



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**DIVORCE CAUSE NO. 28 OF 2002**

**J K N ..... PETITIONER**

**- Versus -**

**J K K ..... RESPONDENT**

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

The Petitioner in this cause is the husband. He works for {*Particulars withheld*} and resides at {*Particulars withheld*} in Mombasa. He met the Respondent sometimes in 1988 when she was teaching as an untrained teacher at a school near his home. Their courtship lasted about one year. On the 31st August 1989 they solemnized their marriage at the Mombasa District Registrar of Marriages' Office.

The couples' first matrimonial home was at the Petitioner's home at {*Particulars withheld*} in Meru District although the Petitioner was working and staying at Mombasa. They were blessed with three daughters, S N K and C M K, twins {*Particulars withheld*} and M M K.

The couples' marriage has not been a bed of roses. They quarreled and fought several times. On the 19th August 2002 the husband petitioned for divorce on the grounds of cruelty and desertion. The particulars of cruelty are that:-

(a) The Respondent is a person of ungovernable temper who:- has on several occasions assaulted and threatened to continue assaulting the Petitioner.

(i) has assaulted and threatened to continue assaulting their workers subjecting them to inhuman treatment.

(ii) has constantly threatened to kill the Petitioner either by herself or by her agents.

(iii) has caused the Petitioner mental anguish by peddling lies and defaming the Petitioner to their friends.

(iv) has caused the Petitioner considerable anxiety and untold mental anguish by stealing from the Petitioner's business at Likoni.

(v) willfully abandoned the children of the marriage to the Petitioner's aged mother.

(vi) willfully neglected and abandoned the children of the marriage leaving them with the Petitioner at Kenya Navy compound at Mtongwe in Mombasa.

(vii) willfully neglecting the children of the marriage and generally being uncooperative on matters affecting the welfare of the family.

(viii) has threatened to set ablaze the Petitioner's motor vehicle and their matrimonial home at Likoni in Mombasa.

On desertion the Petitioner averred that the Respondent has variously abandoned the Petitioner and the children of the marriage and has willfully separated herself from the petitioner thereby denying him his conjugal rights. He further averred that he has not in any manner been accessory to connived or condoned the said acts complained of. He further stated that their marriage has irretrievably broken down and prayed that the same be dissolved with costs to him and he be granted the custody of the children of the marriage.

The Respondent filed an answer to petition and also cross-petitioned for divorce on the grounds of cruelty, constructive desertion and adultery. After denying the allegations and particulars of cruelty and desertion contained in the petition the Respondent listed the particulars of cruelty meted out to her by the Petitioner as follows:-

(a) That sometimes between November and December 1996 the Petitioner seriously assaulted her in the presence of their children and threw her out of the matrimonial home at Mtongwe remaining behind with a housemaid for three days.

(b) That on diverse dates in 1992, 1996, 1999, 2000, 2001 and 2002 the Petitioner seriously assaulted and threw her out of the matrimonial home and denied her access to the children of the marriage and leaving the children to the care of house maids.

(c) That on the 16th February 2002 the Petitioner seriously assaulted and attempted to strangle the Respondent stripping her naked in the presence of their children and the house help and threw her out of their matrimonial home at Ujamaa and threatened to kill her if she returned thereto even to visit their children.

(d) That since the 17th February 2002 the Petitioner has denied her the custody and even access to their children and that her efforts through the Children's Department to get custody of or access to the children have been thwarted by the Petitioner.

(e) That the Petitioner has also been violent to their children and by denying the Respondent access to them he has deprived them motherly love.

(f) That on the 23rd May 2002 the Petitioner beat up their last child M because he found her with the Respondent.

(g) That the Petitioner has also on several occasions physically abused the children of the marriage by beating them with a belt and slapping them on the faces in particular Millicent alleging that she is not doing well in school.

(h) That Petitioner is a moody person of extremely volatile and ungovernable temper who has virtually throughout the subsistence of their marriage physically abused the Respondent in the presence of the children, house helps neighbours and friends.

(i) That on the 17th February 2002 the Petitioner set ablaze the Respondents personal belongings including clothes and her stock in trade and thwarted her attempts to have police take action against him.

(j) That on several occasions the Petitioner subjected the Respondent and their children to untold suffering by refusing to give them money for food and requiring the Respondent to pay rent for their matrimonial home and buy food from their shop. That in particular in May 2001 the Petitioner banished the Respondent and their children to the kitchen in their house at Ujamaa for two weeks while he remained in the main house with a housemaid.

(k) That the Petitioner has unreasonably refused the Respondent the right to participate in the running of their business to which she had financially contributed. (l) That the Petitioner has accused the Respondent of witchcraft

(m) That the Petitioner has on several occasions and in particular in the year 2000, in May 2001 on 16th, 17th and 18th October 2002 used obscene, threatening and abusive language to the Respondent.

(n) That the Petitioner has throughout the subsistence of their marriage withheld from the Respondent himself thereby denying her conjugal rights.

(o) That since April 2000 the Petitioner has committed adultery with one P R who doubles as their shop attendant.

(p) That in October 1989, in 1996 and in July 1998 the Petitioner infected the Respondent with a venereal disease the first instance being when the Respondent was pregnant with their first children.

The Respondent further averred in her answer to petition and cross-petition that she has not in any manner been accessory to or connived at or condoned the matrimonial offences complained of and that the cross-petition is not presented or prosecuted in collusion with the Petitioner.

The Respondent finally averred that their marriage has irretrievably broken down and cannot be salvaged and that by his deportment the Petitioner is a person she can no longer live with. She prayed that the petition be dismissed with costs and that her cross-petition be granted with costs and that an order be made for such periodical payments as the court may deem fit to be made by Petitioner to her for her maintenance and upkeep.

The parties testified at length on the allegations and counter-allegations made by and against each other. Cross-examination by their respective advocates was equally lengthy and extensive.

The Petitioner testified that prior to their marriage he had constructed a house at their village home in Meru intending to settle there whoever he married to stay with his mother and give her company his father having died. After their marriage he settled the Respondent in that house but she stayed there for only two years. Due to her bad character, he said she had very bad relations with his mother and his brother's wife. She could also not keep a maid and as a consequence their first twin children who were asthmatic greatly suffered and had to be looked after by his aged mother. That forced the Petitioner to have the Respondent and the children transferred to Mombasa in 1992.

The Petitioner further testified that he took the Respondent to Muranga Teachers Training College for a P1 course between 1994 and 1996 paying for her the requisite tuition. During that time he stayed with the children. When she was going to college for her last term, they had quarrelled, as they had always done since 1990. She went a day earlier without informing him. That notwithstanding he attended her graduation ceremony but after it was over she walked off on him and went with her mother to her home for the whole of August 1996. She came to Mombasa with her sister and the matter was resolved. That in 2000 she abandoned the matrimonial home and went and rented a house of her own at Mtongwe because the petitioner had remarked that she was living like a cow when she failed to give him socks one morning. It took the intervention of friends for her to return. He continued that she never contributed to the household expenses or concern herself with the welfare of their children. She adamantly refused to take an education policy for their last child when the Petitioner had taken for the first two children.

The Petitioner denied all the allegations and the grounds raised by the Respondent in her cross-petition. He however admitted that on the 16th February 2002 after one of their usual quarrels they seriously fought. He denied beating her or stripping her naked or threatening to kill her as she alleged. However, after that the Respondent deserted the matrimonial home and went to live on her own. She has never returned to the matrimonial home since. He denied that he is the one who threw her out of the matrimonial home.

On cross-examination he said that they always quarrelled over money. That the Respondent always alleged that he was not giving enough money to meet the household expenses. He also stated that they quarrelled over Phillis Ruguru, their shop attendant. That the Respondent demanded that she should leave but he refused because they had nobody honest to entrust the running of their business to. He denied committing adultery with her and said that she was his relative. She however never believed him and always suspected that he committed adultery with her. One time she even beat up Phillis and she was arrested and charged with assault but the case was withdrawn.

In further cross-examination he denied that the Respondent contributed any money to their business. He said he cannot pay for the Respondent's maintenance given the fact he is the one shouldering all family expenses. Their children are in a boarding school at Kwale and he is the one who pays their school fees and meets all their expenses. He earns Sh. 19,000/= and although he has a business of a retail shop and a bar and vehicles he has colossal loans he is servicing.

The Petitioner called one of his workers, Joel Musavi. That witness testified that on the 28th August 2001 the Respondent went to the Petitioner's shop and beat up Phyllis Ruguru and demanded that she should go away. When the witness intervened to separate them the Respondent sprayed his eyes with doom. The matter was reported to police who charged her but the case was later withdrawn. He further stated that prior to that day the Respondent had stayed away from the matrimonial home for about 6 months.

The Respondent on her part testified and denied the allegations made against her by the Petitioner and his witness. She denied there being any bad blood between her and the Petitioner's mother. The reason why she moved to Mombasa, she said, was because of the medical expenses of their first borns who were prematures developed asthma. With her meager salary then of only Sh. 1,440/= she could not afford to pay their household expenses and buy them the medicines they required. The Petitioner, she said, did not give her any financial support. Even when she moved to Mombasa the Petitioner was not giving her enough money for food and other household expenses. She was all the time begging him to give her money and that caused them to quarrel frequently. At that time, she said, her salary of Sh. 2,100/= was all spent on food and household expense and was not enough. Until 1996, when her salary improved after college, her mother had to send them foodstuffs all the way from Meru. The Petitioner spent all his money drinking with his friends and in particular with a lady called Dorcas Kiende. She said that the Petitioner's association with that woman, sometimes going home with her late at night, was also the source of frequent quarrels between them.

She also said that the Petitioner is the one who used to employ maids and did not want her to discipline them. She suspected that the Petitioner had love affairs with them especially one Lucy who caused her to be beaten and thrown out of the home for 3 days in 1996 during which period the Petitioner stayed with her. The other person who worsened their already strained relationship was Phyllis Ruguru whom the Petitioner employed as a shop attendant. The Respondent said that girl was rude to her. The Petitioner rebuffed her repeated demands that she should leave. She suspected and still suspects her relationship with him. She said that in the year 2000 there was a day they had no food. She went to their shop and took some food stuffs. When the Petitioner learned of it he banned her from going to that shop. She has since not gone back and Phyllis is running the show.

She also testified that the Petitioner could at times go for upto two weeks without having any sexual relations with her claiming he was either tired or sick. That in 1989 and on two other occasions he infected her with a venereal disease and asked her to go for treatment even before she knew she was sick..

She also testified that the Petitioner frequently beat her but on 16th February 2002 he brutally assaulted and stripped her naked. Someone went to her aid and she managed to escape and run to her sister's place. The following day he burnt all her clothes. Because of threats to kill her she said she has not gone back since then. She does not want to go back. She produced a copy of the P3 she got as an exhibit.

Prior to the 16th February 2002 she said she had taken a co-operative loan of Sh. 190,000/= out of which she gave the Petitioner Sh. 90,000/= which he put in their business. The balance she bought some

second hand clothes for sale which the Petitioner burnt on 17th February 2002 along with her other personal effects and clothes. She is now repaying that loan leaving her with a net pay of only Sh. 2,882/= per month. That is not enough to keep her hence her demand for maintenance.

In cross examination she said that when she delivered her children she paid all the maternity expenses. The Petitioner did not pay anything. That she also paid for her tuition at Muranga TTC and denied that the Petitioner paid it. She said why she left Mombasa a day earlier for her last term was because the Petitioner had gone into their home with a woman, Dorcas Kiende, at about 3.00 a.m. She denied that she had a venereal disease before they married. She insisted it is the Petitioner who infected her in 1989, 1996 and 1998 but she was unable to produce any medical report or treatment record on that.

She denied that she has built a house of her own. She said her gross salary is Sh. 11,453/= and after loan deductions she is left with only Sh. 2,882/= which is not enough to keep her. Her rent is Sh. 2,000/= per month. She has some little business which helps her. She denied condoning the cruelty. She said she cannot live with the Petitioner any longer and that is why she has cross-petitioned for divorce.

As I have already stated the husband's petition is on the grounds of cruelty and desertion. I have already summarized herein above the particulars of cruelty he alleges against the wife. What is cruelty? Cruelty as a matrimonial offence upon which a petition for divorce may be grounded arises where there is wilful and unjustifiable conduct of such nature as will cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such damage. (See Horton Vs Horton [1940] 3 ALL ER 380. It can also arise in situation where there is systematic neglect and insults to the petitioner. In either situation 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 in the ordinary sense of the word cruel; and, secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury. The burden of proof lies on the petitioner, or on the respondent if there is a cross-petition on that ground, to establish injury or reasonable apprehension of injury to life, limb or health to herself or himself before the respondents conduct can be described as cruel. In Malhouse Vs Malhouse [1964] 2 ALL ER 50 Sir Jocelyn Simon P. stated:-

**“Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt. ... misconduct must be ... of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point which threatens the health of the other spouse, the law will not hesitate to give relief. Secondly, it must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it. Thirdly, it must be proved that it is the misconduct of the respondent which has caused injury to [the] health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought the trouble to himself or herself, the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of the term”.**

To accord with section 10 of the Matrimonial Causes Act the standard of proof required to establish a matrimonial offence is that of beyond reasonable doubt. While dealing with the offence of adultery, Law JA had this to say in **Wangari Mathai Vs Mwangi Mathai [1980] KLR 154 at page 157:-**

**“..., I am of the opinion that, when considering the question of the standard of proof requisite**

**to establish the commission of a matrimonial offence, the safe and proper direction should be that the court must be satisfied beyond reasonable doubt or satisfied so as to feel sure, that the guilt has been proved; ...”**

Returning to the instant case, the question I pose here is whether or not the cruelty complained of by the Petitioner meets the above stated standards. That is, whether or not it has been proved beyond reasonable doubt that the cruelty complained of has caused real injury to the health of the Petitioner or a reasonable apprehension of it. I have already summarized herein above the particulars of cruelty alleged by the Petitioner against the Respondent. Some of the particulars like assaulting or threatening to assault the Petitioner’s workers do not amount to cruelty against the Petitioner. The evidence of the Petitioner’s work P.W.2 in this regard does not in any way prove any cruelty on the part of the Respondent against the Petitioner.

As regards the Respondent’s cruelty to the Petitioner himself the allegations are that the Respondent on several occasions has assaulted and threatens to continue assaulting the Petitioner, that she has constantly threatened to kill the Petitioner either by herself or by her agents and that she has caused mental anguish to the Petitioner by peddling lies and defaming the Petitioner to their friends and by stealing from the Petitioner’s business at Likoni. The evidence of the Petitioner, as summarized above, has not even attempted to prove any of these allegations. The allegations of assault for instance were general. The Petitioner did not adduce any evidence of any threats by the Respondent to kill him or to hire agents to kill him. Allegations of the Respondent neglecting or refusing to contribute to the family budget in my view did not cause injury or threaten to cause injury to the Petitioner. Even if they were proved they could not amount to cruelty against the Petitioner. The Petitioner in his testimony, dwelt mainly on the Respondent’s anti-social character and how she has been unable to live with members of his family. In a case like this the court looks at the conduct of the respondent and not at his or her person or character. In *Gollins Vs Gollins* [1964] AC 644 at page 670 Lord Eveshed said:-

**“The question in all such cases is, to my mind, whether the acts or conduct of the party charged were ‘cruel’ according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman”.**

The Petitioner testified and I accept his evidence that the Respondent does not contribute to the educational expenses of their children. But I am not prepared to hold that she has neglected the children. I accept her testimony that she buys the children some personal effects and occasionally gives them some pocket money when she goes to visit them. In my view she should do a little more than that. She should not spend all her salary on herself.

Even if the Respondent had neglected their children and failed to contribute to the family budget, as I have already said that does not amount to legal cruelty against the Petitioner. On the whole I find that the Petitioner has not proved the ground of cruelty against the Respondent.

On the ground of desertion the Petitioner averred in his petition that the Respondent has variously abandoned the Petitioner and the children of the marriage and has wilfully separated herself from the Petitioner thereby denying him his conjugal rights. In his testimony he said that in the year 2000 the Respondent abandoned the matrimonial home and went to live on her own at Mtongwe. He, however, admitted that this was because he had remarked that she was living like a cow when she failed to give him socks one morning. But the parties were reconciled by their friends and she returned. That cannot therefore amount to desertion.

The Petitioner also testified that on the 16th February 2002 after the parties seriously quarrelled and fought the Respondent deserted the matrimonial home and has since not returned. The Respondent testified that on that date the Petitioner brutally assaulted her and stripped her naked. Someone went to her help and she managed to escape to her sister’s place and that the following day he burnt her clothes and other personal effects. The Petitioner of course denied those allegations and said that they fought.

I observed the parties' demeanour when they testified. The Petitioner was rather reticent on the issue. I prefer and accept the evidence of the Respondent that the Petitioner assaulted her and threw her out of the matrimonial home.

In the circumstances I find that it is the Petitioner who is in constructive desertion. The Petitioner's ground of desertion therefore also fails. Consequently I find that the Petitioner has failed to prove his petition to the satisfaction of the court and I accordingly dismiss it.

The Respondent has cross-petitioned for divorce on grounds of cruelty, adultery and desertion. I have already just found that the Petitioner is in constructive desertion and that on the 16th February 2002 the Petitioner seriously assaulted the Respondent and threatened to kill her. I have considered the testimony of the Respondent with regard to the other incidents of alleged cruelty. I am not satisfied that the Petitioner assaulted her on all the occasions stated in the particulars of cruelty. If he did then the Respondent has not proved to the satisfaction of the court that she was treated with cruelty.

As I have already stated, this was a quarrellous couple. Not every outburst of temper or use of strong language amounts to cruelty. I therefore find that the only incident of cruelty against the Respondent proved to the satisfaction of the court is the one of the 16th February 2002.

The other ground for divorce stated in the cross-petition is adultery. The Respondent testified that she suspected the Petitioner had sexual relations with their maids especially one Lucy and their other employee Phyllis Ruguru. She also suspected that he had a love affair with a lady by the name Dorcas Kiende. In her testimony she did not prove any of those allegations. Other than mere suspicion the Respondent did not adduce any evidence to prove the allegations.

Adultery is a serious matrimonial offence. It must, where it is alleged, be proved clearly. The evidence in proof of that must go beyond establishing mere suspicion and opportunity to commit it. True adultery is committed behind closed doors and it is in most cases difficult to adduce direct evidence in proof of it. However mere suspicion cannot be enough. Circumstantial evidence has to be led to leave the court with no doubt that adultery must have been committed.

In this case as I have already stated the Respondent has not adduced any evidence to prove any of the allegations of adultery. She testified that in 1996 the Petitioner beat her up and threw her, together with their children, out of the matrimonial home for three days. He remained at home with their maid Lucy. She suspects that during that period the Petitioner had sexual relations with Lucy. That is mere suspicion which I cannot accept.

With regard to Phyllis Ruguru, the Respondent thought that the Petitioner had undue familiarity with her. That is also based on suspicion as she adduced no evidence to prove that he had any sexual relations with her. The Petitioner testified that Ruguru was his relative and that he maintained her as his employee because she is the one he could trust in his business. In the absence of any evidence to the contrary I have no reason to doubt that.

The other lady the Respondent mentioned is Dorcas Kiendi. She said that was the Petitioner's drinking paddy from school days. She suspected the two had sexual relations because the Petitioner used to go home with her in the wee hours of the night. Again her evidence was based on mere suspicion. All in all I find that the Respondent has not adduced any evidence to prove the allegations of adultery and I therefore dismiss that ground.

In the result I find that the Respondent has in her cross-petition proved to the satisfaction of the courts the grounds of cruelty and desertion. The marriage between the parties has been in throes of domestic upheavals and has irretrievably broken down. It will, in my view, be in the interest of both the parties if the same is dissolved. Accordingly I dismiss the petition but grant the Respondent's cross-petition on the grounds of cruelty and desertion and order the marriage between the Petitioner and the Respondent be dissolved. Decree nisi do issue and the same be made absolute after the statutory period. Each party shall bear its own costs.

Both the parties prayed for the custody of the children of the marriage with the Respondent praying in addition for reasonable maintenance for herself and the children. In making an order for custody of children the most important factor the courts consider is the interest of the children. The courts consider who, between the two spouses will best serve the interest of the children if their custody is granted to him or her. And the interest of the children must embrace all aspects of life, that is, their social, spiritual and physical well being as well as provision for their education. These in my view can be best provided by both parents living together and co-operating with each other. Now that the marriage between the parties to this cause has been dissolved, I have to consider who between the Petitioner and the Respondent can come near to catering for these interests.

The children are in a boarding school. During the vacations they have been staying with their father, the Petitioner. He pays their school fees and provides for their needs. The Respondent said she stays in a small incomplete house and that her net pay after loan deductions is about Sh. 2,882/= which she said is not enough even for herself. In the circumstances I grant the custody of the children to their father, the Petitioner. I have, however, to make it very clear that children need both their parents. The Petitioner should not therefore deny the Respondent access to the children. I leave it to the parties and their advocates to agree on how the Respondent can have access to the children with liberty to apply in default of agreement.

The last thing I have to deal with in this case is the Respondent's prayer for maintenance. She said that after the loan deductions she is left with only Sh. 2,882/= which is not enough to keep her. But she admitted she has some business which supplements her income. On her own testimony the Respondent said that the Petitioner has all along even when they were living together not been very generous. She has therefore had to make do with the little income she earns. Considering the fact that the Petitioner is the one paying school fees for the children and providing for their needs I am not prepared to make any order for any maintenance to be provided by the Petitioner to the Respondent. If her condition changes for the worse her application may be entertained.

In the upshot I dismiss the husband's petition for divorce but grant the Respondent's cross-petition and order the marriage between the Petitioner and the Respondent dissolved on grounds of cruelty and desertion. The custody of the children of the marriage is given to the Petitioner but the Respondent shall have access to them as will be agreed between the parties failing which the court will decide on an application by the Respondent. The Respondent's claim for maintenance is dismissed. Each party shall bear its own costs.

**DATED this 30th day of June 2004.**

**D.K. Maraga**

**Ag. JUDGE**