



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 81 OF 2007
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G.M.K.....PETITIONER

VERSUS

D.K.K.....RESPONDENT

JUDGEMENT

The Petitioner herein moved to the seat of justice by way of a petition dated 28th day of June, 2007 and filed on the 4th day of July, 2007. The salient features of the same are as follows:-

- The Petitioner and the Respondent celebrated a marriage between them at the Registrar Generals' Office Nairobi on the 11th day of December 1986.
- Thereafter they resided and cohabited in Nairobi within Kenya.
- They have two issues between them namely
 - (i) O.K now aged 18 years and
 - (ii) M.M.K now aged 15 years as at the time of presentation of the petition.

- The reason for moving to court to seek the court's, intervention is because since the celebration of the marriage the Respondent has committed adultery with several women known and unknown. He has also been cruel particularized in paragraph 6 of the petition as denial of conjugal rights to the Petitioner, and being abusive of the petitioner.

- By reason of what has been stated above, it is the stand of the Petitioner that the marriage has irretrievably broken down and that the

- (a) *The marriage between the Petitioner and the Respondent be dissolved.*
- (b) *Sharing of property listed in prayer (b).*
- (c) *Custody of the two issues of the marriage.*
- (d) *That the Respondent do pay costs of this petition.*

- The petition is accompanied by a verifying affidavit verifying the truthfulness of the content of the petition.

The petition was served on to the Respondent who entered appearance and filed an Answer to petition and cross petition dated 26th day of March, 2008, and filed the same date. The salient features of the same are

as follows:-

- The couple was first married under Kamba customary law in 1986 and lived and cohabited as such till they statutorized the same in 1986.
- Confirmed the places of cohabitation and the birth of two issues between them.
- Denied allegation of adultery and cruelty attributed to him. Instead he asserts that it is the Petitioner who has been guilty of adultery, cruelty and desertion since the celebration of the marriage.
- Vide paragraph 4 of the Answer to petition, that is the Petitioner who deserted the Respondent in August 1998, and then took up residence at house No. 5 Kamiti court off 5th Ngong Avenue Nairobi with one X.B and has refused to come back home.
- Contrary to the averments of the Petitioner as averred in paragraphs of the petition, it is the Petitioner who has been cruel to the Respondent. The particulars of cruelty have been particularized in paragraph 5 of the Answer to petition as denying the Respondent conjugal rights, moving out of the matrimonial home in August 1996, and carrying away all household items without any excuse lawful or otherwise when the Respondent was overseas, pathologically lying to the Respondent to create a negative image to him, exhibiting hostility to the Respondent and his relatives, refusing to talk to the Respondent and the children, going out late with the known and unknown men, and cohabiting with them while the Respondent lay bed ridden in bed, deserting the Respondent in 1998, when the Respondent had not fully recovered from meningitis, deserting the children of the marriage at a tender age, of 9 and 6 years, driving the Respondent into depression before he had recovered fully from meningitis, spinning all efforts by the Respondent towards reconciliation, spreading baseless and malicious rumours that the Respondent was an immoral and irresponsible person, openly ridiculing the Respondent by openly going out with known and unknown men when the Respondent was recuperating, being openly and brazenly unmindful of the Respondents fragile state of health when the Respondent suffered an attack of meningitis, abducting the children of the marriage 3 years latter without a court order or respondents consent, removing children from the jurisdiction of the court without the Respondents' knowledge or consent. Associating clandestinely with persons of dubious character or persons of questionable moral rectitude, cohabiting with other men when the Petitioner knew that she was legally married to the Respondent, exposing the children to bad influence of the several men of questionable moral rectitude that she has cohabited with.
- It is the Respondents' assertion that him Respondent has met the Petitioner severally and sent many missionaries to initiate an amicable settlement of issues between the parties but the Petitioner has frustrated all such efforts.
- The Respondent admits that the relationship between the parties has irretrievably broken down but denies that it is as a result of what the Petitioner alleges in paragraph 4 and 5 of the petition.

The Respondent put in a cross petition and reiterated the grounds in the Answer to petition.

- Reiterated the grounds of cruelty in paragraph 10 of the cross petition set out in paragraph 5 of the Answer to petition already set out herein.
- Adds that the Petitioner was cruel and intimidating to the issues of the marriage thereby causing the Respondent a cute distress, depression and severe mental anguish, at a time when his career and life was hanging in the balance owing to sickness.
- Reiterates the Petitioners desertion from the home in August 1998 when she abandoned the respondent together with the children of the marriage without notice never to return again despite Respondents good faith efforts towards reconciliation.

- Asserts that the Petitioner has neglected her duties as the mother of the children and has not demonstrated responsible conduct both as a wife and mother as she invited children of the marriage to visit her knowing that she is already cohabiting with other men unknown to the Respondent.
- Since the Petitioner currently works with WFP as a cabin crew which entails her being away from home for long, it is not advisable that she assumes custody of the children.

For the reasons given in the cross petition the Respondent seeks the following reliefs:-

- That the marriage between the Petitioner and the Respondent be dissolved.*
- That the Respondent be granted full custody, care and control of the minor child of the marriage.*
- That the Respondent be granted costs of this cause on a higher scale.*

The Petitioner put in a reply to answer to Petition and Answer to cross –petition dated 24th day of June, 2008, but filed on the 20th day of June 2008. In a summary form the salient features of the same are as follows:-

- Joined issue with the Respondent cross-petitioner on his answer to the petition and reiterates the content of the petition.

- Denied taking off with the said X.B and reiterates paragraph 4, 5, 6 of her petition.

- Denies any knowledge of attempts by the Respondent to promote reconciliation between them.

In an Answer to the cross petition the following were stressed.

- Denied cohabiting with one L.W.

- Denied particulars of cruelty given in paragraph 10 of the cross- petition.

- Denied allegation in paragraph 12,13 and 14 of the cross- petition and will irave testimony of the issues of the marriage to confirm the allegations by the Respondent that she removed the issues of the marriage from the jurisdiction of the court, without his consent and that of the court. Further that the fact that she works for W.F.P as a cabin crew does not disentitle her to her right to have custody, care and control of the issues of the marriage.

The Registrars certificate was obtained on the 24th day of July 2008, and the cause proceeded as a defended cause. The Petitioner was the sole witness and in her oral testimony she reiterates the content of her petition and answer to cross petition and then stressed the following:-

- They married in 1986.

- By then she was working in the Aviation Industry with various Airlines among them P Airlines, S Belgium. Airlines as a cabin crew but when she was expecting their first born she was changed to ground work doing customer services, maintains when they married they lived in her fathers house where she was paying rent and meeting other house hold expenses.

- Concedes there are two issues of the marriage who are now over 18 years and in the university one Strathmore, and another one at Egerton University.

- Reiterates he was cruel to her because at one time her pinned her down to have sex and then he would spit on her after finishing.

- On adultery, it is her stand that the Respondent used to get familiar with her friends and then go to seduce them.

- Currently they are separated since September 1998, because the tension in the house was becoming unbearable as the Respondent used to stalk her and even tell the watchman to keep a record of times of her leaving and coming back home.

- She is in agreement that they have been separated for 13 years and the marriage cannot work but she is not responsible for that situation.

- Denied abandoning the Respondent during his illness.

When cross examined she made the following response:-

- She is the one who left the matrimonial home leaving behind the issues of the marriage aged 6 and 9 years.
- This was the second time as she had also left in 1996 in similar circumstances, carried away household assets when the Respondent was away over seas. But when he come back she reconciled and then she went back.
- Concedes that it is the Respondent who has been taking care of the children all along, through high school and now at the university.
- It is her stand that the Respondent assaulted her twice but she did not report to the police.
- Asserts the Respondent seduced her friends whose names she has not mentioned and an issue she did not discuss with the Respondent.
- Concedes the Respondent has tried to reconcile with her by sending his brothers but she declined the reconciliation moves because the Respondent gesture was not genuine.
- Denied going out without his knowledge.
- Concedes the Respondent fell seriously ill in 1997 and had to be taken over sea for treatment, but denied walking out on him before he got well as he had been to a London clinic and he had been given a clean bill of health.
- Concedes that indeed she moved out and rented a house in Kilimani area but denied allegation that she moved in with a man named X.B, neither is it true that she currently resides with another man named L.W but knows him just as a friend.
- Concedes the Respondent has been to her residence twice but disputes that on these two occasions he had met the named gentleman there.
- Denied being cruel to the Respondent and the children of the marriage.

The Respondent also gave evidence as the sole witness and he reiterated the content of the Answer to Petition and cross petition and then stressed the following.

- Started cohabiting together in the year 1986.
- 1986 she moved to Miami for studies and when she came back in 1987, they moved to her father's house but they paid rent before moving to their own house in Ngei Estate in 1991.
- There are two issues of the marriage who are now adults.
- Concedes having assaulted the petitioner in 1995-96 but says he was defending himself as she had come home drunk.
- Denied policing her but says records of leaving and coming recorded by watchmen were in line with Company Policy BAT for which the Respondent worked, and which had provided security required that procedure was to be applied to every body without distinction.
- Maintains she stands by the allegation of cruelty attributed to the petitioners.
- Denied being responsible for the Petitioner leaving home in 1996, because he had left for a business trip to Mauritius and when he came back he found her gone.
- He still loves her as she is the mother of his children.
- Still contends that he went to her house and found X.B present and he confronted him, where upon

the Petitioner told the Respondent to go away.

- Denied the allegation that it is the Petitioner who escorted him to London but her sister.
- Upon return from London, Respondents mother and sister came to take care of him but the petitioner chased them away.
- Concedes that the Petitioner informed him she was leaving on 1/9/98. He made efforts to get her back to no avail.
- She has access to the children whom the Respondent fully supports.
- He cannot understand why their marriage did not work.

When cross examined, he made the following responses:-

- Maintains the Petitioner frequently came home drunk.
- They fought in 1995 because he was defending himself.
- It is his testimony that he found X.B and L in her house at Kilimani. They confronted him but he has not decided to include them in the litigation because having been separated for 12 years there was no need to lengthen the proceedings.
- He did not take the first step to petition for divorce because he loved her and also for the sake of the children.
- Concedes that there is no hope for reconciliation.

At the close of the entire case, both sides filed written submissions those of the Petitioner are dated 26th day of May 2010 and filed on the same date. They reiterate the content of the petition and oral testimony of the Petitioner and then stressed the following:-

- That the Petitioner seeks to dissolve the marriage celebrated between her and the Respondent at the Registrar General Office on the 11th day of December 1986.
- The Petitioner has relied on the grounds of denial of conjugal rights and the Respondent being abusive to her as grounds of cruelty.
- The Respondent too in his answer to Petitioner denied allegation of cruelty levelled against him and instead he also set out particulars of cruelty attributed to the Petitioner.
- That it is common ground that since 1993, there have been incidents of cruelty between the parties which lead to their separation in 1998 and since then parties have lived apart.
- Since 1998, efforts to reconcile them have not born any fruits because the Petitioner alleges that the Respondent was not genuine whereas the Respondent alleges that the Petitioner has frustrated efforts to reconcile them.
- It is the Petitioners' stand that their assertion that the Respondents effort to reconcile were not genuine are credible adduced by the fact that it is undisputed that in 1996 the Petitioner had deserted the home but when persuaded to come back she reconciled and hoped the Respondent would reform but when he did not reform and went back to his old habits she moved out in 1998, and she therefore had a genuine reason for not accepting the offer to reconcile as she doubted the Respondents genuineness.
- Contends that the Petitioner informed the Respondent before moving out.
- That the Respondent was comfortable with that move that is why he did not move to court, to file a petition for divorce and his putting in across- petition is just an after thought.
- The court, is urged to believe the Petitioner's evidence on cruelty more so when it was admitted by the Respondent that indeed he battered her in 1995.
- The court, is urged to disbelieve the allegations of cruelty attributed to the Petitioner by the

Respondent because he has admitted by his testimony that in 1997, when he suffered meningitis mellitus, it is the Petitioner who took him to hospital and stayed in the home throughout the period he was on medication till April 1998, when he reported back on duty but on light duty, and only left the matrimonial home in September 1998, after she has given the Respondent notice of her intention to move out of the home.

- That the Petitioner having moved out of the matrimonial home with the knowledge of the Respondent cannot be termed desertion.

- The court, is urged to find the Respondents oral testimony contrary to his pleadings, dismiss the same and confirm the oral testimony of the Petitioner which is consistent with the pleadings.

Turning to the law, the following was stressed.

- The court, was urged to go by the definition of cruelty given by Chesoni J as he then was in the case of **MEME VERSUS MEME (1976-80) IKLR page 22** paragraph 35 which fit the allegations of the Petitioner herein on the grounds that there is uncontroverted evidence that the Respondent would come home and find the Petitioner and issues of the marriage watching T.V, and then he would switch off the same, and 2ndly he would force the Petitioner into sex without her consent something which exposed her to injury to her health or reasonable apprehension of such injury.

- That the Petitioner has brought herself within the ambit of the provisions of section 10 of the matrimonial causes Act, to the level of feeling certain and for this reason, the Petitioner has discharged the burden placed on her.

- The court, is urged to find that the allegations of adultery attributed to the petitioner have not been proved to the required standard because there was no proof of the said adultery with one X.B. Neither with L.W.

- No evidence having been adduced on the issue of custody, care and control and maintenance the court, to treat the same as having been abandoned.

On case law, the court, was referred to the case of **MEME VERSUS MEME (1976-80) IKLR 17**. Issues for determination were ingredients required to be proved to establish existence of cruelty, and the standard of proof required to establish adultery. It was decided by Chesoni J as he then was and he held interalia that:-

1. *That the question whether cruelty had been established was a matter of degree and fact to be decided on all the circumstances of the particular case. To establish cruelty the complainant must show to the satisfaction of the court.*

- (i) *Misconduct of a grave and weighty nature.*
- (ii) *Real injury to the complainant's health or reasonable apprehension of such injury.*
- (iii) *That the injury was caused by misconduct on the part of the respondent and*
- (iv) *That on the whole of evidence, the conduct amounted to cruelty in the ordinary sense of the word.*

At page 22 paragraph 34-40 the learned judge made the following observation:-

“Cruelty as a matrimonial offence upon which a petition for dissolution of a marriage may be grounded is defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily harm or mental or as to give rise to a reasonable apprehension of such danger. At page 23 paragraph 10-15, the following was observed:- “The question in all such cases is to my mind, cruel according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman .

The case of **KAMWERU VERSUS KAMWERU (2003) 2EA 484** decided by the Court of

Appeal on 1, December 2000. The central issues for determination was the standard of proof required to be met in order to establish adultery. *“It was held inter alia that section 10 of the matrimonial causes Act sets out the standard of proof required to prove a matrimonial offence. The requirement is that the court, must be satisfied that a matrimonial offence has been proved. The Act does not refer to proof beyond reasonable doubt and it is proper therefore to put the burden of proof at the level of feeling certain.....”*

At page 487 paragraph h the law Lords of the CA quoted with approval **RAYDEN’S PRACTICE AND LAW OF DIVORCE (10TH EDITION)** paragraph 109 at 176 thus

“The burden of proof is brought on the person alleging adultery there being a presumption of innocence.....The standard of proof is that the court, must be satisfied on the evidence.....As for the standard of proof is concerned, adultery like any other ground for divorce may be proved by preponderance of probability”

The Respondents counsels’ submissions are dated 13th day of May, 2010, and filed on the 14th day of April 2010. The following are the salient points stressed:-

- That the Petitioner relies on cruelty and adultery as her grounds for divorce allegedly but when challenged in cross examination, she stated that she never lodged any complaint about physical or other abuse. As such, there is no evidence to corroborate physical abuse, not even from a family member and for this reason, their stand is that the allegation of cruelty has not been proved.
- As for allegation of adultery, they contend that the same has not been established as the names of the friends who were introduced to the Respondent and him Respondent later went and seduced them have not been disclosed.

Turning to the Respondents case, it is the contention of counsel that cruelty has been proved for the following reasons:-

- (i) The Petitioner chased away the mother and sister in law at a time when the Respondent was sick.
- (ii) She moved away from the home in 1996, carrying away the children and household goods when the Respondent was away on official duty.
- (iii) In 1998, she abandoned the home and the children without care.
- (iv) Declined to heed the call for reconciliation.
- (v) Denied the Respondent conjugal rights and their children motherly care for the 12 years she was away from the home.

- That as regards desertion, this has been established as it has not been controverted that the Petitioner deserted the matrimonial home on or about September 1998 without any apparent reason.

- It is not disputed that the Respondent send an in law with a view to reconciling with the Petitioner who turned down the offer.

- As for adultery attributed to the Petitioner, the Respondent counsel contends that this has been established because the Respondent testified that the Petitioner lived at Kamiti court with one X.B and L. W. The Petitioner does not deny residing at the said place nor that she resides and cohabits at the said place with the said man. Even if there is no direct evidence, the court, to rule that there was opportunity to commit the same.

Turning to the law, the court, is urged to be guided by the following principles:-

- Cruelty has been defined by the case law as *“ The willful and unjustifiable conduct of such a character as to cause danger to life limb or health, body or mental so as to give rise to a reasonable apprehension of such danger”*

(ii) To amount to cruelty, the conduct must have been aimed at the party complaining. In their case, the Respondent at least with Wanton indifference as to the consequences thereof.

(iii) Contend that the Petitioners conduct towards the Respondent was calculated to injure the Respondent because of the following reasons.

(a) The Petitioner moved out of the matrimonial home in 1996, with all the children and property not caring how the Respondent cross Petitioner would feel after finding out that she had left the house with all the children and all the property.

(b) The Petitioner went out and stayed out late with men known and unknown, to the Respondent a time when the Respondent was at home recuperating at home. She spent time out instead of being with the Respondent at a time when she was needed most.

(c) She declined to accompany the Respondent to Britain for treatment in 1998, and instead offered her elder sister to accompany him.

(d) Deserted the Respondent in September 1998, before the Respondent had fully recovered from the injury.

(e) She chased away the Respondents mother in 1998 when she had come to look after her sick son.

On desertion, the same is defined as the cessation of cohabitation brought about by the fault of the deserting spouse whose ingredients are

(i). Fact of separation and

(ii). The intention to desert

It is the Respondent counsels' stand, that these ingredients have been established against the Petitioner because it is uncontroverted that the Petitioner left the matrimonial home in September 1996, and never to return.

(ii) The issue of constructive desertion, does not arise because the alleged assault which is alleged to justify the Petitioner moving from the matrimonial home occurred in 1995.

On adultery, the court was urged to be guided by the decision in the case of **MATHAI VERSUS MATHAI** where the court of Appeal ruled that "*proof of an opportunity to commit adultery was good enough proof of the ground of adultery.*" The same position was taken by the Court of Appeal in the case of **KAMWERU VERSUS KAMWERU (2000) EKR** where the Law Lords of the CA ruled that existence of an inclination together with the existence of an opportunity may give rise to a presumption of adultery in the absence of a challenge. Applying that to the facts herein, the court, is urged to find that the fact of the Petitioner Moving out to live on her own and admitting that the mentioned men are her friends. The court, is urged to find that an inclination and opportunity existed to commit the same and find adultery established in favour of the Respondent.

For the reasons given in their submissions, the Respondents counsel urged the court, to dismiss the Petitioners petition but allow the Respondents cross-petition and grant the reliefs sought in the cross-petition, order that the decree absolute be made immediately and for the reasons of the fact that the Petitioner declined reconciliation, she should be ordered to pay costs of the proceedings.

On case law the court, was referred to the case of **HORTON VERSUS HORTON (1940) 3 AER 381** where one of the issues for determination was the ingredients required to establish cruelty for purposes of divorce. The cruelty alleged was "*nagging complaints of his association with other women, charges of hypocrisy in relation to his religion, Masonic activities, certain small acts of violence and certain damages to his personal effects. He developed twitching and sleeplessness. After separation, there was evidence that his health improved. It was held that the wife's conduct amounted to legal cruelty as there was proof of unjustifiable acts inflicting pain and misery on the Petitioner and causing injury to his health.*" The Law and practice of divorce and matrimonial cause, 4th Edition page 58. It

reads:-

“Definition. Cruelty which is a ground for dissolution of a marriage may be defined as willful and un justifiable conduct, of such a character as to cause danger to life, limb health, bodily or mental or as to give rise to a reasonable apprehension of such a danger.

Willful conduct is defined at page 59 as:.....”*It must consist either of actions or words actually or physically directed at the Petitioner, and in other words, there may be cruelty even though there is no intention to injure or actions not directed at the petitioner but done either with intention to injure him or with un warrantable indifference to the consequences..... Conduct which he must know would have an injurious effect on the Petitioner.....in the case of conduct not directed at the Petitioner, such as her laziness or injury to or neglect of a child or.....done with the express purposes of wounding the Petitioners feelings....”*

Unjustifiable conduct is defined at page 61 as:- *“There must be something in the nature of willful and u justifiable interference by one spouse in the life of the other spouse.....unless there is injury or apprehension of injury to health”*

The case of **WILLIAMNS VERSUS WILLIAMNS (1964) A.C. 698 H.L.** at page 706 it is observed:-*“Cruelty is doing an intentional act without reasonable exercise which the actor would have known if he had not been warrantable indifferent would injure his spouse.”*

The case of **WANGARI MATHAI VERSUS MWANGI MATHAI (1986) 154** decided by the Court of Appeal. Issue for consideration was the standard of proof necessary to establish adultery and the meaning of **“satisfied”** observation made was that:-

“When considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction is that the court, must be satisfied beyond reasonable doubt or satisfied so as to feel sure that the guilt has been proved.....

The charge of adultery is a serious matrimonial offence. Circumstantial evidence is proof thereof ought to be carefully and cautiously considered, the court being required to move with great care, the standard of proof is very high. The charge must be proved clearly beyond establishing a mere balance of probabilities or a proper evidence of probability or a mere suspicion and opportunity to commit adultery. It must be proved to the satisfaction of the court, which means that the court, must be satisfied beyond reasonable doubt or satisfied so as to feel sure.....

The trial judge was satisfied that the Respondent stayed on many occasions both in day time and at night with the appelland wife of the husband (Petitioner) at her house on diverse occasions when her husband was absent from the home, and he held that the circumstances of the case were such as to lead the guarded discretion of a reasonable and just man to the conclusion that adultery had been committed on those occasions. He also found her guilty of cruelty.....”

Upon the a fore set out reasoning the Law Lords of the CA held interalia:-

“(i) That if a court, is not satisfied as to feel sure of the guilt of the Respondent then the charge of adultery, has not been proved but in this case there was nothing wrong in the trial judges’ approach to the question of adultery, and he was right in this conclusion that it had been proved to his satisfaction that adultery had taken place and the appeal must be dismissed on the issue of adultery.

(ii) That as the advocate for the Petitioner did not seek to support that part of the trial judges’ judgement on which he held that cruelty had been proved against the wife the appeal would succeed to that extent”

The case of **ALEXENDER KAMWERU VERSUS ANNE WANJIRU KAMWERU (SUPRA)** whose holding has already been set out herein when dealing with the submission of the Petitioner s’counsel.

Due consideration has been made by this court, of the content of the pleadings filed by both sides, the oral testimony of both sides, submissions made by both sides counsels and decisions of case law cited and in this courts', opinion, the following are the undisputed facts of the case:-

1. That there is a valid marriage between the disputants herein demonstrated by the existence of a certificate of marriage produced as exhibit 1.
2. The existence of a prior customary law marriage has also not been disputed by both sides.
3. There are two issues of the marriage currently attending university, one at Strathmore and another at Egerton University. It is admitted that they are over 18 years. As such they cannot be subjects of these proceedings.
4. That at the start of the marriage and cohabitation, the disputants herein lived harmoniously and when the job requirements of the Petitioner required her to be in the skies most of the time, a matter objected to by the Respondent, the Petitioner for the sake of the family and considering that she was expecting their first child, changed jobs and became a ground crew.
5. Disharmony arose between the disputants herein and in the year 1996, the Petitioner left the matrimonial home taking with her the children of the marriage and household goods.
6. It is on record that reconciliation measures or initiatives were taken and the parties reconciled.
7. That on or around 1997, the Respondent suffered an ailment of meningitis mellitus leading to a long period of hospitalization locally here and over sea, London.
8. There is assertion by the Respondent, that the Petitioner refused to escort him to London for treatment and instead entrusted him to an elder sister to escort him to London for treatment. The Petitioner explained this way by saying that she had other family commitments and the time when she allowed her elder sister to escort the Respondent out to London for treatment was when the Respondent had improved his health and was just going for a medical clinic check up.
9. It is on record that disharmony persisted during the Respondents' recuperations with the Respondent accusing the Petitioner of neglect. Where as the Petitioner asserts to have given maximum care and attention during that moment.
10. There are disputes as to whether the Respondent had fully recovered from his ailments as at the time the Petitioner left the matrimonial home. The assertion of the Respondent is that he had not fully recovered demonstrated by the fact that he was on half day duty whereas the assertion of the Petitioner is that the Respondent had fully recovered.
11. There is no dispute that the Petitioner informed the Respondent of her intention to leave the matrimonial home which she did in September 1998.
12. That the parties have lived apart since September 1998.
13. There is no dispute that the Petitioner filed the petition seeking dissolution of the marriage citing adultery and cruelty likewise the Respondent, responded to the petition by filing an answer to the petition, and then filing a cross petition also citing adultery and cruelty.
14. There is no dispute that the women involved in the petitioners' petition are said to have been known to the Petitioner as they are alleged to have been her friends. But neither were they joined as parties to the proceedings nor named in the proceedings and or called as witnesses. No explanation was given by the Petitioner for her failure to either join them to the proceedings, or name them as witnesses. likewise there is no dispute that the Respondent mentioned X. B in the answer to Petition and another known and unknown in the cross petition, and the naming of one L.W in the evidence. These men were not made parties to the proceedings. The Respondent however gave an explanation that having been painfully

separated for 12 years, he did not want to prolong the proceedings.

This court has made due consideration of these common factors herein, the court, is of the opinion that the following are the courts,' own framed questions for determination in the disposal of these proceedings.

1. What reliefs are being sought by either side?
2. Is there a marriage capable of being dissolved?
3. What are the ingredients that either side is required to establish in order to earn the reliefs being sought?
4. What is the standard of proof required to establish the existence of these reliefs.?
5. Have the disputants herein met the said standards and why?
6. What are the final orders to be granted herein?

The reliefs being sought herein by the disputants are those set out in their respective pleadings. The Petitioner sought:-

- (a) *Dissolution of the marriage between him and the Respondent.*
- (b) *Sharing of properties.*
- (c) *Custody of the two issues of the marriage*
- (d) *That the Respondent do pay for the costs of the proceedings.*

The Respondent on the other hand sought the following reliefs

- (a) *Dissolution of the marriage.*
- (b) *To be granted full custody, care and control of the minor child of the marriage.*
- (c) *That the Respondent be granted costs of this cause on a higher scale.*

As for the existence of a marriage capable of being dissolved, the has been demonstrated by the existence of a marriages certificate annexed to the Petitioners petition. The court, therefore makes a finding that there is in existence a marriage between the disputants capable of being dissolved.

The ingredients required to be proved by either side in order to earn the reliefs being sought are those set out in section 8, of the matrimonial causes Act cap 152, laws of Kenya namely, the demonstration of existence of facts demonstrating existence of:-

- (a) *Adultery*
- (b) *Desertion*
- (c) *Cruelty*
- (d) *Insanity*

The standard of proof required to be established is that one set out in section 10 of the same Act of the matrimonial causes Act cap 152 laws of Kenya. The portion relevant to this judgement are:-

“Section 10 (1), on a petition for divorce, It shall be the duty of the court to inquire so far as it reasonably can into the facts alleged and whether there has been any connivance or condonation on the part of the Petitioner, and whether any collusion exists between the parties and also to inquire into any counter charge which is made against the petitioner.

(2) *If the court is satisfied on the evidence that*
(a) *The case for the Petitioner has been proved.*

(b) *Where the ground of petition is adultery, the Petitioner has not in any manner been accessory to or connived at or condoned the adultery, or when the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and*

(c) *The petition is not presented or prosecuted in collusion with the Respondent or either of the Respondent, the court, shall pronounce a decree of divorce, but if the court, is satisfied with respect to any of the afore said matters, it shall dismiss the petition.*

Provided that the court, shall not be bound to pronounce a decree of divorce, and may dismiss the petition if it finds that the Petitioner, has during the marriage been guilty of adultery or if in the opinion of the court, the Petitioner has been guilty

(i).Of unreasonable delay in presenting or prosecuting; or

(ii). Of cruelty towards the other party to the marriage or

(iii). Where the ground of the petition is adultery, or cruelty, of having without reasonable excuse deserted or having without reasonable excuse willfully separated himself or herself to the other party before the adultery or cruelty complained of.....”

This provision had been construed in cases of this jurisdiction both by the superior court, and the court of appeal such as **KAMWERU VERSUS KAMWERU (SUPRA) and MATHAI VERSUS MATHAI (SUPRA)**. The standard of proof required for a matrimonial offence of adultery is no longer beyond reasonable doubt as was previously the jurisprudence as demonstrated by the text of Toistoy on the law, and practice of divorce, and matrimonial causes (supra). It is now proof to the extent that the court is certain that adultery was committed. Proof can be garnered from circumstantial evidence as well **MATHAI VERSUS MATHAI (SUPRA)**.

Turning to cruelty, what the court is required to look for are “*facts demonstrating willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such a danger.....*” This has been construed in the case of **MEME VERSUS MEME (SUPRA)** namely that in order to establish

(i).Misconduct of a grave and weighty nature

(ii). Real injury to the complainants health or reasonable apprehension of such injury

(iii). That the injury was caused by misconduct on the part of the respondent and

(iv). That on the whole of the evidence, the conduct amounted to cruelty in the ordinary sense of that word.....”

This court has duly applied the said standard of proof to both the rival, pleadings, submissions and arguments and the court, proceeds to make the following findings on the same:-

(a) Before determining the proof of existence or non existence of a matrimonial offence, the court, has to inquire into the existence of collusion and connivance of the presentation of the petition and cross petition and whether there has been any condonation of the alleged matrimonial offence. Paragraph 6 (iii) of the petition contains the guarantees but the cross-petition does not contain the same guarantee. There is also oral assurance in their testimony, that neither consulted the other and agreed before filing the petition or the cross-petition. The court is there satisfied that there was no collusion, connivance and condonation attributed to either side.

(b) The adultery attributed to the Respondent by the Petitioner, has not been proved on a balance of preponderance because the women with whom the Respondent is alleged to have committed the said adultery have not been named nor attempts made to confronts the respondent with the said allegations. The existence of the facts establishing the same is in doubt.

(ii) As for the adultery attributed to the petition, or by the Respondent/cross Petitioner, two men have been named namely X.B and L.W. These were however not joined to the proceedings. The Respondent said that he did not join them to the proceedings because he did not want to prolong the proceedings. Besides the assertion of the Respondent, and denial of the Petitioner, both in her answer to the cross petition and oral testimony, there is no other evidence. The Respondent did not reside in the said house and as such cannot give direct evidence. The circumstances of this case are distinguishable from the facts of the **MATHAI VERSUS MATHAI (SUPRA)** in that in the Mathai case, there was testimony from the security man that the co Respondent and Respondent had been known to be spending even nights in the Respondents’ house whenever the Respondent husband was away, which had given rise to the existence of a presumption of an opportunity to commit adultery. No such opportunity has been demonstrated to

exist, more so when the alleged adulterous have not been joined to the proceedings. The net result of the above assessment is that, the alleged adultery attributed to the Petitioner has not been proved to the standard required, namely a balance of preponderance which can make the court, to be certain that adultery was committed.

(c) Turning to cruelty, those attributed to the Respondent are two particulars, namely denial of conjugal rights and being abusive of the Petitioner. These have to be considered in the light of the admitted facts to the effect that the Respondent made personal appeal as well as sending emissaries to promote reconciliation which the Petitioner declined to accept. There is no demonstration that had reconciliation materialized resumption of cohabitation and rendering of conjugal rights duties and obligations to each other would not have resumed. Having refused reconciliation moves fronted by the Respondent, the Petitioner cannot complain a denial of conjugal rights.

As for being abusive, this appears to have been more prominent for the period before 1996, forcing the petitioner, to move out of the matrimonial home, together with all households goods, and the children of the marriage. It is on record and it is admitted by both sides that the Respondent involved the Petitioner's family members and had the matter sorted out, cohabitation resumed and continued till the Respondent formerly moved out of the matrimonial home in September 1998. The resumption of cohabitation, leads this court to draw a reasonable conclusion that the abuses prior to the 1996 moving out of the matrimonial home, can be treated as having been forgiven and condoned.

It is admitted that from 1997 to 1998 when the Petitioner moved out of the matrimonial home, the Respondent had not fully recovered from his ailment on that condition, it cannot be said that a sick and ailing man who badly needs the services of his wife, can be said to have been abusive. The court finds this ground not established to the extent that the court is **"certain"** that the Respondent was abusive of the wife during the period between the resumption of the cohabitation after the reconciliation of 1996, upto September 1998, when the Petitioner finally quit the matrimonial home for good, and never to return.

Turning to the cruelty attributed to the Petitioner by the Respondent/ cross –Petitioner, even if all the particulars enumerated by the Respondent cross petitioner, have not been established by adduction of evidence, the fact of the Petitioner, having moved out of the matrimonial home, after notifying the Respondent, the fact that she Petitioner left children of tender years of 6 and 9 years under the care, control and custody of a man who was just recovering from a serious bout of meningitis mellitus, the fact that she the Petitioner never went back to render services to the said children, she also adamantly refused offers of reconciliation, is sufficient ground to make this court feel **'certain'** that failure to render motherly care to the children of the marriage who were of tender age, caused stress and psychological trauma both to the Respondent/ cross -Petitioner and the children. This fits the ingredients of causing injury to the health both physical` and mental of the opposite party, has been established. There is sufficient facts to support the assertion of the Respondent/cross-petitioner that the abandoning of children of tender age with a man recovering from a serious ailments was no doubt directed at the Respondent/cross-petitioner. This is further fortified by the fact that no explanation was given by the Petitioner as to why she did not take the children along with her and then sought access rights to their father as well as seek maintenance from the Respondent cross petitioner.

There is also the issue of the length of time that the Petitioner took 12 years to present the Petition for divorce No explanation has been given for this delay, considering the fact that the Respondent initiated reconciliation moves through the Petitioner's own parents and brothers soon after she had moved out of the matrimonial home in September 1998. In contrast the Respondent/cross petitioner has given an explanation for not moving to court, to seek divorce over that period as because of the sake of the children who were left in his custody at the tender age of 6 years and 9 years, as he had hoped the family would one again re unite as it did in 1996, in order to give the children the benefit of being brought up by both parents. The need of children growing up under the care of both parents cannot be trivialized. It is fundamental. It forms the core of parental responsibility and a basic right to be enjoyed by the children. It is however to be noted that the issue of the continuance of the said need of parental care, from both parents has never been over taken by events as both children are adults, over 18 years old, and so their

current situation does not invite the issuance of care, control and custody orders sought by both sides. The court finds these reliefs to have been overtaken by events.

As for the possibility of there being a reconciliation and mending of the marriage, both sides agree both in their pleadings as well as oral testimony that it is irretrievably broken down save that each says that they themselves are not responsible for the said breaking up of the marriage but the other party is. The failure of efforts to reconcile for 12 years is a clear sign that indeed the marriage has irretrievably broken down and it is a proper candidate for dissolution.

For the reasons given in the assessment, the court proceeds to make the following final orders in the determination of these proceedings:-

1. There will be no order issued for custody, care and control of the issues of the marriage as these reliefs have been overtaken by events now that both issues are adults, over the age of 18 years and once they cannot be subjects of custody, care and control orders.
2. The issue of adultery, as well as cruelty attributed to the Respondent/cross-Petitioner by the petitioner herein were not proved to the required standard of the court being "**certain**" for the reasons given as such the same stands dismissed.
- (iii) The issue of constructive desertion raised by the Petitioners' counsel, in his submissions, does not hold as the same had not been pleaded and evidence tendered on the same. More so when it is in the Petitioners testimony that she was not forced out physically but she herself could not cope with the tension, suspicious and mistrust flowing from each sides to the other. For these reasons, the Petitioners' petition has not been proved and the same is dismissed.
3. The allegation of adultery attributed to the Petitioner by the Respondent cross-petitioner, stands disproved for the reasons given. But the allegations of cruelty attributed to the Petitioner by the Respondent cross-petitioner stand proved and can support a relief of dissolution of the marriage since there is no requirement that ingredients for all matrimonial offences be proved before one can earn such a relief. Proof of one suffices. In this case "**cruelty**". There will therefore be an order for the dissolution of the marriage celebrated herein between the Petitioner and the Respondent cross petitioner, on the 11/12/1986 vide entry number 770/86 and certificate number 055331.
4. Decree nisi shall issue forthwith.
5. Decree absolute shall issue 6 months after the issuance of the decree nisi or within such a shorter period upon application by either party.
6. There will be no order made on the issue of property in prayer (b) of the petition as no evidence was tendered on the same and as submitted by counsel for the petitioner, it is to be deemed to have been as abandoned.
7. Each party will bear own costs of the proceedings.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2010.

**R.N. NAMBUYE
JUDGE**