



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Divorce Cause 1 of 2004**

**T.O.....PETITIONER**

**VERSUS**

**S.C.....RESPONDENT**

**JUDGMENT**

By the petition dated 13<sup>th</sup> February, 2004 and filed in this court on the same date, **T.O**, (“**the petitioner**”) sought the dissolution of his marriage to **S.C**, (“**the respondent**”). According to the petition, the petitioner solemnized his marriage to the respondent on or about the 25<sup>th</sup> April, 1996 at the District Commissioner’s office, Kisii. Following the marriage they resided and or cohabited as husband and wife in Kilgoris until about February, 2003 when the respondent deserted the matrimonial home. The marriage was unfortunately not blessed with any issue(s) which according to the petitioner was due to the respondent’s deliberate illegal acts of procuring abortions every time she conceived. Whereas the petitioner was a primary school teacher at A Primary school in Transmara, the Respondent was an Assistant [PARTICULARS WITHHELD] at the ministry of lands, Kilgoris until the year, 2000 when she was retrenched.

According to the petitioner, the respondent had since the celebration of the marriage treated him with cruelty. For instance in May, 1996, she deliberately used pills to prevent pregnancy, in or about 1997, the respondent deliberately took quinine tablets to abort the pregnancy she had conceived, in 1997 the respondent brought into the matrimonial home a young boy by the name **FK** claiming that he was relative when infact he was her son. She had been arrogant and disrespectful to the petitioner’s parent as well. Throughout the marriage, the respondent consistently, openly and privately hurled abuses at the petitioner to the extent of even calling him stupid, useless and that he was not the only man in the world. Indeed in or about 1997, the respondent attempted to burn the petitioner by hauling at him a lit lamb.

Between 1998 and 2001, the respondent became abusive, disrespectful and problematic to the neighbors at Kilgoris causing the petitioner mental torture and anguish as she picked up unnecessary quarrels with the neighbours. The stroke that broke the camel's back was however in 2002. The respondent without any or any reasonable cause hit the petitioner on the right hand with a stick and abused him calling him a donkey, a fool and useless person. She then threatened to kill him. She continued with those threats both in private and public. She even reiterated the threat at the petitioners place of work in the presence of teachers and pupils. This caused the petitioner to suffer indignity and embarrassment before his colleagues as well as pupils. The respondent also maliciously and falsely filed a complaint before Children's Office, Kericho accusing the petitioner for neglecting their children knowing very well that their marriage had not been blessed with any issue(s). In March, 2003, the respondent finally deserted the matrimonial home and went to live with her parents without the consent or permission of the petitioner. For all the forgoing reasons, the petitioner sought for the dissolution of the marriage as well as costs of the petition.

When the respondent was served with the petition she responded by filing memorandum of appearance as well as answer to the petition and cross petition. In the answer, the respondent claimed that before the celebration of the marriage in 1996, they had openly cohabited as husband and wife in Kilgoris town since 1994. Contrary to the assertion that the marriage was not blessed with any children, **F K** was an issue born in September, 1995 as a result of their cohabitation aforesaid. However at the time they celebrated their marriage, the respondent had two other children, a fact the petitioner was well aware of and accepted. The respondent denied cruelty and the particulars thereof attributed to her. Infact she claimed it was the petitioner who was cruel to her as he was a man of quarrelsome and unpredictable disposition. He had frequently abused and quarreled her during the subsistence of the marriage. Following her retrenchment in the year 2000, the petitioner frequently became moody and refused to have any or any constructive communication with her. Instead, he immersed himself openly in adulterous relationship with another woman thereby causing the respondent mental anguish. The petitioner too tricked the respondent into obtaining a bank loan and together with her retrenchment benefits all totaling khs.196,000/- used the same in the construction of their matrimonial home. Finally in February, 2003 the petitioner chased her away from the matrimonial home. The respondent too therefore sought the dissolution of their marriage on the above grounds by way of cross-petition.

On 3rd March, 2004 the cause as required came before the Deputy Registrar of this court for his certificate. The same was duly issued and thereafter the cause was set down for hearing. The hearing commenced before **Kaburu Bauni.J**(as he then was) on 3<sup>rd</sup> October, 2006. However he passed on before he could conclude the same. Thereafter the cause came before **Gacheche.J** for further hearing on 13<sup>th</sup> February, 2007. Parties agreed that the hearing of the cause proceed from where the late **Bauni.J** had left. In the premises the proceedings were typed and certified. On 23<sup>rd</sup> march, 2010, the cause came before me for further hearing. The earlier consent order to the effect that the cause

proceeds from where **Bauni .J** had left was renewed.

**Bauni.J** had the testimony of the petitioner in which he testified that he had married the respondent on 24<sup>th</sup> April, 1996. He tendered in evidence a marriage certificate to that effect. Prior to this, he had not cohabited with the respondent. No children were sired out of this relationship as his efforts to do so were frustrated by deliberate actions of the respondent who without his knowledge was on pregnancy prevention pills. He tendered in evidence family planning cards to prove that she used clinical methods to prevent pregnancy. In 1997 whilst expectant, she deliberately took quinine tablets and miscarried. He also testified further that he had suffered cruelty under the hands of the uncharacteristically hot tempered and violent respondent both at their Kilgoris residence and at the school where he taught. The respondent had vowed to kill him severally. She had uttered words to that effect both in private and public. On some occasions she did so in the presence of his colleagues and pupils in school. She even had the audacity to summon him before Kericho District Children Office accusing him for neglecting the children of the marriage which children if at all, she knew were not sired by him. With regard to the matrimonial house, the petitioner stated that he single handedly put up the house at Nyamira. He tendered in evidence bank documents in verification of that fact. However, the respondent was opposed to the idea and did not lend her hand in the project. She even told the petitioner that the house would be his wife. When he married the respondent, she had led him believe that she was a virgin. Subsequent to the marriage however, the petitioner learned and or discovered that she had infact three children outside wedlock.

To support his case, the petitioner called **MN** as a witness. He was a teacher in the same school as the petitioner. This witness had on several occasions tried to cool down the highly charged and temperamentally unstable respondent. She had repeatedly vowed in his presence to kill the petitioner. As a pastor and a teacher in counselling, he had severally talked to the respondent on her unbecoming and unkind behavior towards the petitioner but to no avail. On one occasion, the Respondent caused chaos in school when she threw out the petitioner's utensils from the house. She threatened to kill the petitioner in his presence. She uttered words to the effect that the petitioner's mother will surely miss him. Sometimes on 2<sup>nd</sup> April, 2003, he met the respondent at Kilgoris bus station who proceeded to boast to him that she would use all her resources to kill the petitioner. Infact she had just come from a witch doctor in pursuit of that undertaking. In so far as he was concerned the respondent caused real threat to the life of the petitioner, was disrespectful and treated or referred to the petitioner as a boy.

With that the petitioner closed his case.

The respondent was however nowhere to commence her response. Before I took the evidence of PW2 aforesaid I was satisfied that the respondent's counsel had been duly served with the hearing notice for the cause in good time.

There being no explanation for his absence and that of the respondent herself, I directed the cause to proceed, the absence of the respondent and or her counsel notwithstanding.

Having closed the petitioner's case **Mr. Maroro**, learned counsel for the petitioner elected to file written submissions. He subsequently did so. I have carefully read and considered them.

The petitioner is seeking the dissolution of the marriage on two grounds; cruelty and desertion. However, I do not think that desertion as a ground is available to him. I say so because, both the petitioner and respondent agree that the respondent left the matrimonial home in or about February, 2003. It matters not that the respondent deserted the matrimonial home on her own account and or volition or she was chased away by the petitioner. What is important is that desertion commenced in or about February, 2003. However this cause was filed on 13<sup>th</sup> February, 2004, roughly, a year after the alleged desertion. According to section 8(1)(b) of the Matrimonial Causes Act, a petition for Divorce may be presented to the court either by the husband or the wife on the ground that the respondent ***"...has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition..."*** In other words for the petitioner to succeed on this ground, he must demonstrate that the respondent deserted him and that desertion had lasted more than three years before he came to court. That is not the case here. The petitioner came to court only a year after the alleged desertion. For that reason this ground for divorce is not available to him.

That leaves the petitioner with the only other ground for divorce, cruelty. Has the petitioner been able to discharge the burden of proof with regard to this ground of Divorce? I think so. In my view the petitioner has proved his case to the required standard in the absence of any evidence to the contrary to weigh against. The respondent too also wishes to have the marriage dissolved on the grounds that the petitioner has been cruel to her as well. So there is a meeting of minds on the issue. Both parties are agreed that this marriage cannot be salvaged in its current form. They have all been cruel to each other. Had this been any other civil litigation, it is the kind of case that would have called in aid an order by consent dissolving the marriage. However such an order is not amenable in matrimonial causes. As both petitioner and respondent have all sought the dissolution of the marriage on grounds of cruelty, it is a clear demonstration and or statement that the said marriage has irretrievably broken down. It cannot be salvaged. A careful reading of the pleadings and the evidence tendered by the petitioner leaves me in no doubt at all that this has been a problematic marriage characterized by violence and dishonesty. First and foremost, the respondent led the petitioner in believing that in marrying her, he was marrying a virgin. However, as it eventually turned out, the respondent was not the virgin she proclaimed to be. She had sired three children in her previous relationships outside wedlock a fact she hid from the petitioner. As if that was not enough, the respondent wanted the petitioner compelled to take parental responsibility for children who were not his. The compulsion came by way of summons to the children office, Kericho issued to the petitioner at the instigation of the respondent.

The petitioner too managed to ably articulate his trials and tribulations at the hands of the respondent. The petitioner wanted to have his own family with the respondent. However, it appears that the respondent would hear none of it. She was determined not to have any children with the petitioner. I suppose she was contended with the three she already had.

The petitioner's efforts to have children with the respondent were thwarted by the respondent at the altar of modern day advances in science, medicine and technology. The respondent deliberately went on family planning pills to prevent conception without the knowledge and consent of the petitioner and when in principle they had agreed to start a family. Obviously the petitioner felt cheated by the turn of events. Somehow by the grace of God, the petitioner managed to put the respondent in the family way. However, that pregnancy was not to see the light of day nor was it carried to full term. The respondent deliberately took quinine tablets to terminate it. She was successful in her endeavour.

If the evidence of the petitioner and his witness is anything to go by, the respondent was uncharacteristically of violent disposition. Frequent fights between the two were abound. She had sworn severally to kill the respondent in private and also in public. At times even in the presence of his colleagues and friends including even his pupils. PW2 attempted severally as a pastor and also as a counselling teacher in the school to talk to the respondent on her predisposition towards the petitioner to no avail. Infact it appears that his intervention only helped to fan the situation and make matters worse. For it was soon after one of those interventions that the respondent called PW2 to Kilgoris bus station and proclaimed that she been to a witch doctor to coin the final solution to the petitioner-death. Since the evidence of the petitioner was neither rebutted nor challenged in any way and was amply corroborated by the evidence of PW2, it must be taken to be true.

To my mind therefore I am satisfied that on the evidence adduced so far that, the petitioner has proved that he has been the subject of constant cruelty by his spouse, the respondent and that he has never condoned the cruelty. I also believe that the marriage hitherto subsisting between the petitioner and respondent has irretrievably and irreparably broken down and cannot be salvaged. Accordingly, the said marriage is hereby dissolved forthwith. A decree Nisi shall forthwith issue to be made absolute within the statutory period. I make no order as to costs.

**JUDGMENT DATED, SIGNED and DELIVERED at Kisii this 14<sup>th</sup> day of May, 2010**

**M.A. MAKHANDIA.**

**JUDGE.**

