



**A.W.K..... PETITIONER**

**E.N.K..... RESPONDENT**

### **J U D G M E N T**

**A.W.K, the Petitioner**, seeks dissolution of her marriage to **E.N.K, the Respondent**, on grounds of cruelty.

The Petitioner is (*particulars withheld*) in Nairobi. Her husband is (*particulars withheld*) working in Voi with (*particulars withheld*). They got married in 1986 at St. Stevens United Chapel, Kwale, under the Marriage Act. The Marriage Certificate produced by the Petitioner during the hearing as exhibit No.P1 shows that the Petitioner was aged 22 years on the date of the marriage and the Respondent was aged 28 years. The latter was a bachelor and the Petitioner was a Spinster working as a (*particulars withheld*).

The parties cohabited in Mombasa from 1986 to 1988 and then moved to Nairobi where they cohabited from 1989 to 1999. During the period of cohabitation, they got two children, D.M.K born in 1986 and D.M born in 1987. The Petition was served on the Respondent who did not enter appearance or file answer to the Petition. Instead, the Respondent wrote a letter to court dated 21.7.2003 showing that he had been served. The hearing of the Petition proceeded as an undefended cause.

In her evidence, the Petitioner testified that after leaving the matrimonial home in Nairobi, the Petitioner went to live in another house also located in Komarock. She took with her the two children of the marriage. She resided in K[...] for two years before moving in the year 2000 to Nairobi S[...]. In her testimony, the Petitioner told the court that she has never resumed cohabitation with the Respondent. She did not stay long in Nairobi S[...] because in 2011, she moved to I[.....] Nairobi where she continued to care for and raise her two children without any support whatsoever from the Respondent. The children are now adults and D.M.K is aged 26 years while D.M is aged 25 years. D.M is in (*particulars withheld*) while D.M.K is in (*particulars withheld*) training to be a Pastor.

In her testimony, the Petitioner gave the particulars of the Respondent's cruelty and stated that he beat her whenever he was drunk which was almost always as he was a habitual drunkard. She suffered anguish and psychological trauma as a result. The Respondent, said the Petitioner in her evidence, never supported the Petitioner or the children nor did he discharge the duties of a husband or a father. That is to say, he gave neither consortium nor material help. He dehumanized the Petitioner also with incessant verbal abuses and damaged her self-esteem. He was good for nothing, she said. As evidence of assault and battery the Petitioner produced P3 form dated 4.7.1998 showing that she had reported to the OCS at

Buru Buru Police Station that the Respondent had assaulted her. The P3 form shows that the Petitioner had sustained bruises on the face and on her thumb and had to get medical treatment.

During the period of desertion, the Komarock house which had been registered in the joint names of the Petitioner and the Respondent was sold and the sale proceeds thereof were shared between the parties. They now own nothing together. As the children are now grown, the Petitioner seeks nothing from the Respondent other than dissolution of the marriage.

I have duly considered the Petition and the evidence adduced by the Petitioner. The Respondent did not file any defence by way of an answer to the Petition, nor did he enter appearance or attend the hearing which proceeded as an undefended cause.

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 defined as "*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.

In this case the Respondent's acts in humiliating the Petitioner, her meanness, sadistic behaviour and depravity had the underlying malice and clearly were intended to hurt. The Respondent no doubt had no interest in the marriage or in the welfare or happiness of the Petitioner. He showed no respect to the Petitioner whom he physically assaulted repeatedly. His cruel acts caused serious apprehension to the Petitioner regarding her health. No one can be expected to put up with such 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 is mentally ill or had other disability and one can only conclude that all along he intended the natural and probable consequences of her actions, namely to hurt the Petitioner. It is my finding that the conduct of the Respondent amounts to cruelty and constitutes a

ground for dissolving the marriage. No spouse can be expected to stay in such abusive relationship.

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 24<sup>TH</sup> day of May 2012.**

**G.B.M. KARIUKI, SC**  
**JUDGE**

**COUNSEL APPEARING**

*Anastansia Wakesho Kimaro Petitioner present in person*

*Mr. Kugwa – Court Clerk*