



REPUBLIC OF KENYA

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

**Divorce Cause 84 of 2006**

**H.J.K ..... PETITIONER**

**VERSUS**

**P.K..... RESPONDENT**

**JUDGMENT**

The parties herein were married on 4<sup>th</sup> August 1984 under the provisions of the Marriage Act. They cohabited as husband and wife in Kisii, several parts in the Rift Valley, Nairobi and Kajiado.

They are domiciled in Kenya and their marriage was blessed with three children all of whom are, by now, adults.

The petition is filed by the wife on the grounds of acts of adultery and cruelty committed by the husband. After the filing of the petition the petitioner filed applications for interim orders against the respondent restraining him from threatening, harassing and other acts which caused adverse effects on her health and well being.

The respondent filed answer and cross – petition dated 15<sup>th</sup> March, 2007. He also alleges that the petitioner was cruel to him and has committed acts of adultery. He has also indicated that DNA test should be carried out to establish the paternity of the children of marriage.

The petitioner filed her reply to answer and answer to cross-petition dated 15<sup>th</sup> March 2007. It is averred by her that after she filed the petition, under advice of the pastor and respondent’s brother, she made an effort to reconcile but the respondent immediately commenced his psychological and verbal abuses making it impossible for her to continue staying under one roof.

Thereafter on 3<sup>rd</sup> April 2008 with the leave of the court, and which application was not objected by the petitioner, the respondent filed an amended answer and cross – petition wherein he has admitted paragraph 4 of the petition stating that there are four issues of the marriage without giving any particulars of the fourth issue.

Even though there is a cross – petition, he has deleted the words. “*Particulars of cruelty and neglect*”, but has retained loose clauses (a), b, c, j, k, r, s.

The answer prays that the petition be dismissed with costs to him.

Although a prayer for injunction is made, no evidence thereon was given, presumably the party

intended to pursue the same after the main prayer of the dissolution is determined.

Both the petitioner and respondent testified and did not call any witnesses.

The petitioner testified and sought divorce on the grounds of cruelty and adultery.

She averred that the Respondent's extra marital affairs started around the years 1986 – 87 with a lady called J who was a probation officer. She named others like N and A being business associates, A around year 1999 – 2000. Then in the year 2005 there was M who admitted to the petitioner about their relations through SMS. Then in 2006 there came S which she found out through SMS between her and the respondent.

This evidence was denied by the respondent, and I do agree with the submissions of the learned counsel from the Respondent that the evidence produced had not satisfied the standard of proof required in matrimonial causes, which, I may refer to as beyond balance of probability. There has to be preponderance of the probability which is less stringent than beyond reasonable doubt. Moreover, the persons although mentioned have not been properly cited and served. The allegation of adultery cannot be loosely considered as it is a very serious offence within the sanctity of marriage.

The aforesaid allegations, which are simply denied without anything further from the Respondent, may be considered as unacceptable and improper actions which caused stress and mental anguish to the petitioner but I cannot do so as they are not pleaded as such.

The last incident is that of 4<sup>th</sup> May, 2006. It is a crucial incident and both parties have given their versions on the said incident. It also refer to involvement with S mentioned herein before.

According to the petitioner at about 5.30 p.m. when she was with her students at University campus, she received a call from the Respondent not to come home if she did not come with children. It was also raining heavily. She called her daughter who was also at the university campus and did not want to talk and said it was a long story. She then went to see her son at around 6.00 p.m. who informed her that since 3.00 p.m. that day her daughter (his sister) was receiving SMS from a lady called S asking her to tell her father not to chase girls of his daughter's age. She forwarded those messages to him, and sent a message to S to deal with him.

Then she decided to discuss the matter with the Respondent. On the way she received a call from the Respondent asking her whether she was coming as directed. She responded that she was coming home as she knew what was the issue. Then he told her not to come home without children and if she did she would face the consequence. Sounding his hostile tone she decided not to go home and instead went to a friends' home at Karen, and explained to her the problem. Respondent kept on calling her insisting that she should come with the children. At around midnight he called and told her that if she was not coming, she would find another woman at home. Then she received message from her maid about two women having come at the home and that she had fed them and one of them had gone to their bedroom with the Respondent. The petitioner called his elder brother F who had come to visit them with one of their friends S2. He did not know what was happening at home as they had retired for the day at the guest house after having an early supper. But he had told her to come around 5.00 a.m. She did so and as she was about to enter the house she saw the respondent driving away.

When she switched on the lights of their bedroom, she saw a naked woman on their bed and she was shocked. She ran to the kitchen. After composing herself she went back and found the woman had gone to join the other woman and that they had locked themselves. The Respondent then came back shouting "**where is she?**". The elder brother and the friend came out. She heard commotion from the kitchen and her shamba boy J2 asked her to leave as the Respondent was very angry and could harm her. She hid herself in the neighbour's garden.

After about 20 minutes the elder brother asked her to come in. She did and found the respondent with his brother and S2. When the two asked the Respondent, all what he said was "**I asked her to come and**

*she refused. So I got angry”.*

She had to give an exam in the university so she left the house and in the evening she talked to his brother and moved to a separate bed – room. The respondent kept on apologizing.

On 15<sup>th</sup> June 2006, he again raised the issue of children and told her why she was paying their school fees and that it is because of her paying the fees they were not respecting him. When she did not respond, he physically assaulted her and she got injured. She produced a medical report from the university clinic as an exhibit (P EX 2). After that she decided to go to her parents’ house as she could not take it any more.

After persuasion of her church pastor and friend she moved back to the matrimonial home. After short time, he once again started emotional abuses and told her that all his relatives thought that she was evil and that she did not care for his children from other relations. He would wake up at night and tell her that her children were not respecting him and that he would eliminate them one by one and she would then remain alone. He also told her that he was not sure whether they were sired by him. When she could not take any more, she had to leave home. This was the last time she did so.

Around 17<sup>th</sup> June when she was in deans meeting he came at her working place and sent a chit informing her that he was waiting outside. When she went to see him he took her to the parking place and told her there was something small and asked her to get in his car. When she refused he forced her in and drove away. He told her that **“I could not leave you like that. Someone must shed blood”**. Those words definitely disturbed her. When he parked the car at a petrol station in [PARTICULARS WITHHELD] as he wanted to see the daughter who was boarding at university, she called her and asked her to come to Langata Police Station. There she reported the incident but the Respondent insisted that she should go back with him. The police had to intervene and she was escorted out with her daughter. Thereafter she filed an application in this cause for restraining order.

She was asked on the allegations which the respondent had made in the answer and cross – petition. However I would not mention them as an amended answer and cross – petition was filed. What she said was that there was no option for her except to pay the school fees for the children as the Respondent was not doing so, but denied that she instigated them against him. She also told about a further incident where the respondent packed the personal belongings of their daughter at midnight and dumped them at her campus. To avoid embarrassment their daughter was advised by their friend S2 to collect those things very early in the morning. She reiterated that their first born was hurt to see the exchange of SMS as regards S.

In cross – examination she conceded that she had not seen any acts of adultery and that she personally did not receive any SMS except as had been told by her children. The incident of 4<sup>th</sup> May was, she insisted, due to SMS from S as the respondent also informed her next day that he wanted the children to come home as he wanted them to explain why they were exchanging sms with S.

She reiterated the incident of her finding one woman in her one bed – room and other in another room. She told that she did not intend to call her children as witnesses and to involve them. As regards the maid she said that she had left the job and had gone home. She reiterated what she has stated in her examination in chief and stressed that she had suffered over the years and her efforts on reconciliation had not helped.

In his evidence, the respondent stated that their marriage was generally cordial, interesting and romantic although there were minor differences.

His version of the incident on 4<sup>th</sup> May, 2008 was as under. According to him he had not seen the children for about two months and anytime he raised the issue, the petitioner avoided it. He insisted that their daughter was staying in a bad hostel.

He stated that due to this problem he invited his close friend S2 and elder brother F so that they can counsel his children. On their arrival he called the petitioner to come home with the children. They waited but she did not come. He called her severally but after 9.00 p.m. she had switched off her mobile and he was advised by his guests to go out and look for her. He left the guests and went out and looked for her upto around 5.00 a.m. When he came back home she was sitting with the guests. They talked and she left for her work.

He said it is a total lie when the petitioner testified that he had brought two ladies. He also stressed that he had not touched (sic) his wife for 27 years and he had not committed any acts of adultery.

According to him, the petitioner left the home after the said incident but she came back and left again in January 2007 over the issue of children. He also said that he had never touched alcohol and did not know why the petitioner told the court that he had been alcoholic.

According to him, he loved the children but the petitioner always came in between. He has been unsuccessful in communicating with their daughter.

He was not aware of the filing of this petition and no efforts to reconcile had been made. He was of an opinion that the marriage could be salvaged, although he said that the petitioner had abused the sanctity of marriage by filing the petition.

In cross – examination he said that he had put his signature on the original answer and cross – petition, but he has retracted the same and stated ‘ I have expunged all what were of no use’. He also agreed that the application to amend his answer and cross–petition was made after the close of the petitioner’s case.

He denied that after her evidence, he accosted her and demanded that she withdrew the case.

He also stated that he did not remember the name of the daughter’s hostel (which he described as unfit for a decent girl) but knew where it was.

Then he stated that after an incident of her being car jacked she was returned to the hostel. Thus it became apparent that it was a family decision to do so. His assertion in re–examination that in the circumstances he did not know whether the daughter was in hostel was either a total lie or a total indifference. He then stated without any substantiation that as per his opinion the marriage can be saved.

He gave evidence on their meeting after the close of the petitioner’s case and averred that the petitioner told him that one has to lie to succeed. He reiterated that he has asked his lawyer to expunge all the accusations he had made against the petitioner and did not know why some were still there.

He has also given evidence that their last born is a drug user and it was due to his interventions that instead of being dismissed he got the permission to transfer him to a new school. He admitted that when the petitioner gave her evidence circumstances were different but stated that it was possible to save the marriage. But he stopped at that without elaborating.

In the end he stated that, as per his ability, he has fulfilled his parental responsibility. He prayed for dismissal of the petition for dissolution.

As in his evidence, he had talked on the events which occurred after the petitioner has given evidence, hence, I thought it just, to recall the petitioner to give her evidence on those events.

According to her further testimony on 3<sup>rd</sup> April 2008 when the respondent was to open his case, he asked for time to amend his pleadings, he came to her home around 2.00 p.m. and told her that he wanted to expunge some of the issues in his pleadings as he stated them in anger and that they were not true. He also indicated that he wanted them to reconcile but she responded that she intended to go on with the petition and that she was not inclined to reconcile. He left at that but returned after half an hour and

asked for clarification on her stand. He insisted and refused to leave till she told him that she would talk to him the next day. She did not do so and he kept on sending messages to her. She called him and told him that her stand had not changed. He still did not stop and kept on calling her even at nighttime. Sometimes he would plead and on other time he would issue threats as if it was life or death issue. He then used to come home and knock on her door or to leave flowers on her doors.

She refuted his averments that they met at Karen and became intimate after the last appearance in the court. She reiterated even in her cross – examination that according to her the marriage was finished and could not be saved.

The learned counsel for the petitioner submitted that the petitioner had proved her case as per the required standards of proof in the matrimonial causes. She had given consistent testimony unlike the respondent who could not show what he wanted. After making scandalous and scathing allegations he withdrew the same and asked for reconciliation. It is also stressed that apart from denying the allegations made by the petitioner, he has failed to say anything further. I was asked to consider demeanors of the two and came to the conclusion that the respondent's evidence is totally without any credibility and the same should be rejected.

In response the learned counsel for the respondent Ms. Oriti submitted that the petitioner has failed to prove her case. I have already observed on the allegations of adultery against the named persons. I also agree that the petitioner has been unable to prove those allegations.

However, the incident of 4<sup>th</sup> May, 2006 is very crucial as to the issues of cruelty and also the mental anguish caused on the petitioner on finding a naked woman on their bed. Why I say is that the version of the respondent that under the advice of his brother and friend around 9.00 p.m. he went to look for the petitioner when she did not answer the calls and switched off her mobile is not credible because he then stated that when he came back home at 5.00 a.m. he found her and his brother and friend sitting in the house. He did not tell where and how he looked for the petitioner and why it took him almost whole night and why he decided to come back at 5.00 a.m. Furthermore, I could not understand why he had to ask the petitioner to come with the children when they were in their respective campuses and are adult persons. He knew where they were and could have gone there himself. He also agreed that he wanted the two elders (!!!) his brother and his friend to counsel them but he failed to state what actions he himself had taken to do his parental duty to counsel them. He did not specify what was the issue which needed the counseling. He could not explain how and why, only because the petitioner was paying for the fees of the children, they became strangers to him and in any event what he did to salvage the problem on his own efforts.

I do agree with the submissions made on behalf of the petitioner that the respondent cut a very sorry figure on the witness stand and I can, without hesitation, state that I found him an unreliable witness, and I do find so.

Coming back to the incident of 4<sup>th</sup> May, 2006, I do accept the version of the petitioner as a credible one and find that the said incident was a fatal blow on the sanctity of marriage and endurance of a spouse.

Her effort to reconcile by going back to the matrimonial home also did not succeed as the respondent abused her emotionally over the issue of children and also their paternity. His physical assault added a fuel to the mental anguish suffered by the petitioner.

It is trite law that the cruelty can be physical and mental. The petitioner herein has suffered by both emotional abuses and physical ones too. I do not think that seeing a naked woman on the matrimonial bed is a normal wear and tear of the marriage which a spouse is expected to bear. Similarly threats to eliminate her children as well as doubt as to their paternity are also not normal wear and tear of the marriage.

Considering the background of both the parties, I do find that the actions of the respondent, which I have specified herein before, are sufficient to meet the required standard of proof which is in between the

balance of probability and beyond reasonable doubt.

I thus find the respondent guilty of acts of cruelty. I also find that the petitioner has not condoned those acts of cruelty. Of course, I do find that the petition is not presented or prosecuted in collusion of the respondent.

In the premises, I order that the marriage solemnized between the parties herein be dissolved.

Decree nisi be made absolute within 90 days from the date herein.

Dated and signed at Nairobi this 26<sup>th</sup> day of June, 2008.

**K.H. RAWAL**

**JUDGE**

**26.6.08**