



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 160 OF 2013

R C RPETITIONER

-VERSUS-

C H RRESPONDENT

JUDGEMENT

1. By a petition dated 1st August 2013 and filed in court on 5th August 2013, the petitioner seeks the dissolution of the marriage between her and the respondent, and that custody of the child of the marriage be awarded to her.
2. The main ground upon which the petition is based is cruelty. The particulars thereof are set out in paragraph 7 of the petition. It is alleged that the respondent has habitually abused alcohol *miraa* and tobacco during the course of the marriage leading to conduct that threatened or affected the petitioner's health, has spent family resources wastefully on gambling alcohol *miraa* and tobacco thereby severely exposing the family to extreme hardship, is neglectful of the petitioner's welfare and of their child, is contemptuous of the petitioner, was indolent, idle and not exert himself for the benefit of the family, is a habitual liar and does not tell the petitioner the truth, consistently coming home late at night or even staying away altogether, is physically and verbally abusive of the petitioner, falsely accusing her of extramarital affairs and infidelity, threats to kill her and the child of the marriage, spreading false rumours within the community that she intended to marry someone else, taking the child away from her custody and denying her access to the child, and denying the petitioner intimacy affection and conjugal rights while at the same time giving comfort to another woman.
3. In response to the petition, the respondent filed an answer to petition on 9th October 2013 in which he denies treating the petitioner with cruelty. He denies consuming alcohol or any brands of spirits in the last few years, asserting that he has been maintaining the petitioner and the child of the marriage by paying for household expenses, medical expenses, school fees, school related expenses, food, clothing, health and shelter. He states that he is committed to the marriage and that he had reunited with the family from August 2012 to January 2013. He contends that he performed his obligations as a father and on numerous occasions he tried to meet his son but when he went to the house where the petitioner resided, the petitioner's workmate, M D, would always be always there, making it difficult for him to socialize with his wife and child. He adds that he was not neglectful in performing his obligations as a husband, and that it was the petitioner herself who chose to sleep in a different room. He states that the accusations by the petitioner of his infidelity are baseless and untrue as he is a devoted family man. He accuses that the petitioner of being the main cause of the failed marriage by having intimate and improper relations with a business partner or associate and their differences arise from the respondent's complaints on the same. It is his position that he has always sought for reconciliation to resume a healthymarriage

relationship. The respondent further contends that the marriage can be worked out and salvaged. He prays for the dismissal of the petition or, in the alternative, if the marriage is to be dissolved, sole custody of the child be awarded to him.

4. This petition was heard orally on 10th July 2014 and 9th October 2014. Both parties testified and were cross-examined. In their testimonies they gave vent to the allegations of fact made in their respective pleadings. At the conclusion of the trial, both sides filed detailed written submissions where they have summarized the facts of their respective cases as set out in the pleadings and the oral testimony presented in court and have cited the relevant statutory and case law.
5. Arising from the pleadings and oral evidence presented at the trial, it is clear that both spouses are unhappy in the relationship. Although the respondent appeared at the hearing to believe that a chance for reconciliation still exists, the petitioner was categorical that all attempts at reconciliation had failed.
6. The ground upon which the petition is premised is cruelty, whose particulars have been enumerated above. The court therefore has to consider whether the petitioner has proved the ground for cruelty. In the case of *N vs. N* (2008) 1 KLR (G&F) Madan J held, *inter alia*, that:

“Whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard.”

7. In **AMA vs. GSB HCDC No. 134 of 2010, GBM Kariuki J** said about cruelty that -

*“It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner’s health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see **Russell vs. Russell [1895] P. 315, 322. See also D. Tolstoy on The Law and Practice of Divorce, Sixth Edn.** It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see **Gollins vs. Gollins [1964] AC 644; Williams vs. Williams [1964] AC 698, 760. Tolstoy, 6th Edn states that the question in all cases is whether the Respondent’s conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see Gollins vs. Gollins (supra) at page 670 and Williams vs. Williams (supra) at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see **Jamieson vs. Jamieson [1952] A.C. 525, 535. Moreover, a deliberate intention to hurt may turn into “cruelty conduct” which, without such intention, would not constitute cruelty.”*****

8. In another case, GBM Kariuki J, *EJMK vs. JWK HCDC No. 21 of 2009*, that -

‘As long ago as 1862, it was accepted in English law that, “the law does not require that there should be many acts (of cruelty) and if one act should be of that description which should induce the court to think that it is likely to occur again and to occur with real suffering, there is no rule that should restrain the court from granting a decree of divorce”, It has been held where in the case of a single act of cruelty “the court takes the view that the injured spouse would be in danger of further ill-usage, then cruelty is sufficiently established. In short, the real question that the court has to determine is whether the conduct complained of and its consequences are so deplorable that the complaining spouse must have a remedy.”

9. From the material before me, it is my considered view that the petitioner has established a case for grant of the orders sought in her petition. The circumstances described by her, in my considered view are appalling, enough to warrant steps being taken to save the petitioner from the mental anguish she is currently suffering as a result of the conduct of the respondent. The respondent's conduct in my view has so weakened the matrimonial relationship that the petitioner could not be expected to live with him. The said marriage is simply unhealthy and clearly does not serve the interests of the parties involved.
10. It has been held on several occasions that where a marriage relationship has become unworkable, it is better that the parties formally end their relationship and minimize the potential bitterness and hostility between them. It is now generally an accepted part of the values in 21st century world that many relationships will not last the lifetime of the parties. The court has recognized that reality and generally accepts that, where the relationship has become unworkable the marriage ought to be dissolved. The court is equally cognizant of the fact that for a majority of couples, divorce is an unpleasant emotional and practical experience. It is not what they had hoped for when they embarked, with optimism, on marriage. It is one of the more stress-inducing experiences of life and may be exacerbated by the primarily fault-based nature of the divorce process.
11. It is without question that the marriage between the parties in this cause has irretrievably broken down. The parties are totally unable to reconcile, and although the respondent has alluded to the possibility of the said marriage being salvaged, he has not demonstrated how that can be possible and how he intends to achieve it. In the circumstances of this case, I do not believe that reconciliation is an option. The said marriage is not in any party's interest and should be ended. Both parties admit that their marriage has failed, with each blaming the other for the failure. My opinion is that their differences are irreconcilable. It will not pay to let them continue causing each other unnecessary mental cruelty. It would serve their best interests if each of them were to live their lives separately from each other.
12. The matter of the custody of the child of the marriage is before the Children's Court, which is the court set up under the principal legislation governing children and which has specific jurisdiction over such matters. As the said court is seized of the matter of the child, there would be no basis for me to venture into anything to do with him.
13. Having considered all the circumstances of the case, I am disposed to make the following orders -
- a. **That the marriage solemnized on 24th July 2005 at Shree Sanatan Hindu Temple between C H R and R C R is hereby dissolved;**
 - b. **That decree nisi shall issue forthwith to be made absolute after expiry of a period of 30 (thirty) days from the date hereof; and**
 - c. **That the respondent shall bear the costs of the suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015

W. MUSYOKA

JUDGE

In the presence of Ms. Kemunto advocate for the petitioner.

No appearance for the respondent.