



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**Divorce Cause 1 of 2002**

**A A C ..... PETITIONER**

**V E R S U S**

**H S A .....RESPONDENT**

**JUDGEMENT**

The marriage between A A C, the Petitioner, to H S A, the Respondent, had a melancholy ring to it. I carefully watched both parties give evidence and observed their demeanour.

After their marriage on 10.12.1983 at Mudete Friends Church, the parties lived together as husband and wife for only four years after which they separated. During that time, they got two children EK and KT. EK died in a swimming pool at Runda while visiting the Respondent's daughter sired by another man prior to the marriage. KT, the second child is in school and is now in [particulars withheld] School.

Unknown to the Petitioner, the Respondent had prior to her marriage to him had four children, M K aged 26 years, who the Respondent admitted was sired by one R I and F who admittedly was sired by D C being two of them. M was married in the year 2000 to one J M.

The couple lived for three years in Mbale and moved to Majengo in 1986. KT, the second child, was born after cessation of cohabitation in 1987.

In his Petition for divorce dated 12-2-2002, the Petitioner alleged three matrimonial offences against the Respondent namely, desertion, adultery and cruelty on the basis of which he sought dissolution of the marriage. In her answer to the Petition, the Respondent denied the alleged matrimonial offences and the alleged acts of cruelty.

The evidence adduced shows that it was towards the end of 1986 that the parties quarrelled in the process of which the Respondent bit the Petitioner's finger and after reconciliation lived together for only two months up to January 1987 when the Respondent, according to the Petitioner's evidence, fed up with the Petitioner, took all her personal belongings and left the matrimonial home. The parties have never resumed cohabitation since.

In his evidence, the Petitioner stated that since January 1987 he has never had any sexual relation with the Respondent. When their daughter EK died, he however organized her burial without help from the Respondent who did not participate in the funeral although EK died in the home of the Respondent's other daughter, Maureen.

The Petitioner alleged that the Respondent used to drink a lot and was irresponsible. He said in evidence that she committed adultery with various men and that after she deserted the matrimonial home, she got pregnant by another man and aborted. He asserted that there was no collusion between him and

her to bring the Petition and that there was no condonation of the matrimonial offences nor was the desertion that spanned about 15 years immediately prior to the presentation of the Petition interrupted or broken.

He admitted in cross examination by Miss Okal, learned counsel for the Respondent, that he had no evidence to prove the allegation of adultery by the Respondent. He himself denied having committed adultery. He denied any knowledge of one J with whom the Respondent alleged he committed adultery. He declined to reveal his source of information that the Respondent had aborted after she became pregnant as a result of adultery after cohabitation ceased.

When they got married, said the Petitioner in cross-examination, the Respondent had told him that he had only one child, F, and had concealed the fact that she had three other children, a fact he came to learn later after marriage. He conceded that there were attempts by the Respondent to reconcile with him after the Respondent had left the matrimonial home, but he turned down the Respondent's overtures. After cohabitation ceased, the Petitioner owned up that he stopped contributing towards the upkeep and education of the child, KT. .

In her evidence, the Respondent conceded that she stopped cohabiting with the Petitioner in 1987. She gave the date of birth of KT as 3-9-87 which was after cessation of cohabitation and admitted that EK died in December of 2001, a fact not denied by the Petitioner. KT had been brought up and educated by the Respondent single handedly without any support from the Petitioner who testified that he wished to have his custody as the Respondent was a drunkard and irresponsible. She alleged that she was chased away by the Petitioner and she denied having committed adultery or having been cruel to him or being the party in desertion. She prayed for an order for maintenance of KT especially his educational expenses.

In cross-examination by Mr. Fwaya, learned counsel for the Petitioner, the Respondent testified how she had endeavoured to reconcile with the Petitioner but failed. She also accused him of adultery but produced no evidence to buttress the allegation. She conceded that after her daughter, EK died in a swimming pool in Runda, Nairobi, the Respondent did not participate in her funeral. She alleged that she had told the Petitioner about the four children she had had before the marriage but from her evidence and that of the Petitioner it seems clear that the Petitioner had been told of only one child. Indeed when EK went to Runda, he did not know whose home she had gone to visit. The Respondent testified that she is saved and according to her faith the marriage cannot be dissolved. She prayed that the Petition be dismissed with costs and orders be made for the Petitioner to contribute towards the upkeep and education of KT.

Neither party called any other evidence.

I have considered the evidence of both the Petitioner and the Respondent in the light of the former's allegations of matrimonial offences against the latter and the Respondent's denials. This is a marriage which, from the inception started on the wrong footing. If the Respondent seems to have surreptitiously kept away vital information about her personal life from the Petitioner, the latter failed to be a little more circumspect before plunging into the union. Soon after the marriage, revelations that surfaced of the Respondent's past personal life shattered the Petitioner's confidence in the Respondent. In their evidence, the parties did not throw a lot of light on their love life and it seems there was little candour between them especially as they were suspicious of each other and showed little respect to each other. The incident in January 1987 which led to the separation was not the cause, rather, it was the occasion. The cause had been there. The Respondent never quite felt as part of the Petitioner's family and the incessant quarrels into which the parents, according to the Petitioner, intervened were symptoms of a marriage that had developed irremedial cracks.

The Petitioner's allegations of adultery against the Respondent were not supported by evidence. Courts of law determine disputes on the basis of facts proved by evidence and law applied to such facts. Even where it is rightly and generally believed that a party has engaged in adultery, the party at fault cannot be condemned without evidence to prove it. In this case, the four children of the Respondent who were sired by men other than the Petitioner and were born before wedlock, in so far as adultery is concerned, were

irrelevant. After marriage, the Petitioner generally believed that the Respondent was committing adultery and he suspected she had several men with whom she was doing so. He referred to an abortion done by the Respondent during the period of desertion. But he adduced no solid evidence from which the court could infer that adultery had taken place. Normally, it is not always necessary, in cases of adultery, that a spouse be caught *in flagrante delicto*. After all, sexual encounters and sexual escapades are done so clandestinely. But a woman who becomes pregnant otherwise than through sexual intercourse by her husband can be presumed to have committed adultery although modern medical scientific advancement makes it possible for a woman in sophisticated societies to be pregnant without sexual intercourse as where there is introduction of sperms from a Sperm Bank, a factor that may give rise to cruelty rather than to adultery! The allegation of adultery was simply not proved in this cause.

With regard to cruelty, the evidence was insufficient as it did not show that the few acts of cruelty went beyond the ordinary wear and tear of conjugal life.

But the evidence of desertion was cogent showing as it did that the Respondent had without cause, and either in a flash of anger or following a well calculated and premeditated move, withdrawn from the matrimonial home. I watched both the Respondent and the Petitioner give evidence and observed their demeanour. I was more impressed with the evidence of the Petitioner who struck me as a person who told the truth regarding the marriage. The Respondent on the other hand appeared to withhold the truth or to give it begrudgingly. I did not believe her when she said that the Petitioner turned her out of the matrimonial home. It is my finding that the Respondent left the matrimonial home of her own volition and without any justification or sufficient cause. It seems she was at the time fed up with the life she had with the Petitioner. The desertion was not condoned by the Petitioner and prior to the institution of the cause it had run for a period of fifteen (15) years.

The Respondent said in evidence that her faith as a converted Christian does not allow dissolution of marriage. But the marriage between the parties is a statute one and the law of the land under which it was ceremonised makes provision for its dissolution so that the faith professed by the Respondent is overridden by the law of the land in matters of divorce.

The only surviving issue of the marriage is KT who is now 17 and in Form 3.

The Petitioner has made no contribution for his upkeep or education. He is obligated to do so. The Petitioner seeks custody of KT. But he has never had his custody before and now at 17, KT is not a child of tender years. If he chooses to see his father, he is capable of walking or driving to him. An order to force him to stay with his father in the sunset of his teenage life would be counter productive. It is the Respondent who he knows. It is the Respondent who has struggled to raise him with all the attendant problems of bringing up a child and of educating him to the level he has reached. I cannot in the interest of the child give custody to the Petitioner.

The Petitioner had also prayed for maintenance from the Respondent for himself and the child, KT. This was peculiar but it was not pursued at the hearing. But even if it was, I would have been disinclined to make such an order. I am not unaware that there is no law that precludes a man from seeking maintenance from his wife but cultural and economic factors have for a long time combined to place the man in a position not of want, but of economic power and it's the woman who has often been disadvantaged and who has had to be the seeker of maintenance. I would be disinclined to grant such order for maintenance because no basis for it was laid.

In the result, I allow the Petition on the ground that desertion on the part of the Respondent has been proved and I grant prayer (a) of the Petition. Decree nisi will issue forthwith.

I also order that two thirds of future school fees of KT be borne by the Petitioner. Each party shall bear its own costs in this cause.

***Dated at Kakamega this 22nd day of July, 2005.***

**G. B. M. KARIUKI**

**JUDGE**