



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Divorce Cause 52 of 2006**

**JKW ..... PLAINTIFF**

**VERSUS**

**JWM ..... DEFENDANT**

\*\*\*\*\*

**JUDGEMENT**

This petition was brought by the Petitioner **JKW** (hereinafter called the Petitioner) seeking the dissolution of his marriage to **JWM** (hereinafter referred to as the Respondent). On 12<sup>th</sup> March 2009 when the matter came up for hearing before my learned brother **HON. JUSTICE SERGON**, Mr. Kilonzo for the Petitioner indicated that the Petitioner would be abandoning his prayer for custody and his prayer for an injunction against the Respondent. As such the only matter remaining in issue between the parties was that of the dissolution of their marriage.

The Petitioner in his evidence told the court that he and the Respondent got married on 2<sup>nd</sup> December 2000 at Kangaita in Nyeri District under the African Christian Marriage and Divorce Act Cap 151 Laws of Kenya. Their union was blessed with two children

- (i) L.W – born on 1<sup>st</sup> August 1997
- (ii) W.W – born on  
14<sup>th</sup> August 2007

The couple initially cohabited in Nairobi and later moved to Mombasa where they continued to live together as man and wife. The Petitioner bases his petition on the grounds of cruelty and desertion.

S.6 (1) of the Matrimonial Causes Act Cap 152, Laws of Kenya provides

***“6(1) No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage”***

In this case the couple got married in December 2000. The Petitioner did avail a copy of their marriage certificate Serial No. [particulars withheld.] as proof of this fact. This petition for divorce was filed in court on 6<sup>th</sup> October 2006, a period of six (6) years after celebration of

their marriage. I am therefore satisfied that this petition complies with S.6 (1) of Cap 152 and is properly before this court.

The Petitioner claims that during the course of their marriage the Respondent treated him with cruelty. S.8(1)(c) of the Matrimonial Causes Act recognizes cruelty as a ground for divorce thus

***“8(1) A petition for divorce may be presented to the court either by the husband or the wife on the grounds that the Respondent***

***(a) .....***

***(b) .....***

***(c) has since the celebration of the marriage treated the Petitioner with cruelty”***

In his evidence the Petitioner tells the court that the Respondent became confrontational, violent, quarrelsome and disrespected him in the presence of friends and relatives. All these remain mere allegations as no evidence has been adduced by other witnesses to confirm this behaviour by the Respondent. However the Petitioner alleges that on 9<sup>th</sup> March 2002 he came home late. The Respondent was angry at this. She locked the gate and main door and pushed the Petitioner over the wall injuring him. He produces an X-ray as proof of the injuries so sustained **Pexb3**. The X-ray indicates that the Petitioner sustained a fracture to the left ankle and right wrist. This is certainly consistent with his having been pushed over a wall. On her part despite having filed an answer to Petition and Cross-Petition the Respondent later chose not to testify in this case. As such the Petitioner’s evidence remains uncontroverted. For one spouse to push another off a wall causing such severe injury does in my view certainly amount to cruelty of a physical nature. I am satisfied therefore that this ground of cruelty has been proved.

The Petitioner also alleges that the Respondent deserted the matrimonial home on several occasions and has denied him conjugal rights. He claims that the Respondent left the home in January 2003 and only returned in December 2003. Since 2006 the Respondent has slept in a separate room clearly by abandoning the matrimonial bed, the Respondent has constructively deserted the union. I do note however that under cross-examination the Petitioner conceded to having had a relationship with one **H.M** with whom he admits he has sired a child. The Petitioner cannot therefore claim to be the innocent party in these proceedings. It is clear from this admission that he too was guilty of adultery. This could have been the reason why the Respondent deserted their bed. Once again I note that by declining to testify the Respondent did not allow court to hear her side of the story. She did not prosecute her Cross-Petition. As such the Petitioner’s allegations have not been effectively countered. On this issue of desertion I find there may have been just cause for such desertion and I do not find this ground to have been proven. Notwithstanding the above, it is clear that this couple is estranged. In her Cross-Petition, the Respondent avers that their marriage cannot be salvaged and seeks the dissolution thereof. This is the same prayer made by the Petitioner. I am satisfied that the ground of physical cruelty has been proven as against the Respondent. It would serve no useful purpose to continue to yoke together two people who clearly have no desire to remain so yoked. I find that this Petition for divorce succeeds. Decree nisi to issue to be made absolute within three (3) months of today’s date.

**Dated and Delivered at Mombasa this 25<sup>th</sup> day of May 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Ms. Sudi for Respondent

No appearance by Petitioner

**M. ODERO**

**JUDGE**

**25/05/2010**