



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Divorce Cause 44 of 2008**

S A A M S ..... PETITIONER

VERSUS

A A M S ..... RESPONDENT

**JUDGMENT**

The parties herein were married on 24<sup>th</sup> October, 2000 under the provisions of the Marriage Act. They cohabited till 2006 at a premises along Westlands, Nairobi and have two children of marriage namely **SS** born on 22<sup>nd</sup> October, 2000 and **AS** born on 4<sup>th</sup> November, 2001. However, this court was not invited to determine the issue of their custody and/or maintenance as the said issues are pending for determination before the Children's Court Nairobi.

The Petitioner/wife testified before the court and added that after the marriage solemnized under the Marriage Act, she was asked to undergo a marriage ceremony under the Islamic law. However, I do note that the Islamic marriages are polygamous marriages and thus, in my view, the second marriage ceremony, is not valid after the couple had earlier solemnized their union under the Marriage Act (cap 252) which is a monogamous marriage. The same parties cannot undergo a second marriage, which is a different system of marriage and specifically a polygamous marriage system. I have the support from the case of **Ayoob –vs- Ayoob (1968) E.A. 72** wherein spry J. held that in Kenya there is no provision to convert a civil marriage into a customary marriage one (page 79).

In holding no. iv it was held, namely:

(Per Spray J.A) ***“A ceremony purporting to be a marriage, according to Islamic or customary law following a Christian or civil marriage between the same parties is not a marriage and cannot as such replace the actual marriage”.***

It was further observed that (on page 78) where there are two ceremonies of marriage, then the second ceremony was of no effect.

Thus the marriage of the parties under the Marriage Act can only be dissolved as per the provisions of the Matrimonial Causes Act (Cap.250).

The parties are residents and citizens of Kenya and thus this court has jurisdiction to determine this case.

The Petitioner testified that the Respondent has been cruel to her and which included his desertion of the family. She specified that the Respondent was physically and verbally abusive. The Respondent has threatened her severally of harming her and always physically abused her when under the influence of alcohol. She recalled a very serious incident on 30<sup>th</sup> January, 2006. He was drunk when he arrived home and after assaulting her physically he stripped her in front of their children. Thereafter he threw her and the children out of the house during the same night. She has heard from him the last since that day. He did not ask her to come back. She said that on the said night she sustained serious injuries on her back, chest and ribs.

She further testified that the Respondent was not caring or responsible either to the Petitioner or to the children.

She added in support of her allegations as regards acts of adultery committed by the Respondent, that he has committed adultery during subsistence of the marriage with one lady called Z who is now living with the Respondent. However, in my considered view, she has failed to prove this allegation as per the required standards of proof in the matrimonial proceeding. It is write law that the standard of proof in these proceedings is higher than balance of probability but not strictly beyond reasonable doubt, the same being of quasi criminal nature.

She emphatically denied that she has condoned the acts of cruelty and adultery committed by the Respondent. She also denied that she has either presented and or prosecuted this petition in collusion with the Respondent

From the evidence led before the court, which is not challenged, it is satisfactorily proved that the Respondent has consistently abused the Petitioner physically as well as orally. The act of him physically violating her by causing serious bodily harm; stripping her shamelessly in front of the children; throwing her and the children out of the matrimonial home in the night and thereafter not bothering to look after them and totally neglecting them, are clearly acts of cruelty which any spouse is not expected to suffer from the other spouse.

In the premises aforesaid, I do find that the Respondent has been guilty of cruelty against the Petitioner and the Petitioner is rightfully before the court to seek the dissolution of her marriage with the Respondent.

I thus grant the prayer and order that the marriage in fact solemnized between the Petitioner and the Respondent on 24<sup>th</sup> October, 2004 be dissolved and the decree nisi be made absolute within 60 days from the date hereof.

I further order that the Respondent shall pay the costs of the Petitioner.

Orders accordingly.

Dated and signed at Nairobi this 22<sup>nd</sup> day of January, 2009.

**K.H. RAWAL**

**JUDGE**

**22.1.09**