

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO.144 OF 2003

S.B.M.....PETITIONER
VERSUS
A.N.W.....RESPONDENT

J U D G M E N T

The petitioner and the respondent started cohabiting together as husband and wife in 1994. On 4th October 2000, the petitioner and the respondent formalized their marriage under the **Marriage Act** at the Registrar's office in Nairobi. During the subsistence of their marriage, they lived at N estate in Nairobi. The couple were blessed with two (2) children who are now aged seventeen (17) and ten (10) years respectively. According to the petitioner, his marriage to the respondent has not been a happy one. He accuses the respondent for treating him with cruelty. In particular, he states that the respondent was a person of uncontrollable temper and rage. It is this behaviour that caused the respondent to threaten to kill the petitioner and further caused the respondent to hurl insults at the petitioner without any provocation. The petitioner accused the respondent of being a habitual drunkard to an extent that her behaviour became erratic and uncontrollable. The petitioner stated that the respondent quarreled him without any reason and on one occasion in January 2000, the respondent during one of her foul moods insulted the petitioner after which she jumped from the first floor of the building that they were residing in. The petitioner averred that the respondent had on several occasions attempted to set on fire their property and personal belongings. She accused the respondent of unreasonably and without any justification of accusing him of adultery. The petitioner averred that the respondent deserted the matrimonial home on 10th August 2001. Since then, the respondent had not returned to the matrimonial home. The petitioner was of the view that his marriage to the respondent had irretrievably broken down with no chance of being salvaged. He urged the court to grant his petition for divorce. He further prayed to be granted custody of the children of the marriage.

When the respondent was served, she duly entered appearance and filed an answer to the petition. She also cross-petitioned for divorce. She denied the allegation made by the petitioner that she was a person of uncontrolled temper and put the petitioner to strict proof thereof. She averred that after she was injured and became wheelchair bound, the petitioner had rejected her because of her disability. She contends that it is the petitioner who treated her with cruelty during the subsistence of their marriage. In particular, she accused the petitioner of pushing her down the stairs thus resulting in the respondent injuring her spinal cord which rendered her disabled. The respondent stated that the petitioner willfully neglected to provide for the respondent and the children of the marriage thereby causing them undue suffering. The respondent accused the petitioner of engaging in adulterous relationships during the subsistence of the marriage. She therefore asked the court to grant her cross-petition for divorce. She further prayed to be granted custody of the children of the marriage. She prayed for the court to order the petitioner to provide reasonable maintenance for her upkeep and those of the children of the marriage.

At the hearing of the petition, I heard evidence adduced by the petitioner and the respondent. After the close of both the petitioner's and the respondent's respective cases, counsel for the petitioner and counsel for the respondent filed written closing submissions. I have carefully considered the evidence adduced in this petition. I have read the pleadings and assessed the submissions that were filed after the close of the hearing of the case. The issue for determination by this court is whether a case has been made for this court to grant the petition for divorce. Certain facts are not in dispute. It is not disputed that the petitioner and the respondent got married and cohabited together as husband and wife at N estate in Nairobi. They were blessed with two children, a boy and a girl. The petitioner and the respondent used to operate a restaurant business in the same building that they resided in. They operated the business on the ground floor of the building while they occupied a flat on the 2nd floor of the building. It was apparent from the evidence that was adduced by both the petitioner and the respondent that the marriage was not a happy one. It was characterized by constant quarrels and disagreements. In some of the instances, the petitioner physically assaulted the respondent. The respondent reacted by destroying some of their properties. The petitioner attributes these constant disagreements to the respondents ungovernable temper. On her part, the respondent attributes their travails to the petitioner's adultery and cruelty on her. This cruelty was

exhibited by physical assaults that the petitioner subjected the respondent to. Matters came to head in January 2000 when during one of their quarrels, the respondent fell down from the 1st floor of the building they were occupying resulting in the respondent breaking her back. The respondent was hospitalized for a period of two months after which she was discharged. She was under constant medical care for the following year. This medical care included physiotherapy. Unfortunately, the respondent was unable to recover her normal bodily functions. She was paralysed from the waist down. She is now wheelchair bound. According to the respondent, during her initial period of recovery, the petitioner left her under the care of his parents. The respondent formed their view that the petitioner had abandoned her. This is due to the fact that the petitioner never bothered to see her during the period that she was recovering from her injuries. On 10th August 2001, she left the petitioner's parents' home. She went to live with her sister. She left the children of the marriage under the care and custody of the petitioner. It was clear from the evidence adduced that whenever the respondent wants to see her children, the petitioner has not restricted her access. The petitioner testified that after the respondent deserted the matrimonial home, he made a decision to start another relationship. He told the court that he was now living with a girlfriend at Jamhuri estate in Nairobi. The respondent after living in various places including the Kibera slums, is now living with her sibling at Kiambu. The respondent pleaded with the court to grant her custody of the children and further compel the petitioner to provide maintenance for her upkeep and that of the children. On his part, it is the petitioner's case that he should continue having custody of the children. He testified that he was not in a financial position to maintain the respondent. Having carefully evaluated the facts of this case, it was clear that the petitioner and the respondent respectively established the ground of cruelty to entitle this court grant the divorce. From the evidence adduced, it was clear to the court that the petitioner and the respondent were incompatible in terms of temperament. Their marriage was doomed to fail because of their constant quarrels. It is unfortunate that the petitioner and the respondent were not divorced before the respondent sustained a permanent injury that rendered her unable to fend for herself. The petitioner and the respondent have been separated for more than eight (8) years. It was clear to this court that the marriage between the petitioner and the respondent has irretrievably broken down with no chance of salvage. If reconciliation were to be promoted, it would have borne fruit in the period that the petitioner and the respondent have been separated. As it were, it is now too late. The petitioner has moved on with his life. He is in another relationship. The respondent no longer wishes to stay married to the petitioner. In the premises therefore I will grant the petition for divorce on the grounds of cruelty. The marriage solemnized between the petitioner and the respondent on 4th October 2000 at the Registrar's office in Nairobi is hereby annulled. Decree nisi is hereby issued granting the said petition for divorce. The decree nisi shall be made absolute thirty (30) days from the date of this judgment. The petitioner shall continue custody of the children of the marriage. The respondent shall have unrestricted right of access. During the school holidays, she shall be entitled to have custody of the children of the marriage. The petitioner shall provide monthly maintenance of Kshs.20,000/- for the upkeep of the respondent. It was clear to the court that although the petitioner pleaded that he did not have regular income, his parents have allowed him to collect rent for his upkeep and that of his children from some of the residential properties that they own. The petitioner shall pay this amount to the respondent with effect from 30th November 2010 until further orders of the court. Either party shall be at liberty to apply. There shall be no orders as to costs.

DATED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2010

**L. KIMARU
JUDGE**