



E.K..... PETITIONER

D.K..... RESPONDENT

JUDGEMENT

E.K, the Petitioner in this divorce cause, and **D.K, the Respondent**, married each other in September 1988 at Muranga County in the Registrar of Marriages Office. The Petitioner was a spinster aged 25 years and the Respondent was a bachelor aged 28 years. The Respondent was a (*particulars withheld*) while the Petitioner was a (*particulars withheld*). The couple cohabited as man and wife from 1988 up to 2008. During that period, their marriage was blessed with three children one of whom died. The remaining two children of the marriage are **E.M.K** who was born on in March 1988 and is now aged 22 years and **T.W** who was born on in November 1990 and is now aged 20 years. At the time of the filing of the divorce Petition, the Petitioner was working as a civil servant while the Respondent was also working as a Civil Servant. Both parties are Kenyans by birth. They are also domiciled in Kenya.

Although served with the Petition, the Respondent neither entered appearance nor filed an answer to the Petition. Consequently, the Petition proceeded to hearing undefended.

In her testimony before me on 19th January 2012, the Petitioner told the court that the Respondent gave no support to the Petitioner, whether financial or emotional, throughout the period of their cohabitation. There were too many differences and quarrels in the marriage, said the Petitioner. In 2007 it became impossible for cohabitation to continue. The Petitioner averred that the neglect by the Respondent was too much. She told the court that the Respondent was cruel to her. She pointed out that she looked after herself and took care of the children single handedly as the Respondent was as good as not there. In January of 2008, the cohabitation ceased completely when the Petitioner seeing that it was pointless having the Respondent in the house asked him to leave. She told the court that when they lost their third child, the Respondent failed to empathize with the Petitioner or to give her any emotional support. This traumatized the Petitioner. It was her evidence that there was no collusion or connivance in the presentation of the Petition.

Under the Matrimonial Causes Act, Cap 152 the grounds for dissolution of 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 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.

The Respondent's conduct shows that he was not committed to the marriage. He made no effort and took no trouble to make it work. Instead, he offered no emotional or financial help to the Petitioner throughout the period of cohabitation. That he did not give the Petitioner a shoulder to lean on when they lost a child was in itself a callous act on his part and this traumatized the Petitioner. The marriage existed only in name. The Petitioner bore the brunt of shouldering the responsibility of caring for the children and putting up with an insensitive husband who offered nothing in the marriage.

In this case the Respondent's insensitivity and disregard of the Petitioner's welfare coupled with his failure to support the Petitioner and the children materially or emotionally adversely affected the petitioner. The Respondent clearly had no interest in the issues of the marriage or in the welfare or happiness of the Petitioner. He did not care if his conduct made the petitioner suffer and become miserable. The Petitioner did not however condone these acts. That is why she told him to leave.

The Respondent's conduct was unjustified. It adversely affected the Petitioner's health. There is no evidence that the Respondent was mentally ill or that he had other disability and one can only conclude that he intended the natural and probable consequences of his actions, namely to make the Petitioner suffer as he knew very well or ought to have known that she would struggle and be over-burdened in trying to feed the family and keep a roof over their head and that this would hurt her. It is my finding that the conduct of the Respondent amounted to cruelty and constitutes a ground for dissolving the marriage.

I am satisfied that the marriage cannot be saved. I am also satisfied that the Petitioner did not condone the Respondent's matrimonial offence, to wit cruelty. It would be pointless for the parties to remain man and wife.

The marriage between the parties is dead. It exists only in name. It is my finding that cruelty has been proved against the Respondent. 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 24TH day Of May 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. B. K. Sang of Lilan & Koech Associates & Co. Advocates for the Petitioner

Mr. Kugwa, Court Clerk