



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**DIVORCE CAUSE NO. 30 OF 2011**

**F.M.K.....PETITIONER**

**VERSUS**

**J.M.M.....RESPONDENT**

**JUDGMENT**

The Petitioner filed a petition together with a verifying affidavit before this court on the 3<sup>rd</sup> of March 2011 seeking to have the marriage between her and the Respondent J.M.M dissolved on ground of adultery and cruelty.

The Petitioner stated in her petition that she and the Respondent were lawfully married on 27<sup>th</sup> July 2007. Their marriage was solemnized in the Registrar of Marriages Office in Nairobi. The Petitioner attached a certified true copy of the marriage certificate.

The Petitioner cohabited with the Respondent as husband and wife in Langata from July 2007 to November 2009. They were not blessed with children in the marriage.

The Petitioner is a Nurse while the Respondent is an I.T Administrator.

The Petitioner deponed that during the subsistence of the marriage, the Respondent was cruel towards her. The particulars of cruelty are as follows;

- a. The Respondent left the matrimonial home in 2008 and this caused the Petitioner mental anguish.
- b. The Respondent never communicated to the Petitioner.
- c. The Respondent slept in the sitting room and not in their matrimonial bedroom.
- d. The Respondent spent several days away from the matrimonial home.
- e. The Respondent always came home drunk subjecting the Petitioner to loneliness and mental torture.
- f. The Respondent was violent towards the Petitioner throwing plates at her and threatened her to leave the matrimonial home.
- g. The Respondent deserted the matrimonial home for a week.
- h. The Respondent sent the Petitioner threatening messages

The Respondent has been adulterous during the subsistence of the marriage. The particulars of adultery are as follows;

- a. The Petitioner was told that Respondent had an affair with a lady called Bernice and went with her for a Christmas holiday to Mombasa.

- b. The Respondent told the Petitioner that he was intimately involved with another woman and intends to desert the matrimonial home.
- c. The Respondent is currently cohabiting with one V N in South C.
- d. The Respondent is expecting a baby with one V N.

The Petitioner did not condone the adulterous and cruel behavior of the Respondent.

The Petitioner prayed for orders that;

- a. The marriage be dissolved,
- b. The Respondent pays the costs of the petition,
- c. Any other relief court deems fit.

The Petitioner served the Respondent with the petition together with the notice to appear on 24<sup>th</sup> of May 2013. The Respondent entered appearance and filed an answer to the petition together with the cross-petition on 10<sup>th</sup> June, 2011. In his answer to the petition, the Respondent denied the particulars of cruelty and adultery. He however alleged that the Petitioner's cruelty towards him greatly contributed to the breakdown of the marriage despite efforts of reconciliation by friends. The particulars of cruelty as illustrated in the cross-petition are as follows;

- a. The Petitioner made a habit of coming home late at night.
- b. The Petitioner continuously denied the Respondent conjugal rights.
- c. The Petitioner never took care of the Respondent when he had an accident.

The Respondent deponed that the Petitioner committed adultery and deserted the matrimonial home. The particulars of adultery are as follows;

- a. The Petitioner refused to wear her wedding ring claiming that she never wanted her patients to notice it.
- b. The Respondent discovered the Petitioner's love letters and cards hidden in the Petitioner's drawers from one P M.
- c. The Petitioner constantly asked for divorce from the Respondent when she left on her business trip to Kitui.

The particulars of desertion include the following;

- a. The Petitioner moved out of the matrimonial home despite numerous efforts of reconciliation.
- b. The Petitioner neglected her duties as a wife to take care of the Respondent when he had an accident.

The Respondent did not condone to the cruel and adulterous behavior of the Petitioner. The marriage between him and the Petitioner had irretrievably breakdown.

The Respondent prayed for orders;

- a. The petition be dismissed with costs
- b. The cross-petition be allowed
- c. the marriage between the Respondent and the Petitioner be dissolved
- d. The Petitioner to bear the costs
- e. Any other relief the court deems fit.

The Petitioner filed a reply to the answer to the petition and cross-petition on 12<sup>th</sup> January 2012. She denied the particulars of adultery, desertion and cruelty.

The Petitioner moved court by way of Chamber Summons filed under **Order 29(1) of the Matrimonial**

**Causes Rules** on the 12<sup>th</sup> January, 2014 seeking issuance of a certificate for the matter to proceed for hearing as a defended cause. The Registrar certificate was issued and the matter was scheduled for hearing on the 19<sup>th</sup> of August, 2012.

On the 19<sup>th</sup> of August, 2012, the Respondent and the Petitioner did not appear in court. The matter was finally scheduled for hearing on 4<sup>th</sup> of July 2015 by court. During the hearing, the Petitioner gave sworn evidence and stated that she works with *[particulars withheld]*. She now resides in Roysambu. The Petitioner and the Respondent lawfully married on 27<sup>th</sup> July 2007. They cohabited as husband and wife since July 2007 to November 2009. They never had children in the marriage. The Petitioner alleged that the marriage problems began with the Respondent's infidelity. The Respondent left the matrimonial home for a month and switched off his phone. When the Respondent got involved in an accident, he was with a lady called Bernice. The Respondent was violent towards the Petitioner during their subsisting marriage. The Respondent threw plates at the Petitioner. The Petitioner and the Respondent separated in 2009. The Respondent got married and has a child. She and the Respondent cannot reconcile. She prayed to court to accept her petition and dissolve the marriage.

The Respondent did not appear in court on that date and no sufficient reason was given for non-appearance.

The court has evaluated the evidence adduced by both parties together with their submissions. The Petitioner based her petition on adultery and cruelty. According to **Section 66(1) of the Marriage Act**, a party to a civil marriage may not petition the court for separation of the parties or for the dissolution of the marriage unless three years have lapsed since the celebration of marriage. The Petitioner and the Respondent celebrated their marriage in 2007. The court accepted the petition since the three years had lapsed.

The grounds for dissolution of a marriage are as stated under **Section 66(2) of the Marriage Act** to include; adultery, cruelty, exceptional depravity by the other spouse, desertion for at least three years, and irretrievable breakdown of marriage.

As regards the adultery, the Petitioner alleged that the Respondent committed adultery with several women. The Respondent went on Christmas holiday with a woman with one Bernice. The Respondent is now cohabiting with another woman named V N in South C while still married to the Petitioner. The Respondent now has a child with one V N. The Respondent in his cross-petition deponed that the Petitioner had a marital affair with one P M while still married to him. The Petitioner once came back home from a business trip in Kitui with a banquet of flowers. The Respondent alleged to have discovered hidden love card and letters from the Petitioner's drawer from the same P M. In **N V N (2008) 1 KLR 17** Hon Justice Madan (then was) stated that;

***“To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, elicit undue familiarity and guilt attachment are some of the instances that create an inference upon which court can act. Circumstantial evidence can prove and establish adultery provided that the circumstances are relevant, cognate and compellable”.***

The Respondent cohabiting and having a child with another woman in South C proves that the Respondent committed adultery while still married to the Petitioner. The Respondent did not appear at the day of the hearing to dispute this allegation and neither did he file an answer to the reply of the cross-petition. The allegations made by the Respondent that he discovered hidden love letters and cards addressed to the Petitioner from one P M constituted circumstantial evidence. The court is of the opinion that adultery was proved on the balance of probabilities by both parties to this case.

Cruelty as a ground for divorce is defined to include mental and physical cruelty. In this matter, the Respondent left the matrimonial home for a month . He never communicated to the Petitioner. He slept in the sitting room and not in their matrimonial bedroom. The Respondent always came home late and drunk. The Respondent was violent towards the Petitioner throwing plates at her and threatened her to

leave the matrimonial home. The Petitioner would always come home late. She neglected her matrimonial duties to take care of the Respondent when he was involved in an accident.

The **Black's Law Dictionary** defines mental cruelty to mean;

**“one spouse’s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”**

The Respondent’s violent behavior towards the Petitioner and coming home late while drunk caused mental anguish to the Petitioner. The Respondent’s habits of sleeping in the sitting room instead of the matrimonial bedroom and threatening the Petitioner to leave the matrimonial home amounted to mental cruelty towards the Petitioner.

The marriage is said to have irretrievably broken down when one or more of the conditions under **Section 66(6) of the Marriage Act** are present. The conditions are as follows;

- 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 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 or at least three years immediately preceding the date of presentation of the petition;***

In this case, the marriage between the Petitioner and the Respondent had irretrievably broken down due to cruel behavior of the Respondent towards the Petitioner. Both the Respondent and the Petitioner committed adultery during the subsistence of the marriage. The Petitioner and the Respondent spent nights away from their matrimonial home. This amounted to constructive desertion. In **NMM V SJC, Divorce Cause No. 1 of 2013**, where Karanja, J stated 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 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...”**

On the basis of the foregoing, the court hereby orders as follows;

- a. The petition is upheld.
- b. The marriage between the Petitioner and the Respondent that was solemnized on 27<sup>th</sup> July 2007 has irretrievably broken down due to cruelty of the Respondent towards the Petitioner and adultery by both parties.
- c. Decree nisi to issue forthwith.
- d. Decree absolute to issue in six (6) months.
- e. The Respondent shall bear the costs of the case.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE 2015.**

**M. MUIGAI**

**JUDGE**

