



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

**DIVORCE CAUSE NO. 34 OF 2004**

**E.W.K ..... PETITIONER**

**VERSUS**

**G.K.M..... RESPONDENT**

**JUDGMENT**

The petitioner and respondent are wife and husband, respectively, having contracted a statutory marriage under the Marriage Act (Cap. 150) at the Registrar of Marriage Chambers, Sheria House, Nairobi on 12.10.2000.

On 15.03.04 the petitioner filed the present divorce proceedings on grounds of cruelty and adultery ascribed to the respondent. In her petition for divorce, the petitioner averred that since the marriage she and the respondent have lived and cohabited at Ongata Rongai of Kajiado District. That at the time of the said marriage the petitioner already had one child, A.S.K then aged 2 years and now aged 5 years. The petitioner told this court in her subsequent oral testimony that the respondent is not the biological father of the child, A.S.K and that the respondent knew as much when he married her. The petitioner continued to aver that after she married the respondent, the two of them were blessed with one issue, A.W who is aged about 2 ½ years. Further, the petitioner averred that she and the respondent are citizens of and domiciled in Kenya and that there have been no previous proceedings by the two of them or on their behalf in relation to their marriage.

With regard to the cruelty pleaded, the petitioner averred that since celebration of the marriage the respondent has often treated her and the children with cruelty . She listed the following particulars of the respondent's alleged cruelty:-

- a) Unreasonably beating the petitioner's child (A.S.K).
- b) Inflicting serious bodily injuries on the petitioner's son (A.S.K).
- c) Punishing the petitioner by expelling house-helps from the matrimonial home.
- d) Uttering threats of grievous injuries and even death against the petitioner.
- e) Committing acts of adultery/indecent assault with their house-helps.
- f) Being habitually excessively drunk and disorderly.
- g) Exposing the petitioner to emotional torture and public ridicule.

h) Neglecting the family.

Regarding the ground of adultery, the petitioner averred that since celebration of the marriage the respondent has often and with total disregard for the petitioner's feelings openly committed adultery with various women known to the petitioner. She listed the following particulars of adultery:-

- a) In and around 11.03.02 the respondent committed adultery with the petitioner's house-girl called Judy whom he raped in the house as she was going about her daily household chores.
- b) The respondent is a drunkard who spends his time and money drinking.
- c) The respondent is an irresponsible man and apart from time spent drinking heavily spends most of the rest of the sleeping (sic) leaving the petitioner the burden of meeting the needs of the family.
- d) The respondent has created circumstances which the petitioner cannot reasonable (sic) be expected to bear and the petitioner has since for her children's safety and her own security taken cover at her parents' home where she and the children have been residing for the last one year.
- e) That the marriage between the petitioner and the respondent is irretrievably broken down and there is no need for continuance of this marriage as the petitioner and the respondent continue to suffer physical and emotional distress. In winding up her averments against the respondent, the petitioner stated that she did not present her petition in collusion with the respondent, neither had she condoned the cruelty and adultery she ascribed to the respondent. Accordingly, the petitioner prayed for the following orders:-

1. That the marriage between the petitioner and the respondent be dissolved.
2. That the petitioner be granted full custody of the issues in the marriage.
3. That the respondent be ordered to contribute to the cost of maintenance of the children.
4. That the petitioner be awarded costs of this suit.

There is evidence on record that the respondent was duly served with the petition herein plus the petitioner's affidavit in support of the petition. The respondent never entered any appearance nor did he file any answer to the petition. These divorce proceedings, therefore, went undefended. That did not absolve the petitioner of the duty of proving her allegations to the satisfaction of the court.

The petitioner, who is an advocate in private legal practice, appeared in court for the hearing of these divorce proceedings on 14.07.04 together with her counsel, Mrs. Siaji. The petitioner gave oral evidence in support of her petition for divorce. Among other things, she clarified that although she cited the respondent's name as G.K.M, his name appears in their marriage certificate as K.P.M. The petitioner told the court that G.K.M is one and the same person as K.P.M. and that the respondent uses the two names interchangeably. The petitioner added that the respondent is a self-employed architectural engineer. The petitioner testified at length in an effort to substantiate the two grounds of divorce pleaded by her. I shall examine them in reverse order, starting with the ground of adultery.

The evidence given by the petitioner on the ground of adultery may be summarized as under. In March, 2002 the petitioner had a house girl called Judy who was in her employment for a month. Petitioner did not give any other name for the house girl. Petitioner used to give Judy off-duty on Sundays and she was to report back to work at 5.00 p.m. On one Sunday Judy did not report back to work until about 7.00 p.m. when she came with a girl cousin of hers. Petitioner did not name Judy's cousin. The two girls did not enter the petitioners house but instead they stood outside. There was an exchange between Judy's cousin who stood outside and the respondent who was inside the house. The gist of the exchange is that Judy's cousin asked the respondent what he had done to Judy. The petitioner did not say what answer the respondent gave. Later the respondent walked away from the house and Judy confessed to the petitioner that the respondent had made love to her on the previous Monday 11.03.02. Judy and her

cousin were not happy that the respondent had walked away on them and said they were going to report his alleged rape of Judy to Rongai Police Station and they did so. In the evening a police officer visited the petitioner's house looking for the respondent but he was not at home. The petitioner who was there was asked to tell the respondent to report to the Police Station and she gave him the message.

Next day, i.e. Monday, the respondent went to Rongai Police Station in connection with Judy's rape report and he was locked up. Subsequently the petitioner learnt from the Officer in Charge, Rongai Police Station that no rape charges could be preferred against the respondent as the alleged rape on Judy was not reported until a week later.

Other evidence given by the petitioner about the adultery ascribed to the respondent is that the house girls she employed to take care of her children never stayed long in her employment. The petitioner usually left the respondent at home sleeping after he returned late at night from his drinking sprees and the house girls seemed to leave her employment abruptly in her absence. When the petitioner asked the respondent why the girls were leaving in quick succession, his usual answer was that they wanted wage increase. Petitioner said she was puzzled by the respondent's answers as she is the one who negotiated their wages with them, yet they left employment without raising the issue of wage increase with her. The petitioner added that she used to get the girls from an employment bureau which later informed her that it would no longer offer any girls to be employed by her as they were treated badly at her house.

On the basis of Judy's confession to her that she had been raped by the respondent a week earlier and on the basis of adverse comments from the employment bureau about bad conditions of work at the petitioner's house, the petitioner concluded that Judy was raped by the respondent as alleged by her.

Judy was not joined as a co-respondent to testify. The petitioner said she did not know how to trace her. If Judy indeed made a rape report against the respondent at Rongai Police Station, the Police would be expected to have taken her contact address. No evidence was called from the police on the matter. In the absence of evidence from Judy or any other witness on her alleged rape, the rape allegation was not proved to the satisfaction of this court as it was based on the hearsay evidence and suspicion of the petitioner. At the tail end of the petitioner's oral testimony, she said she moved out of the matrimonial home on 11.04.05 to run away from the respondent's cruelty and that the respondent subsequently started cohabiting with another woman called Nyambura Karanja. This woman was not joined as a co-respondent and she did not testify in this case. No other evidence was tendered on the respondent's alleged adulterous activities.

I find that the matrimonial offence of adultery alleged against the respondent has not been proved and that the ground of adultery must fail. It is, accordingly, dismissed.

I now turn to the ground of cruelty pleaded by the petitioner against the respondent. The evidence on this ground is also that of the petitioner and it may be summarized as under. The petitioner got her first child, A.S.K with another man out of wedlock before the petitioner married the respondent who knew of this child but all the same married the petitioner. After the parties' cohabitation they were blessed with a daughter, A.W born on 01.06.01. At the beginning of the marriage the respondent used to live in Embu while the petitioner lived in Nairobi. In November, 2001 the parties moved to Ongata Rongai and cohabited there. It was then that the petitioner discovered that the respondent drunk excessively and habitually. He would come home at around 5.00 p.m. and then go out for drinking and return in the "wee" hours of the morning. Sometimes he would do this for a whole month when in funds. Upon return from his drinking sprees, the respondent would bang the door causing the petitioner and the children to wake up. Then he would go to sleep until around 10.00 a.m. or 11.00 a.m., or even the whole of the next day. This turned out to be his life style and more frequently than not it is the petitioner who met bills for feeding the family and also footed other domestic expenses. Once in a while the respondent would make a contribution but only after quarrels. This went on until 2002 when the petitioner left the matrimonial home.

The petitioner added that when the respondent returned home from drinking as aforesaid, he would not stand any noise from A.S.K who was only 2 ½ years old. If A.S.K cried and made the respondent

wake up, the respondent would beat up the boy. These beatings sometimes took place at night and at other times during the day. The petitioner told the court that even A.W sometimes made noise in the respondent's presence but her noises never attracted beatings from the respondent. Sometimes the respondent would call A.S.K and strike him for no apparent reason. At other times the respondent would call A.S.K and order him to remove his (respondent's) socks. On such occasions the petitioner protested and the respondent complained that the petitioner wanted to spoil the boy. In the course of time A.S.K became withdrawn and fearful such that if he wanted to tell the petitioner something in the respondent's presence, A.S.K would resort to whispering into the petitioner's ear. A.S.K started sucking his thumb and still does so at the age of 6 years. These goings – on distressed the petitioner so much that she started taking afternoon offs from her single proprietorship law practice and the practice suffered. Eventually she fell into rent arrears and had to be evicted from her rented residence and her household effects auctioned.

On 11.04.02 the petitioner got home at about 5.30 p.m. and found A.S.K sitting on the cold floor. He had a blood stain on the cheek and two upper teeth plus four lower teeth were loose. The respondent was in the bedroom. The petitioner asked the respondent about the boy and the respondent said he did not know. Later the petitioner learnt from the house girl that the respondent had pushed A.S.K who fell and got injured. The petitioner took the child for X-Ray and medical treatment at Ongata Rongai Medical Clinic. The petitioner later asked the respondent again as to what had happened to the boy and he said the boy was very playful and could have fallen and injured himself. The respondent also floated the alternative theory that A.S.K could have got an electric shock. Subsequently A.S.K started getting nightmares, e.g. waking up and screaming "*daddy usinichape!*". The petitioner said she feared for A.S.K but did not go for any treatment for those traumatic experiences.

In January, 2002 the petitioner asked the respondent about money he was supposed to have received from a relative called Gitau. The respondent told her not to mention Gitau again in that house, otherwise the respondent would kill her and the worst that would happen to him would be to go to prison. As an architectural engineer, the respondent had tools of trade like a hammer, a carpentry knife, a chisel, etc. These tools used to be kept in the store. Suddenly the petitioner found them in the bedroom she shared with the respondent. The respondent never gave any explanation for relocating his tools from the store to the bedroom. Although the respondent never used any of the tools to inflict injuries on the petitioner, their presence in the bedroom instilled fear in her. According to the petitioner, the respondent's physical assault on A.S.K was the last straw and she decided to move out of the matrimonial home on 11.04.02 and took her two children to her parents' home at Githunguri where they have been staying todate.

In the petitioner's view, her marriage to the respondent has irretrievably broken down. The respondent has not sought any reconciliation and he has not taken any steps to maintain the children and the petitioner. The petitioner reiterated the first two prayers in her petition but said she abandoned the prayers for maintenance and costs.

I had the opportunity of watching the petitioner testify and I observed her demeanour. Her intonation, body language and facial expressions told a story of one totally disenchanted with and distressed by the marriage she had entered into with the respondent and who was looking forward to early dilinkage from the said marriage. She said she got so fed up with the respondent's behaviour that she decided upon discovering the respondent's physical assault on her son, A.S.K on 11.04.02 to abandon the respondent and everything else except her two children. What she left behind at the matrimonial home included an X-Ray taken on A.S.K's jaw plus his treatment notes written when she took the boy to Ongata Rongai Medical Clinic on the day the respondent physically assaulted him. Most of the events she complained about under the head of cruelty are matters the petitioner said she witnessed or observed herself. The respondent did not bother to file any answer to the allegations of cruelty leveled against him. The petitioner's evidence on the said matters, therefore, remains uncontroverted. I have no reason to disbelieve the petitioner's evidence and I accept the same.

The respondent behaved in a most reprehensible manner towards the boy, A.S.K and the petitioner. The respondent's conduct constitutes the matrimonial offence of cruelty and the petitioner is entitled to the reliefs sought. 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 a period of 30 (thirty) days from the date hereof. I also grant the petitioner full custody of the issues in the marriage, i.e. A.S.K now aged 5 (five) years and A W now aged 2 ½ years until they attain age of majority. As the petitioner abandoned her prayers regarding maintenance and costs, I make no order regarding these two matters.

Orders accordingly.

**Delivered at Nairobi this 28th day of October, 2004.**

**B.P. KUBO**

**JUDGE**