



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**NULLITY OF MARRIAGE CAUSE NO. 41 OF 2010**

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

**=VERSUS=**

**G.D.....RESPONDENT**

**JUDGEMENT**

This is the petition of **A.W.K.** dated 6<sup>th</sup> September 2010 and filed in court on 23<sup>rd</sup> September 2010. In her petition the Petitioner seeks a declaration that her marriage to the Respondent one G.D. be declared null and void. Leave was sought and obtained to have service to the Respondent effected by way of substituted service. This was done by way of an advertisement placed in the Standard Newspaper of November 2010. The Respondent did not enter any appearance in the matter neither did he file a reply to the petition neither. The petition therefore proceeded as an undefended cause.

The petitioner in her oral evidence told the court that she met the Respondent at the [PARTICULARS WITHHELD]. The Respondent was a tourist who was in the country on holiday. The two became friends and cemented this friendship by a marriage ceremony conducted at the office of the Registrar of Marriages on 21<sup>st</sup> December 2009. The Petitioner produced as proof of the fact of this marriage their marriage certificate Serial No.[...]. The couple cohabited as man and wife at the same U[...] for six (6) weeks after which the Respondent returned to his native land Germany. The plan was that the Petitioner obtains the requisite documents including a visa and follow him to Germany. The Petitioner states that her marriage to the Respondent was never consummated.

It is imperative to note at this stage that the Petitioner is **not** seeking a Divorce under Part II of the **Matrimonial Causes Act Cap 152 Laws of Kenya**. Rather she seeks a declaration of Nullity under S. 13 of said Act. As such S. 6(1) of the Matrimonial Cause Act which provides for a three year period before which a petition for divorce cannot be presented to the court will not apply. S. 13 under the heading **NULLITY** provides:

**“13. A husband or wife may present a petition to the court praying that his or her marriage may be declared null and void”**

Further S. 14 lists the grounds upon which such a declaration of nullity may be made. S. 14 provides:

**“14(1) The following are the grounds on which a decree of nullity of marriage may be made –**

**(a) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or**

**(b) that the marriage had not been consummated owing to the willful refusal of the respondent to consummate the marriage**

**(c) .....**”

In her evidence the Petitioner told the court that the Respondent demanded that their marriage be consummated by way of anal sexual intercourse. This shocked the Petitioner who told the court that she had never been involved in such an act before thus she declined. Due to the Respondents adamance and the Petitioner’s refusal to engage in anal sex, their union was never consummated. The Petitioner told the court that even the Respondent’s offer to use Vaseline as a lubricant could not persuade her. The Petitioner left the cottage due to their disagreement over this issue and went to her rural home to see her parents. When she returned to U[...], she found the Respondent living with another woman whom he announced had agreed to his ‘terms’. The Respondent packed the Petitioner’s things, gave her the original copy of their marriage certificate and basically told her to ‘get lost’. Attempts by the Petitioner’s family to resolve the stand-off bore no fruit. Finally the Petitioner learnt that the Respondent left to Mombasa with his lady friend and she has not seen him since that time. Clearly this was a marriage which was a ‘non-starter’ so to speak. The Petitioner’s evidence is on record. It has not been challenged or controverted at all. The Respondent was given an opportunity to respond to the petition but for reasons known only to himself opted not to do so. I have no reason to doubt the Petitioner’s evidence. It is hardly likely that the Petitioner would fabricate such an unusual story.

As the facts are, the marriage between the Petitioner and the Respondent was never consummated. This failure was not physical impediment such as impotence or any other incapacity as provided in S. 14(1) (a) of Cap 152. The reasons rather fall under the ambit of S. 14(1) (b) which talks of a ‘wilful refusal’ by the Respondent to consummate said marriage. Does the Respondent’s persistent demand for **only** anal sex constitute such ‘wilful refusal’? The Petitioner did tell the Respondent that she had never engaged in this form of intimacy and found it distasteful. A considerate and loving husband would have taken her views on board. To insist in consummating the marriage in a manner that was unacceptable to his wife is tantamount to a willful refusal by the Respondent to consummate their union. Indeed the Respondent later threw out the Petitioner claiming that he had found another lady who was ready and willing to accede to his wishes. I find that the Petitioner did not in any way condone or connive towards the non-consummation of their union. I therefore find that the present petition has merit. I do hereby declare the marriage between the Petitioner and the

Respondent to have been a nullity. No orders as to costs.

**Dated and Delivered in Mombasa this 21<sup>st</sup> day of June 2011.**

**M. ODERO**

**JUDGE**

In the presence of:  
Mr. Gathuku for Petitioner