



C.K **PETITIONER**

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

J U D G M E N T

The Petitioner, CKM, presented to this court on 1.9.2011 her divorce petition seeking orders for dissolution of her marriage to **the Respondent, BM** and custody, care and control of the only child of the marriage, **KM**, aged 2 years and 10 months as at the time of presentation in court of the petition.

The Petition was served on the Respondent on 14.10.2011 but he neither entered appearance nor filed answer to it. On 7th February 2012, the Registrar issued a certificate of compliance pursuant to Rule 29(1) of the Matrimonial Causes Rules and certified the hearing of the Petition as an undefended cause.

The hearing came up before me on 19th April 2012. **Mr Austine Odoyo**, *the learned counsel for the Petitioner* called the Petitioner to testify. I listened to the testimony of the Petitioner. This is what emerged from her evidence.

The Petitioner and the Respondent solemnized their marriage on 25.06.2008 at the Registrar's Office at Sheria House, Nairobi. The Petitioner, then a Spinster, was aged 25 years and the Respondent, then a bachelor, was aged 27 years. The Petitioner was then a soldier employed by the Kenya government while the Respondent was self-employed. Both were residing in Umoja, Nairobi at the time. As proof of the marriage, a copy of the Certificate of marriage No[...] was produced as exhibit No. P1.

After the marriage, the couple continued to live together at U[.....], Nairobi, in the house they had occupied for close to one year before the solemnization of their marriage on 25.6.2008. They cohabited up to 1st June 2010 when the Petitioner moved out of the home they used to call their matrimonial home.

It was the Petitioner's evidence that the Respondent had made their house help, one N.M pregnant. The house help confessed this to the Petitioner before the Petitioner left the matrimonial home. When the Petitioner confronted the Respondent about it, the Respondent refused to discuss it or to see his elder brother, one AW, to whom the incident had been reported with a view to finding solution. Instead, the Respondent turned on the Petitioner and beat her mercilessly. Even when she was expecting the child, the Respondent continued to beat the Petitioner. It was the Petitioner's evidence that the Respondent took out his frustration on her and in spite of intervention from his siblings, parents, and uncles, the Respondent persisted in his cruel conduct to the Petitioner! After the baby was born, the Respondent on 1.6.2010 took the baby who was of tender age and barely 1 ½ years and refused to return it to the Petitioner even after request. Instead, he took it to his brother's house. The Petitioner sought police intervention. The Respondent then threatened to kill the Petitioner. He took a panga and forced the Petitioner to hand the baby back to him. It was the Petitioner's evidence that the police report is contained

in O.B. No.77/01/06/2010 at Buru Buru Police Station. It was not until after two days that the baby the respondent had been taken to his brother was returned to the Petitioner. The Petitioner suffered excruciating psychological pain as a result. At age 1 ½ years, the baby was little and was breastfeeding.

The Petitioner narrated how the Respondent also hit her in the face giving her a black eye. His temper, she said, was ungovernable. He did not care while harassing the Petitioner whether it was in the full glare of relatives, friends or members of the public. He showed no respect whatsoever to the Petitioner and he engaged in extra-marital activities with complete abandon. It was also the Petitioner's evidence that the Respondent locked her in the house during the weekends to prevent her from visiting her friends and members of the family. When she realized that the Respondent was not going to change and that her life was in danger, she fled for dear life. These acts of cruelty by the Respondent, said the petitioner, were exacerbated by the fact that the Respondent neglected and abdicated his responsibility as a husband and failed to provide for the Petitioner and instead took to uncontrolled drinking of alcohol, sometimes up to the wee hours of the morning.

The Petition is not presented with any connivance or collusion with the Respondent, said the Petitioner, and the acts of cruelty complained of have not been condoned.

I have duly considered the Petition and the evidence adduced by the Petitioner. The Respondent did not file any defence by way of an answer to the Petition, nor did he enter appearance or attend the hearing which proceeded as an undefended cause.

The grounds for dissolution of the marriage are stipulated in Section 8(1) of the Matrimonial Causes Act thus:-

S.8(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent-

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

The Petitioner alleged cruelty on the part of the Respondent. It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner's health or reasonable apprehension of such injury. Cruelty is defined as "*willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger*" (see **Russell v. Russell [1895] P. 315, 322. See also D. Tolstoy on The Law and Practice of Divorce, Sixth Edn.** It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see **Gollins v Gollins [1964] AC 644; Williams v Williams [1964] AC 698, 760.** Tolstoy, 6thEdn states that the question in all cases is whether the Respondent's conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see **Gollins v. Gollins (supra)** at page 670 and **Williams v Williams (supra)** at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see **Jamieson v Jamieson [1952] A.C. 525, 535.** Moreover, a deliberate intention to hurt may turn into "*cruelty conduct*" which, without such intention, would not constitute cruelty.

In this case, the Respondent's acts in torturing and humiliating the Petitioner, his meanness, and sadistic behaviour and depravity had the underlying malice and clearly were intended to hurt. The Respondent no doubt had no interest in the marriage or in the welfare or happiness of the Petitioner. He showed no respect to the Petitioner whom he physically assaulted repeatedly. His cruel acts caused serious apprehension to the Petitioner regarding her health. No one can be expected to put up with such acts of cruelty.

The Respondent's conduct was unjustified. It threatened to harm the Petitioner's health. There is no evidence that the Respondent was mentally ill and one can only conclude that all along he intended the natural and probable consequences of his actions, namely to hurt the Petitioner. It is my finding that the conduct of the Respondent amounts to cruelty and constitutes a ground for dissolving the marriage. No spouse can be expected to stay in such abusive relationship.

It is my finding that the Respondent is guilty of cruelty. Accordingly, **I pronounce a decree of divorce and hereby dissolve the marriage between Petitioner and the Respondent on the ground of cruelty on the part of the Respondent.**

In the first instance, a **decree nisi** shall issue forthwith and subject to the provisions of section 15 of the Matrimonial Causes Act, Cap 152, **the decree nisi shall be made absolute after the expiry of three months** after this pronouncement. It is so ordered. There shall be no order as to costs.

Dated at Milimani Law Courts, Nairobi, this 5th day of July 2012.

G.B.M. KARIUKI, SC

JUDGE

COUNSEL APPEARING

Mr. P. Wachira appearing for Patrick Odoyo of Kipkenda & Co. ,Advocates for the Petitioner

Mr. Kugwa – Court Clerk