



M.M.M..... PETITIONER

E.M..... RESPONDENT

JUDGEMENT

The Petitioner, **M.M.M**, got married to the Respondent, **E.L.A.N**, in 1987.

The Petitioner, than a bachelor, was aged 27 years and was a (*particulars withheld*) while the Respondent, then a spinster, was aged 24 years and was a (*particulars withheld*). The marriage was solemnized in the Office of the Registrar of Marriages, Sheria House, Nairobi. The parties cohabited in Nairobi in 1987 during which period their first child, P.M, was born. Subsequently, they went to Denmark where they lived up to 1999. It was while in Denmark that the second child, D.M, was born. The parties returned to Kenya from Denmark in 2007 and moved to R[....] Road Nairobi where the Petitioner bought a semi detached house with a guest quarters and caused it to be registered in the joint names of himself and the Respondent.

The Petitioner currently works as a Consultant with (*particulars withheld*) while the Respondent works with (*particulars withheld*). Their first child P.M works with the [particulars withheld] of Newspapers while the second child, D.M is in Secondary school at (*particulars withheld*), Nairobi in form 3.

The Petitioner and the Respondent and the 2 children of the marriage live in the said premises at R[....] Road Nairobi. But the Petitioner and the Respondent separately. The Petitioner in his evidence told the court that he was forced to move out of the main house and now lives in the guest bedroom while the Respondent lives in the main house with the two issues of the marriage. For 10 years before he filed the Divorce Petition, the Petitioner told the court that he had been denied conjugal rights by the Respondent and during that entire period the parties had no sexual intercourse but instead had a lot of irreconcilable differences.

In his testimony during the hearing of the Petition on 19.01.2012. which proceeded undefended as the Respondent did not enter appearance or file Answer to the Petition after due service upon her of the Petition, the Petitioner told the court that the Respondent was cruel to him. She completely refused to have sexual intercourse with him. Sometimes she demanded that he undergoes HIV test which he did but upon the results turning negative she would still deny him conjugal rights. The Respondent would not agree to undergo HIV test herself. For seven years the Petitioner has been living in the guest house while the Respondent has been in the main house. She entertains her family and friends in the main house and excludes the Petitioner in such activities. It was the Petitioner's further evidence that external family issues had crept into their marriage thereby exacerbating the bad relationship between the parties. Attempts by the Petitioner to get counseling were resisted by the Respondent whose relatives continued to rudely intrude into the Petitioner's privacy in the guest bedroom which the Petitioner found extremely offensive. In the face of all this, the Respondent has remain unconcerned with the Petitioner or his welfare

and does not care who cooks for him or who washes his clothes. The conduct of the Respondent and the relationship between the parties which continues to deteriorate seems to be having impact on the children with obvious negative implications with regard to their happiness, studies and welfare. But this, said the Petitioner in evidence, does not seem to bother the Respondent who does not care a hoot.

It was the Petitioner's evidence that in the neighbourhood and R[...] he has become the butt of gossip and bad jokes on account of the treatment meted out to him by the Respondent who lives in the main house while the Respondent lives in the guest bedroom. It was the Petitioner's plea that as there was no love in the marriage, it should be dissolved.

I have perused the Petition and duly considered the evidence adduced by the Petitioner in support of the alleged cruelty.

The marriage between the parties is a valid marriage under the Marriage Act, Cap 150. It is 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 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, 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 meanness, sadism 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. She seems intent on making sure that the Petitioner suffers and becomes miserable. The Petitioner has for 10 years put up with these acts of cruelty and much to the chagrin of the Respondent. He has not however condoned the cruelty.

The Respondent's conduct is unjustified. It has caused reasonable apprehension to the Petitioner's health. There is no evidence that the Respondent is mentally ill or has other disability and one can only conclude that she all along 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 man can be expected to make do without conjugal rights for such an incredibly long period of time. Such right is the entitlement of every spouse. Where it is unreasonably denied, the denial constitutes an act of cruelty. Apart from denying him conjugal rights the Respondent has ostracized the Petitioner from her life without a care in the world what impact this will have on the children. She has humiliated him in the eyes of relatives and neighbours and this has adversely affected the Petitioner. It is a wonder that he was still disposed to save the marriage if he could. He is a man of strong character. But love has disappeared in the marriage and this is the glue that holds the marriage together. The Petitioner's perseverance and desire to hold the family together is admirable. But the marriage is irretrievably broken and cannot be saved. It is as dead as a dodo.

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 22nd day of March 2011.
G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. N. H. Muturi of Nelson Harun & Co. Advocates for the Petitioner

Mr. D. Mutisya, Court Clerk