

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

H. C. DIVORCE CAUSE NO. 3 OF 2004

P.N.K.....PETITIONER

AND

S.N.K..... RESPONDENT

J U D G M E N T

On 20th January, 2004 P.N.K brought this Petition against S.N.K for dissolution of their marriage formally solemnized on 21st December, 1996.

The Petitioner's statutory marriage to the Respondent was conducted at African Inland Church, Ziwani in Nairobi under the provisions of the Marriage Act (Cap 150), and a certificate of marriage number [*particulars withheld*] was duly issued by the presiding Marriage Officer. Subsequently, the Petitioner and the Respondent established their matrimonial home at the Kenya Railways Staff Quarter near the Racecourse along Ngong Road in Nairobi.

According to the Petitioner, the said marriage is blessed with one child Namely BW born on 16th July, 1997 to a twin sister who subsequently passed away in November, 1997.

The Petitioner seeks for dissolution of the said marriage to the Respondent on grounds of cruelty and desertion as particularized in paragraph 7 and 8 of the said Petition. Upon being served with a copy of the Petition and Notice to Appear on 2nd March, 2004, the Respondent failed to Enter Appearance or file an Answer within the time prescribed by the relevant Rules. When the Petition came for hearing on 26th May, 2005 the said Respondent was absent and thus the hearing of this Petition proceeded as undefended cause in terms of the Registrar's Certificate dated 16th September, 2004.

I have carefully considered the testimony of the Petitioner. I have also scrutinized and inquired into the alleged grounds of divorce as contained in the petition suit. I am satisfied that the Respondent has during the subsistence of the said marriage been persistently cruel to the Petitioner on the basis of the evidence of the Petitioner and stated conduct of the Respondent as outlined in paragraph 7 of the said Petition.

The said Petitioner has tendered convincing documentary evidence in support of the Respondent's cruelty unto herself including letters written by the Respondent to the Petitioner as testimony of an indeed turbulent marital relationship. The Petitioner has convincingly testified that following the birth of the said children of marriage, the Respondent deliberately neglected to provide immediate needed, financial and moral support to the Petitioner who was then undergoing severe post-natal medical complications associated with the difficult birth of the twin children. Instead of providing the said support, the Respondent is said to have resorted to excessive drinking to the detriment of the Petitioner to the extent that the said Respondent commenced and continued to deny the Petitioner her conjugal rights. The said Respondent is further said to have demonstrated minimum concern morally and financially following the untimely demise of Everlyne, and was too introverted to care about the emotional feelings of the Petitioner. Further, the Petitioner testified that the said Respondent finally commanded the Petitioner to leave their matrimonial home following a heated quarrel sometime in April, 1998 when after the said Respondent wrote a letter dated 7th May, 1998 to the Petitioner informing her that their marriage for all purposes had terminated. As a consequence of the foregoing events the Petitioner finally testified that she was compelled to desert the matrimonial home with the child of marriage in search of refuge of tranquility and has had no contact with the Respondent since April, 1998, save through the said letter.

In line with the holding in the case of **Gollins -Vs- Gollins (1963) 2 All ER 966**, I am satisfied that the said conduct constituting persistent neglect, excessive drinking, denial of conjugal rights, denial of emotional, psychological and moral support on the part of the Respondent was intolerable and thus grave and weighty, distressful, embarrassing and emotionally traumatizing to the Petitioner to amount to cruelty. At the very critical moment, especially following the demise of Everlyne the twin sister of Barbara, the Respondent miserably failed to rise to the occasion and provide the much needed moral, emotional and psychological support to the Petitioner. I thus adopt the holding in **Russel Vs Russel (1897)** P. 315 and which established the principle that no conduct can amount to cruelty in law unless it has the effect of producing actual or apprehended injury to the complainant's physical or mental health and where Lopez L.J. said at p. 322

“there must be danger to life, limb or health bodily or mentally or a reasonable apprehension of it, to constitute cruelty.”

I am thus satisfied that the test in Russel's case (supra) has been met in that the aforesaid persistent cruel conduct of the Respondent was injurious to the health of the Petitioner. I find therefore that the said marriage of the Petitioner to the Respondent has irretrievably broken down on the grounds of cruelty and constructive desertion on the part of the Respondent to the Petitioner as particularly more pleaded in the said Petition, notwithstanding the various efforts made by the Petitioner to salvage the said marriage through family meetings.

I am satisfied that there has not been any connivance or condonation on the part of the Petitioner and further that no collusion exists between the Petitioner and the Respondent.

Lastly, I am satisfied that the Petition has not been presented or prosecuted in collusion with the Respondent and further that there has not been unreasonable delay in presenting or prosecuting the Petition.

I am satisfied on the basis of the evidence adduced that in accordance with the holding in the case of **Wangari Mathaai -Vs- Mathaai (1980) KLR 154** the case for the Petitioner has been proved beyond any reasonable doubt. I hereby therefore pronounce **a decree of divorce** and order that the marriage between the Petitioner and the Respondent be and is hereby dissolved. A decree nisi shall henceforth issue, the same to be made **absolute** upon expiration of two months. I grant custody of the child of marriage to the Petitioner and unlimited access to the Respondent but with liberty to apply. I make no orders for maintenance as the same were not canvassed but however grant liberty to apply.

It is ordered that the Respondent meets the costs of this Petition suit.

DATED, DELIVERED and SIGNED at Nairobi this 9th day of June, 2005.

P. J. KAMAU

JUDGE.