



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 39 OF 1998**

S J O PETITIONER

VERSUS

J O O DEFENDANT

J U D G E M E N T

The petitioner, S J O petitioned the court for an order to dissolve her marriage to J O O, on the grounds of the respondent's cruelty. The petitioner also asked for custody of the children of the marriage. She prayed for a further order directed at the respondent to "pay school fees and upkeep of the children", and finally, she prayed the court to condemn the respondent with the costs of the petition.

The petitioner amended her petition, vide an amended petition dated 19th June, 2001, but the prayers remained the same as in the original petition.

The respondent did enter appearance but did not file any answer.

The Registrar certified the proceedings to be in order and directed that the petition be heard as an undefended petition.

In court during the hearing of the petition, the petitioner recalled that she got married to the respondent on 17th May, 1985, at the Attorney General's Chambers (Sheria House) in Nairobi. She produced the marriage certificate as Ex.1 in court.

After marriage, the two lived and cohabited at [Particulars withheld] Government quarters, [Particulars withheld] Court along State House Avenue, and from there to [Particulars withheld] Government quarters.

The couple had 2 children, A B O, born on 9th November, 1985, and O I, born on 6th December, 1989. The petitioner produced the birth certificates of the children as Ex.2.

The petitioner recalled that they started having marital problems from 1987, when her husband started beating her in front of their children, and even relatives. This continued even when they moved out of [Particulars withheld] Government Quarters, and the petitioner was forced to go to an advocate who gave her a letter, which she produced in court as exhibit.

The petitioner was injured as a result of the beatings, and in 1993 she was attended by a Doctor who completed a P3 form in respect of the injuries sustained. The petitioner reported the matter to the police and her husband was given a bond to attend court and answer the charges of beating her so severely. She produced the bond in court as Ex.3.

The petitioner recalled that her husband had a tendency of locking her out of the house, together with

the 2 children. She recalled an incident in 1993 when she got home late after picking the children from the school. She got to the school and found that the children had not returned from a school trip so all parents had to wait. The petitioner got home only to find that she had been locked out of the house. It was raining and the weather was very wet.

As the petitioner was busy looking for alternative accommodation, she had an accident and both herself and the children were injured then they were all admitted at Nairobi hospital for the night. She produced a police abstract form to show the accident and also hospital bills from Nairobi Hospital.

The petitioner blamed her husband for the accident because it was him who had locked them out of the house, that is why they had to go round looking for alternative accommodation.

Though the petitioner continued living together with the respondent, she was not happy and she went back to her lawyer, Messrs Onalo & Co. Advocates who wrote to the respondent asking him to stop being cruel to her. This letter made the respondent beat her up so much that she escaped and ran away to Nakuru. This was in 1994.

The petitioner recalled another incident in 1996 when the respondent again beat her up, and she was treated at Masaba Hospital for bruises and was issued with a P3 form. The treatment sheet from Masaba hospital as an exhibit in court.

The petitioner testified further as follows:-

“Following all this I finally decided to leave. I first moved out for one month, then I moved to Lavington in 1996, towards the end I had hoped that we could discuss our differences but this did not happen. I did not go with the children but I visited them over the weekends, but in 1998, my husband stopped me from visiting the children. He locked the gates so that I could not reach the children. I started going to the school to see the children during lunch time.....”).

In January 1998, the respondent was transferred to Nakuru. The petitioner moved the court to get custody of the children. The court gave her temporary custody and she has had the children to date, and the respondent has access to the children. He collects them from her house.

In 1999, the petitioner went to study overseas for one year. She decided to put the children in boarding schools under the care of her sister. During that period, the respondent collected children during school vacation. The petitioner returned back to Kenya in November, 2000 and got back the custody of her children, who complained of cruelty suffered at the hands of the respondent and his new wife.

The children are still in boarding schools and during the school holidays, the petitioner sends them to their grandparents i.e the respondents parents. The respondent usually goes there to see the children.

The respondent was transferred back to Nairobi in January, 2000. The children usually go to see him in the office otherwise the petitioner has continued to send the children to their grandparents in Kitale.

The petitioner testified further that in December last year (2001) she sent the children to visit their father at his house in Ngara, in Nairobi. He in turn locked them up on the 3rd floor of a flat and they did not like it.

When he brought the children back to her, she sent them to Kitale, to the grandparents. She visited the children during Christmas and collected them on 28th December, 2001. She wanted to send them back to their father but the younger child refused. Only the older one agreed to go back to visit the father.

The petitioner is also having problems paying school fees for the children and their maintenance. The first born child is currently studying at Kabarak High School, where the fees is Kshs.15,000/= per term. The petitioner paid all his fees last year but this year (2002) the respondent gave a cheque of

Kshs.13,000/- instead of Kshs.25,000/=.

The petitioner testified further that the younger boy is at St. Patrick Hill School, where the school fees payable is Kshs.56,500/= per term.

The petitioner has been paying this school fees by herself since 1998, when the children joined the school. Prior to that, the children were in Consolata Primary School, and even there she paid the school fees on her own. She produced various receipts showing the school fees expenses.

The respondent complains that the school fees is too high, so the petitioner told him to pay what he can and they in fact agreed that he would be paying Kshs.25,000/= per term, but so far this money had not been paid. The petitioner has paid her share of the fees for both children as agreed. She hoped that the respondent would pay the balance.

She complained that whenever her husband takes the children, he retains their clothes, but does not buy them any. The petitioner also produced medical bills she has paid on behalf of the children. She then said,

“My marriage is not working. I wanted to go back but he refused. I filed this case as the last resort. He is married to another woman. They have a child.....”.

The petitioner testified further,

“I want the marriage dissolved. I want to have custody of the children. I want my husband to pay half school fees and maintenance. I do not refuse access as long as he protects the children and treats them well”.

The respondent did not give evidence but his advocate Mr. Ngaira addressed the court and said the following,

“I have discussed with my client the school fees structure for the first born child. He will pay half fees for Aaron. For Nicholas, he says the school is too expensive. He expresses the view that he would like Nicholas to go to an equally good school but less expensive. He would not be able to meet this high fees. He says he will contribute what he can. The respondent says he will share in paying money for text books and stationery for the two boys”.

I have considered the petitioner's evidence, which evidence was not challenged. That evidence which I find was corroborated by the many documents from the court, the police station and the hospital shows that the respondent was cruel to the petitioner as he beat her up quite often and injured her, prompting her to report the matter to the police and also seek Doctor's help.

The evidence I heard shows that so much violence suffered by the petitioner at the hands of the respondent that I have to grant the order to dissolve this marriage. I therefore formally grant an order dissolving the marriage between S J O and J O O. I also proceed to grant custody of the two children to the petitioner, S with access to the respondent. S's evidence shows that there is presently some arrangements so far as access is concerned which seems to be working. I would like to leave it to the parties to agree on a mode of access which would be acceptable to them. The court can only come in if there is no agreement.

The address by the respondents counsel showed that the respondent is willing and prepared to pay half the school fees for the children especially the first born child who goes to Kabarak High School. I order the respondent to pay half the school fees for A the first born child who goes to Kabarak High School. Failure to do so will amount to contempt of a court order which may attract penalties.

There is a problem as concerns the school fees of the 2nd born child, as the respondent says that the

fees is too high. The figure was given as Kshs.56,500/= per term. It is not enough for the respondent to say that the fees is too high and therefore he cannot pay. Both the petitioner and the respondent are parents to these 2 children. They have to be prepared to make sacrifices within the limits of their financial

capability. If the respondent cannot pay half of Kshs.56,500/=:, how much can he pay towards the school fees of his second son? Is it reasonable to suggest the removal of the 2nd child from this particular school bearing in mind that he has settled in the school and has friends.

I find that the matter of school fees for the second child is so important that I am forced to ask for affidavit of means from both the petitioner and respondent before I can make a decision. The answers I need to know are, how much does each parent earn and how do they spend that money? What are the expenses and obligations of the parties.

As the reports are being awaited I order the respondent to pay half the expenses of the school books and stationery and any medical expenses for both the children as well as payment of ½ school fees for the first born child. Failure by the respondent to make contribution as above, will amount to contempt of court.

The decree nisi for the divorce I have granted will issue straight away today. The same will become absolute within a period of one month from today.

Finally, mention of this Divorce Cause be on 4.7.2002.

Dated at Nairobi this 20th day of June, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE