



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**DIVORCE CAUSE NO.30 OF 2008**  
**BETWEEN**  
**M.S.V.....PETITIONER**  
**AND**  
**S.J.V.....1<sup>ST</sup> RESPONDENT**  
**R.H.....2<sup>ND</sup> RESPONDENT**  
**JUDGMENT**

**Introduction**

1. The Petitioner and the 1<sup>st</sup> Respondent were married on 4<sup>th</sup> January 1993 at the Arya Samaj, Vithalbhai Patel Road, Kakad Wadi, Bombay, India and were subsequently issued with a Memorandum of Marriage by the Officiating Priest on the same day. They were spinster and bachelor, respectively, and they immediately moved to settle in Kenya after the marriage aforesaid.

2. They lived and cohabited at various residences in Nairobi including along State House Road, James Gichuru Road and Vihiga Road. They were also blessed with three issues of the marriage namely;

- i. K.V – 20 years (as at 2015)
- ii. R. S.V – 17 years (as at 2015), a twin to;
- iii. R.S.V – 17 years (as at 2015)

3. At the time of filing of the Petition, the Petitioner had been retired from the [Particulars Withheld] where she had worked as a Reference Terminologist while the 1<sup>st</sup> Respondent was working as a Consultant Obstetrician/Gynecologist at [Particulars Withheld] Doctors' Plaza. The 2<sup>nd</sup> Respondent has at all material times worked as a self-employed Medical Practitioner.

4. According to the Petitioner, their marriage has irretrievably broken down on account of the 1<sup>st</sup> Respondent's acts of adultery with the 2<sup>nd</sup> Respondent, cruelty against the Petitioner and desertion. It was alleged in the latter regard, that he deserted the matrimonial home in 2007 and has since been co-

habiting with the 2<sup>nd</sup> Respondent in Nairobi.

5. It has not been denied that the Petitioner and the 1<sup>st</sup> Respondent had previously been parties to **H.C. Divorce Cause No.208 of 2000** which was later withdrawn by consent on 13<sup>th</sup> January 2006. Prior to the withdrawal, the 1<sup>st</sup> Respondent had been ordered to;

- i. Pay the school fees for R and R, the twins.
- ii. Pay 50% school fees for K.V
- iii. Pay Kshs.35,000/- for maintenance of the three children.

6. Another of the uncontested facts is that in the course of the marriage, the Petitioner developed a drinking problem whose impact on the marriage is contested and will be addressed later in this judgment.

7. The Petitioner now prays for the following orders;

- “(a) That the said marriage between Petitioner and the Respondent be dissolved.***
- (b) That the Petitioner be granted custody of the issues of the marriage.***
- (c) That the Respondent be ordered to pay maintenance for the issues of the marriage.***
- (d) That the Respondent be ordered to pay all the school fees for the children until completion of university or tertiary education.***
- (e) That the Respondent be ordered to pay maintenance for the Petitioner.***
- (f) That the Respondent be ordered to pay alimony pending determination of this Petition.”***

#### **Petitioner’s Case**

8. The Petitioner relied on the following documents in setting out her case;

- i. Petition dated 19<sup>th</sup> March 2008.
- ii. Affidavit in support sworn on the same date.
- iii. Written Submissions filed on 13<sup>th</sup> October 2014.
- iv. Supplementary Written Submissions filed on 18<sup>th</sup> December 2014.
- v. Oral evidence in Court.

9. I should note that there are also a number of Affidavits in support of or in opposition to interlocutory Applications filed by both Parties during the pendency of the Petition and where necessary, I may refer to them in due course.

10. According to the Petitioner and of relevance to the Petition, after their marriage, they lived peacefully until the year 2000 when the 1<sup>st</sup> Respondent threw her out of her matrimonial home. During the separation, she allegedly discovered that he was having an affair with the 2<sup>nd</sup> Respondent and that is when she filed **Divorce Cause No.208 of 2000** earlier referred to. That although they later reconciled and the Divorce Cause withdrawn, he allegedly continued with his adulterous affair and even travelled with the 2<sup>nd</sup> Respondent on holiday in India.

11. It was her further case that the 1<sup>st</sup> Respondent subjected her to physical and psychological cruelty which drove her to alcoholism for which she was rehabilitated in South Africa in 2005. She later suffered a stroke in 2008 which rendered her incapable of sustaining her employment and she was therefore retired from [Particulars Withheld] on health grounds in 2011.

12. As for instances of cruelty, she testified that the 1<sup>st</sup> Respondent never wanted to see her sister and brother-in-law in his house and would not let her parents visit or stay with them. That he particularly treated her mother very badly and called her “very ugly” on several occasions. He also used the same words as against the Petitioner and allegedly stopped communicating with her and would not tell her how much he was making at work. He was, she stated, cold and abusive and once broke her arm and later took away all her medical documents to hide the incident.

13. It was her evidence that all the above actions caused her anguish and led to the stroke which left her with inability to speak properly and one eye blind. She also blamed the 1<sup>st</sup> Respondent for his actions that drove her to alcoholism which was only contained after her mother took her for rehabilitation while the 1<sup>st</sup> Respondent contributed only USD2000 for her treatment.

14. She further stated that she lives on a paltry pension from [Particulars Withheld] and she is unable to take care of herself or her children hence her claim for maintenance.

15. For the above reasons, she seeks the orders elsewhere set out above.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Case**

16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a joint Answer and Defence to the Petition and they denied all the claims against them made in the Petition and specifically the allegations of adultery, cruelty and desertion. They instead pleaded that the Respondent was driven by the Petitioner’s behavior to leave the matrimonial home.

17. While also admitting that the marriage has irretrievably broken down, the 1<sup>st</sup> Respondent denied that the Petitioner was entitled to maintenance and further pleaded that the issue of the issues of the marriage should be dealt with by the Children’s Court and not this Court.

18. I should note here that the Respondents filed an Amended Answer and Defence to the Petition and added a Cross-Petition in which they claim that;

i. The Petitioner has been abusing alcohol since the age of 16 years and the alcoholism is the cause of the breakdown of her marriage to the 1<sup>st</sup> Respondent.

ii. The 2<sup>nd</sup> Respondent had since divorced her husband.

iii. The Petitioner, since their marriage, had treated the 1<sup>st</sup> Respondent with utmost disdain, cruelty, negligence and contempt resulting in him literally raising, providing for and educating all his children alone since their birth. That the Petitioner was perpetually drunk, never spent her money on the children and totally neglected them and the 1<sup>st</sup> Respondent.

19. That the Petitioner is also incapable of taking care of the children and therefore while the marriage should be dissolved, the Cross-Petition should be allowed in the following terms;

***“(a) That the marriage between the Respondent and the Petitioner be dissolved.***

***(b) That the Respondent be granted custody of all the issues of the marriage viz;***

***(i) K.V***

(ii) *R.S.V*

(iii) *R.S.V*

(c) *That an order be made against the Petition for contribution towards the maintenance of the Respondent and issues of the marriage.*

(d) *Costs of this Cross-Petition be provided for.*

(e) *The Petition of the Petitioner against the Co-Respondent be dismissed with costs.*

(f) *Any further or other relief this Honourable Court may deem fit to grant.”*

20. In addition to the above, the 1<sup>st</sup> Respondent also filed an Affidavit of Means sworn on 5<sup>th</sup> August 2014 and written Submissions on 18<sup>th</sup> November 2014.

21. Like the Petitioner, he also filed other Affidavits and Annexures in support of Interlocutory Applications and if need be, I will refer to them in determining the Petition.

### **Determination**

22. I have read all the Pleadings and Submissions by Parties and my view is that the following issues require determination;

i. What is the law applicable to this matter?

ii. Whether the 1<sup>st</sup> Respondent is guilty of adultery, cruelty and desertion as alleged? Conversely, whether the Petitioner was also guilty of cruelty as alleged by the 1<sup>st</sup> Respondent?

iii. Whether the Petition and Cross-Petition should be allowed and whether as a consequence;

a. Whether the Petitioner requires maintenance from the 1<sup>st</sup> Respondent.

b. Whether the 1<sup>st</sup> Respondent requires any contribution from the Petitioner in raising their children.

### **Issue No.(i) – What Law is applicable to the Matter?**

23. The Petitioner and 1<sup>st</sup> Respondent were married under the **Indian Hindu Marriage Act** and the provisions of the **Bombay Registration of Marriage Act, 1953 (Boon V. of 1954)**. Before me I have submissions by the Petitioner that the repealed **Hindu Marriages and Divorce Act** as read with the **Marriage Act, 2012** should be the applicable law. The 1<sup>st</sup> Respondent on the other hand submitted that the latter Act is the applicable law. I see no great contest in that regard because as correctly submitted by the Petitioner, the **Marriage Act, 2014** states as follows in its **Section 98(2)**;

“(1) ...

(2) *Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act*

(3) ...”

24. That provision was inserted to give effect to **Section 97** thereof which provides as follows;

“*The Acts of Parliament listed in the Schedule are repealed.*”

25. One of the repealed Acts was the **Hindu Marriages and Divorce Act** and it is not also contested that all Parties are of the Hindu faith and in the proceedings herein were commenced before the enactment of the **Marriage Act, 2014**. In that context, **Section 2** of the **Hindu Marriage and Divorce Act, Cap.157 Laws of Kenya** defined "marriage" as follows;

*"Marriage" means a marriage between Hindus and either –*

*a. Solemnized after the commencement of this Act; or*

*b. A marriage which, immediately before the commencement of this Act, was deemed, under Section 3 (now repealed) of the Hindu, Marriage, Divorce and Succession Act (Cap.149), to be a valid marriage or which would have been so deemed if it had been solemnized in the Colony; or*

*c. A marriage solemnized under the Special Marriage Act, 1954 (No.43 of 1954), or the Hindu Marriage Act, 1955 (No.25 of 1955), of India, as amended from time to time, and any enactment substituted therefore;"*

26. The import of the above definition is that the Marriage solemnized in India such as the one in issue is a Hindu marriage for purposes of the **Hindu Marriage and Divorce Act, Cap.157**. That is therefore the applicable law as read with **The Marriage Act, 2014**.

27. Under both the **Repealed Act** and the **Marriage Act, 2014**, some of the grounds of divorce are;

- i. Adultery,
- ii. Cruelty,
- iii. Desertion.

28. These grounds have been pleaded in the present Petition and proof thereof is therefore necessary on the part of the Party pleading the same.

### **Standard of proof**

29. As for the applicable standard of proof in such matters, in **Kamweru vs Kamweru [2000] eKLR** the Court of Appeal stated thus;

*"Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. 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."*

30. I am duly guided and that is the standard of proof I shall apply in determining the issues set out above.

### **Issue No.(ii) – Allegations of adultery, cruelty and desertion on the part of the Petitioner and cruelty on the part of the 1<sup>st</sup> Respondent**

31. From the evidence before me, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents presently live together as husband and wife and are raising children born of their marriages, together, in the same house which they jointly own. Those facts were confirmed as true by the 1<sup>st</sup> Respondent. I have no doubt that the said cohabitation started soon after the 1<sup>st</sup> Respondent moved out of the matrimonial home just before the Petition was filed. It is also not an issue in dispute that the relationship he developed with the 2<sup>nd</sup> Respondent precipitated the 2<sup>nd</sup> Respondent's divorce with her husband, one Mr. H. That is why in the Amended

Response and in the Cross-Petition, the 2<sup>nd</sup> Respondent pleaded that having been divorced, she had reverted to her maiden name, R. S. The 1<sup>st</sup> Respondent on the other hand, as at the date of this judgment is still lawfully married to the Petitioner and any sexual relationship with any other woman amounts to adultery.

32. All evidence before me points therefore to the fact that prior to his departure for good from the matrimonial home, he had begun and has sustained an adulterous relationship with the 2<sup>nd</sup> Respondent and I am satisfied that the acts of adultery pleaded by the Petitioner have been proved to the required standard – see **Mathai vs Mathai [1980]KLR 154.**

33. On desertion, it has been alleged that the 1<sup>st</sup> Respondent moved out of the matrimonial home, went to live with the 2<sup>nd</sup> Respondent and has done so to-date. I need not spend any time with this issue because it was admitted that the 1<sup>st</sup> Respondent has moved together with the issues of the marriage to the house that he jointly purchased with 2<sup>nd</sup> Respondent and that fact is not just proof of adultery but also of desertion. That is all I have to say on that matter.

34. Cruelty was the only matrimonial offence that both the Petitioner and the 1<sup>st</sup> Respondent alleged against each other. What evidence supports these allegations?

35. On the part of the Petitioner, she alleged that the 1<sup>st</sup> Respondent psychologically and physically abused her. She produced no evidence of physical abuse including that of an alleged broken arm. Instead, she alleged that the 1<sup>st</sup> Respondent took away all her treatment notes indicative of that injury. Further, that the 1<sup>st</sup> Respondent often threw her and her mother out of the matrimonial home and would not allow her sister and brother-in-law the right to visit her at the home.

36. In addition, that she was often insulted, together with her mother, as being “very ugly”.

37. On his part, the 1<sup>st</sup> Respondent alleged that because of her alcoholic escapades, the Petitioner subjected him to cruelty and negligence leaving him to raise the children alone.

38. In **D.M. vs T.M. (2008) 1 KLR 5**, Chesoni, J. (as he then was ) stated as follows;

***“To establish cruelty, the complainant must show to the satisfaction of the Court:***

***i. Misconduct of a grave and weighty nature.***

***ii. Real injury to the complainant’s health and 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.”***

39. I agree with the learned Judge and in the instant case and noting the standard of proof as set out in **Kamweru (supra)**, all the allegations by both the Petitioner and the 1<sup>st</sup> Respondent fall far short of the threshold of proof. I say so because there is absolutely no evidence of physical abuse on the part of the 1<sup>st</sup> Respondent. I would have expected the Petitioner to show me, at the very least, scars as remnant of the allegedly broken arm, if she had no medical and treatment notes. She did not do so. I have also seen a medical report by one Dr. Okonyi and no such incident was recorded (although he was conducting a mental examination, principally).

40. As for the psychological abuse, the Petitioner’s mother who has been present in Court throughout the hearing was never called to corroborate the Petitioner’s allegations. When it is the word of one angry party against another equally angry party, their allegations require more than their angry words.

41. Turning to the Petitioner's alcoholism, the issue is beyond debate but whether it is what caused the 1<sup>st</sup> Respondent to leave his matrimonial home, in my view, is just an excuse. He had fallen in love with the 2<sup>nd</sup> Respondent and they had agreed to leave their spouses and move in together. That is why he deserted his matrimonial home and the Petitioner's problem with alcohol may only have triggered that action but the same cannot be an act of cruelty.

42. The allegations of cruelty are therefore dismissed.

### **Issue No.(iii) Whether the Petition and/or Cross-Petition should be allowed**

43. Before determining this issue, there is the issue of custody of the issues of the marriage as well as the maintenance of the Petitioner.

### **Custody of the issues of the marriage**

44. When the Petition was filed, all the three children, K, R and R were minors. Today, K is an adult while R and R will turn 18 next year.

### **What is the situation obtaining today?**

45. For the last 8 or so years, the parties have an arrangement where the two children live with the 1<sup>st</sup> Respondent, visit the Petitioner every weekend and she also picks and drops them after school.

46. None of them has complained about that arrangement and it is best to maintain it, meaning that they shall have joint custody for the next one year along the above lines.

### **Maintenance of the Petitioner**

47. This is the most contested issue in these proceedings and the law on the subject was well set out by G.B.M. Kariuki, J. (as he then was), in **W.M.M. vs B.M.L. (2012) eKLR** where he stated thus;

*“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage ...it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the Constitution which enshrines equality of men and women and specifically states that “women and men have the right to equal treatment...”*

*...the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore ...*

*No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the Court makes a finding as to whether a spouse should pay maintenance and if so how much ...”*

48. The learned Judge went on to add thus;

*“neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and*

***therefore deserves the support of the other partner.”***

49. I am in total agreement with the sentiments of the learned Judge and applying them to the instant case, I note that;

i. The Petitioner retired from [Particulars Withheld] in 2011 and is on a pension of USD2,248 every month. That is an amount close to Kshs.200,000 per month.

ii. The Petitioner does not cater for the children's school fees, neither does she cater for their medical expenses (their medical cover is paid by [Particulars Withheld] until they all reach the age of eighteen).

iii. In her evidence, she claimed that she spends all or most of her pension on her children but she gave no evidence as to what she actually pays on behalf of the children. In evidence all she stated in that regard was as follows;

***“the children are taken care of by my husband and I do too. I buy them food every weekend. They visit me almost every other day – I pick them without difficulty.”***

iv. She seeks Kshs.300,000/- per month as maintenance for herself and a car to be purchased for her by the 1<sup>st</sup> Respondent.

v. The 1<sup>st</sup> Respondent in his Affidavit of Means and in evidence stated that his average income per month is Kshs.520,000/- but in submissions, the Petitioner calculated such income to be Kshs.1,600,000/- or thereabouts.

50. On my part, it is obvious that with her pension of Kshs.200,000/-, the Petitioner is not destitute. It is also uncontested that the 1<sup>st</sup> Respondent pays school fees for all the children including for K who is at University abroad.

51. The other two children live with the 1<sup>st</sup> Respondent all week save weekends and he caters for their needs. The Petitioner merely accommodates them during weekends and caters for their food. No evidence has been tendered to show that she does more than that.

52. I said earlier that the two are angry with each other and in a statement filed on 26<sup>th</sup> September 2011, their son, K, stated partly as follows;

***“I rang my mother and asked her for the reason for asking for money from father. My mother and grandmother told me that they had enough money but want to teach my father a lesson.”***

53. Why would the first born of this family make such a statement unless it is the truth and that anger is the driver behind the claim for maintenance? The lad went on to add;

***“I am of over 17 years of age, and I have sufficient intelligence and understand the duty of speaking the truth.”***

54. My finding is that whether or not the 1<sup>st</sup> Respondent earns more than Kshs.1 Million a month, and he having the sole responsibility over the children and noting that they had no assets at during their marriage, to burden him with maintenance of Kshs.300,000/- is grossly unfair.

55. Having so said, one other issue has troubled my mind throughout this case; the Petitioner's problem with alcohol. I have elsewhere above stated that it could not have been the reason why the 1<sup>st</sup> Respondent left the matrimonial home. But conversely, what triggered her alcoholism? Mere misadventure and recklessness? I don't think so. In his report of 4<sup>th</sup> July 2014, Dr. Okonji stated as follows;

***“She goes into episodes of severe depression, with thoughts of hopelessness and irritability with heavy alcohol consumption.”***

Further, that;

***“She has been affected by her family problems including separation from her husband and children.”***

56. In her evidence before this Court, she stated that she was taken to South Africa in 2005 for rehabilitation and her mother paid for the same with the 1<sup>st</sup> Respondent contributing USD2,000. The alcohol dependency from Dr. Okonji’s report has not been cured and in her evidence she said that she spends about Kshs.200/- a day on wine and probably a beer. Her problem is therefore still persisting.

57. Like G.B.M. Kariuki J in W.M.M. vs B.M.L. (supra), I am certain that even after divorce, each spouse has certain duties to the other. In the present case, with the illness dogging the Petitioner and which I am certain was caused by the 1<sup>st</sup> Respondent’s adulterous relationship with the 2<sup>nd</sup> Respondent, he has a duty to alleviate the Petitioner’s suffering. That is the extent to which any order of maintenance will be made and I will shortly give the final orders in that regard.

58. Turning back to the Cross-Petition, I see no reason why the Petitioner, with her Kshs.200,000/- pension should do more than taking care of the children during weekends while continuing to pick and drop them from school. That is enough contribution on her part and she need not pay anything to the 1<sup>st</sup> Respondent as he demands.

### **Conclusion**

59. Having held as I have done above, the final orders to be made are that;

**(a) The marriage between the Petitioner and the 1<sup>st</sup> Respondent be and is hereby dissolved as prayed by the Petitioner and the Cross-Petition is dismissed.**

**(b) The Petitioner and 1<sup>st</sup> Respondent shall have joint custody of the two minor issues of their marriage in terms of the present and existing arrangement between them.**

**(c) The 1<sup>st</sup> Respondent shall pay for half the costs of treatment for the Petitioner’s rehabilitation for alcoholism in a reputable institution in Kenya subject to the Petitioner and her family accepting that she requires such treatment.**

**(d) Each Party shall bear its own costs.**

60. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MARCH, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Lagat for Respondent

Mr. Omani holding brief for Mr. Jamal for Petitioner

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**