



**REPUBLIC OF KENYA**

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

**DIVORCE CAUSE NO.160 OF 2011**

**A N M .....PETITIONER**

**VERSUS**

**P J W M..... RESPONDENT**

**JUDGMENT**

1. The petitioner A N M via his petition dated 5th October 2011, avers that he married the respondent on 23rd September 2003 at the Registrar's office, Nairobi under the Marriage Act, Cap 150 Laws of Kenya. He seeks a dissolution of his marriage to the respondent and cost of the cause.

2. The petitioner argues that during the subsistence of the marriage the parties cohabited as husband and wife in various parts of Nairobi, lastly being [particulars withheld] estate. The marriage was blessed with one issue namely W M N born on 24th November 2002 and the respondent's daughter E W from a previous relationship. The petitioner is a motor vehicle mechanic by profession while the respondent is a T.V. producer.

3. He alleges that the respondent has during the subsistence of the marriage treated him with cruelty. He particularized the same as follows; That the respondent made it a habit to spend her nights out of the matrimonial home drinking alcohol and returning home in a drunken stupor upon confronting her she would hurl insults at him before their children. That sometime in 2009 while attending a party with the respondent she encouraged another man to hug her suggestively while calling her romantic names and when questioned she reacted angrily and hurled insults at him embarrassing him in public. On one occasion, she has deserted the matrimonial home taking away her daughter and subjecting their young son to torture and suffering. The respondent falsely accused the petitioner of assault subjecting him to unnecessary questioning. The respondent threatened to have him fired from his job with [particulars withheld] Company where he works. While his mother was ailing, she forced the petitioner to send her away to his brother's home. That the respondent constantly refused to contribute towards the welfare of the family causing him and the children of the marriage undue agony and embarrassment. That the respondent lied about her income stating she only got a net of Kshs.30,000 while earning Kshs.90000 which concealment he terms as cruel as he was forced to fend for the family single handedly even when he had no job. The respondent has failed to recognize him as a role player in the family and refused to discuss investment options for the family and has consistently denied him access to see W M which prompted him to file Children's case no. 49 of 2010 in attempts to gain access to his child and despite obtaining the said orders the respondent has poisoned the mind of the minor against the petitioner. That the respondent has thwarted all reconciliation attempts made by the petitioner. It is on the basis of these cruel acts that the petitioner argues that the continuation of the marriage is untenable, as the same has irretrievably broken down.

4. The respondent did not respond to the said petition and the petitioner sought to have the registrar certify the same as undefended cause.

5. When the matter came for hearing the petitioner in his testimony reiterated the averments as raised in the petition adding that he and the respondent have lived separately since 2011 and there was no chance of reconciliation.

6. The petitioner's evidence was not controverted. The petitioner has sought divorce on grounds of cruelty on the part of the respondent. The petitioner narrated incidents of cruelty during their marriage. Cruelty is

one of the grounds provided for under the Matrimonial Causes Act Cap 152 (now repealed) and also the Marriage Act 2014. For the court to grant the orders sought it must be satisfied that the petitioner has established a case on cruelty. In the case of **Alexander Kamweru v Anne Wanjiru Kamweru [2000]eKLR**, it was held that, “*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*”.

7. The Petitioner’s allegation of cruelty requires proof to convince the court that the factual circumstances would suggest that the Respondent’s conduct caused or threatened to cause actual danger to the Petitioner’s life or limb. In the case of **DM v TM [2008] 1 KLR 5**, Chesoni J (as he then was)held that, “*To establish cruelty the complainant must show to the satisfaction of the court: – misconduct of a grave and weighty nature real injury to the complainants health and reasonable apprehension of such injury that the injury was caused by misconduct on the part of the Respondent, and that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word*”.

8. The petitioner argues that due to the said cruelty the marriage to the respondent has irretrievably broken down and the only course of action that is just is to dissolve the marriage. In the case of **NMM v SJC, Divorce Cause No. 1 of 2013**, Karanja J held that, “... *it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives ...*” The parties have lived apart since 2011. I find that the parties cannot be reconciled and find that the marriage between the two has irretrievably broken down. I therefore dissolve the marriage between the petitioner and the respondent that was celebrated at the Registrar’s of Marriages at Nairobi on 23rd September, 2003. A decree nisi to be issued and to be made absolute within 30 days. No orders as to costs. It is so ordered.

Dated signed and delivered this **30th** Day of **November** 2016.

**R. E. OUGO**

**JUDGE**

In the presence of:

.....**Petitioner**

.....**Respondent**

**Ms. Charity Court Clerk**