



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Divorce Case 8 of 2004**

**IN THE MATTER OF: MARRIAGE ACT AND DIVORCE ACT (CAP 150 LAWS OF KENYA)**

**A N D**

**IN THE MATTER OF: MATRIMONIAL CAUSE ACT (CAP 152 LAWS OF KENYA)**

**D. M. M. .... PETITIONER**

**- Versus -**

**J. N. M. .... RESPONDENT**

**Coram: Before Hon. Justice L. Njagi**

**Court clerk - Ibrahim**

**Mr. Mulwa for Petitioner**

**Mrs. Deche for Respondent**

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

This divorce petition is dated 20<sup>th</sup> February, 2004, and was filed in court on the same day. The petitioner, D.M.M, accuses the respondent, J.N.M of persistent cruelty to the petitioner.

The particulars of the cruelty are that the respondent infected the petitioner with a venereal disease; that on diverse dates she was quarrelsome to the petitioner and threatened to become violent; and that on numerous occasions she was abusive to the petitioner in front of his friends and relatives. The petitioner further alleges that on diverse occasions since 1995, the respondent left the matrimonial home and went to spend the school holidays alone, thereby abandoning the petitioner. He also alleges that between 1995 and 2003, she obtained loans without informing him and spent it on a frolic of her own without consideration to the matrimonial home; and that during the same period, she became home late at night on diverse dates and became violent when asked by the petitioner. On account of the above matters, the petitioner contends that the marriage between him and the respondent has irretrievably broken, and therefore prays that the same be dissolved, and the respondent do pay the costs of the petition.

By an amended answer to the petition and cross petition dated 30<sup>th</sup> May and filed in court on 6<sup>th</sup> June, 2005, the respondent denies that she was cruel to the petitioner as alleged or at all. On the contrary, she

counter accuses the petitioner of cruelty, failure to maintain her, and also charges that the marriage between the parties has irretrievably broken down. She therefore prays that the petitioner's petition be dismissed with costs, that the cross petition be allowed, and the marriage between her and the petitioner be dissolved. She also prays that the petitioner do pay alimony to the respondent, and that the costs of the petition and cross petition be borne by the petitioner.

During the hearing of the matter, only the petitioner gave oral evidence. His sworn testimony was that the parties married at the Registrar's office Mombasa, on 23<sup>rd</sup> November, 1995. They were neither blessed with children, nor did the respondent have children of her own. The petitioner sought a dissolution of the marriage on grounds of cruelty. The particulars of cruelty were that between 1997 and 1999, and finally in 2003, the respondent used to go out of the matrimonial home during the school vacations without the courtesy of explaining to the petitioner where she was going. Instead, she used to say that it was her right to go wherever she liked, and that the petitioner should not control her life, especially because her employer had granted her leave to go where she pleased. Even though the petitioner understood that she used to go to her parent's home, it was disrespectful of her not to explain it to him.

Secondly, the respondent started spreading rumours to the petitioner's friends and relatives that the petitioner was unable to make her pregnant. This led to the respondent's father sending a telegram to the petitioner dated 20<sup>th</sup> May, 1998, advising the petitioner to go and consult a gynaecologist. The petitioner produced a copy of that telegram as his exhibit 2. as for the petitioner, every time he asked for sex, the respondent would deny him the same. The respondent also accused the petitioner of having paid peanuts for dowry as a result of which he paid her Kshs. 10,000/= as part of dowry with the knowledge, approval and concurrence of her father. She further accused him of using witchcraft to bring her back to the matrimonial home every time she went away.

It was further the petitioner's evidence that the respondent used to borrow money from the Teachers Service Commission, who were her employers, and spend it secretly. He could not comprehend why she was taking the loans that he was providing fully for her. The respondent also used to come home late, around 7 p.m. and if asked why she came late, she would get violent instead of offering an explanation. The petitioner denied chasing the respondent away, beating her or quarrelling her, or failing to give her financial support. He said that he was very supportive, and kept on maintaining her and even paying her hospital bills. He admitted, however, that sometimes he used to come late because he was a technician and sometimes he was on call 24 hours a day. Even, he always told the respondent whenever he was going to be late and sometimes she would disconnect the calls.

Finally, the petitioner said that the parties ceased cohabiting in 2003, and an attempt at reconciliation did not bear any fruits. At one point, the respondent threatened to burn the marriage certificate which she said was the only thing holding her to that house. She also threatened to set the matrimonial home on fire. For these reasons, the petitioner said that the marriage had irretrievably broken down, and asked for its nullification.

In cross examination, he said that the parties used to have arguments as to whether the respondent should go to her parents' home during the holidays. He felt that as the head of the family, he should be the one to decide how the couple would go about the holidays, especially where they would go. Instead of discussing, they would quarrel about it. He also admitted that the Respondent did not conceal that she was going to become a member of a co-operative society, and he recalled that she took only one loan. Lack of children was a problem in the marriage, leading to consultations with three different doctors. The petitioner denied, however, that he got rid of the respondent because she could not give him a child. According to him, the respondent said she was leaving because the petitioner could not give her children; that he was poor; and that she was fed up with the marriage. Since the respondent left the matrimonial home, the petitioner has neither bothered to know where she lives, nor did he seek any reconciliation. He said he was fed up. However, he insisted that he did not chase away the respondent because she did not give him children.

Upon re-examination, the petitioner said that the respondent left alleging that she was being taken to

hospitals as a cover because the petitioner was the one who could not father children. She also said that she was tired of the marriage. She had already thrown away the wedding ring. She had also threatened to burn the certificate of marriage but had not accessed it. He therefore asked for the marriage to be dissolved as the parties could not reconcile.

The petitioner did not call any witnesses. The respondent herself did not offer any evidence, nor did she call any witness. We are therefore left with the testimony of the petitioner alone. On the basis of that testimony, the issues to determine are whether the petitioner has proved cruelty, or that the marriage has irretrievably broken down. The first of the pleaded particulars of cruelty was that the respondent had infected the petitioner with a venereal disease, but no evidence was adduced in support of that allegation. If this allegation had been proved, it would have suggested that the respondent had committed adultery, which was not even pleaded. I therefore find that nothing turns on the alleged infection.

The other particulars of cruelty are that on several occasions, the respondent was very quarrelsome to the petitioner and threatened to become violent. It is also the petitioner's case that on numerous occasions, the respondent has been abusive to the petitioner in front of his friends and relatives. Even in the absence of third parties, hurling abuse or insults at a spouse is conduct unbecoming in a marriage. It hurts. It is cruel. It is especially painful for a husband in a childless marriage to be told, every time he asks for sex, that he is wasting the wife's night. Such language is foul and cruel to the extreme, and the petitioner cannot reasonably be expected to live with the respondent when she behaves in such a manner.

I don't think that the borrowing of money by the respondent constitutes cruelty as alleged or at all. She could only have borrowed, most probably, because she was not adequately provided for. At any rate, she borrowed and repaid her debts. Nothing turns on that allegation either.

Finally, although it has not been articulated, I think that lack of children has been the root cause of the disharmony in this marriage. Under cross-examination by Mrs. Deche, the petitioner said, "lack of children was a problem in our marriage." With patience and goodwill, only the couple can sort out that one between themselves. But they seem to have run out of that patience. The respondent left the matrimonial home on 15<sup>th</sup> August, 2003, which is exactly 4<sup>1/2</sup> years today. Since then, the parties have been living their separate ways. In further cross-examination by Mrs. Deche, the petitioner said –

"I have never bothered to know where she lives. I did not seek any reconciliation. I was fed up."

And in re-examination by his advocate, Mr. Mulwa, the petitioner said –

"We cannot reconcile now."

It is significant that he used the word "we". It is equally significant that earlier on, the petitioner had said in cross examination that the respondent said she was leaving because she was, inter alia, "fed up with the marriage." Even though these words did not fall out of the respondent's lips, they find adequate corroboration from her cross petition in which she claims that as a result of the petitioner's conduct, the marriage has irretrievably broken down and prays that the same be dissolved. The petitioner seeks similar orders on similar grounds.

On the basis of the evidence before the court, I find that the petitioner has established mental cruelty against the respondent, and also that this marriage has irretrievably broken down. Bearing in mind that the respondent's prayer for alimony was withdrawn, I accordingly make the following orders –

1. The marriage solemnized between the petitioner and the respondent herein at the Registrar's Office, Mombasa, on 23<sup>rd</sup> November, 1995, be and is hereby dissolved.
2. Decree nisi to issue.
3. Decree nisi to be made absolute after three months upon application therefore.

4. The respondent's cross petition is hereby dismissed.
5. Each party to bear its own costs of the petition and the cross petition.

Dated and delivered at Mombasa this ...19<sup>th</sup>.. day of ...March...2008.

L. NJAGI

JUDGE