



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

**AT NAIROBI**

**DIVORCE CAUSE NO.19 OF 2015**

**P C J K.....PETITIONER**

**VERSUS**

**A N K.....RESPONDENT**

**JUDGMENT**

1. The Petitioner has filed a petition dated 24<sup>th</sup> February 2012 seeking the dissolution of his marriage to the respondent. He got married to the respondent at the Attorney General's chamber under the Marriage Act Cap 150 and issued with a marriage certificate. After the said marriage the petitioner and respondent started cohabiting as husband and wife in Langata Nairobi. The marriage has one issue F M M K born on 14<sup>th</sup> July 2008.

2. The petitioner argues that since the said marriage the respondent has treated him and her child I E O K with extreme and intolerable mental and physical cruelty. He particularized cruelty as;

i. The Respondent has blatantly refused to make up her role as a wife by abandoning her matrimonial home on 15<sup>th</sup> December 2011.

ii. The respondent has treated the said I E O K with violence.

iii. The respondent has deprived the petitioner of moral support and has continued to intentionally ignore the petitioner showing no interest in the petitioner though she married him and this has made the petitioner's expectation in marriage a shadow hence making the petitioner suffer mentally.

iv. The respondent has totally failed to show love and affection to the petitioner whom she treats as a stranger and has denied the petitioner his conjugal rights for several months before her sudden flight from the matrimonial home.

v. The respondent is dishonest and arrogant in nature

vi. The respondent has allowed her relatives particularly her sister to interfere with the marriage and who constantly aided and abetted her flight from the matrimonial home.

vii. The respondent has interfered with the plaintiff's place of work by making wild allegations against the petitioner's employees with a view to embarrassing the petitioner and leading to discontent and unhealthy working environment which negatively affected the smooth running of

the company.

3. That the respondent has willfully and of her own volition abandoned the matrimonial home. He particularized desertion as follows;

- i. The respondent left the matrimonial home on 15<sup>th</sup> December 2011 after packing all the household goods into a truck to be stopped by the security men after deceiving the petitioner that she was going to town to purchase medicine. To this end the respondent is a dishonest person.
- ii. That the respondent conduct has rendered it impossible for the petitioner to continue his marriage to the respondent since it has become apparent that the respondent is no longer interested in being married. The respondent is in active desertion.
- iii. The petitioner has not been in any way an accessory to or connived to or condoned the acts of cruelty and desertion.
- iv. There is no hope or possibility of reconciliation or compromise whatsoever nature or kind between the petitioner and respondent.
- v. The differences between the respondent and petitioner are of irreconcilable in nature and the marriage between them has irretrievably broken down.

4. The petitioner seeks dissolution of the marriage and costs.

5. The respondent in response filed an Amended Answer to Petition and Cross Petition. The respondent denied the allegations set out in the petitioner's petition adding that she has been a loving wife to the petitioner and has never failed to show affection to him nor their son I E O K. That she has never been dishonest, arrogant or interfered with the petitioner's place of work. She avers that she only took her clothes and minor's adding that the petitioner has been very cruel to her and has refused to communicate with her despite various attempts for reconciliation. That it was the petitioner who asked her to leave on 12/12/11 and she subsequently left on 15/12/11. That since the petitioner refused to take up parental responsibility with expenses of their child she instituted Children's Case No. 149 of 2012. In her cross petition she particularized the petitioner's cruelty as;

- i. The petitioner has been cold to the respondent and has not been emotionally supportive to her and generally did not offer her any love and affection as is expected thus causing the respondent to feel rejected and suffer psychological trauma causing her to be hospitalized at Nairobi hospital for 6 days.
- ii. The petitioner has been neglecting his family responsibilities at the instance of his mistress one S N who is also his secretary causing her to suffer psychological trauma and that he also had an affair with one M a neighbor of his at Langata.
- iii. The petitioner would refuse to take the respondent when she got her 2 epileptic seizures in 19<sup>th</sup> October 2011 thus endangering her life and causing her to suffer neglect.
- iv. The petitioner has withdrawn all emotional support and has reluctantly provided financially despite the current economic crisis causing her to struggle and strain to meet the numerous family needs of the family despite being capable of providing the same.
- v. The respondent had made numerous attempts to reconcile the marriage through friends and relatives and even at CREAW offices in Lovington but the petitioner has refused to reconcile.

She particularized adultery as;

- i. That on or about 2011 the petitioner would flirt with the secretary in his office with one S N and

would exchange romantic emails and on being questioned he would say that flitery was in his nature thus causing her to suffer untold mental stress and anguish.

ii. On or about December 2011 on December holiday he travelled to Nakuru and met up with M who introduced him to her parents.

iii. The petitioner would receive numerous calls at night of which the respondent was uncomfortable with and on being questioned he would say they were private calls / text messages.

iv. That the petitioner had not colluded or condoned the petitioner's cruelty or adultery adding that the marriage has irretrievably broken down on account of the petitioner and cannot be salvaged.

v. She prays for the marriage between her and the petition be dissolved that the respondent be granted legal and actual custody of the issue of the marriage F M M K;

6. The petition came for hearing on 5/3/2015. The petitioner in his testimony reiterated the grounds as laid down in the petition adding that on 15/12/2011 when the respondent deserted him they had gone to the office together and on arrival she asked to go buy medication in town only to be called later by the guards who informed him that there was a canter parked outside his house packing household goods, this was confirmed by his neighbor and he decided to go home. He added that on 12<sup>th</sup> December they had fought and he had asked her to respect him and his children or leave. He testified that Fanciscos was with the respondent while he had Iman. That he took Iman when his mother died and that he was mistreated by the respondent as she would beat him if he urinated in bed and would beat his head with a spoon. That when they got married the respondent had no problem of the child living with them but this changed later on. That they tried to attend various counseling but the same has not helped.

7. In regards to the allegation of an affair with N he stated that he had a professional relationship adding that his MD had confirmed that. He admitted that the respondent was epileptic and the same would go after a rest and taking the prescribed dose of her medication. He denied going to meet M in Nakuru adding that he only went to have his nyama choma and by then the respondent had deserted her. That his phones had no passwords and that she had the password to his emails. He testified that he has had one visit with F but she has denied him access.

8. The respondent reiterated the averments in her reply to the petition adding that on the issue of school that she took the children to school for an interview F passed but I failed and this is what brought an argument in the house as she told the petitioner it was better to have one child admitted to the school. That she fell ill and her house help informed her relatives that she was unwell and they went and took her to hospital where she was diagnosed with depression and admitted for 6 days.

9. In regards to the adultery allegation she testified that she knew of the petitioner's affair with S as she had seen their conversations and the same were not pleasant. On M she testified that she got the information from the guards. She stated that she had been granted the custody of the child and the petitioner had begun making payments for the child. She sought maintenance for the child. She added that the petitioner had not contacted him about the child since 2012 to have the child and neither has she.

10. The petitioner has raised two grounds of divorce cruelty and desertion. The respondent in her cross petition has also raised two grounds of divorce cruelty and adultery. From the pleadings and the testimony of the parties it is evident that the marriage has irretrievably broken down. Section 8 of the Matrimonial Act (now repealed) outlines grounds of divorce. The Marriage Act 2014 at Section 66 outlines the grounds for dissolution of a marriage, amongst them being cruelty, desertion and adultery.

11. The petitioner and respondent have both given a detailed account of the cruelty meted on them by each other. In the case of **DM -VS- TM (2008) 1 KLR, 5**, Chesoni, J. as he then was, said:-

*“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 complainant's 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."*

I find that the parties have testified on instances that amount to cruelty during the subsistence of their marriage which led to them growing apart. Such incidences were lack of care and affection especially when the respondent fell ill and the petitioner was hesitant to take her to hospital for treatment leaving her to rely on her relative, and the respondent lack of concern towards the petitioner's child. These acts are cruelty in their ordinary sense of the word.

12. The respondent on her part has alleged adultery. On ground of adultery, Madan J, as he then was, *in N-VS- N (2008) 1 KLR, 17*, said:-

*"Adultery is that physical act of sexual union between two married persons of the opposite sex not lawfully wedded to each other. To prove adultery, it is not necessary to have direct evidence of the same. Association coupled with opportunity illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling."*

In *DM -VS- TM (Supra)*, Chesoni, J. as he then was, held:-

*" .... that the evidence required to establish adultery must be more than the mere suspicion and opportunity; evidence of guilty inclination or passion was necessary, nevertheless the evidence of a single witness might suffice to establish adultery, unless that evidence aroused the suspicion of the court when corroboration would be required. The husband in the present case, having raised no more than a state of facts consistent with adultery beyond reasonable doubt."*

13. The respondent's evidence on adultery was insufficient as the same was based on mere suspicion and information given to her by the security guards. However, the respondent has proved cruelty and allow the respondent's cross petition on the same. On the other hand the petitioner has alleged desertion this is admitted by the respondent and as such I find the respondent had deserted the matrimonial home. On this ground the petitioner's petition succeeds. I find that the marriage has irretrievably broken down on the grounds of cruelty and desertion and there is no possibility of reconciliation. This court therefore dissolves the marriage between the Petitioner and the Respondent celebrated on 10<sup>th</sup> November 2010. A *decree nisi* to issue forthwith and to be made absolute within 30 days. Each party to bear its own costs. It is so ordered.

Dated, signed and delivered this **24<sup>th</sup>** day of **April** 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:

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

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

.....**Court Clerk**