



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Divorce Cause 24 of 2008**

**K.J. D..... PETITIONER**

**-VERSUS-**

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

**JUDGMENT**

The petitioner married the respondent at a ceremony, conducted under the civil law, at the Mombasa office of the Attorney-General's Chambers on 28<sup>th</sup> April, 2005. The petitioner, up to then, was single and was working for gain as a hotelier, at Mombasa; the respondent was and is a public service officer at Mombasa. Both parties are of Kenyan nationality and are domiciled in Kenya.

The petitioner pleaded (petition dated **8<sup>th</sup> May, 2008**) that he had cohabited with the respondent, following the celebration of the marriage, in the Mtwapa area of Coast Province, and the marriage was blessed with one child, **N.O.J**, now aged 9 years.

The petitioner pleaded that, following the celebration of the marriage, the respondent has shown cruelty towards him, and on several occasions, has deserted him and at present, has left the matrimonial home and is cohabiting with another man.

The petitioner sets out the particulars of cruelty as: the respondent repeatedly spent nights outside the matrimonial home, with a boyfriend whom she has been cohabiting with, since **April, 2006**; the respondent repeatedly used her status as a police officer to intimidate the petitioner, and indeed on a number of occasions, did subject him to assault; the respondent persistently showed a lack of warmth and caring, as well as contempt for the marriage by denying the petitioner his conjugal rights; in **April, 2006** the respondent carried away all the household goods from the matrimonial home, to Bamburi Police Station where she now cohabits with a boyfriend; the respondent took with her, away from the

matrimonial home, the child of the marriage whom she had handed over to her relatives; the respondent has, since the celebration of the marriage, committed adultery with men known to the petitioner, and currently she cohabits with her boyfriend known as **R**.

The petitioner gives the particulars of the adultery charge as follows: the respondent frequently slept outside the matrimonial home, after the celebration of the marriage; the petitioner has repeatedly found the respondent kissing and having intimate moments with one **R**, at the respondent's house at Bamburi; the respondent now cohabits with the said **R** and has informed the petitioner that she will be marrying **R**.

The petitioner pleads that since **April, 2006**, the respondent has been guilty of desertion as a wife.

The petitioner pleads that he has not in any way been an accessory to, or connived at, or condoned the respondent's acts of cruelty and adultery; and he pleads that these proceedings have not been brought in collusion with the respondent.

The respondent filed an answer to the petition, and a cross-petition, on **15<sup>th</sup> October, 2009**. She pleads that "the marriage has irretrievably broken down due to adultery, desertion, negligence and irresponsibility on the part of the petitioner"; she denies cohabiting with any man as alleged; she denies having once assaulted the petitioner; she pleads that it was the petitioner himself who refused to partake of his conjugal rights, on the basis of other demands which he was making of her; the respondent avers that it is the petitioner who expelled her from the matrimonial home, and she left with only her personal belongings and things for her child; the respondent pleads that she had a right to take away her child who was of tender years, and that she has only entrusted the child to relatives when public duty has taken her to unconducive environments for child upbringing; the respondent denied "ever committing adultery and cohabiting with one **R** who, in fact, is a married man; the respondent denied having frequently slept outside the matrimonial home, and asserted that, on the contrary, "on several occasions the petitioner could leave the respondent for weeks or even months to spend time with girlfriends both in Kenya and abroad"; the respondent denied "being found kissing or having any intimate moments with one **Mr. R** who is a married man and currently stays with his family"; the respondent denied cohabiting with, or having intentions to marry **Mr. R**, the respondent denied deserting the petitioner in 2006, and stated that "it was the petitioner who chased her away and has never made any effort at all to seek reconciliation and has remained aloof and cold towards her".

The respondent, in common with the petitioner, sought orders dissolving the marriage. She sought the custody of the child of the marriage; **N.O.J**, on the grounds that the child is now ten years old and, being of tender years, "needs the care and motherly love of the respondent". The respondent has no objection to the petitioner being granted unlimited access to the child.

The respondent sought an order of maintenance, in the sum of Kshs.3,000/- per month, for food and medical care; and an order requiring the petitioner to pay the child's school fees up to college level, on the basis of fee structures issued by the educational institutions. She asked that the petitioner be made to pay the costs of the petitioner.

The parties appeared before the court for the hearing of the petition on *5<sup>th</sup> May, 2010*; and the petitioner confirmed the content of his pleadings: save that in departure from the pleading that the respondent has been in desertion since *April, 2006*, he testified that she deserted in *2004*. He asked for divorce, to enable him to marry again.

Of the answer to petition and cross-petition, the petitioner said his salary was too small to sustain any maintenance orders; and with regard to custody for the child, he said he would take up the matter at the Children's Court, but he thereafter said:

***“We have no dispute over the child; she can keep the custody.”***

The petitioner testified that he and the respondent have a rental house at Shanzu, and that it was the respondent who was receiving the rent. He said he will be filing a separate suit regarding the said property, which brings a monthly rent-payment of Kshs.12,000/-.

The respondent, in her evidence, said she had been the petitioner's girlfriend from 1999 and that the marriage had taken place in 2005; at the time the respondent was an employee of N[particulars withheld] Hotel, but currently she is a police officer at K[.....] Police Post in the Rift Valley, and she has been with the police since 2002. The respondent started working with the police at M[....] Police Station, then moved to Bamburi Police Station in 2004. It was the respondent's testimony that after the marriage in 2005, the petitioner embarked upon a course of negative behaviour: like engaging in love affairs with women from foreign countries, and travelling abroad and remaining there for long; and sometimes he left her alone and travelled to Malindi and Lamu, remaining there for prolonged periods.

The Respondent was concerned that the petitioner did not take the trouble to introduce her to his close relatives, and she felt she was being taken for granted.

It was the respondent's evidence that unseemly communication had become common between her and the petitioner: like the petitioner declaring he could do as he chose, in his selection of friends. The respondent said that the petitioner had become more violent towards her, following the consummation of the marriage. She said that on one occasion the petitioner threatened an unspecified consequence if he returned to find her in the matrimonial home: and this is how she came to leave, as she feared for her own safety. Thereafter, it was the respondent who endeavoured to have the differences solved, but it turned out that the petitioner was already staying with another lady, by name, **DA**

The respondent said she once asked the petitioner to stay with their child, as she was being transferred to Tana River District, and the place was not conducive to the child's upbringing; he declined, and she had to leave the child with her relatives. But she stated that lately, the petitioner has been paying school fees for the child: and so she has had no complaint in that regard.

The respondent called upon the Court to dissolve the marriage, and to mulct the petitioner in costs.

On cross-examination, the respondent said she was aware that the petitioner was at present living with **DA**; and on this account, she was already preparing to file a petition for divorce.

Learned counsel **Mrs. Momanyi** submitted that the respondent had confirmed that she had deserted the matrimonial home; and she urged that the evidence of adultery and cruelty was confirmed. Counsel

submitted that this was a marriage so broken-down, it could not be salvaged, and so divorce should be granted. Counsel urged that the cross-petition of the respondent had not been proved, and that there was no evidence in this regard except hearsay. Counsel asked for costs; but the respondent, who also called for the dissolution of the marriage, also asked for costs.

Every point of pleading raised by the petitioner is denied by the respondent, who at the same time makes statements censuring the petitioner's conduct. And there were only two witnesses, namely the parties themselves, each one impugning the conduct of the other during the marriage relationship. Quite often, the conviction of a witness can be read from demeanour; but in this instance, the parties' deportment only showed them to be anxious to depart from a disappointing marriage relationship. Both parties agree that the marriage has broken down beyond repair, and ought to be dissolved.

At this stage, there are relevant matters which, apart from the marriage question, should be regulated, mainly centering on the child of the marriage. I formed the distinct impression that the petitioner is not very much concerned with the custody of the child, even though he appears happy enough to be paying the child's school fees. For the child, there are other important needs: in particular nutrition and health-care. Taking into account the motions of evidence, and the apparent inclinations of the parties, I will determine this case by making orders as follows:

- (1) *The marriage solemnized between the parties on 28<sup>th</sup> April 2005 is hereby dissolved, and a decree nisi of divorce granted which may be made absolute upon a suitable application being made.*
- (2) *Custody for the child, N.O.J is hereby granted to the respondent, with unlimited access granted to the petitioner.*
- (3) *The petitioner shall bear the responsibility for payment of educational fees for N.O.J, up to and including the stage of College education.*
- (4) *In respect of nutrition and health-care for NOJ, the petitioner shall every month make a payment of Kenya Shillings Three Thousand (Kshs.3,000/=).*
- (5) *Each party to bear own costs for this petition.*

*Orders accordingly.*

DATED and DELIVERED at MOMBASA this 2<sup>nd</sup> day of July, 2010.

**J.B. OJWANG**  
**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Petitioner: *Mrs. Momanyi*

Respondent in person