



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Divorce Cause 82 OF 2006**

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

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

**P.M.....PETITIONER**

**VERSUS**

**E.N.M.....RESPONDENT**

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

The parties commenced living together in the year 1993 and formalized their marriage on 17<sup>th</sup> April, 1996. They cohabited in Nairobi.

This Petition was filed by the husband on 19<sup>th</sup> June, 2006 and on service thereof the Respondent filed out of time her appearance and answer and cross-petition which were admitted to have been duly filed by a consent order on 16<sup>th</sup> February 2007.

There are two issues of this marriage – namely

(1) *S.M born on 19<sup>th</sup> July, 1994*

(2) *S.S.M born on 1<sup>st</sup> May 2002*

The issues of custody of these children and maintenances were agreed to be heard by way at separate applications after the determination of this cause.

Apart from these two children of the marriage, the Respondent had two children from former relation named H.N and A.N. They lived with the parties since they were 4 and 3 years of age. They went to bring their children from her mother.

The Petitioner prays for dissolution of the said marriage on the grounds of cruelty on the part of the Respondent.

In short the Petitioner testified that the Respondent used to come home late at night drunk and would pick up quarrels with him and abuse him in front of the children in the house. She used to tell her own two children that the Petitioner was not their father and would beat their son by abusing that he was like his father. She would leave the children unattended at night when he looked after them after coming home.

One day when he came home from work at night, he was locked out. On knocking several times a man came out and told the Petitioner that he was disturbing them. He had to spend a night at Lodging Home. On 8<sup>th</sup> April 2004 the Respondent called him to collect his belongings and leave the house. When he went home he found some of his belongings were thrown out.

He recalled the incident culminating to the said event of his belongings being found outside. On the said day he had arranged to go home (upcountry) but due to failure to arrange for transport, he was going home. On the way he had to release himself and went inside a pub and on his way out he found the Respondent, her sister and a man drinking on a table. He at their invitation joined them and went home around 10.00 p.m. On reaching their bed-room, he started changing and the Respondent started quarreling by accusing that he was following her like a dog and that she could also kill him. She lifted a stool to strike him. He tried to defend and managed to put the stool down the Respondent being drunk stumbled and hurt her leg. She started shouting and calling her boys. The boys broke the windows as the bed-room was locked. This fact is also testified by the Respondent when she said on arrival at the home she went first to the bedroom and locked it and the Petitioner went to watch T.V. with the children and maid. It is also on record that the bedroom and living room are very near. The Petitioner knocked and she opened for him. Thus the bedroom was locked at her behest and the Petitioner also testified that he was changing. The maid (DW2) also stated that he was without a shirt when she entered the room. The boys then also broke open the door and assaulted him. He was pushed and dragged outside the home and then outside the gate which they locked. The Respondent complained to the police and he was charged with offence of causing grievances harm which charge was later withdrawn by the Respondent.

Before this event he had moved out of the matrimonial home twice and at the intervention of her elder brother they would come back to live together, but the situation did not improve despite her promises. The Petitioner works at [PARTICULARS WITHHELD] and he had to work late for stock taking.

He also testified that she had denied him conjugal rights and any co-operation as a wife. He gave her money to raise mortgage by paying Shs.42,000/= and then she put the house on her name. She also had very hostile relationship with his family members.

He denied averments made in her cross-petition and explained the accusations of his neglect during the birth of their last born. It is admitted by the Respondent also that he was working at Mombasa and that he was with her during her admission to the hospital. He said that after her operation he left to go to Mombasa to take leave from his employers. He also testified that she changed her transfer to Mombasa to Kisumu to be near her boyfriend. The Respondent however said that it was to be near the children. I was not told by her, however, that which school they were going to or whether the same was changed after her transfer. I say so because it is the evidence of the Petitioner that he did not know where the children are. His evidence that after their last separation in the year 2004 he had tried to see the children and the same is corroborated by their maid DW2.

Before I state the evidence led by the Respondent I would consider her evidence as regards the night when she was injured and sustained a fracture on her leg. According to her 8<sup>th</sup> April, 2004 was the day before Easter Friday and the Petitioner called her to wait for him so that they could go home together and she told him that she would wait at a Bar named by her. She and her sister waited and later were joined by her workmate. The Petitioner came very drunk and behaved badly by asking from her a charity of Shs.2,000/= so that he could entertain. They went home and as I had stated earlier, she went first inside the bedroom and locked it as she was changing. He knocked and she opened. He asked her about the transfer and then when she said about her requests not to send her to Mombasa, he asked her why she could not go to Mombasa. Before she could explain he punched her on the forehead and she fell down. When she stood up he punched her again. She tried to run out and he kicked her leg and she fell down.

He threw the key under the bed and continued beating her. She started screaming and then her sons came in breaking windows and door. The house girl pulled her out and the boys brought the Petitioner outside the house. There also he tried to hurl a bicycle on her but her boys deterred him and forced him out of the gate. She had swollen face and black eye and fracture. As per P3 form the only injury mentioned was fracture of lateral tibia. It was also stated that above knee plaster was done.

The column in respect of the head and neck was not filled in the P3 form.

DW2 was called to give evidence as regards the said incident. She was with big boys watching T.V. and heard noise after the Petitioner had entered the bedroom. She told the boys that their mother was crying inside. As stated by others the boys entered the bedroom. She also did the same. She found the Respondent on the floor and the Petitioner was beating her. She was near the bed as if fallen down from the bed. The Petitioner was beating her with an iron bar and she intervened and she was injured on the chest. This part of her evidence is not what the Respondent herself has said. She only said that she was punched. I also noted the demeanours of this witness whose only purpose was to support the Respondent in any way she could including exaggeration. She is apparently also a cousin to the Respondent and still working as a house maid with her.

In any event it is clear that the two boys of the Respondent pushed the Petitioner out of the house and also locked him out of the compound; and that became the couple's last separation.

After considering all the circumstances evident from the evidence, I do find that the aforesaid incident was the last stroke on the already fragile relationship in the marriage. I do tend to find that the story given by the Petitioner as regards the said incident is more reliable than that given by the Respondent.

The Respondent gave evidence as regards her purchasing the properties without the help from the Petitioner and she said that when she asked him for purchase and that what he did was to move out of the house. She did not explain why and under what circumstances he left the house. She also did not explain in whose names those properties were bought and registered. Thereafter she testified on the incident of April, 2004 which I have already dealt with.

She further testified as regards the birth of their last born. She did say that the Petitioner came home from Mombasa, where he was working, to take her to the hospital. He signed the hospital papers but without telling her left her and went back to Mombasa and that he came after three weeks on transfer. She then denied all the averments made by the Petitioner on her drinking habits and coming back home late or never. She denied that the Petitioner gave her Shs.42,000/= towards deposit to purchase their house but she agreed that the house is in her name during cross examination. She denied also that she had relation with a Luo man and that is the reason she asked for transfer at Kisumu. She said it was the Petitioner who used to come home late.

This in short is the evidence before me. As stated earlier the marriage faced problems almost from its inception. The small differences and actions by the spouses triggered into big issues forcing the Petitioner to leave the matrimonial house three times, the last being in April 2004. Since then the Petitioner has tried to be with the children which efforts are now thwarted as he is unaware of the schools they attend. The name of their school is not disclosed by the Respondent even before the court. Be that as it may, there is no denial that the marriage is irretrievably broken down. The parties have not satisfied the court as per stronger onus of proof required under the Matrimonial causes, but the Petitioner's case seemed to be more plausible.

I have thus a marriage which is beyond repair and thus I grant the order that the marriage solemnized between the parties be dissolved.

Each party to bear its own costs.

Decree nisi be made absolute within 60 days hereof.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of May 2008**

**K.H. RAWAL**

**JUDGE**