



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

**Divorce Cause 116 of 2008**

**M.S.R.....PETITIONER**

**VERSUS**

**M.K. N.....RESPONDENT**

**JUDGMENT**

The petition was duly certified as an undefended cause by the learned Deputy Registrar on 19<sup>th</sup> February 2009.

The petitioner thus testified before the court. In short her evidence is as under.

The Petitioner got married to the Respondent on 9<sup>th</sup> July, 2002. They have two issues, of the marriage i.e.

- (1) N.K born on 8h January 2000
- (2) M.K born on 12<sup>th</sup> December 2002

Looking at their dates of birth, it is apparent that they cohabited before the solemnization of the marriage. She produced marriage certificate and birth certificates of the children of the marriage.

Both of them are residents of Kenya and do work for gain. She both parties had their own child before the marriage. She confirmed that there is no previous proceedings before any court in respect of their marriage.

She claims dissolution of the marriage on the grounds of cruelty and adultery on the part of the Respondent.

In respect of the claim of cruelty, she stated that in the month of October 2006, the Respondent physically assaulted her when she asked him about his extra-marital relation with a lady called G. The kids also heard the commotion and even if they came to the room, the Respondent continued beating her. She went to Aga Khan Hospital next day for treatment and also reported the assault to the police. She produced medical report which confirms that she had swelling of the occipital region with small hematoma on the area. The P3 form also confirms the said injury.

According to her, the aforesaid incident was the third in the series of physical violence.

As regards her claims of acts of adultery by the Respondent, she stated that he had extra-marital relation with their housemaid. When the maid was confronted by her, she conceded and earlier the Respondent

was confronted, he just denied but thereafter agreed to go for counseling after conceding. The last incident of physical violence in December 2006 occurred when she confronted him with his illicit relation with one lady called G.

The last stroke on the camel's back was in 2008. Between 25<sup>th</sup> May, 2008 and 10<sup>th</sup> June 2008, the Respondent stayed with an underage girl called J.N. The Respondent took her away from Secondary School at J, under the pretext that the girl was required home because her mother was unwell. He kept the girl at a lodge. On 10<sup>th</sup> June, 2008, J's father discovered them and after an arbitration before the elders he conceded that he had committed adultery and agreed to pay her father shs.200,000/= as compensation. This agreement was aired by [.....] FM Radio on 24<sup>th</sup> July, 2008. The Petitioner went at the Radio Station and was shown the agreement signed by the Respondent. She averred that the girl's father who is a friend of the Respondent, telephoned her and narrated the story informing that the Respondent stayed with his minor daughter at a lodge for 10 days. The Respondent was not ready to give up the relation. The girl went underground and eventually was found in Kahawa after two months because of continuous announcement on the said Radio station on 7<sup>th</sup> every Thursday. She lived in a house rented for her by the Respondent.

The petitioner thereafter filed this petition. She denied that she has condoned the cruelty and did not have any marital relation with the Respondent after those incidents, she refused to be an accessory to those acts of adultery.

The Respondent has refused to support the children of marriage or pay for their school fees, by telling her that he had no money.

She also denied that she has colluded with the Respondent in presenting or prosecuting the petition.

With these facts before the court, she prayed for dissolution of the marriage with costs.

The learned counsel for the Petitioner submitted that the Petitioner has proved that the Respondent was cruel to her and that he has committed several acts of adultery. She relied on authorities like *Meme –vs- Meme* (1975) KLR 13, HC DC No. 14 of 2007 (Mombasa), and *Wangari Mathai –vs- Mwangi Mathai* (1976-80) 1 KLR page 1689.

It is trite law that the matrimonial causes carry stricter standard of proof. It is not as stringent as beyond reasonable doubt but require stronger proof than balance of probability. The standard can be described as almost certainty!!

What is cruelty has been well established over the years but in *Meme –vs- Meme* Case (*supra*), it is succinctly observed. It is stated that to establish cruelty, the claimant must show to the satisfaction of the court, namely:-

- (i) Misconduct of 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 a misconduct on the part of the Respondent, and
- (iv) On the whole from the evidence, the conduct amounted to cruelty in the ordinary sense of the word.

In her uncontroverted evidence, she has narrated and shown to the satisfaction of the court that the Respondent used physical force and assaulted the Petitioner resulting in real injury to her. According to her, it was not an isolated act. In my view, from the circumstances under which the Respondent used physical violence, even an isolated incident would suffice to establish that the Respondent is cruel to her. The physical violence is not, as simply put, a common wear and tear of the marital life. It is also shown

that the couple were undergoing counseling which confirms the gravity of effect on the Petitioner. Moreover, several extra-marital relations averred by her (which are not denied) show the mental anguish and embarrassment suffered by the Petitioner. The Petitioner did testify that she has not condoned those acts of cruelty.

In the premises, I do hold that the Respondent has treated the Petitioner with cruelty during the marriage.

Coming to the allegation of adultery by the Respondent, it must be noted that it is not easy to establish the acts of adultery as usually it is not possible to adduce direct evidence. It is also a very serious matrimonial offence. It is thus a trite law that the circumstantial evidence in proof thereof must be carefully and cautiously considered. The court is obligated to feel sure of the guilt of the respondent and if it is so satisfied, then the offence of adultery is proved.

As regards her averments of adultery with one lady called G, this court has no evidence, even circumstantial, that the offence took place. Similar is the case, with her evidence as regards his adulterous relation with the housemaid, though it is much stronger than the first alleged act of adultery.

However, considering her evidence as regards his shameless act of illicit relation with a minor girl J.N who is also a daughter of his friend the petitioner has satisfactorily proved the adultery. This incident is no more a secret within four walls of the house, but is declared publicly by airing the incident in a local radio station. I do tend to believe the evidence of the Petitioner which has remained uncontroverted. Unfortunately, the issue has been, once again, hushed up by the elder's award of compensation which is nothing but a trade of the minor by the father in my view. But this is not the forum to make any further comment over this tragic incident.

Her evidence is further strengthened by her testimony that the Respondent still stays with the girl at a house in Kahawa.

This court does not need any further evidence to get support in its findings, which I do hereby make, that the Respondent is guilty of committing acts of adultery with the said J.N. As she is a minor person, obviously she could not be made a party to this petition.

In the premises, I also find that the Respondent has been and is guilty of adultery during the subsistence of marriage.

With the aforesaid findings, I direct that decree nisi for dissolution of the marriage solemnized between the parties be issued. The decree nisi be made absolute within 60 days from the date hereof. The Respondent to bear the costs.

I am not at this point making any orders on custody and maintenance of the two children as the Petitioner intends to file proceedings before the children's court.

Orders accordingly.

Dated, signed and delivered at Nairobi this 28<sup>th</sup> October, 2009

**K. H. RAWAL**

**JUDGE**

**28.10.09**