



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

**Divorce Cause 7 of 2004**

**A A R..... PETITIONER**

**VERSUS**

**M H.....RESPONDENT**

**JUDGMENT**

By a divorce petition filed on 22.1.2004, the petitioner A A, prayed the court to dissolve his marriage to M H on the ground of cruelty whose particulars he gave in paragraph 7 of the petition.

At the time the petition was filed, both parties were resident and domiciled in Nairobi, Kenya.

The respondent filed an answer which was subsequently amended vide an “**Amended Answer to Petition**” dated 19<sup>th</sup> July, 2004, filed in court the same day.

The respondent denied having been cruel to the petitioner since the celebration of the marriage. The respondent further charged that the petitioner filed the petition “**in bad faith**”, and failed to disclose a material fact to the court that,

**“he left the matrimonial home on 27<sup>th</sup> May 2003 and went to live with a girlfriend one J H, and has not returned.**

**She also accused him of having failed, refused, neglected or declined to maintain her, the respondent.....”**

She therefore prayed the court to “**dismiss the petitioner’s petition with costs**”, and further, that, “**The petitioner be compelled to provide the respondent with monthly lump sum maintenance.....”**”.

The petitioner replied to the Amended Answer to the petition and denied that the respondent had treated him with love as alleged. He also denied being cruel to the respondent and stated that it is the respondent who has been cruel to him, thus causing the breakdown of the marriage.

The petitioner also denied living with any woman as alleged.

In court during the hearing, the petitioner described the respondent as his wife who is of Venezuela by nationality, and he is Mexican by Nationality.

The two got married on 1.4.1998 under the Marriage Act, Cap. 150, Laws of Kenya

in Nairobi. They lived in {PARTICULARS WITHHELD} in Nairobi. The petitioner worked with {PARTICULARS WITHHELD}, whilst the wife worked as an architect and consult {PARTICULARS WITHHELD}.

The couple do not have any children together, but both of them have children from previous marriages. The petitioner had 3 and the respondent, four.

The petitioner and the respondent have not lived together since 27.5.2003. He complained that the respondent's attitude was possessive, aggressive, especially when she was under the influence of alcohol, which was a trend she started from the beginning of the marriage. That this caused a lot of embarrassment to him, especially in public.

The petitioner further complained that his wife refused to accept his authority for the use of funds, that is, she would spend beyond their financial possibilities and would not accept his authority to travel abroad, thus she traveled overseas without letting him know where she was going to, or when she would return, and these travels were reflected in a common credit card which they both owned and used. He produced a statement of account of one of their joint accounts. He got this via e-mail, and had it certified. He gave an example of his wife's trip of 1½ months, where his wife spent US Dollars 6000, which at the time was equivalent to about Kshs.480,000/=. This was reflected mostly in hotels and night club expenditures.

The petitioner contributed between 80 – 90% of the funds in this account, and the wife used to deposit 20% of the funds. She, however, stopped depositing any funds into the account since 2000.

The petitioner related his wife's aggressiveness at different social functions after getting drunk. Because of differences between them, the petitioner and respondent started sleeping in different bedrooms. He complained that the respondent used to bang on his bedroom door repeatedly on several occasions. He stated that his wife has an aggressive character which made them lose many friends. He explained further that in the state of drunkenness she would fall down in the middle of social functions. That this happened several times.

The petitioner also produced a sample of UNESCO Commissary purchasers which showed the number of times his wife purchased alcohol for her consumption.

He further complained about what he referred to as “**abusive**” use of common property by her (Respondent) and her children. By this he referred to an apartment he bought in Paris. It used to produce monthly income, but the respondent decided to put her son to live in it, and he has continued to live there upto the date of the hearing of the divorce petition.

The petitioner continues to pay taxes on that property and pays for the boy's maintenance, with no support from his wife, yet the boy's father is still alive, and lives in Venezuela.

The petitioner talked of an apartment the two of them bought in Venezuela, but his wife registered it in her name, so he lost the possibility of using it as the same is being used by his wife's children.

The petitioner also complained about “**black mail**” by his wife, which has caused him great stress. These were in the form of threats of writing letters to the petitioner's employers, alleging that he had committed acts of fraud or unprofessional behaviour. He produced some of such letters in court. He also produced evidence to the effect that his wife was summarily dismissed from the UN on allegations of presenting false receipts.

The petitioner also referred to a case, H.C. Misc. Application No. 5 of 2004, which was filed by his wife, seeking maintenance from him. The court declined to grant any. He also referred to and produced evidence which, according to him, showed that his wife had substantial income besides the money he was giving her for maintenance, which amounted to US Dollars 1000 plus US Dollars 2000, for rent for the house she occupies. He pays this freely without a court order.

The petitioner then testified,

**“I am asking the court to help me finish a relationship which has broken all normal links of a marriage relationship and has gone to blackmailing and insults which go far beyond the acceptable norms. Because of all this, there is no possible reconciliation of the parties and it would be against natural laws to keep us together. I pray that the marriage be dissolved”.**

Several questions were put to the petitioner on the evidence he adduced, especially about his relationship with Julia, to which he explained that he has no affair with her, but they have rented a 4 bedroomed house together and they both contribute rent. They are housemates using different bedrooms.

The petitioner answered several questions about the beginning of his life with the respondent both in Venezuela where they first met, and Paris where the petitioner was posted to, and the respondent visited on a student’s visa. As the 2 were good friends, they opened a joint account in Paris. Whilst still in Venezuela, and before marrying the respondent, the petitioner declared 3 of her children as his dependants via a court order dated 23.1.1997 in Caracas. He subsequently married her. This facilitated the children’s studies, as he paid their school fees and paid their maintenance till they turned 21 years.

To further questions about his wife’s behaviour during the marriage he repeated that she would be aggressive and abusive when drunk either at home or in public. About her income, he answered that his wife has a reasonable and steady income, whilst he has retired after working for the UN for 30 years, and now gets a monthly income of US Dollars 6200, being his pension. That this will reduce when his son turns 21 years old.

The petitioner has not condoned his wife’s aggressive and abusive behaviour. That apart from her, he had married twice before.

The petitioner called M W O, media consultant, who between 2003 – 2004 was engaged by {*PARTICULARS WITHHELD*} on a contract under the Eastern and Southern Africa Media Strategy against HIV/AIDS.

He explained that the petitioner was the Regional Communications Advisor, and the respondent was co-ordinating the programme on HIV/AIDS. Martin was the consultant to set up the project. He gave evidence of the times he worked with the respondent, and the occasions she shouted at him, and was aggressive thus talking about her character. He again referred to an incident when the respondent arrived at work looking as if she had had a sleepless night, and smelled of alcohol. He had been working from her office but he decided to move as he could not get on with her.

Martin denied having come to court to assist the petitioner because of the contracts he used to get from UNESCO.

C K, an administrative officer with UNESCO, for the past 9 years came to court to produce an Internal Memo dated 20.6.95, addressed to the petitioner, A A.

The Memo requested him to make travel arrangements for the petitioner to Carcus. He was shown a copy of the Memo. He identified it as a true copy of the original, except that it had footnotes, whereas the one in his file did not. He nevertheless produced both as exhibits in court. This was a document emanating from the petitioner Alonzo to Chris changing the final destination of his travel to read Carcas as opposed to Mexico, his country of origin.

Another witness Goran Ilia, a businessman, who together with his wife knew the petitioner and respondent having met them in 1996. He also knows that they are now separated and live apart for almost 3 years.

He testified further that they were close family friends who often visited each other. Being friends, they attended parties together, and he noticed that the respondent Mariflor used to drink a lot and become

aggressive and focus on her husband. That she was jealous of every woman around her husband.

Goran witnessed physical confrontation between the petitioner and respondent in public. He referred to an incident which occurred in their house and another at a friend's house. As a result of these incidents, Goran and his wife stopped inviting the petitioner and respondent to their house parties.

He explained on questioning that the petitioner is a good dancer and many women wanted to dance with him, and this made the respondent jealous. He denied being part of a **“plot to conceal Alonzo's property”**.

He admitted having A A's car which he said he was purchasing by instalments and had not completed paying for fully.

The respondent Mariflor Hernandez Azna, is a Venezuelan by nationality. She is resident in Kenya, since 1991. She does not live with the petitioner Alonzo anymore since 27.5.2003. She recalled that her husband came downstairs for breakfast that morning wearing a shirt but no jacket or tie. She was surprised because he normally went to work smartly dressed, so she enquired why he looked so casual, and he in turn answered that he had decided to move out of the house that day.

The respondent went into a state of shock, as she did not understand what was going on. She asked him why, he was leaving and he replied that he was moving out as he had been having an affair for 2 years with J H and she was arriving in the country that evening. That the petitioner said the marriage was over, as he was moving in with J H.

The respondent went to the office, and according to her, cried the whole morning, trying to understand how the petitioner could have loved her upto the night before, only to turn round the following morning and move out of the matrimonial home.

The respondent has not been introduced to Julia who works at UNEP, but she has seen her husband and Julia at parties hugging and kissing, a behaviour which humiliated her greatly.

The respondent denied being possessive and aggressive. She explained that they started co-habiting in 1988 in Carcas, Venezuela, her country. That thereafter they lived in Paris for 2 years, before coming to Kenya, where they got married at the Attorney General's office.

The respondent produced photos dating back to 1989, when they started living together, and copies of some pages in her passport with stamps showing how many times she visited the petitioner in Paris, where she lived as his dependant and studied French. She produced her students pass as an exhibit in court. That the 2 also opened a joint account in Paris, and operated it jointly. She later joined the petitioner in Nairobi, but prior to that, through a court order, her children were made dependants of the petitioner. They were all aged below 18 years old.

The petitioner testified that they had a happy life as a couple before her husband walked out. That in December, 2005, about 5 months before he walked out on her, he took her to a romantic cruise to the Caribbean. She produced receipts showing expenses incurred on that trip plus a photo they took a board the ship. The respondent detailed the expensive presents given to her by her husband in the months preceding his departure, that is why she could not understand why he walked out on her.

About the flat in Paris where her son lives, the respondent said they bought it jointly, and further that her son occupies it with both their consent. The respondent denied having bought alcohol excessively, and stated further that she does not normally drink at home. She denied getting drunk and becoming abusive. She said that that is not her nature.

The respondent disputed the evidence of Chris which tended to show that she had forged some documents. She denied that allegation, and also denied blackmailing the petitioner, though she had evidence that he had given false information that he was paying school fees for 4 children in University

thereby getting allowance from UNESCO, when this information was not true. She passed this information to UNESCO, because she wanted to distance herself from whatever claim her husband was making on account of her children. She did not consider this as blackmail.

The hearing of the respondent's case went upto this stage, and subsequently a long break followed as the advocates tried to get suitable dates for continued hearing. In the meantime and on 12<sup>th</sup> March, 2007, the advocates for the parties recorded the following consent,

**“The parties herein consent to finalize the divorce proceedings and leave the matter of maintenance to the recording of a consent on the date of judgment, failing which the parties will seek to make submissions on the same”.**

The hearing of the divorce petition then continued on the same date, when the respondent said,

**“I am M H. I earlier on gave evidence to the fact that this marriage can still be saved, BUT, I now say this is not the position now. I have recently been thinking about everything that has happened. It is going to 4 years now since A A left the house, I have been trying to talk to him for all these 4 years, but when I do so, I find no communication between us. I have tried for 4 years to take him for matrimonial counseling, but has not been possible. In the 4 years, I came to realize that we have grown apart, that this is not the man I married and loved for 15 years. We do not have much life left. I have decided to move on with my life. My husband retired from the UN last year. He will be going back to his country, Mexico, and I will be going back to Venezuela. This will keep us apart and make it more difficult to reconcile. I now tell court that this marriage cannot be saved, there is no hope. I have come to realize this as a fact, and I have come to accept that this marriage has no hope....”.**

Mariflor was asked several questions by counsel for the petitioner about her husband, to which she replied,

**“I am not contesting the petition for divorce. I am not challenging it. We have not been living together for the past 4 years. I have come to the conclusion that we are incompatible.....”.**

M/s Judy Thongori, counsel for M H the respondent, then addressed the court and said,

**“In the changed circumstances, I ask to withdraw the documents marked for identification”.**

That request was allowed by the court and the documents which had earlier been marked for identification were released to the respondent.

The 2 advocates representing the parties filed written submissions. Counsel for the petitioner submitted that his client had discharged the burden placed on him by law as he had proved his grounds of divorce in his petition. This was the ground of cruelty, whose particulars were given in para 7 of the petition.

He based his submissions on the case of M vs M, D.C No. 3 of 1993, where the court said that certain standards of proof must be met by litigants to a divorce petition. These are,

- 1) ***“There must be a marriage capable of being dissolved”.***
- 2) ***“There must be a matrimonial offence being proved”.***
- 3) ***There must be proof of matrimonial offence, being relied on”.***

M/s Judy Thongori, counsel for Mariflor, the respondent also made submissions in which she noted that her client opposed the divorce which the petitioner sought from this court. That she had also sought an order to **“compel the respondent to provide her with monthly and or lump sum maintenance”.**

M/s Thongori submitted that it was clear from the oral evidence of both parties that the marriage had “**irretrievably**” broken down. That the respondent denied the “**charge of cruelty**” but at the end also admitted that the marriage had broken down.

I have summarized the oral evidence of both parties as well as the evidence of the witnesses called by the petitioner.

I am also aware of the answer to the petition filed by the respondent in which she averred at paras 7 and 8 that,

**“The petition herein has no merit, it is filed with malice and in bad faith to enable the petitioner to continue living with his so called lover, and should be dismissed”**,

and at para 8 thereof,

**“The respondent avers that the petition discloses no good grounds for divorce and should be dismissed”**.

Together with all this, are the brief submissions by both learned counsel. The respondent denied the “**charge**” of cruelty leveled against her by her husband.

The particulars of cruelty in para 7 of the petition aforementioned include the fact that the respondent, “**drank alcohol and became aggressive without cause**”, a charge which the respondent denied in the amended answer to the petition, and also in court during her oral evidence.

It is on record, however, that the petitioner called witnesses and on the issue of the respondent “**drinking alcohol and becoming aggressive without cause**” both Martin and Goran Ilia testified to the incidents when they both witnessed the respondent being drunk and aggressive, both in public functions and otherwise. There was also the evidence of “**too much**” expenditure on alcohol by the respondent.

From the above evidence, I am satisfied that the respondent did “**drink alcohol and become aggressive**” in public and other places. This was a behavior which embarrassed her husband and caused him mental anguish, as he put it. This was cruelty, especially given the fact that such actions were repeated on various occasions. I find this to be evidence of cruelty which contributed to the breakdown of the marriage between the petitioner and respondent. I am satisfied from the evidence adduced that the petitioner that he,

**“has not in any way been accessory to or connived at or condoned the respondent’s cruelty”**.

In the circumstances therefore, I proceed to dissolve the marriage between Alonzo Aznar and Mariflor Hernandez, solemnized on 1<sup>st</sup> April 1998 at the office of the Registrar of Marriages in Nairobi, Kenya under the Marriage Act, Cap. 150, Laws of Kenya.

Because I have dissolved the marriage between the parties herein on the ground of cruelty, I now move to formally dismiss, the “**Amended Answer to Petition**”, filed by M H on 4<sup>th</sup> August 2003.

Each party to these proceedings will bear their own costs.

Finally, I direct that the decree nisi do issue straightaway today, and the same be made absolute within a period of one month from today.

Dated at Nairobi this 12<sup>th</sup> day of July 2007.

**JOYCE ALUOCH**

**JUDGE**