



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**DIVORCE CAUSE NO. 13 OF 2009**

**D.A..... PETITIONER**

**VERSUS**

**DR. C.A..... DEFENDANT**

**J U D G M E N T**

The Petitioner and the Respondent, then spinister and bachelor respectively married on 30/10/1988 at the Registrar of Marriages Office Nairobi. They thereafter cohabited as husband and wife in Nairobi until 1990 when the Petitioner relocated to Eldoret for gainful employment. The Respondent was left residing in Nairobi and parties would visit each other. In 1989 they got the first child of the marriage with the second one coming on 7/2/1994. The parties both profess the Christian faith. The Petitioner prays for the dissolution of the marriage on grounds of cruelty and adultery. She says that he failed to support and maintain the petitioner as well as the issues of the marriage, he is an habitual drunkard who is verbally abusive with violent tendancies which have caused the petitioner extreme emotional distress fear and anguish. On adultery she said that the respondent cohabited with one F. M between 2000 and 2005 and the petitioner did not condone or connive at it and did not collude with him. She prayed for custody of the issues of the marriage and for the dissolution of the marriage. She also prayed for the costs of the petition.

The Respondent was served but failed to enter appearance or file an Answer to Petition or even a Cross – Petition.

The petitioner gave evidence to support her allegations in her petition and produced the marriage certificate. She stated that the marriage has irretrievably broken down.

I have given due consideration to the Petition and the availed evidence which evidence was not controverted. There was no (physical violence) cruelty proved in this case. However cruelty is not merely and solely physical. Cruelty as a matrimonial offence was defined in the English case of **RUSSEL V. RUSSEL (1895)73 LT 295 CA** as

***“wilful and unjustifiable conduct of such character as to cause danger to life, limp or health, bodily or mental or as to give rise to a reasonable apprehension of such danger.”***

See also the Kenyan case of **MEME Vs. MEME (1975)(KLR 13**

The court was not shown prove of adultery between the Respondent and the said F.M, but the respondent did not attend court to disprove the allegation that the two cohabited between the years 2000 and 2005. I accept that, in the absence of the contrary, the two so cohabited and that is an event leading the court to infer that they committed adultery. Adultery need not be strictly proved beyond reasonable doubt as though it were a criminal offence – see

**PRACTICE AND LAW OF DIVORCE, 10<sup>TH</sup> EDITION** page 176 at paragraph 176 where Judge Rayden remarked;-

***“But it has been held that a suit for divorce is a civil suit not a criminal proceeding and the analogies and precedents of criminal law have no authority in the divorce court, which is a civil tribunal. It is wrong therefore to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned adultery, like any other grounds for divorce, may be proved by preponderance of probability.”***

Guided by the above therefore I find that adultery is proved in this case.

Having been satisfied as I am, that two matrimonial offences have been proved, and considering the petitioner's evidence in its totality, I find that a decree for divorce must be granted and I hereby pronounce one. This marriage has irretrievably broken down. The petitioner shall have the custody of the issues of the marriage. A decree nisi shall immediately issue, and be made absolute at the expiry of three months thereafter. Each party shall bear its own costs.

It is accordingly ordered.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF DECEMBER 2010.**

**P.M. MWILU  
JUDGE**

**In the presence of;**

Advocate for Petitioner

Absence of Respondent

Court Clerk

**P.M. MWILU  
JUDGE**