



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

**Divorce Cause 52 of 2005**

**L N .....PETITIONER**

**VERSUS**

**M S M .....RESPONDENT**

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

In a petition dated 22<sup>nd</sup> July 2005, L N , the Petitioner herein, prayed for the marriage between her and M S M the Respondent herein, to be dissolved. The pleadings were served upon the Respondent who filed in response a reply and a cross petition. When this petition came up for hearing the Respondent and his advocate failed to turn up hence the hearing proceeded ex parte.

The Petitioner herein, L N , testified without calling for the evidence of an independent witness. She said she got married to M S M under Islamic law on the 9<sup>th</sup> day of February 1999 and that the marriage was later converted to that under the marriage Act on the 13<sup>th</sup> day of February 1999. she produced the Marriage Certificate to establish the existence of the marriage. She said that they cohabited in their matrimonial home situated at Kiembeni Estate and that the marriage was blessed with one issue in the month of June 1999 called Saandi Mohamed. He is now aged 6 years.

The Petitioner in her evidence claimed that the Respondent committed adultery in the year 2001 with a woman not personally known to her in the matrimonial home. She claimed that the Respondent has on various occasions continued engaging in adultery acts in various Guest Houses.

The Petitioner further claimed that the Respondent was cruel to her. She said that he assaulted her and as a result they separated in the month of April 2002. The Petitioner further claimed that the Respondent willfully neglected to support her and her son financially. The Petitioner is of the view that their marriage with the Respondent is irretrievably broken down. She claimed that she sharply differed with the Respondent. She prayed for the marriage to be dissolved and for an order that she be given the custody of the child. She also claimed costs of the petition.

After receiving the evidence from the petitioner the following issues arose for my decision:

First, whether or not the particulars of cruelty and adultery were established.

Secondly, whether or not the Petitioner is entitled to the prayers sought in the petition.

I will start with the first issue as to whether or not the particulars of cruelty and adultery were established.

The evidence tendered by the petitioner in support of the petition does not specifically state the kind of cruelty the Respondent committed against her. She has only claimed that the Respondent assaulted her and that he failed to maintain her and her child. There was no credible evidence in form of medical evidence to establish the fact that the petitioner was assaulted.

It is the submission of the Petitioner that the Respondent committed acts of adultery. The petitioner claimed the Respondent committed acts of adultery in the matrimonial home and in various guest houses with women not personally known to her. This court dealt in detail with what constitutes cruelty in the case of **Meme =vs= Meme [1976] K.L.R. p. 13** The late Justice Chesoni who later became the Chief Justice of Kenya at p. 18 said:

*“For cruelty to be established two tests must be satisfied. These are: First whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel: and, secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury.”*

I will apply the above tests in this case. I am not satisfied that the Petitioner established the particulars of cruelty to the required standard of beyond reasonable doubt. It is not enough to allege that the Respondent assaulted the Petitioner. Tangible evidence must be led to establish such a claim. Misconduct must be established to be grave and weighty.

The second charge by the Petitioner is that the Respondent is guilty of adultery. Let me also adopt the position taken by the former Chief Justice, the late Justice Chesoni in the case of **Meme =vs= Meme [1976] K.L.R.**

**p. 13.**

At p. 22 Justice Chesoni said:

*“Adultery is a serious matrimonial offence and it must, where it is alleged be proved clearly. To prove adultery evidence of a guilty inclination or passion is needed in addition to the opportunity to commit it. The evidence of a single witness is enough without corroboration. But the evidence of a single witness arouses the suspicion of the court that a true case is not being disclosed in the sense that adultery may not in fact have been committed, as it is in this case, that evidence must corroborated before the court will fix guilt.”*

In this matter I am not satisfied that the evidence tendered by the Petitioner established any shred of adultery on the Respondent’s part.

It follows that in view of my findings, the petitioner is not entitled to the prayers made in the petition. In the end the petition is dismissed with no order as to costs.

Dated and delivered at Mombasa this 17<sup>th</sup> Day of March 2006.J.K. SERGON

**J U D G E**

In the absence of the parties in open court.