pays school fees for Isabelle and his daughter from his first marriage. He has also adduced receipts evidencing purchases of uniform and other school items. I find that as it is the respondent who is financially stretched. The petitioner indicates that the respondent gets works now and then and as such should contribute more towards the child’s maintenance. She has however not adduced any evidence to support this. The petitioner in my view should also to some extent contribute to the maintenance of the said issue of the marriage. The Constitution as at Article 53 seeks to protect the interest of a child and bestows obligation of the child on both parents. It provides as follows; ***“(e) “to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;”***

31. Having taken into consideration the parties financial capacity as well as their current responsibilities, I find the respondent's prayer for alimony is unmerited and dismiss the same. In arriving at this decision, I have considered that the petitioner obtains reasonable income from the property she has rented out and as such is capable of maintaining herself as well as contribute to the maintenance of the issues of their marriage. I note that there is a maintenance matter before the Children’s court (**Nairobi Children’s Cause No. 1116 of 2013**), the parties have not indicated whether the same is pending or was concluded and the orders if any given by the said court. I find that to order the respondent to pay alimony to the petitioner would be to burden him unnecessarily.

32. The petitioner has also sought custody of the issue of the marriage Isabelle Lanoe. This matter I find should be dealt with at the children’s court and should lie as a matter of appeal in this court as such I will refrain from making a determination on the same. The marriage between the petitioner and the respondent is dissolved on grounds of cruelty and that the marriage has irretrievably broken down. Each party to bear its own costs and a decree *nisi* to issue and to be made absolute within 30 days. It is so ordered.

Dated, signed and delivered this **31<sup>st</sup>** day of **August** 2016.

**R. E. OUGO**

**JUDGE**

In the presence of;

.....**For the Petitioner**

.....**For the Respondent**

**MS. Charity**

**Court Clerk**