



L.N.G.....PETITIONER

G.K.G..... RESPONDENT

JUDGEMENT

The Petitioner, L.N.G, seeks dissolution of her marriage to **the Respondent, G.K.G,** which was solemnized in 2001 at the Registrar of Marriages office at Nairobi. The Petitioner and the Respondent were described as a businesswoman and a businessman. They cohabited in in Kiambu District. Both are Kenyan citizens and are resident in Kenya.

When the Petition for divorce was served on the Respondent, he filed an “Affidavit of objection to the Petition” in which he contended that the Petitioner moved from the matrimonial home of her own free will and that the Respondent was forced to relocate to his mother’s home. He also denied the adultery alleged on his part and averred that he is ready to forgive the Petitioner and reconcile with her.

The marriage between the parties was blessed with two children, D.G.K, born in 1992 and M.M.K, born in 1996.

When the Petition came up for hearing before me on 1st December 2011, the Petitioner testified that she is a businesswoman and operates her business under the name and style of (*particulars withheld*) .She told the court that she lives in Kasarani with the two children of the marriage. The Respondent, she said, went to the United Kingdom just three days after their marriage. According to her, the Respondent went to work. It seems the parties had an agreement that the Respondent would return after 2 years. He did not do so. He remained in U.K. for 7 years and returned to Kenya in May 2008. According to the Petitioner, the Respondent’s return was not voluntary. He was deported. The Petitioner did not know the reasons for the Respondent’s deportation.

It was the Petitioner’s evidence that in the first 3 years when he was in U.K. the Respondent supported the family. However, after 3 years, the Respondent resorted to abusing the Petitioner on telephone and would call her a prostitute. In spite of the Respondent’s failure to offer support, the Petitioner continued to work as a gospel singer and managed to support herself and the children. It was the Petitioner’s evidence that the Respondent never visited her during the 8 years he was away. But in his phone calls to the Petitioner, he kept threatening her that he would kill her upon return to Kenya.

The Respondent returned to Kenya in May 2008 when the Petitioner was still living in Kiambu. The Petitioner was forced to relocate to Kawangware where she moved in with her sister. Not to be deterred, the Respondent got his mother and the Petitioner’s mother together and both persuaded or prevailed upon the Petitioner to resume cohabitation with the Respondent. The Petitioner agreed. They started living together in K[...] with the children. The resumed cohabitation lasted 7 months during which period verbal abuse continued even in the presence of the children. One night, said the Petitioner, the Respondent took a knife and threatened to use it against her. In January 2009, when she could bear it no more, the Petitioner left but not without reporting to the police the death threats as evidenced, she said, by O.B.

20/8/2010 at Kabete Police Station and O.B. 81/7/8/2010 at Central Police Station. The Respondent also attempted to disrupt the launch of the Petitioner's CD at St. Andrews Church Nairobi. The Respondent's death threats also drove the Petitioner to record a complaint at Kasarani, vide O.B.28/6/2010. The police did not file charges against him because the Petitioner forgave him and intervened.

The Petitioner told the court that she had no sexual relationship with the Respondent after June 2008. But prior to this, the Respondent, she said, always called her by the name J during intimacy and always explained that J was the woman with whom he had left his household goods and with whom he lived. It was for this reason that the Petitioner concluded that J had a sexual relationship with the Respondent.

The Petitioner seeks dissolution of the marriage on the grounds of cruelty and adultery. The particulars of cruelty and adultery set out in the Petition are:

Particulars of cruelty

- a. *Constantly abusing the Petitioner.*
- b. *Threatening to kill or harm the Petitioner.*
- c. *Treating the Petitioner with contempt and lack of respect.*
- d. *Spreading malicious rumours against the Petitioner.*
- e. *Failing to maintain the Petitioner and the children.*
- f. *Denying the Petitioner her conjugal rights for prolonged periods.*
- g. *Denying the Petitioner emotional support and companionship.*

Particulars of adultery

- i. *The Respondent has had a long sexual relationship with a woman who is only known to the Petitioner as J and who lives in Britain.*
- ii. *Spending long periods of time conversing on phone with the said J.*

The Respondent although served, did not attend court and did not offer any evidence in rebuttal.

I have given due consideration to the evidence of cruelty and adultery. As stated in **A.M.A. v G.S.B. (Nbi Milimani Divorce Case 134 of 2010)** by this court.

*"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 v. 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 v Gollins [1964] AC 644; Williams v 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 v. Gollins (supra) at page 670 and Williams v 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 v 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.”

The Respondent’s conduct was unjustified. It caused reasonable apprehension to the Petitioner’s health. There is no evidence that the Respondent was mentally ill nor is there evidence to show that he had other disability and one can only infer that he intended the natural and probable consequences of his actions, namely, to hurt the Petitioner. It is my finding that the Respondent is guilty of cruelty to the Petitioner.

The Petitioner’s allegations of adultery against the Respondent were not supported by concrete evidence. This court observed in **I.M. versus J. M. M. (Nbi Milimani Divorce Case No.161 of 2010) that:**

*”Courts of law determine disputes on the basis of facts proved by evidence and law applied to such facts. Even where it is rightly and generally believed that a party has engaged in adultery, the party at fault cannot be condemned without evidence to prove it. The Petitioner did not furnish any evidence to prove the allegation that the Respondent sired the unnamed children. He did not tell the court when or where they were born. The Petitioner generally believed, it seems, that the Respondent was committing adultery and she suspected him. But she adduced no solid evidence from which the court could infer that adultery had taken place. Normally, it is not always necessary in cases of adultery that a spouse be caught **in flagrante delicto** or red-handed. After all, sexual encounters and sexual escapades are done so clandestinely. But a woman who becomes pregnant otherwise than through sexual intercourse with her husband can be presumed to have committed adultery (although modern medical scientific advancement makes it possible today for a woman in sophisticated societies to be pregnant without sexual intercourse, as where there is introduction of sperms from a Sperm Bank, a factor that may give rise to cruelty rather than adultery). It is my finding that the Petitioner did not prove the allegation of adultery. It is unlikely that it has not taken place but there is no evidence to prove it. Mere suspicion is not sufficient to justify a finding of adultery (see **Beer v. Beer(1948) P10, 13.**”*

It is my finding that the evidence of adultery in this case is insufficient.

The marriage between the parties is dead. It exists only in name. As it is my finding that the Respondent is guilty of cruelty, I accordingly, **pronounce a decree of divorce and hereby dissolve the marriage between Petitioner and the Respondent on the ground of cruelty on the part of the Respondent.**

In the first instance, a **decree nisi** shall issue forthwith and subject to the provisions of section 15 of the Matrimonial Causes Act, Cap 152, **the decree nisi shall be made absolute after the expiry of three months** after this pronouncement. It is so ordered. The Petitioner who has all along had custody of the children of the marriage between the parties shall continue to have such custody.

Each party shall bear its own costs.

Dated at Milimani Law Courts, Nairobi, this 16th day Of February 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. D. M. Mugo of Mwangi, Wahome & Co. Advocates for the Petitioner

Ms Pamela Osodo - Court Clerk