



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO.88 OF 2002**

MGK PETITIONER

VERSUS

PNN RESPONDENT

JUDGMENT

The petitioner and respondent are wife and husband, respectively, having contracted a statutory marriage on 09.12.95 under the Marriage Act (Cap.150) at St. Peter Claver's Church Nairobi.

On 16.05.02 the petitioner filed in the High Court the present petition for divorce on grounds of cruelty. On 29.01.03 the respondent filed his answer to the petition and also cross-petitioned for divorce on grounds of cruelty and desertion. The petitioner is a Records Management Officer in the Public Trustee Department at the Attorney-General's Chambers.

The parties are on common ground that they got married on 09.12.95 as aforesaid. However, their pleadings and evidence show that they started living together before the statutory marriage and continued doing so thereafter as follows: at Eastleigh, Nairobi from 1991 to 1993; at Gachie in Kiambu from 1993 to 1996; and at Karura, also in Kiambu from 1996 to 1999. Paragraph 3 of the petitioner's petition, which the respondent admits, states that there are three (3) issues of the marriage:-

- a) V.K., a boy born on 02.12.88;
- b) J.N, a boy born on 02.08.93;
- c) C.M, a girl born on 08.05.95.

Clearly, the parties must have had a relationship before they started living together and before they got married.

The cause came up for hearing before me on 04.11.04. The petitioner was represented by learned counsel, Mr. Osiemo while the respondent was represented by learned counsel, Mr. Gichimu. The petitioner and respondent gave evidence on oath and called no witnesses. While the parties conceded that their marriage was rocked by their domestic problems, each party blamed the other as the cause of the problems.

According to the petitioner, the biggest bone of contention arose from a misunderstanding over a *matatu* Reg. No. [Particulars withheld] bought by her father for the respondent sometime after the petitioner and respondent got married. It was the petitioner's case as I understood it, that the respondent did not fully account for proceeds of the *matatu* business and that he eventually sold it without consulting the petitioner and he became hostile when the petitioner sought an explanation for the disposal of the

matatu. The petitioner also accused the respondent of willfully neglecting to shoulder his financial obligations for the upkeep of the family despite having the means of doing so and, again, being hostile, abusive and cruel when the petitioner called upon him to account for his neglect. The last straw, according to the petitioner, came on 19.03.99 when the respondent physically assaulted her and forced her to take refuge at a neighbour's home overnight. Next morning she returned to the matrimonial home, collected her belongings and the three children and left the matrimonial home for good. She did not produce medical evidence of the assault in question. The petitioner also accused the respondent of having destroyed and thrown away her personal possessions, such as hairdressing tools. In the petitioner's view, the marriage between her and the respondent has irretrievably broken down and cannot be salvaged, as witness the fact that the two have lived apart for the last five years without making contact except for one or two occasions when the respondent went to see the children at their school and also when he went to the petitioner's parents' home accompanied by his mother after the fracas of 19.03.99 allegedly for purposes of reconciliation but the meeting ended up in hostile exchanges and nothing useful was achieved.

The petitioner prayed for dissolution of the marriage; custody, care and control of the children; and costs of this cause. She added that she did not collude with the respondent in bringing this petition.

On the other hand the respondent, who is a property agent at Ngong, held the petitioner as the author of the domestic problems between him and her. He traced the genesis of the problems to a trait the petitioner developed of coming home late and drunk. This was between 1998 and 1999. According to him, she would sometimes come home as late as midnight and became hostile when asked for an explanation. On the occasions when she explained, she ascribed her lateness to her having started attending evening classes. The respondent said he had two major problems with that explanation. Firstly, the petitioner never consulted him about her intention to enroll for the evening classes in question. Secondly, he was hearing for the first time of evening classes lasting upto midnight. He was far from being impressed by the petitioner's explanation and concluded that the petitioner was engaging in acts of unfaithfulness.

The respondent continued to narrate that when his questioning of the evening class theory persisted, the petitioner vacated the matrimonial bedroom and moved to the children's bedroom such that upon her return from "evening classes", she would go straight to the children's bedroom. The respondent averred he used to drink alcohol prior to his marriage to the petitioner but stopped before getting married. He said he was positive that he knew what he was talking about when he said the petitioner used to come home late and drunk. The petitioner denied the accusation of coming home drunk and said she had never taken alcohol in her life. She, however, conceded that she sometimes got home late because she was attending evening classes but said the latest she got home was 9.00 p.m.

The respondent counter-accused the petitioner of using unfriendly and abusive language towards him. He recalled, not with fondness, that when he persisted in questioning the petitioner why she came home late or did something without notifying him, she would ask him what kind of a man he was. The respondent complained of the petitioner transferring the children from one school to another without informing him and also taking the children to her parents' home for part of the school holidays without recourse to him. The petitioner denied the accusations.

Regarding the incident of 19.03.99, the respondent testified that the petitioner came home at about 10.30 p.m. with her sister. The sister was staying at the parties' matrimonial home and was unemployed. Respondent told the court that he politely asked the petitioner if she had seen his Driving Licence which he had missed in the morning. Respondent complained that instead of the petitioner answering whether she had or had not seen the licence, she asked him if he had even seen her driving! Respondent said he did not like the petitioner's remark and he moved away from the sitting room to the bed room and the petitioner not only followed him there but also called him names and that the petitioner's sister joined in the fray and also called him names. Respondent added that he went back to the sitting room and the petitioner again followed him. Respondent said he was provoked by this and he opened the door and asked the petitioner and her sister to walk out and they did so. Respondent then proceeded to lock the door behind them and refused to re-open for them. He denied physically assaulting the petitioner and wondered why she never produced medical evidence to support her claim. Respondent denied destroying

petitioner's hairdressing tools and said he never saw any such tools in the matrimonial home.

Regarding petitioner's accusation that the respondent did not care about the children, he said he actually cared and used to contribute to the payment of their fees. He said there was in fact a time when he took sole responsibility for doing so under a domestic arrangement by which he paid fees while the petitioner increased her share contributions to her co-operative society. He added that after he and petitioner parted ways, he used to go and see the children at school until the petitioner called him one day and asked him for how long was going to bother her about the children he claimed to be his! Respondent proceeded to say that since petitioner had physical custody of the children, he thought it wise to stop seeing the children for their own safety.

Like the petitioner, the respondent told the court that there is no chance of reconciliation between him and the petitioner and he prayed for dissolution of the marriage, unlimited access and visitation rights to the children of the marriage and costs of this cause.

Both the petitioner and respondent appeared and testified before me. Neither called independent evidence to support their rival claims.

The parties are agreed that their marriage relationship soured to the extent of reaching rock bottom. Each blames the other as the sole cause of that state of affairs. I find each to have exaggerated the wrongdoings ascribed to the other. It seems clear to me that the parties have not been transparent with each other and have not fully appreciated that marriage is an intricate affair requiring good understanding and tolerance, transparency and mutual trust between the parties. These central ingredients have been clearly missing from the parties' marriage and it cannot hold together. In my view each party has contributed to the breakdown of the marriage. Now that the marriage has irretrievably broken down, it would be unrealistic for the court to insist that the parties live together as husband and wife since such a union would not be voluntary as marriage is supposed to be.

There is only one course open to the court and that is to dissolve the marriage. Accordingly, I hereby pronounce a decree of divorce and order that the marriage between the petitioner and the respondent be and is hereby dissolved. Decree nisi shall issue forthwith, the same to be made absolute after expiry of the statutory period of 3 (three) months. I grant the petitioner legal custody of the children, V.K., J.N. and C.M. until they attain majority age. I also grant the respondent unlimited access and visitation rights to the children. The petitioner and respondent shall bear their own respective costs of this cause.

Orders accordingly.

Delivered at Nairobi this 13th Day of May 2004.

B.P. KUBO

JUDGE