



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

**MILIMANI LAW COURTS**

**DIVORCE CAUSE NO 50 OF 2012**

**V. S. ....PETITIONER**

**VERSUS**

**S. S. B. ....RESPONDENT**

**JUDGMENT**

The Petitioner, V. S., filed a petition on 26<sup>th</sup> March 2012 seeking to have the marriage between her and the Respondent, S. S. B., dissolved on the grounds of cruelty and desertion, and to have the Respondent pay to her alimony in such sums as the court deems fit and reasonable to grant. The Petitioner and the Respondent were lawfully married on 20<sup>th</sup> September 2006, and their marriage was solemnized at the Office of the Registrar of Marriages in Nairobi. A copy of the Certificate of Marriage is annexed to the Petitioner's petition as proof of the marriage. The Petitioner is a manager of a portrait photography business while the Respondent is a mechanic. Both parties to this case are currently domiciled in Kenya and are within the jurisdiction of this Court.

The Petitioner stated that she and the Respondent lived together as husband and wife in Westlands and Parklands in Nairobi when the marriage subsisted. The marriage has been blessed with one (1) issue, S. K. B., a minor son who was born on 7<sup>th</sup> April 2007. The Petitioner deposed that during the subsistence of the marriage, the Respondent treated her with cruelty and also deserted her. This is elaborated in the particulars of cruelty and desertion in the Petitioner's petition. The Petitioner detailed instances of cruelty on the part of the Respondent which, among others, include:

- a. Physically abusing the Petitioner in front of their child, thereby causing the Petitioner actual bodily harm;
- b. Verbally abusing the Petitioner using unprintable words and maintaining an ungovernable temper, thereby creating tension in the home and causing the Petitioner undue stress and trauma;
- c. Spending all his money irresponsibly on lavish entertainment with friends on night outs, thereby causing the Petitioner to bear the family budget on her own;
- d. Being financially unsupportive to the Petitioner by borrowing money from the Petitioner or causing her to borrow money on his behalf, and turning violent when reminded to pay his debts, thereby causing the Petitioner mental anguish;
- e. Being an absentee husband and father, thereby depriving the Petitioner mental anguish and stress;
- f. Failing to act in the child's best interests by insisting on using the child's emergency fund for entertainment; and
- g. Threatening the Petitioner severally and instilling fear in her, thereby causing her to live a life of anxiety and psychological trauma.

Regarding the allegation of desertion, the Petitioner stated that on 8<sup>th</sup> August 2008 the Respondent deserted her by moving out of the matrimonial home; this was after he had brutally assaulted her and left her for dead. The Petitioner further deposed that the parties have been living separately and apart from each other since then, and that three (3) years have lapsed since the alleged desertion.

The Petitioner served the Respondent with the petition and the Notice to Appear on 26<sup>th</sup> May 2012. Despite service of the petition, the Respondent did not enter appearance. Neither did he file an answer to the petition, nor file a cross-petition. On 24<sup>th</sup> May 2013, the Petitioner, through Counsel, moved the Court by way of an application made pursuant to **Rule 29** of the **Matrimonial Causes Rules** seeking to have the Registrar's Certificate issued for the matter to proceed for hearing. This Court gave a ruling on this matter on 19<sup>th</sup> September 2013 in which, among others, the following orders were made: i) the Registrar's certificate to issue that the pleadings are in order; and ii) the matter to proceed as an undefended cause.

The matter was heard on 12<sup>th</sup> February 2015, and the Petitioner gave both oral and documentary evidence reiterating the averments in her petition. She testified that she was lawfully married to the Respondent on 20<sup>th</sup> September 2006 and she produced the original copy of their marriage certificate as evidence of the same. She also gave evidence concerning the alleged cruelty of the Respondent towards her and the child; she stated that the Respondent was physically abusive, and this resulted in the Petitioner reporting an incident where the Respondent assaulted the Petitioner to Parklands Police Station. The Respondent was charged and the case was prosecuted at Kibera Law Courts vide Criminal Case 2251/2008.

The Petitioner further testified that the Respondent left the matrimonial home in 2008 when the criminal case against him began and stopped providing for the Petitioner and the child. Subsequently, the Petitioner filed a suit for maintenance of the child at the Children's Court vide Case Number 525/2008. The Court gave the custody of the child to the Petitioner but allowed the Respondent to visit the child. It was the Petitioner's submissions that the Respondent only exercised his right to access the child for three (3) months before he stopped visiting and supporting the child financially. The Petitioner specified that the Respondent has failed to financially support or maintain the child since 2008.

The Respondent, despite due service of the petition, did not file an answer to the petition, nor did he file a cross-petition. Hence, the allegations and particulars of cruelty and desertion as set forth in the petition and reiterated in oral evidence are not challenged by way of pleadings or testimony from the Respondent.

From the pleadings and oral evidence of the parties in this case, this Court finds that the following are the issues for determination to which the Court will focus its legal analysis:

- a. Whether the Petitioner has adduced sufficient evidence in their respective presentations to warrant the grant by this Court of a divorce;
- b. Whether the Respondent should pay to the Petitioner alimony, and if so how much.

**Section 66** of the **Marriage Act 2014** provides:

1. ***A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.***
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 –***
  - 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 at least three years; or***
  - e. ***the irretrievable breakdown of the marriage.***

6. *A marriage has irretrievably broken down if –*

- a. *a spouse commits adultery;*
- b. *a spouse is cruel to the other spouse or to any children 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 spouses have been separated for at least two years, whether voluntary 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; ...*

The grounds of cruelty and desertion are all questions of fact which require this Court to assess them based on the evidence adduced by the parties. The standard of proof in establishing the above grounds of divorce is a preponderance of probability. This view is supported by the Court of Appeal judgment in the case of **ALEXANDER KAMWERU V. ANNE WANJIRU KAMWERU (2000) eKLR**, where it was observed 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.***

Cruelty is a question of fact and the establishment by a court of law of the fact of cruelty depends on the circumstances of each case. In the present case, in order to prove the Petitioner's allegation of cruelty on the part of the Respondent, this Court must satisfy itself that there is evidence indicating that the Respondent, without any justifiable cause, deliberately conducted himself in such a manner as to endanger the Petitioner's physical or mental health, or cause her anxiety over the imminence of such danger. The standard of proof for cruelty was elaborated in the case of **DM v TM (2008) 1 KLR 5**, where Chesoni J (as he then was) stated that:

***To establish cruelty the complainant must show to the satisfaction of the court: –***

- i. *misconduct of a grave and weighty nature*
- ii. *real injury to the complainants health and 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.*

The allegations made by the Petitioner concerning the Respondents cruelty have satisfied this Court of their gravity. In particular, the allegations of violence and physical abuse have been supported by convincing evidence. The Petitioner told the Court that on one occasion the Petitioner physically assaulted her with such cruel violence that she reported the matter at Parklands Police Station where the Respondent was charged and the incident became the subject of Kibera Criminal Case No. 2252/08. While the Respondent did not adduce further proof of the assault, this Court finds that the fact that the incident was dealt with by a court of law as a criminal case is sufficient to indicate that the Respondent's action constituted a misconduct of a grave and weighty nature. The Court also finds that the Respondent's conduct must have caused real injury to the Petitioner or reasonable apprehension of such injury to warrant the prosecution of a criminal case.

The petitioner also detailed instances in which the Respondent's conduct can form the basis on which an inference of cruelty can be founded. One example from the evidence provided by the Petitioner is illustrative of the Respondent's cruelty. The Petitioner deposed that the Respondent insisted on using the child's emergency fund on drinks and friends, and he would react with hostility and violence when asked by the Petitioner to refund money borrowed from her or from other people. While no direct proof of this was produced, a reasonable inference can be drawn by this Court that the above is true from the fact that the Petitioner subsequently filed a matter in at Nairobi Children's Court vide Case No. 525/08 to compel the Respondent to maintain the child.

Circumstantial factors are useful in assessing the objective and subjective aspects of a particular case in order to determine whether the evidence can sustain the allegation of cruelty. In the case of **RAF V SML [2014] e KLR Divorce Cause No 25 of 2011**, Muriithi J observed that:

*The test for cruelty in matrimonial causes is both objective and subjective. A petitioner is required to prove conduct on the part of the respondent that may be construed to be cruel in an objective sense and to a standard of beyond reasonable doubt or, as otherwise put, that the court must feel sure of the commission of the offence ...*

In the above regard, this Court has satisfied itself, on a balance of probability, that the Respondent was cruel to the Petitioner and that the same has been proved by the Petitioner to the required standard of proof.

Likewise to the allegation of cruelty, it is important for the Court to satisfy itself that certain factual and circumstantial factors have been proved to support the allegation of desertion. The Petitioner maintains that the Respondent deserted her. She gave evidence that the Respondent moved out of the matrimonial home on 8<sup>th</sup> August 2008 after Criminal Case No. 2251/08 in which the Respondent was charged with assaulting the Petitioner commenced. The Petitioner did not provide direct proof of the desertion, but this can be reasonably be inferred from the particular circumstances of this case: a domestic dispute arose, it turned violent, it subsequently became the subject of a criminal case, there was no remorse or reconciliation, and one spouse decided to up and leave the matrimonial home.

The filing by the Petitioner of custody and maintenance case, Nairobi Children's Case No. 525/08 in which the Respondent was ordered to maintain and visit the child who was then in the Petitioner's custody appears to corroborate her case that the Respondent had deserted her. This ties up with the evidence that the parties have been separated since 2008. Moreover, the Respondent's conduct in willfully refusing to participate in the present case despite due service is also indicative that he had deserted the Petitioner. This Court is satisfied that the Petitioner has proved her case, on a balance of probabilities, that the Respondent has deserted her during the subsistence of the marriage.

Upon an examination of the Petitioner's petition and her unchallenged evidence, the Court finds that on the basis of **Section 66(6)** of the **Marriage Act, 2014**, the marriage between the Petitioner and Respondent has irretrievably broken down because the Respondent was cruel to the Petitioner and deserted her for more than three (3) years immediately preceding the date of the presentation of the petition. The fact that the Respondent has neither answered nor challenged the allegations set forth in the Petitioner's pleadings and testimony, and the fact that he made no presentations in this matter despite living within the jurisdiction of this Court is indicative of his disinterest in the marriage. The Court, therefore, finds that the marriage has irretrievably broken down.

Apart from an order for the dissolution of marriage, the Petitioner also sought for an order that the Respondent pay to her alimony in such sums as the court deems fit and reasonable to grant. The provision of post-divorce spousal support in this case will benefit both the Petitioner and the child of the marriage. In this regard, the Court is guided by **Article 53(2)** of the **Constitution** which provides that:

*A child's best interests are of paramount importance in every matter concerning the child.*

This indicates that in cases where there are children of the marriage, any finding of the Court regarding alimony payment must not only factor in the best interests of the child, but must also consider the consequence of such an order on the survival and development of the child. This Court is also guided by the provisions of **Article 53(1)(e)** & **Article 45(3)** of the **Constitution**. **Article 53(1)(e)** of the **Constitution** provides:

*Every child has the right –*

*(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;*

Article 45(3) of the Constitution provides:

***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.***

In the above regard, and in light of the evidence adduced by the Petitioner, this Court has formed the opinion that the Petitioner has borne the disproportionate weight of what is, in law as well as fact, a shared burden; that is, the obligation of parents to provide for their children. The unchallenged evidence before this Court is that the Respondent has not maintained the child since 2008 resulting in the filing by the Petitioner of a child maintenance case in Nairobi Children's Case No. 525/08. This Court therefore finds it necessary that the Respondent be compelled to pay to the Petitioner money to assist in the upkeep of the child. Section 77(1) of the Marriage Act, 2014 provides:

***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 spouse is found to be alive.***

This Court is satisfied that there are valid grounds to justify issuing an order that the Respondent pay to the Petitioner some money to support herself and the child of the marriage. The reason for this is that the Respondent has refused or neglected to provide for the Petitioner and the child, and has also deserted her. An important starting point in assessing the amount payable by one spouse to the other as alimony is their current and future financial capacity. This view has been upheld by Justice Musyoka in **SMR v PHS [2013] e KLR** who observed that: ***"The financial capacity of the parties has to be examined before the court makes a ruling as to whether a spouse should pay maintenance and if so how much."***

In the present case, the Petitioner has not provided the Court with a schedule of her income and expenditure and an estimate of what the Respondent earns or an indication of his sources of income from which a reasonable approximation of his income can be deduced. Section 66(5) of the Marriage Act provides:

***The proceedings for the dissolution of a marriage celebrated under Part IV may be adjourned for a period not exceeding six months as the Court may think fit –***

- a. ***for the court to make further enquiries; ...***

On the one hand, the absence of estimates of the financial capability of the Respondent and the needs of the Petitioner and the child may warrant the invocation of Section 66(5) of the Marriage Act in order that the Court may make further inquiries into the same. On the other hand, this Court must be guided by the mandatory import of the principle of the best interests of the child. Section 4(2) & (3) of the Children Act provides:

***(2) In all action concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.***

***(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –***

- a. *safeguard and promote the rights and welfare of the child;*
- b. *conserve and promote the welfare of the child; ...*

Guided thus, this Court finds that the best interests of the child in this matter will not be served by adjourning the dissolution and final determination of the case. In the circumstances, this Court finds it necessary to exercise its discretion under **Section 77(1)** of the **Marriage Act**, which discretion is justifiable in light of the priority of child's best interests over other analogous considerations, to order that the Respondent pay to the Petitioner monthly maintenance. This Court has come to this finding after taking into account the uncontroverted evidence that the Respondent has neither supported the Petitioner financially nor maintained the child in this matter in spite of a court order to that effect. It is not the failure per se by the Respondent to comply with those orders that has informed this Court's decision, but rather the consequences of the persistence of such non-compliance on the best interests of the child. If this Court were to postpone the final decision in this matter in order to make further inquiry as to the financial status of the parties, the ends of justice will likely be impeded by the Respondent's willful lack of cooperation which has been evident throughout the prosecution of this case.

In the final analysis, this Court orders that the marriage between the Petitioner and the Respondent that was solemnized on 20<sup>th</sup> September 2006 is hereby dissolved:

- a. Decree nisi to issue forthwith;
- b. Decree absolute to issue thereafter within 30 days;
- c. The custody of the child to remain with the Petitioner, but with access rights to the Respondent;
- d. The Respondent to pay to the Petitioner a monthly sum of Kshs. 40, 000 subject to review by this Court;
- e. Each party is at liberty to apply;
- f. No orders as to costs.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2015**

**M. MUIGAI**

**JUDGE**