



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Divorce Cause 67 of 2005**

**K.S.R ..... PETITIONER**

**VERSUS**

**G.K.R .....RESPONDENT**

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**JUDGMENT**

On the 24<sup>th</sup> January 1988 **K.S.R** (the Petitioner), then a bachelor, married **G.K**, (the Respondent), then a spinster, at a marriage ceremony held in New Delhi, India. They thereafter came to Kenya and lived and cohabited at Ukunda. There are two issues of the marriage, namely, **A.R** and **A.S.R** sons born on 20<sup>th</sup> November 1989 and 13<sup>th</sup> March 1992 respectively.

The Petitioner states in his petition that, except for a short period of their marriage, the Respondent has treated him with cruelty. He claims that during the time the Respondent resided with him in Kenya before she moved to England to provide a home and stay with their children to enable them go to school there, the Respondent did not show any love or affection for the Petitioner or any enthusiasm in building physical or emotional ties with the Petitioner. On the contrary she was critical of the Petitioner even over minor issues and embarrassed and humiliated him by shouting and hurling insults and abuses at him at home in the presence of their children and at his clinic in the presence of his staff and patients.

During her stay in Kenya, despite living under the same roof with the Petitioner, for several years, the Respondent isolated herself and led an independent life. Although staying at home and without being engaged in any business or employment the Respondent would not even as much as bother to warm food for the Petitioner whenever he came home late from his clinic. Instead she would go on watching television and have no regard for him.

The Petitioner also complains that at times the Respondent would go out for dinners with her friends including male friends without informing him and stay out till late at night thereby causing him anxiety and worries about her safety.

In her cruel behaviour, the Petitioner further claims, the Respondent has not spared their children either. She has especially mistreated their elder son **A.R** whom she accuse of gossiping against her. On several occasions, one being about a year ago, the Respondent has physically assaulted **Angad**.

All this, the Petitioner says, has caused him great mental anguish, distress and depression thereby affecting his health. He has therefore been left with no option but to petition for divorce on the ground of cruelty.

Upon being served with the petition the Respondent filed an Answer to Petition and cross-petitioned for divorce on the grounds of cruelty, adultery and desertion. On cruelty the Respondent claims that the Petitioner is high handed, cruel, abusive and of immoral and illegal behaviour. Despite the Petitioner forcing her to do odd jobs in the family business like cooking for patients at their hospital and attending to the flower beds and gardening, going to fetch food, medicines and stationery for their hospital as well as taking patients to town for X-rays the Petitioner did not allow her to open a joint bank account with him.

As a consequence the Respondent used all her salary when she was teaching on household expenses as the Petitioner did not provide for the family. She also complains that the Petitioner is of very cruel behaviour and has subjected her to mental torture, abuses and physical violence. During one of their fights he dislodged one of her right hand fingers. She added that on many occasions the Petitioner left her in the car without food when he attended the Rotary Club luncheons – instead of dropping her home where she would have something to bite.

In 2006 the Petitioner was supposed to go to England to visit the Respondent and the children but he failed to go and never provided funds for their travel to Kenya. Since then the Petitioner has deserted the matrimonial bedroom and is instead using the children's.

The Respondent also accused the Petitioner of adultery. She claimed in her cross-petition that on diverse dates between 2006 and 2007 the Petitioner acted in an immoral manner by openly committing adultery at Ukunda and since that is a small place everybody got to know about it thereby making the Respondent a laughing stock. She also claimed that the Petitioner is a person of loose talk and often derided their sexual life to his patients.

In the circumstances, the Respondent concluded, her marriage to the Petitioner has irretrievably and irreparably broken down and the same should be dissolved on the basis of her cross-petition.

In a lengthy reply to answer and answer to the cross-petition the Petitioner denied the allegations of being high handed, cruel, abusive, or of immoral and illegal behaviour as being totally false.

On the allegation that he has failed to provide for his family the Petitioner stated that he has not only provided for the family decent housing both in Kenya and in England but has also provided all that his family requires including luxuries of holidays in Kenya and Overseas. He said he has always ensured that there is enough money in the Respondent's bank account to take care of the children's school fees and household expenses. In this connection he claimed that it is the Respondent who has mismanaged their joint bank account in England resulting in their being black balled by the bank.

While she was in Kenya the Respondent had a joint bank account with the Petitioner which ran their Pharmacy business. It is only after she mismanaged it that the Petitioner was forced to revoke her authority to operate it. Besides providing for her, the Petitioner claims that the Respondent is highly profligate and used to routinely pledge his credit for her personal expenses including expensive jewellery.

As regards the accusations of cruelty levelled against him by the Respondent the Petitioner denied them and said he has never raised a finger against her. He said that contrary to the allegations that he scandalised the Respondent the Petitioner stated that it is the Respondent who has gone round Diani bad mouthing him.

The Petitioner admitted having moved out of the matrimonial bedroom but said he was compelled to do so as a result of the Respondent's conduct, behaviour and attitude. He concluded that between 2003 and 2006, for the sake of their children, he visited the Respondent and the children in England 5 to 6 times despite being made to feel unwelcome.

At the hearing the parties testified and neither called any witnesses. They basically amplified the averments in their respective pleadings and denied each other's counter-allegations.

I have carefully considered the evidence on record alongside both the parties' pleadings. I wish to start

with the Respondent's charge of adultery against the Petitioner. Adultery is a serious matrimonial offence. Where it is alleged it must be proved clearly. Like any other matrimonial offence Section 10 of the Matrimonial Causes Act (Cap 152) requires the same to be proved to the satisfaction of the court before a decree of divorce is pronounced. Proof to the satisfaction of the court was held by the Court of Appeal in **Mathai –Vs- Mathai [1980] KLR 154** to be proof beyond reasonable doubt or proof that will satisfy the court **“so as to feel sure, that the guilt has been proved.”**

The Court of Appeal further held that though **“it is not common to have eye witnesses in cases of adultery”** the same should **“nevertheless be proved”** beyond reasonable doubt **“by circumstantial evidence.”** The circumstantial evidence may be by way of an inference to be drawn from the surrounding circumstances such as confessions and admissions, improper behaviour, undue familiarity or suspicious circumstances. Mere suspicion or opportunity to commit adultery is not enough. In **Meme –Vs- Meme [1976] KLR 13** Chesoni J (as he then was) stated that:-

**“To prove adultery evidence of a guilty inclination or passion is needed in addition to opportunity to commit it.”**

In this case the Respondent alleges in her cross-petition that on diverse dates in 2006 and 2007 the Petitioner openly committed adultery with women of loose morals some of whom she knows. In her testimony she only gave the name of the wife of one of the Petitioner's employees. She also alleged that the Petitioner used to take that lady to town for shopping and referred me to an amorous valentine card she found in their house, which she claimed must have been sent to the Petitioner by that lady. In cross-examination she admitted that that lady stayed with the Petitioner with the consent and or knowledge of her husband when there was a problem in her house.

The Petitioner denied knowledge of that card and there is no proof that it was indeed sent to him or by that lady. He also denied the allegations of adultery. That leaves us with evidence of mere suspicion on the basis of opportunity to commit adultery. As I have said that is not enough. See also **Beer –Vs- Beer [1948] P10, 13**. I do not think that the husband of that lady would have left her and their child in the Petitioner's house if the lady had an affair with the Petitioner. I must therefore dismiss the Respondent's charge of adultery.

That brings me to the charge of cruelty alleged by both parties. For cruelty to be established the conduct complained of must be sufficiently grave and weighty to warrant the description of being cruel and it must have caused injury to health of the Petitioner or reasonable apprehension to such injury. In the words of the late Justice Chesoni in **Meme –Vs- Meme (supra)**

**“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 or mental, or as to give rise to a reasonable apprehension of such danger (see Russell –Vs- Rusell [1895] P 315, 322 and Horton –Vs- Horton [1940] P187.**

In **Mulhouse –Vs- Mulhouse [1966] P 39**, quoted with approval in **Meme –Vs- Meme (Supra)**, Sir Jocelyn Simon P said at Pages 49 and 50:-

**“Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt; Bater V Bater [1951] P 35. That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point which threatens the health of the other spouse, the law will not hesitate to give relief. Secondly, it must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health**

**or a reasonable apprehension of it. Thirdly, it must be proved that it is the misconduct of the Respondent which has caused injury to [the] health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought the trouble on himself or herself, the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of that term.”**

As was stated by Willmer C. J. in **Windeatt –Vs- Windeatt (No. 2) [1963] P 25, 36** the conduct complained of must be looked at as a whole, and it must be looked at in the light of the sort of people the parties are. It must be judged what was the impact of the conduct complained of, viewed as a whole, on the personality of the complaining party. If it has indeed caused him serious stress that is an injury to health hence it is cruelty.

With this legal position in mind, I now want to examine the evidence given by the parties and see who has proved the charge of cruelty.

In his testimony the Petitioner stated that between them there has been no marriage at all right from inception. He complained that he in most cases went to bed leaving the Respondent watching television, and always begged for sexual intercourse with her and whenever she consented the intercourses were always mechanical. The Respondent never showed any love or affection for the Petitioner or any enthusiasm in building any physical or emotional ties with him. That always left the Petitioner humiliated and frustrated.

On disagreements on even minor issues the Respondent incessantly quarrelled and hurled insults and abuses at him even in the presence of their children and at times even in the presence of the Petitioner’s patients. He said one time he had a problem with the incinerator and their hospital was closed. While in tears with other hospital staff, the Respondent instead of being sympathetic remarked that the Petitioner deserved that. That broke the Petitioner’s heart.

The Petitioner further testified that the Respondent’s mistreatment of their elder son A.R because he talks with the Petitioner has also caused the Petitioner a lot of stress causing him to take anti-depressants. He denied failing to provide for the family or in any way mistreating the Respondent or threatening to kill her.

On her part the Respondent denied the Petitioner’s allegations of cruelty. She said if anything it is the Petitioner who has been very cruel to her and went ahead to enumerate instances of his cruelty to her. They include forcing her to do odd jobs at the hospital like cooking for patients, attending to flower beds, taking patients to town for X-rays, taking vehicles to garages and waiting for them until they are fully repaired; assaulting and dislocating her right hand ringer finger in 2002; threatening to kill her and scandalizing her to his patients.

She also complained that the Petitioner failed to provide for her and their children. She said he only took them out to the National Parks and other places whenever his relatives were around. She wondered how they would have had two children and she suffered three miscarriages if they never used to have regular sexual relations.

As already stated the parties did not call any witnesses. So what we have here is the Petitioner’s word against that of the Respondent on the allegations and counter allegations against each other. Having observed their demeanour I am satisfied that the Petitioner told me the truth. He impressed me as a straight forward man. Save for cruelty he did not allege anything else against the Respondent.

The Respondent on the other hand did not impress me as a truthful witness. Claiming for instance that the Petitioner forced her to cook for patients, attend to flower beds, take patients to town for X-rays or take their vehicles to the garages cannot be true. These are chores one would expect a couple starting a business to gladly perform. Even rich people with many workers sometimes take care of their flowers as a pastime. I am satisfied that the Respondent performed those chores out of her own volition as her

contribution to the family business out of which she has at the end of the day been paid Sh. 92 million.

The Respondent also complained that while in Mombasa the Petitioner refused to give her any money for the family expenses forcing her to spend her meagre salary on the family. That also cannot be true. The parties have been married for now close to 20 years. The Respondent admittedly worked for only six months. How then have they been managing without assistance from the Petitioner?

I am satisfied that the Petitioner, who has gone as far as purchasing a house and settling his family in England so that their children can get the best education, is a responsible person who took good care of his family. He did not only provide the basic necessities but also luxuries like trips to National Parks and to countries like Singapore.

All this aside has the Respondent been cruel to the Petitioner? I think she has. The Petitioner testified that while they stayed together he had most of the time to beg the Respondent to have sexual intercourse with him. He also said that she was always cold and never showed any love or affection for him. The Respondent did not specifically deny those allegations. I cannot imagine anything more frustrating than a denial or restriction of one's conjugal rights. That no doubt distressed the Petitioner. I find and hold that that was a most cruel treatment.

I agree with the Respondent that the Petitioner may also have treated her in a cruel manner like when she came to Kenya in December 2005 and he refused to go to the matrimonial bedroom. But that is all as a result of her own cruel behaviour. In any case the Petitioner had at that time already filed this cause.

The Respondents claim of desertion based on that incident and the Petitioner's failure to visit her in England cannot therefore stand. As a whole I find that the Petitioner has proved the charge of cruelty against the Respondent.

The parties have for all intents and purposes been leading separate lives since 2004. They both agree that their marriage has irretrievably and irreparably broken down. Previous attempts to reconcile them have all failed. In the circumstances, I find that there is nothing left of their marriage to warrant keeping it alive and I accordingly grant the Petitioner's plea for divorce and dismiss the Respondent's cross-petition.

A decree nisi shall forthwith issue to be made absolute after the statutory period. It is gratifying to note that the parties have by consent settled the financial aspect of their lives and arranged for the education and welfare of their children until they are on their own feet. The Respondent shall therefore, as agreed, have the custody of the younger son until he is of majority age. The Petitioner shall have the right of access to call and even visit the son or have him come to Kenya to visit him during the school vacations.

Each party shall bear its own costs.

**DATED** and delivered this 11<sup>th</sup> day of January 2008.

**D.K. MARAGA**

JUDGE