



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Divorce Cause 6 of 2006**

**E W M.....PETITIONER**

**AND**

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

**JUDGMENT**

The parties before the court is a young couple who got married on 20<sup>th</sup> December 2003 and separated on 17 May 2005.

The marriage was solemnized in church, However, the couple was not lucky to have a happy marriage. As per the petitioner/husband the main reason of their differences was constant quarrels over small issues, and by October 2004 the quarrels became their normal life. He left the home because of this situation but came back in January 2005 as the Respondent was pregnant and was unwell. He came back to look after her, when his mother advised him to do so. But the things did not change. After the birth of their daughter, she refused to breast feed the daughter for two nights by stating that she was tired. He called his mother and asked her to take their daughter. The respondent refused to accede to his suggestion and a quarrel ensued and the Respondent left the house taking their daughter with her.

He reiterated that the Respondent did not listen to his advice or suggestions. He denied that he drank or smoked, that he used to beat the Respondent by explaining that in March, 2004 when the Respondent got hurt, he was only trying to prevent her from leaving the house. He stated that he did not use abusive language or that he had extra marital relations with Alice or Ann or Chiko. He refused that he frustrated efforts of reconciliation made by the Respondent.

He also asked for grant of custody of their daughter in his favour, stating that he would do his best to look after her and that the Respondent was a poor and uncaring mother. But in cross – examination he stated that he did not mean to say that she was irresponsible mother but he simply wanted the custody, of the daughter.

In short the petitioner seeks dissolution of his marriage on the ground that due to constant quibbles he did not have peace in marriage.

The respondent in her testimony denied that she was at all cruel to the petitioner. She averred that the petitioner was a compulsive drunkard and used to physically beat her. He was also a womanizer and could have relations with three women in a week. She stated that quarrels arose due to his drinking and extra marital relations. She also stressed that the petitioner was under the total influence of his mother. In her cross examination she stated that on 17<sup>th</sup> May, 2005 it was his mother who gave her Shs.400/- to move out as she had found a new wife for the petitioner.

As regards the issue of custody of the daughter, she emphatically stated that she would not trust the petitioner with the child. She openly told the court that under the influence of drinking he does untoward acts in front of the daughter. She however, agreed that the petitioner loves the child and helps her when she gets sick. She emphasized that she had been trying to reconcile but if the petitioner did not want it, she could not impose herself on him.

She added during her cross examination that the petitioner used to come home drunk even after the birth of their daughter. She moved out from the home on 17<sup>th</sup> May, 2005, because she was not given any choice by his mother who told her that if she did not do so, the petitioner would move out. She dared the counsel for the petitioner to visit his house where he would find bottles of wine and liquor.

This is the evidence, in short, before me for the prayer of dissolution of their marriage. I have observed demeanors of the petitioner as well as those of the Respondent. Even though the Respondent was not represented and was in person, I would not hesitate to find, which I hereby do, that she was a more credible witness and I shall rely on her evidence.

Yes there were quarrels in the marriage, but I do find that they were mostly due to drinking habits and other misgivings of the Respondent. The situation got worse due to interference or dominance by the petitioner's mother. The petitioner is very emphatic that there is no chance of reconciliation in the marriage and the Respondent has resigned to that eventuality.

In the premises aforesaid, I find that the petitioner has been cruel to the Respondent and also find that the Respondent has not condoned those acts of cruelty. Of course, the petition is not presented or prosecuted in collusion between the parties before me.

As regards the issue of custody is concerned, it is not disputed that since 17 May 2005 the daughter has been under the care and custody of the Respondent; and the Respondent also agreed during his cross examination that he did not mean to say that the Respondent was irresponsible mother. Moreover, the child is a female child of very tender age and I cannot give her custody to the petitioner, and thus without any hesitation, I do grant the custody, care and control of V W W to the Respondent, with unlimited access to the petitioner which could be varied if the circumstances do require such order.

I, while making this order rely on dictum of Law JA in **Githunguri Vs Githunguri 1 KAR 9** which states

***“The prima-facie rule which is now quite clearly settled is that other things being equal, children of this tender age should be with their mother and where a court gives custody of child of tender age to the father, it is incumbent on it to make sure that there are really sufficient reasons to exclude the Prima facie rule .....*”**

Lastly, I shall have to determine the issue of maintenance.

The Respondent has filed two affidavits of means sworn on 17<sup>th</sup> July, 2007 and 28<sup>th</sup> May 2008. The latter one was filed after the court directed both of them to file the affidavits.

In the first affidavit she had shown her needs as under:-

- (a) Food – Kshs3,000/- per month.**
- (b) House rent – KShs.5,500/- per month.**
- (c) Medical expense – Kshs500/- per month.**
- (d) Clothes – Kshs2,000/- per month.**

In the second affidavit the following claims are made by her:-

- (a) Food – Kshs4,000/- per month.**
- (b) School fees – KShs.8,500/- per term**
- (c) School uniform – Kshs5,000/- per annum**
- (d) Medical expense – Kshs3,500/- per month**
- (e) House rent – Kshs 6,000/- per month**

She has explained the difference between the two affidavits due to present inflation and also due to the fact that the daughter has started going to school. She has stated that, from her business of selling of second hand clothes, she earns Shs1,500/- per month and the petitioner earns roughly Shs100,000/- from his job as gospel singer and from exhibition of clothes and C.D's.

The petitioner, in his affidavit sworn on 29<sup>th</sup> May 2008 has stated that he earns around KShs.20,000/- per month, and his expenses are as under:-

- (a) House rent – KShs.8,500/-**
- (b) Food – KShs.4,000/-**
- (c) Electricity, water & utilities – KShs.1,000/-**
- (d) Car maintenance – Kshs2,500/-**
- (e) Miscellaneous purchases – Kshs4,000/-**

However, he has offered:

- (a) Food – KShs.3,000/- per month**
- (b) Clothes – KShs.5,000/- per annum**
- (c) All education and medical expenses for the daughter to be paid directly by him.**

It is true that neither of them has given any proof of their respective income or expenditure. The Respondent has stated further that she had started a course which is also an additional expense for her so that eventually she could support herself and her daughter.

I cannot help noticing that the petitioner has given his own expense at Shs.20,000/- against his averred income of Shs.20,000/- and yet has given an offer of some payments to the Respondent and their daughter.

Doing best I could, and reading between the lines, I order that the petitioner pays Shs.15,000/- per month to the Respondent for her and daughter's maintenance. He would pay, for the school fees and her school uniform.

I have already found that the petitioner has treated the Respondent with cruelty and I order that the marriage solemnized between the parties be dissolved. The decree nisi be made absolute within 90 days.

I have already made orders on custody of the child of marriage and on the maintenance for the Respondent and the child.

Orders accordingly.

Dated and signed at Nairobi this 2<sup>nd</sup> day of October 2008.

**K.H. RAWAL**

**JUDGE**

**2.10.08**