



**B. M. K.....PETITIONER**

**VERSUS**

**E. W. M.....RESPONDENT**

**JUDGMENT**

1. The petitioner herein married the respondent on 6<sup>th</sup> March 1999 under African Christian Marriage and Divorce Act, (Cap 151 of the Laws of Kenya. The marriage was solemnized at the All Saints Cathedral in Nairobi and a marriage certificate issued to the couple. The certificate was produced in evidence and marked “exhibit D1”.

2. The petitioner now wishes to have the said marriage dissolved on the grounds that the respondent has since the celebration of the marriage, treated the petitioner with cruelty, as particularized at paragraph 6 of the Divorce Petition dated 27<sup>th</sup> March 2008 and filed on 2<sup>nd</sup> April 2008.

3. The petitioner complains that in the course of the marriage, respondent has:-

***(a) Failed to provide companionship to the petitioner;***

***(b) Been insensitive to the petitioner’s needs;***

***(c) Failed to communicate with the petitioner;***

***(d) Failed to show love and affection;***

***(e) Failed to act candidly as regards the possession of vital family documents, such as the marriage certificate, birth certificates etc;***

***(f) Unjustly and without sufficient cause declined to satisfy the petitioners conjugal rights;***

thus causing the petitioner to suffer in his health and occasioning him mental anguish.

4. In answer to the Divorce Petition, the respondent filed an answer to Petition and Cross-Petition dated 22<sup>nd</sup> April 2008 which was amended by consent on 31<sup>st</sup> July 2008. A further consent was recorded on 9<sup>th</sup> July 2009 to, inter alia, delete paragraph 6(a) thereof, remove a certain name, whenever it appeared with reference to the issue of marriage, who for the sake of confidentiality shall be referred herein as U.K

5. Under the said consent parties agreed that the petitioner needed not reply to the answer and cross petition and that the child’s maintenance would be shared between the petitioner and the respondent at the ratio of 60/40.

6. In her Answer to Petition and Cross Petition, the respondent denies the allegations of cruelty levelled against her by the petitioner and blames the petitioner for creating an environment in the home which was not conducive for any expressions of marital intimacy. Her Cross-Petition cites cruelty as a ground for

her desire to have the marriage between herself and the petitioner dissolved, even as she prays that his petition be dismissed.

7. The respondent cites 9 particulars of cruelty characterized by disrespect, contempt arrogance, verbal insults and threats, hostility, harshness and indifference, failure to uphold agreed values and mental intimidation via short text messages, emails and over the telephone all of which she claims left her feeling lovely, unwanted, intimidated and unloved to the extent that the marriage has irretrievably broken down and cannot be salvaged.

8. The respondent states that she approached several people, including the couples best man and best maid, the church pastor, parents, friends and relatives in an attempt to save the marriage but her efforts were frustrated by the petitioner's apparent lack of interest in patching up the marriage, leading to her fleeing from the matrimonial home in December 2007.

9. When the petition came up for hearing on 2<sup>nd</sup> February 2012, the couple recorded a consent order to the effect the respondent would have the physical custody of the issue of marriage, now aged eight years, that both parents would be involved in the making of major decisions relating to the child, and that the petitioner would pay the school fees and other education related expenses as well as her medical expenses.

10. Both parties testified orally on oath. Written submissions were duly filed by their advocates on their behalf. In his testimony, the petitioner demonstrated the manifestations of cruelty in the manner in which the respondent treated him while they cohabited as husband and wife including threats of desertions which were actualized three times prior to the final desertion of 1<sup>st</sup> February 2008 when she never returned.

11. The petitioner testified that, as a couple, they hardly communicated and that the respondent was given to yelling, uncontrolled rage and threats, and that she made scandalous remarks and/or accusations about him to family and friends and used anger to justify her refusal to accord him conjugal intimacy. He also complains that she was insensitive towards his physical and health needs when he underwent a major surgical procedure.

12. Responding to the accusations that he never cared to have the marriage saved through the reconciliatory measures put in place by the respondent, the petitioner was quick to say that he gave up a \$15,000 job which required his being away from home for the sake of the marriage but found the methods used by the respondent towards the same end, including being served with a memorandum by the respondent through a pastor, quite damaging, in that it left him feeling betrayed.

13. The petitioner testified that the service of the said memorandum in December 2007 brought to him the final realization that his marriage to the respondent had irretrievably broken down, hence his filing this petition in March 2008. Having recorded the consent orders of 9<sup>th</sup> July 2009 and 2<sup>nd</sup> February 2012 on physical custody, joint parental responsibility, and the shared maintenance and upkeep of the issue of the marriage, which he wants confirmed, the petitioner now seeks, in addition to the order for the dissolution of the marriage, unrestricted and unsupervised access to the daughter, U.K. He also prays that he be awarded costs of the petition.

14. In her testimony the respondent blamed the petitioner of the same indifference, coldness and hostility he attributes to her. She testified that he would sometimes reject food she had laid out for him and other times sleep in the living room as she slept alone in the cold matrimonial bed. She felt unwanted and assumed.

15. In her attempts at resolving the differences the respondent invited several people into the marriage including the best couple at the wedding, the couple that spoke at the wedding, the pastor, her parents and friends. She left in December 2007 after these attempts failed. To punctuate her seriousness, the respondent instructed her lawyers to draw up the memorandum dated 7<sup>th</sup> December 2007 which set out her conditions for returning to the matrimonial home. The same was served not only to the petitioner but

also to the pastor and parents.

16. The respondent says she expected the petitioner to change and to persuade her to return to the matrimonial home. He has never done so and she does not contemplate a possibility of returning. Asked by the court whether there has been any communication between them since, the respondent stated that the couple have spoken whenever the petitioner wanted to see the child and that they have even met as a couple and played with the child to give her security. She testified that the child is receiving spiritual and psychological support to help her cope with the separation.

17. The court took time to interview the issue of this marriage in confidence and did not record the interview. It is not in order for the petitioner's advocates to make references to or draw inferences from the said interview in their submissions. Such inferences are to be ignored. The court also interviewed the couple separately in exercise of its duty under **Section 10 of the Matrimonial Causes Act (Cap 152 of the Laws of Kenya)**.

18. I have considered evidence tendered herein, the submissions filed and the case law cited by the petitioner. The parties' accusations and counter-accusations of cruelty are characterized by the apparent indifference of the petitioner towards the respondent and the respondent's condescending attitude towards him which play against each other in equal measure.

19. It is very clear to the court that the couple herein has lost all love for each other and the possibility of reconciliation is acutely remote. They are both judgmental of each other and behind their smiles, there appears to be some hidden secret which gives rise to their mutual resentment. They both understand, however the need to cultivate some measure of respect for each other for the sake of the issue of the marriage in the event that the marriage is dissolved.

20. I find that cruelty on both sides has been proved within the parameters considered in the **1977** case of **N.vs.N. [2008]I KLR (G&F)** wherein Madan J (As he then was) held, inter alia, that:-

***“Whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard”.***

The parties have been separated now for over four years and their marriage has, indeed, broken down irretrievably.

21. The irony of all this is that the parties have been blessed with a beautiful, particularly bright and focused young girl who loves them both in equal measure. They have agreed that the physical custody of the minor remains with the mother. This court finds that to be in the child's best interests and suits the minor well. Both the petitioner and the respondent are gainfully employed and have the potential to even work better in the freedom they seek, away from the obvious pain of their relationship. They have agreed on the maintenance and upkeep of the child and are both aware that parental responsibility is to be shared equally. I believe that the same can only be exercised in an environment of mutual respect and unlimited and/or unrestricted right of access.

22. Taking into account all the evidence recorded and taken in camera, with only a mental being made by the court, I now make the following orders:-

**1. That the marriage between B.M.K and E.W.K be and is hereby dissolved.**

**2. E.W.K to have the physical custody of U.K until she attains the age of 18 years.**

**3. B.M.K shall have unsupervised, unlimited and unrestricted access to U.K and shall be free to visit school and also meet UK at a neutral location in Nairobi proposed by U.K and agreed upon by both parties. Should U.K request the presence of either the mother or the nanny at such meetings B.M.K shall respect the request. E.W.K. shall on her part allow B.M.K. to visit U.K. at home once every week**

*at the request of U.K.*

*4. Neither party shall remove the minor from the court's jurisdiction without an order of the court.*

*5. B.M.K shall bear 60% of U.K's maintenance the cost of which shall be agreed by the parties with the assistance of their advocates.*

*6. E.W.K shall meet 40% of the agreed maintenance.*

*7. B.M.K shall bear the cost of U.K's school fees, attendant costs of academic materials and also take responsibility for all her medical and health -related expenses.*

*8. Once U.K. attains the age of 10 years, E.W.K. shall allow and facilitate her visits to B.M.K. twice a month on alternate week-ends. Should U.K. desire to be accompanied by the nanny or a friend at such weekend visits B.M.K. shall oblige and make the necessary arrangements.*

*9. There shall be leave to apply.*

23. A decree nisi shall issue forthwith in accordance with order 1. above.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>rd</sup> DAY OF August, 2012.**

**M.G. MUGO**

**JUDGE**

**In the presence of :**

**Miss. Kalsi for the petitioner.**

**Mr. Chigiti for the respondent.**