



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**DIVORCE CAUSE NO. 3 OF 2009**

**J W M.....PETITIONER**

**VERSUS**

**M M M.....RESPONDENT**

**JUDGMENT**

**The Petition**

The Petitioner herein and Respondent solemnized their marriage on the 18th day of December 2002, at the Registrar's office Nairobi in accordance with the then Marriage Act, (Cap 150 of the Laws of Kenya), which has since been repealed. Before the said solemnization the Petitioner and Respondent were married under customary law since 1999, and at the time of the said marriage the Respondent was a single lady with one baby girl, known as R M W. The couple later had one child, a boy who is known as N M W. The Petitioner is a soldier with [particulars withheld], while the Respondent is a teacher employed by [particulars withheld]

The Petitioner has petitioned for the marriage between himself and the Respondent to be dissolved and for the costs of the cause, and that the answer to his petition be struck out. He filed a petition for divorce dated 4th September 2009 and a reply to the answer to the Petition dated 27th October 2009. The grounds for the petition are firstly that since the celebration of the marriage, the Respondent has subjected the Petitioner to cruel treatment causing him untold suffering and severe mental anguish. The Petitioner gave the particulars of cruelty as follows:

- a) From 2007 the Respondent started drinking and spending outside matrimonial home without the Petitioners consent.
- b) The Respondent has treated the Petitioner with disrespect and abused him when he protested against her drinking.
- c) The Respondent broke into the petitioner's house on 8/8/2009 and carried all the Petitioner's property in the said home away.
- d) Selling the Petitioners property without his consent.

Secondly, that during the subsistence of marriage the Respondent committed adultery when she spend nights outside the matrimonial home, and vowed she will never stop doing so. Lastly, that in November 2008, the Respondent deserted the matrimonial home vowing never to return and insisting that the marriage could no longer work, and has denied the Petitioner his conjugal rights. The Petitioner also filed a Further Affidavit he swore on 18th December 2015, to which he attached copies of printouts he claimed

were emails communication between the Respondent and another man which showed that they were having a secret love affair.

The Petitioner averred that the Respondent's conduct has been willful and unjustifiable and the same goes beyond the ordinary wear and tear of conjugal life, and for these reasons the marriage has irretrievably broken down. Further, that he has suffered severe mental anguish as a result, and that he has not condoned the Respondent's conduct nor have they colluded to bring this cause

The Petitioner in his reply to the Respondent's Answer to the Petition denied the allegation that he is guilty to similar offences and denied the particulars of adultery and of cruelty as set out in the Answer to Petition. According to the Petitioner, the Respondent deserted the matrimonial house without his authority, and that on or about 21/7/2009 the Respondent accompanied by her father M K1 and her uncle M K 2 delivered a goat known as "Mbui ya Ulee' in Kamba customs, which signifies severance of marriage ties.

He averred that he has provided for the Respondent and the children even after the Respondent deserted the matrimonial home, as he allowed her to reside at a house in his developed property at [particulars withheld] and to collect rent from one of the shops to cater for both her needs and those of the issues of the marriage.

The Petitioner further stated that the police only became involved when the Respondent without the knowledge and consent of the Petitioner on 8/8/2009 broke into his house after she had deserted and carried away everything, and the police had to investigate and confirm whether a crime had been committed. Further, that the Respondent wants to waste and interfere with his property since she did not contribute to acquiring of the properties.

The Petitioner claimed that the Respondent is a woman of means working and that she is not entitled to maintenance from him. In addition that he is not opposed to maintenance of the issues of marriage and meeting costs of their education, however that both parties have equal parental responsibility over the issues of marriage, and the respondent should therefore contribute 50% of the costs of maintenance and education.

### **The Answer**

The Respondent filed an Answer to the Petition dated 14<sup>th</sup> October 2009, which her counsel, Mr. Muia, also submitted included a cross-petition. She admitted that she was married to the Respondent since 2000 and not 1999, and denied the allegations in the Petition and all particulars of cruelty listed thereunder. It was the Respondent's averment that the Petitioner's claim is unfounded, and that he has no valid complaint whatsoever against her as she has never committed any matrimonial offence as alleged, or conducted herself in a manner that would violate the sanctity of her marriage to the Petitioner.

According to the Respondent, the Petitioner is also guilty of all the allegations he has stated, and she contended that the Petitioner has since the time of celebration of the marriage committed acts of adultery with women known and unknown to the Respondent, and has subjected the Respondent to cruelty. The Respondent gave the particulars of the adultery as follows:

- a) The Petitioner was having a sexual affair in 2004 with a lady known as NM who was their house girl at the time, a fact the petitioner admitted to. Due to the said affair the Petitioner contracted an STD which he consequently infected the Respondent with.
- b) The Petitioner also committed adultery in 2006 with a lady he met in a matatu and consequently infected the Respondent with an STD again. He admitted this in presence of the Respondent, his uncle and the lady friend
- c) Between 2008 - 2009, the Petitioner has been committing adultery with a lady known as J M N who was their house girl at the time.

d) The Petitioner has been committing adultery with E M M, the Respondent's colleague at work. Further, that the affair is known at the work place as the Petitioner allows her to visit him at their matrimonial home.

The particulars of cruelty by the Petitioner as stated by the Respondent were as follows:

- a) Constantly abusing the respondent in the presence of her children and workmates.
- b) Willfully and deliberately failing to buy clothes and pay school fees for the issues of marriage.
- c) Subjecting the Respondent together with the issues of marriage to starvation by failing to buy food despite the fact that the Petitioner is financially stable.
- d) Using police to intimidate and threaten the Respondent on diverse dates in August 2009.
- e) Attempting to dispose off matrimonial property to subject the respondent and the children of marriage to hardship.
- f) Bringing his mistresses to the matrimonial home.

The Respondent denied being an accessory to, conniving or condoning the Petitioner's cruelty or adultery, and sought orders that the Petition be struck out with costs, that she be awarded custody of the children; that the Petitioner be ordered to pay maintenance for the Respondent and the issues of marriage and cost of their education, and for alimony pending hearing and determination of the suit.

### **The Evidence**

The Petitioner and Respondent both testified on their own behalf during the hearing of the divorce cause, and did not call any additional witnesses. The Petitioner adopted the contents of his petition as his evidence, and on cross examination he testified that he stayed as man and wife with the Respondent at [particulars withheld] which was their matrimonial home, and the Respondent should not have broken into the matrimonial home as she had another place to stay. He further stated that in 2007 the Respondent was studying journalism broadcasting in 2007 in Nairobi and she was staying at their matrimonial home in [particulars withheld]. He denied that she left the home at [particulars withheld] because he reported her to the police, and that she moved the things from the house at [particulars withheld] to [particulars withheld].

The Petitioner testified that the Respondent did ask him about his association with other women particularly about N M , J M and E M M, and that he denied any association. He also explained his association with N M who he stated was their housegirl, E M M was from his clan and was related to him, and that E M M's father was his pastor.

Lastly, the Petitioner testified the Respondent was sleeping out of the matrimonial home, and that on 3 occasions when he was off-duty he would call her at Mlolongo and she would say she was at work or in the farm. Further, that there are three times he slept in the home at [particulars withheld] and the Respondent did not come home.

The Respondent on her part testified that she only slept out of the matrimonial home during the 2007 General Elections because she worked late into the night at [particulars withheld] and they were not allowed to go home. She asked for custody of the children R M W who is 18 years old and N M W who is 12 years old, and testified that she has been staying with them, and that the Petitioner sends 9,000/= per month for their upkeep.

Upon cross-examination the Respondent stated that she had not refused the Petitioner to see the children, and that the only reason he does not see them is because he creates disturbance at the home when he visits. Further, that she had no objection to him staying with the children for short periods upon proper

and reasonable arrangement, and without him deducting expenses he thereby incurs from monthly maintenance.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. I however find it prudent to address the issue of this Court's jurisdiction, following the enactment of the Marriage Act of 2014 which now gives jurisdiction to Resident Magistrate's Court as the court of first instance to hear and determine matrimonial cause. My finding in this regard is that this Divorce cause was filed on 7<sup>th</sup> September 2009 when this Court had similar jurisdiction, and in addition, the provisions of the Marriage Act of 2014 do not take away the unlimited original jurisdiction of the High Court in criminal and civil matters as provided under Article 165 (3) (a) of the Constitution and as held in **WBR vs J. O. [2014] eKLR**.

The issue for determination by this court is whether the Petitioner and Respondent have adduced sufficient evidence to warrant the grant by this court of the divorce they seek, and the orders sought as regards custody of children and maintenance. The Petitioner attached a copy of their certificate of marriage to his Petition, that shows that he and the Respondent contracted a civil marriage under the Marriage Act, and thus the applicable law concerning the dissolution of their marriage is to be found in **Section 66 of the Marriage Act 2014** which provides as follows:

**“1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.**

**2) A party to a marriage celebrated under Part IV may only petition the court for separation of the parties or the dissolution of the marriage on the following grounds-**

**a) adultery by the other spouse;**

**b) cruelty by the other spouse;**

**c) exceptional depravity by the other spouse;**

**d) desertion by the other spouse for at least three ioner.years; or**

**e) the irretrievable breakdown of the marriage”**

Mr. Muia, the counsel for the Respondent, submitted that it is evident that parties have been staying apart for the last 5 years, and they are all desirous to be divorced. Further, that taking into account the grounds put forward by the parties it is evident that the marriage has irretrievably broken down and their evidence meet the requirements of Section 66 of the Marriage Act of 2014. He also submitted that the printouts produced by the Petitioner as evidence of adultery were inadmissible under section 106B(4) of the Evidence Act which deals with admissibility of electronic records, and requires a certificate to show that the conditions set out in section 106(B) have been met, and also relied on the decision in **William Odhiambo Oduol vs Independent Electoral & Boundaries Commission & 2 Others,(2013)e KLR** in this regard.

On custody, of the children, the counsel submitted that the Respondent has been having actual physical custody of the minors and that the paramount principle to be considered on custody in the best interest of the child, and no evidence has been tendered to show that the Respondent is not suitable to have custody. Further, that the Petitioner being the biological father can have legal authority with the Respondent and can be granted visitation rights.

On the issue of maintenance, it was submitted that both minors are school going and need school fees, and maintenance with respect to food, medication and shelter. Further, that the Petitioner has not

disputed that he has been sending 9,000/= per month to the Respondent, and that the Petitioner is a civil servant working as a police officer and should accord the minors a good life based on his current station.

Both parties have alleged cruelty and adultery on the part of the other. The standard of proof in establishing the ground of divorce is a preponderance of probability as held by the Court of Appeal in the case of **Alexander Kamweru vs Anne Wanjiru Kamweru, (2000) eKLR**. As regards the elements required to be proved in the grounds for divorce alleged by the parties herein, in **Meme vs Meme [1976-80] KLR 17**, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court:

- i. Misconduct of a grave and weighty nature;
- ii. Real injury to the complainant's health or reasonable apprehension of such injury;
- iii. That the injury was caused by misconduct on the part of the respondent; and
- iv. That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.

Therefore for cruelty to be established, the Court will need to evaluate the conduct of the parties in their matrimonial relationship, and find that the behaviour of a respondent is such that the petitioner cannot be reasonably expected to live with him or her. In the present cause, the incidents alleged by the Petitioner that give rise to the alleged cruelty, namely the breaking into the matrimonial house by the Respondent and the Respondent sleeping out of the matrimonial home, were reasonably explained by the Respondent, and were isolated incidents which are not weighty enough to raise an inference of cruelty.

In addition the Respondent did not testify as to the incidents of cruelty she alleged on the part of the Petitioner, and admitted that the Petitioner was paying Kshs 9,000/= per month as maintenance. This ground for divorce was therefore not proved to the required standard by both the Petitioner and Respondent.

On the ground of adultery, Madan J, as he then was, defined the said matrimonial offence in **N vs N (2008) 1 KLR, 17**, as follows:-

***“Adultery is that physical act of sexual union between two married persons of the opposite sex not lawfully wedded to each other. To prove adultery, it is not necessary to have direct evidence of the same. Association coupled with opportunity illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling.”***

In the instant cause, the Petitioner did not provide evidence of the persons the Respondent is alleged to have had adultery with, for this Court to make a finding that there was a possibility of sexual relations between the Respondent and the said persons. I have perused the printouts the Petitioner produced and stated were emails between the Respondent and another man that showed a secret love affair, and they do not indicate who they are addressed to or recipient of the same, and the Petitioner did not indicate their source or where he accessed them from. This Court cannot therefore rely on the same as reliable evidence of the Respondent's adultery pursuant to section 78(A) of the Evidence Act, which provides as follows as regards the admissibility of electronic messages and digital materials including email communication:

**“78A. (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.**

**(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.**

**(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under**

**subsection (l), regard shall be had to-**

- (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;**
- (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;**
- (c) the manner in which the originator of the electronic and digital evidence was identified; and**
- (d) any other relevant factor.”**

Likewise, the evidence by the Respondent on the adultery by the Petitioner was based on hearsay evidence, and none of the persons who she claimed told her of the adultery were called to give evidence. She did not provide any evidence of the sexual transmitted disease she claimed to have been infected by the Petitioner. In addition her evidence was circumstantial, and did not establish the opportunity or association she claimed the various females she named had with the Petitioner.

The ground of desertion was also alleged by the Petitioner. Desertion is the abandonment of one spouse by the other with the intention of forsaking him or her and without just cause. I take cognisance of the fact that the parties herein have been separated since 2008, and that it is the Respondent who had no desire to co-habit with the Petitioner, as she did not dispute the averments by the Petitioner that her father and uncle did perform Kamba customary rites to signify her intention to separate with the Petitioner. I have also noted that both parties seek dissolution of the marriage, which has thereby irretrievably broken down.

As regards the issues of custody and maintenance of children of the marriage, I am alive to the fact that under **sections 73 and 118 of the Children Act**, it is the Children’s Court which has jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children. This Court however also has original jurisdiction to hear any civil case including family disputes, and I also note that this cause was instituted in 2009 and it will not be in the spirit of the new Constitution which requires that substantive justice be rendered expeditiously to refer the matter of the maintenance and custody of the children of the marriage to the Children Court at this stage.

On the issue of custody of the children, Article 53(2) of the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child. This principle underpins and reinforces the provisions of section 4(2) of the Children Act which reiterates the same principle. Section 83 of the Children Act sets out the considerations the court is to take into account in making an order of custody;

**“83 (1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to –**

- a) The conduct and wishes of the parent or guardian of the child.**
- b) The ascertainable wishes of the relatives of the child.**
- c) The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under who the child has made his home in the last three years preceding the application.**
- d) The ascertainable wishes of the child.**
- e) Whether the child has suffered any harm or likely to suffer any harm if the order is not made.**

**f) The customs of the community to which the child belongs.**

**g) The religious persuasion of the child.**

**h) Whether a care order, or supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force.**

**i) The circumstances of any sibling of the child concerned, and of any other children of the home if any.**

**j) The best interest of the child.”**

I note that in this regard that one of the issues of the marriage, R M W, is eighteen years old and has therefore attained the age of majority. She is therefore an adult who can make her own independent decisions as to which parent she wants to live with or visit. As regards the minor issue, N M W, who is aged 12 years, the Petitioner did not oppose the Respondent’s prayer for custody of the child, and only seeks visitation rights.

No evidence was also brought to show that placing the custody of the child with the Respondent would occasion him harm or would not be in his best interest. I accordingly grant the custody of N M W to the Respondent subject to reasonable visitation rights by the Petitioner as shall be ordered, and will not make any custody orders as regards R M W in the circumstances. However, since the said issue is still in school, she still requires maintenance from both her parents who will therefore continue to have the right to make decisions affecting her in this regard.

Lastly on the issue of maintenance, under **Article 53(2)(e)** of the Constitution, every child have the right, *to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.* This provision imposes on the parents of the children equal responsibility on the father and mother of a child to provide for the child. The Marriage Act 2014 in addition provides for the circumstances under which the court may grant maintenance to a spouse. Section 77 of the Act provides as follows:

**“(1) The court may order a person to pay maintenance to a spouse or a former spouse –**

**a) if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;**

**b) if the person has deserted the other spouse or former spouse, for as long as the desertion continues;**

**c) during the court of any matrimonial proceedings;**

**d) when granting or after granting a decree of separation or divorce; or**

**e) if, after making a decree of presumption of death, the spouse or former is found to be alive.”**

Kimaru J. after considering various judicial and statutory authorities on payment of maintenance from Kenya and South Africa in **RPM vs PKM (2015) eKLR** held as follows:

**“I am persuaded that in exercising its discretion to make orders for post-divorce maintenance, it is the duty of this court to be guided by the objectives sought to be achieved by such orders. These include, but are not limited to, the following:**

**a) Identify the economic advantages and losses to the spouses as have been contributed**

**by the subsistence of the marriage or its breakdown;**

**b) Apportion between the parties the attendant expenses of maintaining the issues of the marriage;**

**c) Provide relief to cover the negative consequences for the spouses as may likely arise from the breakdown of the marriage;**

**d) Make sufficient provision to enable the parties to become economically self-sufficient within a reasonable duration of time.”**

I have perused the affidavits of means filed by the Petitioner and Respondent upon direction by this Court, and note that both are in salaried employment, with the Petitioner earning a net salary of 15,855/= and the Respondent a net salary of 18,420/= after deduction of expenses. I note that one of the expenses the Petitioner has itemised is school fees of Kshs 15,000/=.

The Petitioner in his Reply to the Answer to the Petition also stated that he has developed properties in [particulars withheld] and has allowed the Respondent to collect rent from one of the shops, which were not disclosed in his affidavit of means, while the Respondent did disclose that she receives rent of Kshs 12,000/- per month from a residential block which is part of the houses they share with the Petitioner. The Respondent also stated that N M W requires Kshs 50,597.00 per annum and R M W Kshs 53,000/= per annum for school fees coming to a total of Kshs 103,597/= per year for school fees.

It is my finding from the law and evidence that as between the Petitioner and Respondent, both have the requisite income to cater for their own needs, save for the Respondent being allowed continued access to the matrimonial home and properties that she is currently occupying and getting income from. As regards the maintenance of the children, since the children are in the physical custody of the Respondent and she takes care of their day-to-day subsistence needs including food, transport and clothing, it is in my view only equitable that the Petitioner shoulders the burden of school fees and medical costs for the two children.

I accordingly order as follows arising from the findings in the foregoing:

1. That the marriage between the Petitioner and the Respondent, celebrated on 18<sup>th</sup> December 2002, be and is hereby dissolved.
2. That a decree *nisi* shall issue forthwith, to be made absolute after thirty (30) days.
3. That the Petitioner and Respondent shall have joint legal custody of the issues of the marriage, namely R M W and N M W.
4. The Respondent shall have physical and actual custody of N M W, the issue of the marriage who is still a minor, and the Petitioner is awarded visitation rights with regards to the minor on the last weekend of every month during the school holidays, and/or upon such other reasonable terms as shall be agreed by the Respondent and Petitioner.
5. That as the other issue of the marriage, R M W, has reached the age of majority, I will make no orders on her custody and visitation rights.
6. That the Petitioner shall pay the Respondent a sum of Kshs 15,000/= every month for maintenance of the children of the marriage.
7. That the Respondent shall have free and continued access to the matrimonial home and matrimonial properties she is occupying and controlling as at the date of this judgment, and the petitioner is hereby directed to ensure such access is not interfered with in any manner, pending any further orders as regards division of matrimonial property.



8. That each party shall bear their own costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 6<sup>th</sup> day of October 2016.

**P. NYAMWEYA**

**JUDGE**