



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**DIVORCE CAUSE NO.147 OF 2008**

**MNM.....PETITIONER**

**VERSUS**

**KJMM.....RESPONDENT**

**JUDGMENT**

The petitioner MNM via his petition dated 28th November 2008. He avers that he got married to the respondent on 10<sup>th</sup> November 1998 at Sheria House Nairobi under the Marriage Act. After the said marriage the petitioner and respondent cohabited in Nairobi. At the time of the petitioner and respondent were self-employed. They have one issue of the marriage NN born on 16th August 1997.

The petitioners are both Kenyan citizens domiciled in Kenya. The petitioner avers that after the formalization and cerebation of the said marriage. The respondent deserted the matrimonial home sometime in March 2000 and was unheard from until October that year. Sometime in September 2002 the respondent deserted the matrimonial home again and has since never returned.

He particularized desertion as follows; That the respondent had threatened him with death and physical injury. Had used abusive, violent and vulgar language against the petitioner often in public causing him embarrassment emotional pain and anguish. That she caused him to suffer mental cruelty and stress and general ill health by her undesirable conduct of insult , depravations, selfishness and sheer indifference. She had subjected the petitioner to denial of conjugal rights and was persistently indifferent in her attitude towards the petitioner and towards the petitioner's needs. The petitioner denies conniving or condoning the desertion.

He sought orders that ;

- i) The said marriage be dissolved forthwith
- ii) That the cost of the petition be granted to the petitioner
- iii) The petitioner be granted any other reliefs as the honorable court deem just.

The respondent filed her answer to Petition and Cross Petition on 5th February 2008. She stated that there two issues of the marriage MWN and NMN. She denied deserting the matrimonial home sitting that the petitioner was unable to provide for the family and the two were surviving on her teacher's salary. That they could not afford the rented house they were renting and had to go stay with relatives. Further that the petitioner had started numerous affairs from 1999 to October 200 he had an affair with a woman called M. In view of the numerous hardships the couple was facing it was agreed that she should seek employment outside the country. While working in Britain the respondent resumed his affairs and started cohabiting with one JK forcing her to stay away for longer than intended. And on coming back home she found the petitioner cohabiting with one CM and they had advance place to solemnize their relationship in a church wedding.

She particularized the petitioner's cruelty as follows;

He physically abused her on many occasions he called her stupid and useless even in front of third parties. He flaunted girlfriends before her. She admitted to having left the matrimonial home but not in the manner alleged by the petitioner.

In her cross-petition she alleged that the petitioner committed adultery with various women 1999-2000 with M, 2002-2006 with J W K, In 2005 with CM who he intended to marry in Church. That the petitioner has during the entire marriage ignored providing for the family and would spend money recklessly and on other women leaving the entire burden of caring for the family on her and squandered all the money she forwarded while working in Britain instead of setting up a business as agreed. That the petitioner is self-centered, egoistic and incapable of sustaining a relationship and the marriage is irretrievably broken. She sought that the marriage be dissolved and she be granted custody of

the issues of the marriage plus cost of suit.

The petitioner in his testimony stated that he met K in Buruburu in 1996 and developed a relationship and they were blessed with a daughter in 1997 and they got married. That they stayed together for a while for a short while 1999-2000 when he was out of employment and was a casual laborer at Leburys and later employed in one of the duty free shops in the airport. That the relationship was initially good but later became bad when he couldn't take care of their daughter. The respondent moved away from the matrimonial home when he lost his job and he learnt that she went to Kisii she also had a problem at work and stopped working and the children were taken to her aunty's place. That she came back from rural home in October 2000. At the time the respondent earned more than him and was the breadwinner. In 2002 September she left for the UK and did not see her until 2008. That during the first few years they used to talk but there after there was no communication. He denied allegations that he had affairs but admitted to cohabiting with C M whom he intends to marry if granted the divorce. He did not seek custody of the issue of the marriage as he is not currently employed. He denied knowledge of the respondent going to the UK despite he and his family having escorted the respondent to the airport on the day of her travel. He stated that he used to visit the children after the respondent travelled to the UK. He stated that though he assumed responsibility of the respondent's child from a previous relationship he admits not supporting the children financially. He admits to having met CM in 2006 had a relationship with her but did not start living with her immediately. However, he started cohabiting with her sometime in 2008. He admitted to having received money from the respondent when she was away in the UK. He stated that sometime in 20004 he told the respondent that he wanted nothing to do with her. Later on he wanted to get married to the CM because the respondent had abandoned him.

The petitioner alleges that the respondent had threatened him with death and physical injury. Had used abusive, violent and vulgar language against him which caused him embarrassment emotional pain and anguish cruelty and desertion as basis for his petition for divorce. These two form grounds as provided for under the Matrimonial Causes Act Cap 152 (now repealed) and also the Marriage Act 2014. For the court to grant a divorce on grounds raised it must be satisfied that the petitioner has established a case on cruelty and desertion.

In the case of *Alexander Kamweru v Anne Wanjiru Kamweru [2000]eKLR*, it was held that,

***“Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established”.***

The Petitioner's allegation of cruelty. To prove the ground on cruelty one requires proof to convince the court that the factual circumstances would suggest that the petitioner's conduct caused or threatened to cause actual danger to the Petitioner's life or limb.

In the case of *DM v TM [2008] 1 KLR 5*, Chesoni J (as he then was) held that,

***“To establish cruelty the complainant must show to the satisfaction of the court:– misconduct of a grave and weighty nature real injury to the complainants health and reasonable apprehension of such injury that the injury was caused by misconduct on the part of the Respondent, and that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word”.***

Both parties have alleged cruelty against each other however I find that none of them has adduce sufficient evidence to prove this ground.

The respondent has denied desertion of the petitioner and their matrimonial home. She claims that her travel was mutually agreed upon by both spouses so as to enable them support the family financially. The parties have been separated since 2004 and have lived separately since then. The petitioner is currently in another relationship with one C M with whom he cohabits with.

In the case of *NMM v SJC, Divorce Cause No. 1 of 2013*, Karanja J held that,

***“... it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives...”***

The marriage between the parties appears to have irretrievably broken down. I therefore dissolve the marriage between the petitioner and the respondent that was celebrated at on 10th November 1998. It is so ordered. Cost in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>RD</sup> DAY OF DECEMBER, 2018.**

**M.W. MUIGAI**

**JUDGE –FAMILY DIVISION –HIGH COURT**

In the presence of:

.....**Petitioner**

.....**Respondent**

