



**H.K.W.....PETITIONER**

**-VERSUS-**

**K.M.....RESPONDENT**

### **JUDGMENT**

**H.K.W**, the petitioner, brought her petition dated and filed on **6<sup>th</sup> August, 2008**, asking that her marriage to the respondent be dissolved; that she be granted custody of the child of the marriage; and that the respondent be condemned in costs.

The petitioner pleads that, being a spinster she married the respondent in **December, 2000** and that, thereafter, the parties cohabited in Nairobi from **2000 to 2006**, siring in that period one **K.G.M**, born in **2004**. The petitioner is at present a (*particulars withheld*), while the respondent is a businessman in Nairobi.

The petitioner pleads that since the celebration of marriage between the parties, the respondent has treated her with cruelty, the particulars whereof (in summary) are as follows:

- (i) *at the time of the birth of the parties' child, the respondent refused to take the petitioner to hospital or to pay the hospital bills;*
- (ii) *following the birth of the child, the respondent declined to play the role of father, and exhibited "open hostility towards the child";*
- (iii) *immediately after the birth of the child, the respondent moved to a separate bedroom, and would not share consortium with the petitioner;*
- (iv) *the respondent excluded the name of the petitioner in the registration of titles for all newly-acquired properties, preferring instead to register his mother as co-owner;*
- (v) *the respondent denied the petitioner conjugal rights;*
- (vi) *the respondent has led a mysterious lifestyle, and "has never disclosed his true business or work or source of income to [the] petitioner";*
- (vii) *the respondent has always endeavoured to keep the petitioner economically dependent by denying her the approval to "engage in any form of employment or income-generating [activity]";*
- (viii) *the respondent has on various occasions physically assaulted the petitioner;*
- (ix) *the respondent's cruelty forced the petitioner, in **September, 2006** to secure employment in Mombasa to enable her to support herself and her child;*
- (x) *since the petitioner relocated to Mombasa on employment, the respondent has never made any efforts*

to visit her or to see the child;

(xi) all attempts on the part of the petitioner and her family to resolve the conflict and reconcile the parties have been frustrated by the respondent;

(xii) the marriage has irretrievably broken down;

The petitioner pleads that she has not in any way been accessory to, or connived at, or condoned the acts of cruelty caused by the respondent; and that she has at no time colluded with the respondent in the lodging and prosecution of the petition herein.

The respondent filed a cross-petition and answer to petition, pleading that “*since the celebration of the marriage the [petitioner] has treated the cross-petitioner with [unparalleled] cruelty resulting in mental anguish, trauma, embarrassment and depression to the cross-petitioner*”. For particulars, the respondent pleads that the petitioner had taken “*the children*” to Mombasa without the approval and consent of the cross-petitioner; that the petitioner had denied the cross-petitioner an opportunity to present a birth-day gift to the daughter; that the petitioner had failed to “*cook, wash clothes, and attend to the cross-petitioner*”; that the petitioner “*deserted the cross-petitioner’s home without any justifiable cause.*” The respondent pleaded that the marriage herein has irretrievably broken down; he avers that he has not acted in collusion with the petitioner, nor has he been accessory to, condoned or connived at the alleged acts of cruelty and desertion; he asks for a decree of divorce, and for costs.

When this matter came up for hearing on **29<sup>th</sup> July, 2010** the petitioner was represented by learned counsel, **Mr. Mobisa** who held brief for **Mr. Njonjo**; but the respondent/cross-petitioner was absent and unrepresented.

The petitioner, being led through her evidence-in-chief by **Mr. Mobisa**, testified that she had been working at (*particulars withheld*), but she was later transferred to Nairobi, and now resides in Nairobi. The petitioner married the respondent in 2000, the relevant Marriage Certificate being No.[...] dated **December, 2000**; a child was born to them, **K.G.M.** in **April, 2004**; and the child lives with the petitioner.

The petitioner said she was seeking a decree of divorce, on grounds of cruelty: the respondent’s hostility towards her and the daughter of the marriage; failure to provide for mother and daughter from the time of birth to-date; failure to maintain ready accommodation for the family in Nairobi; election of respondent’s mother as co-owner of property purchased by the respondent; keeping the petitioner in darkness as to his business activities; holding the petitioner as a virtual prisoner at the matrimonial home; mysterious and continual absence from the matrimonial home, by the respondent; refusal to render conjugal rights to the petitioner; refusal by the respondent to accede to reconciliation efforts.

The petitioner averred that the marriage between the parties had irretrievably broken down, and she had no intention of ever living with the respondent again; that she lives alone currently with her daughter, and wishes to have sole custody of the child.

To questions from the Court, the petitioner said she had not understood the man she had married: although he said he was a businessman, he had no known place of work, “*he would just get up and go*”; when he went off to business, he did not always return for the day; she never knew the nature of his business; sometimes he would not speak to, or even greet the petitioner; “*I was not allowed to have an opinion, I was housewife material; I felt there was a secret*”; “*he would lock his bedroom, come with his own food, and eat in the bedroom*”.

Learned counsel submitted that the petition was a “*weighty*” one, and that the petitioner had proved her case, even as “*the respondent failed to come to challenge the evidence.*” Counsel urged that the respondent, by his pleadings, was in agreement that the marriage be dissolved. He asked that the custody of the girl-child of the marriage be entrusted to the petitioner, and that the Court do mulct the respondent in costs.

Upon reading all the pleadings herein, and hearing the petitioner's testimony, and bearing in mind that the respondent who made focused assertions in the pleadings, elected not to lay any evidence before the Court or to controvert the evidence against him, I would remark the clear-cut profile of the petitioner's case which properly invites the termination of the marriage in question. It is shown on more than a balance of probability, in my opinion, that the marriage in question has irretrievably broken down, and neither party expects or wishes that it be merely presumed to be alive under the law.

A remarkable difference between the *marriage relationship*, and the commercial or related kind of arrangement, is that it touches intimately on the social stability and well-being of *persons* who need constant intimacy, love and family care. Once those elements go missing, as I find to be the case herein, then the legal shell of marriage becomes nothing but an oppressive structure.

This Court must be guided, in dispute-resolution, by certain principles which are well expressed in the **Constitution of Kenya, 2010**, Article 45 of which is concerned with family well-being. **Article 45** of the **Constitution** thus stipulates:

***“(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.***

.....

***(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

The evidence given before the Court shows a marital union shot through with the deepest mistrust, and in which the setting for *equal partnership* is distinctly missing. This, taken together with the matrimonial offence of cruelty which has been shown, makes a doubtless case for dissolution of marriage.

Consequently, I will grant a decree *nisi* of divorce, to be made absolute by suitable application after a period of six months. I will make orders as follows:

***(1) A decree nisi is granted, dissolving the marriage between the parties which was celebrated in December, 2000.***

***(2) Custody for the child of the marriage, K.G.M shall vest in the petitioner; provided that the respondent if he shall desire visiting rights, may seek the same through an application in Court.***

***(3) The respondent shall bear the costs of the petition dated 6<sup>th</sup> August, 2008 and of the cross-petition dated 28<sup>th</sup> November, 2008.***

SIGNED at NAIROBI .....

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 7<sup>th</sup> day of December, 2011.**

**H.M. OKWENGU** .....

**JUDGE**