



M.N.A.....PETITIONER

D.N.N..... RESPONDENT

JUDGEMENT

The Petitioner, M.N.A, is a military man. He resides in (*particulars withheld*). He married **D.N.N (the Respondent)** in 2006 under the African Customary Law and later converted the potentially polygamous customary law marriage into a monogamous Christian marriage when on 29.11.2007 he and the Respondent solemnised their marriage to each other at the District Commissioner's office in Kisii Central District. They continued to reside in Kisii after the marriage and later moved to Nairobi, in 2009.

The marriage was blessed with one child, **B.N.N** who was born in August 2007.

In his Petition for divorce, the Petitioner alleges that the Respondent treated him with cruelty and cites particulars of cruelty as including failure by the Respondent to provide love and support and shutting herself away from the Petitioner, being of ungoverned temper, and denying the Petitioner conjugal rights. Moreover, averred the Petitioner, the Respondent deserted the matrimonial home in 2009 without good cause taking away with her the child of the marriage.

It was the Petitioner's evidence that he has not condoned the Respondent's cruelty and desertion. He has not forgiven the Respondent who, he said, now cohabits with another man.

The Petitioner seeks dissolution of the marriage and visitation rights to the child.

The initial marriage under the African custom was as valid as the marriage between the parties under the Marriage Act, Cap 150 which was monogamous. The provisions of the Matrimonial Causes Act Cap 152 define marriage as "*a voluntary union of one man and one woman for life to the exclusion of all others*". The grounds for dissolution of the marriage are stipulated in Section 8(1) of the Matrimonial Causes Act thus:-

S.8(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent-

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

The Petitioner alleged **cruelty on the part of the Respondent**. 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, 6thEdn 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.

In this case the Respondent's acts in humiliating the Petitioner, her refusal to give him conjugal rights were clearly intended to hurt. The Respondent clearly had no interest in the welfare or happiness of the Petitioner. She seemed intent on making sure that the Petitioner was ostracized from her life. He did not condone the acts of 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 she had other disability and one can only conclude that she intended the natural and probable consequences of her actions, namely to hurt the Petitioner.

The marriage between the parties is as dead as a dodo. It exists only in name. It is my finding that the Respondent is guilty of cruelty. Accordingly, **I 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. There shall be no order as to costs.

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

G.B.M. KARIUKI, SC

JUDGE

COUNSEL APPEARING

Mr. K. Kirugi of J. M. Waiganjo & Co. Advocates for the Petitioner

Ms Pamela Osodo - Court Clerk

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