



M.N.A.....PETITIONER

D.N.N..... RESPONDENT

JUDGEMENT

M.N.A, the Petitioner, is a (*particulars withheld*). He resides at (*particulars withheld*).He is a (*particulars withheld*) in Kenya. The Respondent is a (*particulars withheld*) and resides in Kenya.

The Petitioner filed the Divorce Petition on 15.3.2011 seeking an order for dissolution of his marriage to **D.N.N, the Respondent**. In his petition, the Petitioner also seeks visitation rights to his son, B.N.N, during school holidays as well as during calendar holidays. Cruelty in the matrimonial offence relied on by the Petitioner in the petition as a ground for divorce.

The Petitioner married the Respondent on 29.11.2007 in the D.C.'s office in Kisii Central District, Nyanza Province, Kenya under the Marriage Act, Cap 150 of the Laws of Kenya. This is evidenced by the copy of the Certificate of Marriage produced as an exhibit during the hearing of the Petition. Prior to the marriage, the parties were cohabiting in the popularly known as "come we stay" relationship. After the solemnization of the marriage, the parties continued cohabiting in Kisii where they established their matrimonial home. Their marriage was blessed with one child, namely, **B.N.N**, who was born on in 2007 as evidenced by the Birth Certificate produced during the hearing of the divorce Petition as exhibit No.P2. Both the Petitioner and the Respondent are Kenya Nationals and are domiciled in Kenya.

In his Petition, the Petitioner set out the acts of cruelty on the part of the Respondent which included the following:

- a) *Treating the Petitioner in a contemptuous and patronizing manner with scorn.*
- b) *Quarrelling and insulting the Petitioner for no reasons at all*
- c) *Failing to provide love and support to the Petitioner*
- d) *Not obeying anything the Petitioner requests of the Respondent*
- e) *Completely shutting herself from the Petitioner and having no interactions with the Petitioner to the extent of hardly spending anytime together with the Petitioner as a couple.*
- f) *Being extremely hot tempered and having frequent mood swings for no valid reasons whatsoever.*
- g) *THAT the Respondent is guilty of denying the Petitioner his conjugal rights and does not want any emotional connection whatsoever with the Petitioner and the Petitioner and the Respondent have had*

no sexual relations whatsoever since sometimes way back in the year 2008.

h) *THAT the Petitioner for no reasons whatsoever deserted their matrimonial home sometimes in mid 2009 taking with her the child of their marriage and the Petitioner and Respondent have been living separately since then.*

i) *THAT the Petitioner has been patient for a long time and persevered the Respondent behavior aforesaid which are incompatible with marriage life all in an effort to save their marriage and ensure that their child enjoys the stability provided in a family environment only to realize that the Respondent has no interest whatsoever in salvaging their marriage as she failed to reciprocate.*

The Petitioner also averred that the marriage has irretrievably broken down and cannot be salvaged.

In his testimony in court on 17.11.2011 when the divorce petition came up for hearing before me, the Petitioner reiterated the averments in his petition and further stated that the Respondent lives with another man and has custody of the child of the marriage whom the Petitioner does see from time to time. Apparently, the parties have come to terms with the realization that the marriage cannot be salvaged and have continued with their separate lives.

I have considered the evidence adduced. 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, and deprivation had the underlying malice and 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 suffered and became miserable. He did not condone the acts of cruelty.

The Respondent's conduct was unjustified. It caused reasonable apprehension to the Petitioner's mental 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 conclude that she intended the natural and probable consequences of her actions, namely to hurt the Petitioner. It is my finding that the conduct of the Respondent amounted to cruelty and constitutes a ground for dissolving the marriage.

It is patently clear to me that to all intents and purposes the marriage between the Petitioner and the Respondent exists only in name. It is as dead as a Dodo. I find cruelty proved on the part of the Respondent.

Accordingly, I pronounce a decree of divorce and hereby dissolve the marriage between the Petitioner and the Respondent on the ground of cruelty on the Respondent's part.

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.

I also order that the Petitioner shall have visitation rights to his son, B.N.N, during **half** of the school holidays.

There shall be no order as to costs.

Dated at Milimani Law Courts, Nairobi, this 22nd day of March 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