



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Judicial Separation 15 of 1995

K.N PLAINTIFF

VERSUS

N.W.M DEFENDANT

K.N (to be referred to in this judgment as "the Petitioner") filed this judicial separation through a petition dated and filed on the 16th February, 1995. She is seeking for judicial separation from her husband **NYAKIBA WILLIAM MORURI** (to be referred to in this judgment as "the Respondent").

On his part the Respondent, in a cross petition which he drew up on the 17th March, 1995 and filed on 21st March, 1995 prays for the dissolution of their marriage.

In these proceedings the Petitioner was represented throughout by the firm of M/s Martha Karua & Co. Advocates of Nairobi. While the Respondent was represented by the firm of M/s Osoro Mogikiyo & Co. Advocates based in Nairobi.

Both the Petitioner and the Respondent gave oral evidence in support of their respective prayers and called witnesses. Their respective advocates made very constructive submissions which I found to be very helpful. I am grateful to these two learned Advocates.

The Petitioner's grounds for seeking judicial separation from the Respondent are two: that since the celebration of their marriage the Respondent has treated her with cruelty and has committed adultery with women known and unknown to her and, at the time of filing this petition, the Respondent was living with a woman known to her in the matrimonial house.

In the cross petition for the dissolution of this marriage the respondent stated that the petitioner had since October, 1994 and unknown to him committed adultery with one D.M.M. He further prayed that the petitioner herself confessed to him in January, 1995 that she had committed adultery with the said D.M.M on two occasions: i.e in October, 1994 and November, 1994 at the said D.M.M residence at Buruburu Estate Nairobi. The Respondent therefore states in his cross-petition for dissolution of the marriage that this marriage has irretrievably broken down.

The matrimonial offenses on which this petition for judicial separation and cross-petition for dissolution of the marriage are: cruelty and adultery.

The undisputed facts are that in August 1984 the Petitioner, who was then a spinster known as **K.N** commence cohabiting with the Respondent, who was then a bachelor, as husband and wife. On 9th October, 1992 the Petitioner and Respondent solemnized their marriage before a Registrar at Nairobi under the MARRIAGE ACT Chapter 150 Laws of Kenya

y have cohabited at Bangladesh Estate in Nakuru from August, 1984 to December, 1985, Kenya Navy Quarters Motongwe Mombasa from December, 1985 to October 1989, Dam Estate in Nairobi from October, 1989 to June, 1992 and then at Mogoya Estate Nairobi from July, 1992 to January, 1995. It was while they were at Mugoya Estate that this marriage was solemnized. Regrettably it was at the same estate that the issues which are before me today are said to have occurred.

There are living the following children of the said marriage i.e A.O.N born on 30th August, 1985, B.K.N born on 31st January 1990 and N.W.M born on 25th April, 1991. It is also admitted that both the petitioner and Respondent are domiciled in the Republic of Kenya, that there has not been any previous proceedings in the High Court or any other court in Kenya or elsewhere in reference to this marriage.

The Petitioner averred that she has not in any way been accessory to, connived at or condoned the said cruelty and adultery. The Respondent equally averred that this cross-petition was neither presented nor prosecuted in conclusion with the petitioner nor has the cross-petition in any manner been accessory to or connived at or condoned the acts of adultery. I accept both averments.

This petition and cross-petition are governed by the provisions of the Matrimonial Causes Act Chapter 152 Laws of Kenya. It is provided in section 17(1) hereof that a petition for judicial separation may be presented to the court by either the husband or the wife on any grounds on which a petition for divorce might have been presented. And it is provided in section 8(l) (a) and (c) that a petition for divorce may be presented to the court either by the husband or the wife on the ground that the Respondent has since the celebration of the marriage committed adultery or has treated the Petitioner with cruelty.

The same legal considerations, therefore, would be applicable in cases of judicial separation and divorce when the court is called upon to determine whether or not adultery and cruelty have been proved to the required standard.

I will proceed now to deal with the petition for judicial separation and I will deal with the matrimonial offence of cruelty first, and then of adultery.

It is trite law that the onus of proving cruelty lies on the Petitioner, and the law requires that proof must be beyond reasonable doubt.

In MULHOUSE -VERSUS- MULHOUSE (1964) 2 ALL & R. 56 SIR JOCELYN SIMON after considering the various judicial opinion in COLLINS -VERSUS- COLLINS (1963)2 ALL.E.R. 966 stated the essential elements of the offence of cruelty and these were approved by the then Court of Appeal for EAST AFRICA in the case of MUNZIO COLROSSI -V-MICHELINA COLAROSSO 1965 E.A. B. to E,

"Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt (BATER -V- BATER 1950)2 ALL.E.R 458). That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First misconduct must be proved of a grave and weighty nature. It must be now than were trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point which threatens the health of the often spouse, the law will not hesitate to give relief. SECONDLY, it must be proved that there is a real injury to health of the complainant or a reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health. But in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it.

THIRDLY, it must be proved, beyond reasonable doubt that it is the misconduct of the Respondent which has caused the injury to health of the complainant.

FOURTHLY, it must be proved beyond reasonable doubt that the whole conduct of the Respondent, taking into account its repercussion on the health of the complainant, can properly be described as cruelty

in the ordinary sense of that term". It is in the light of this onus and standard of proof that this petition will be examined. The petitioner has averred in her petition that since the celebration of the said marriage the Respondent has treated her with cruelty and enumerated those acts of cruelty at clause 9:

- a. The Respondent has frequently absented himself from home without informing the petitioner, thus subjecting the petitioner to great mental anguish and deprivation of consortium.
- b. That throughout the month of September 1994 the Respondent kept telling the petitioner to pack and go to her home and he refused to pay school fees for the children of the marriage.
- c. That on 2nd January, 1995 the Respondent refused to pay school fees for the children.
- d. That on 4th January, 1995 the Respondent subjected the petitioner to intense harassment and beating and ordered her to leave the matrimonial home together with the children of the marriage. The petitioner was forced to seek refuge from friends.
- e. On 5th January, 1995 the Respondent found the Petitioner at the matrimonial house at around 11.00am. He subjected her to a lot of beating in a bid to force her to sign a false statement to the effect that she has been unfaithful to him.
- f. That on 6th January, 1995 the petitioner returned to her matrimonial home only to discover that the Respondent had ordered the house girl on 5th January, 1995 to take the children to the petitioner's parents' house in Kisii District. Children have not gone to school since then.
- g. That on 7th January, 1995 the Respondent came to the matrimonial home at around 10.00 am and threatened the petitioner with death. He ordered her to leave the house thus exposing her to suffering and forced her to seek refuge from friends. The petitioner has not since been able to return to the matrimonial home."

In her testimony the petitioner told the court, on the issue of cruelty, that on 31st December, 1994 the Respondent told her that MARIA MATERNITY & NURSING HOME had been completed and the owner of the building was going to hand the keys to him on the 1st January, 1995 so there would be a party for this occasion. She realised then that there was to be a party on that occasion and that the Respondent did not want her to attend. She said she had not been attending those parties. Since this was going to be a big Hospital she told the Respondent that she wanted to attend this party. The Respondent told her that he did not want her to go to the party. She asked for the reason. He told her that the people who had been involved in its preparation had not seen her there but had only seen a lady by the name of Dr Florence Wambui Kiboi. This is the other woman with whom the Respondent, according to the petitioner, used to stay most of the time with at Kenyatta National Hospital and was the cause of their problems. Upon being told that people had only been seeing Dr Kiboi, the Respondent told her that as she had started a war he would see who would be the winner. The Petitioner did not attend that party. The Respondent went away from home and returned to the matrimonial home on 2nd January, 1995. The petitioner told the court that the Respondent told her to pack up her belongings and leave with the children and go back to her parents home, but she did not do so.

She told the court that the schools opened on 2.1.1995 and he did not give her money to pay school fees with. On the 3.1.1995 the Respondent questioned her as to why she had not left his house and he started to beat her up. As he was beating her he was telling her to pack up and go. He wrote a cheque of Shs.10,000 and gave to her and ordered her to take it and pay fees with. She told the court that she took the cheque which was part of her transport as well to her parents home. On the 4th January, 1995 she decided to go to Nakuru to tell the Respondent's brother what had happened. She stayed at Nakuru until the next day 5th January, 1995. On the 6th January, 1995 she returned to the matrimonial home at Mugoya estate. She came along with one of the Respondent's brother called Peter Mboga (PW 6). Upon arrival at her matrimonial home she did not find the children at home. She was told by one of the housemaids that the children had been taken to her parents home the previous day. She and Peter Mboga waited for the Respondent to come. He did not come home that night of 6th January, 1995.

He came on 7th January, 1995 at 11.00 a.m. Peter Mboga tried to talk to him but the Respondent could not listen. The Respondent ordered her to pack up and go to her parents' home. She decided to leave for a friend's place. But before she left the house she asked him to give her some of her property. The respondent told her to collect them on the 8th January, 1995. She left. Upon her return on the 8th January, 1995 she did not find the Respondent in the house. She only found her brother-in-law, Peter Mboga. The Respondent returned on the same day at noon. He asked her what she was doing there. She told him that she had come to collect her belongings. He then started to beat her up. His brother tried to intervene but was unsuccessful. The petitioner told the court that the Respondent forced her to get into their bedroom and began to question her whether she had been unfaithful to him. She denied it. She told the court that the Respondent then wanted her to write a letter, apologizing to him for having been unfaithful to him. He started to look for a pen and paper. He told her that if she did write the letter he would cut her to pieces. When he went to look for the paper she got the opportunity and escaped. She ran away through the rear door towards the road, leaving the Respondent, the maid and the brother-in-law Peter Mboga in the house. The Respondent saw her and ran after her, chased her and caught up with her near the road. He started to beat her again and this attracted the attention of the members of the public. She told the court that she saw a motorist passing by, who then stopped and rescued her. She got into that motorist's car and she was driven to LANGATA POLICE STATION. She came to know the name of that good Samaritan of MR. G. IKIARA of the University of Nairobi. After making report at the police station the Respondent arrived and also recorded a statement. He asked the police if she could be allowed to go back to the house with him. She agreed on condition that she was given escort by the police . She said that the police escorted her to the matrimonial home where she collected her belongings and left. She went to live with a friend and has not gone back to him ever since.

The petitioner was subjected to a lengthy cross-examination which I recorded and have analysed again for purposes of this judgment she was warned, beaten up and told to pack up and leave the matrimonial home. On the 8th January, 1995, after returning from Langata Police Station where she had made a report of that, she was escorted to the matrimonial home collected her belongings and left and she has never gone back again. She maintained that this was misconduct on the part of the Respondent which injured her health. She denied to be painting a false picture of the Respondent.

The Petitioner was cross-examined by Mr Mogikoyo at great length on various issues.

The Petitioner conceded that she started working as an untrained teacher in 1985, joined Siriba TTC in 1987 and left in the month of May 1989; that the Respondent graduated from the university of Nairobi with first degree in December, 1984. She started to cohabit with him as husband and wife in August 1984. They lived at the Respondent, brother's house at Bangladesh estate in Nakuru. By then the Respondent was doing his INTERNSHIP at the Provincial General Hospital Nakuru. She said that they cohabited continuously until March 1986 when they went back to her parents' home. She joined B SECONDARY SCHOOL in Nyamira District (then Kisii District) as a teacher. The Respondent is the one who went for her from Bonyunyu Sec. School in November, 1986. She explained about the source of their problem in 1986. She told the court that she delivered their first child through a Caesarian operation and the wound became septic. She had to be admitted at the Provincial General Hospital (Annex) Nakuru for one month. The Respondent, who had by then been posted to New Nyanza General Hospital, Kisumu did not want her to go and join him at Kisumu. He got her a job to teach at Bonyunyu Sec. School. She was to report to that school within a particular period stated in that letter failing which she would lose her teaching job. She said that the Respondent forced her to report to that school even before she was cured but she was resisting because she valued her health more than the job. He thought and believed that she was refusing this job. She however, reported to the Headmaster of that school, to whom she explained her problem that she was still weak and unable to take up the teaching job. The Headmaster was understanding and told her to go back home and report to school at the beginning of 1st term in January, 1996. When school opened in January, 1996 she reported to school and taught upto February, 1986. The Respondent was in Kisumu. When the school broke up for half-term she decided to pay him a visit in Kisumu. But when she reached there he forced her back to that school, which she did. Then in March, 1986 he wrote her a letter and told her that their marriage was over because she was a difficult woman. She said that the respondent went to his parents home called his parents and brothers and told them that he did not want her as his wife because she was difficult. She decided to go back to her parents home, where she stayed up to November

1986 when the Respondent went for her himself.

In further cross-examination by Mr Mogikoyo the petitioner told the court that she reported to Bonyunyu Secondary School in October, 1985. After reporting at the said school she went and stayed at the Respondent's home from where she was working. She denied refusing to report at that school because she did not want to stay alone at Kisii. She said she was refusing to report to school because she was sick.

She told the court that the Respondent then joined the Kenya Navy in 1986 even without consulting her. She said that when the Respondent was making the arrangements to join the Kenya Army, they had already quarreled. She denied having been against the Respondent's joining the Kenya Navy. She also said that that was not the reason she was refusing to report to Bonyunyu Secondary School.

She told the court under cross-examination that she started teaching in Nairobi in November, 1989. She denied having been allocated with a plot in Nairobi, neither at Dandora nor at Athi River. She said she was aware that H.E. President Moi promised to allocate land to Nairobi Secondary School Teachers but told the court that the teachers had not registered themselves for allocation of that land. She denied receiving Shs.21,000 from the Respondent to register herself as a member of the Teachers body.

She said further that she was aware that the Respondent was a medical doctor and that, by virtue of his profession, he attended night duties. She said that he joined the University of Nairobi for Masters Degree in medicine in October 1989 and graduated on the 11th December, 1995. As a student he could attend classes and carry out research as part of his degree course. She said that she knew it as a fact that the respondent went to Nakuru in 1991 or 1992 during August Holidays to do research and he would be coming to see her and the children over the weekends. He was attending his classes from home. She denied that the respondent would be away from her and which she was complaining about, the respondent was either attending classes or doing research. She said that the respondent began to be absent from home in 1992 although he had not finished his studies then. She said that she did not expect him to be with her during the day time when he was doubling up as a doctor as well.

She said that she knew one JACQUILINE KINOSI one of her housemaids. She denied even telling JACQUILINE on 4.1.95 that she was about to move into her own house, and she denied telling JACQUILINE to prepare the children to move out the next day 5.1.1995. She also admitted that RISPA was one of her cousins. She recalled to have left matrimonial home on 4.1.95 for Nakuru with RISPA and not with another maid called PAMERS. At Nakuru she went to her brother's house while RISPA went to another of her cousin's house. She came back to Nairobi from Nakuru on 6.1.95 but without RISPA. She denied having left the matrimonial home on 4.1.95 with Rispa and to have returned to Nakuru on the same day but without RISPA and PAMELA. She said that when she left the matrimonial home on 4.1.95 she had left the children behind. She said that she did not know whether the Respondent was on duty on 5th and 6th January, 1995 because she was away in Nakuru.

She said there were occasions when the Respondent would be on night duty throughout and then rest thereafter. She did not know whether he had been on duty on the day of 5th January and also at night and that he then went off duty in the afternoon of 6th January, 1995. She insisted that she was not at the matrimonial house on 5th January, 1995. She was in Nakuru.

The petitioner was then referred to paragraph (e) of the petition in which she had claimed that on the 5th January, 1995 the respondent had found her at the matrimonial home at around 11.00 a.m. and had subjected her to a lot of beatings in a bid to force her to sign a fake statement that she had been unfaithful to him. She admitted these were her words, meaning, her complaint against the respondent but that it all happened on the 8th January, 1995.

She said that she realised this mistake and instructed her counsel to amend the petition. Her counsel told her that the date would be corrected when she is giving evidence. The Petition had not been amended by the time she had concluded her evidence-in-chief. She insisted that it was true on 5.1.1995 she did not come into contact with the respondent at all because she was away in Nakuru.

She told the court that there were times when the respondent would go for day and night duties consecutively but she could not tell whether he was on day and night duty on 5th and 6th January, 1995.

She denied having travelled to Keroka with Jacqueline and the Children on 5th January, 1995 and that he told Jacqueline he would go to collect them after she had found a house of her own.

She said that on 7.1.95 the respondent returned to the matrimonial home at about 11.00 a.m, found her, Pamela and Peter Mboga. The children were not at home. She said that the respondent did not ask her where the children were as he had already sent them to her parents' home and therefore he knew where they were. She denied telling him that she had told him that the children had been taken by her to their grandmother and that the respondent had become annoyed with her answer. She denied that the respondent questioned her about her relationship with D.M.M and the number of times she and D.M.M had sexual intercourse. She said that she did not admit to have had sexual intercourse with Mr Michira in October and November, 1994 in his house where they had used condoms in order not to contract any disease. She denied that the respondent had asked her to put into writing what she had allegedly told him and that when he went to get a pen she had escaped and ran away. She insisted that she escaped through the rear door when the respondent was beating her. She said that she did not escape because he had gone to collect a pen from his car but because her life was in danger. She said when she escaped through the rear door and jumped over the wall, the respondent was in the bedroom. He had forced her into the bedroom, had beaten her up, and had asked her to sign an admission that she knew Mr Michira. She said she told him that she knew Mr Michira who was her father's family friend.

She said that she managed to climb over the wall by stepping on the burglar proofing of the kitchen window. She said she reported this assault at Langata Police Station but was not issued with a P3 form (medical exam report) the police had told her to try to solve the problem after the respondent had gone to the police station and had a talk with the police. She said that the police told her that she had first to be examined before a P3 form would be issued. She was told to go back the following day but she did not go because of the police attitude towards her. She said she had sustained injuries to her head and right ear, had shown them to the police, who first ignored her. They were unfriendly to her. She denied that she did not go back to the police station because she had no injuries. As the police had not given her any assistance she did not bother to go back.

In re-examination on this evidence in support of the claim of cruelty the petitioner told the court that she was forced to leave the matrimonial home on Sunday 8th January, 1995. She had travelled to Nakuru on the 4th January, 1995 and spent a night at home. The Respondent was not there but came home on 7.1.95 at 11.00 a.m., asked her what she was doing there, told her to pack up her things which she did. She went and stayed with a friend and then returned back to the house on 8.1.1995. This is the time the respondent began to question her in the presence of Peter Mboga. He beat her up, Peter tried to intervene and she escaped from the home. The Respondent followed her, caught her up and started to beat her. The rest she said she had told the court.

The petitioner called PAMELA BONARERI MABEYA as PW 2. She will be referred in this judgment as "Pamela". Pamela worked as a housemaid in the petitioner/Respondent's matrimonial house. She started working on 28th December, 1994. She worked in that home upto April, 1995.

She told the court, in her evidence-in-chief that she is now working a AURA GARMENTS COMPANY, Industrial Area, Nairobi.

She recalled that when she used to work for the petitioner and respondent there was another housemaid called JACQUILINE. She recalled that the respondent chased the petitioner from the matrimonial home in early January, 1995 but the children remained behind. Two days from the day the petitioner was chased away, the respondent told her to prepare the children and take them to a bus stop so that they could be taken to the petitioner's parents home in Kisii. The respondent gave her Shs.1,200 for transport of the children and JACQUILINE who was to travel with the children. Indeed she said she escorted the children and JACQUILINE up to bus stage for GUSII DELUXE. She left the children and Jacqueline there and she returned home. The respondent then instructed her to go to the bus stage the following morning to wait

for Jacqueline who was supposed to return from Kisii. She did so but Jacqueline did not return. When she went back to the house she found the petitioner in the house. She did not know where she had come from. The following day the petitioner's brother in-law (respondent's brother) Peter Mboga Nyakibu, arrived. It was a Friday. They all stayed together in the house the whole of that Friday. In the evening Peter telephoned the respondent at his place of work at Kenyatta National Hospital and told him that he was at his home. The respondent came home on Saturday morning and found three of them there. She recalled that respondent, petitioner and Peter Nyakibu held a discussion in the sitting room of that house. During that discussion the petitioner requested the respondent to release her belongings so that she could go away. The Respondent told the petitioner to go for them on Sunday. The petitioner went away and returned on Sunday. She found respondent and Peter Nyakibu in the house. The three of them again held a discussion while she was in the kitchen. She did not hear what they were discussing about.

She recalled that from where she was in the kitchen she could hear the petitioner being beaten up. She went to the sitting room and found the respondent beating up the petitioner and Peter Nyakibu was trying to intervene. The respondent wanted to beat both petitioner and his brother Peter. Then the petitioner entered the kitchen and drunk water. By that time the Respondent had walked out for a while. The petitioner then, on seeing the respondent out, escaped through the kitchen door and jumped over the wall and disappeared towards the road. When the respondent returned to the house he found the petitioner had escaped. He ran after her. She told the court that she did not follow the respondent and therefore did not see what happened along the road.

She recalled that, on the same day, the petitioner returned home in the company of policemen and the respondent. They sat down and talked in the sitting room. The petitioner told the respondent give her her clothes so that she would go away. The respondent gave them to the petitioner and she went away. This was at about 3 p.m. She continued to work in the same house.

She recalled that on the same day when the petitioner had left, at 3 p.m. she returned at 7 p.m. all found Peter Myakibu in the house. The Respondent was not there. The petitioner had come to collect her. She went with her on that day (Sunday) but she returned to the house on Tuesday next. On her return to the house she found another maid, a girl and a woman with a baby. They were staying in house.

As this evidence relates to adultery, it will be reviewed at the appropriate stage in this judgment.

In cross-examination by Mr Mogikoyo, Pamela said that she attended school upto form I which she left in 1991 due to lack of school fees. She recalled that the respondent first chased them away on 3.1.1995 after they had quarreled at night there was the petitioner's cousin present in the house called Rispa. That night she saw the respondent beating up the petitioner. The time was 9.00 p.m. She said she had not known Rispa for long. She had found her there on 28.12.94 and had not seen any disagreement between RISPA and the petitioner. She did not hear Rispa and petitioner quarrel over an alleged affair between the petitioner and somebody staying at Buruburu.

After that quarrel between respondent and petitioner in the night of 2.1.95, they slept in separate bedrooms. In the morning of 3.1.95 the petitioner left the matrimonial home and came back on 4.1.95. The respondent was not in the house when the petitioner left on 3.1.95. Upon her return on 4.1.95 the petitioner left again with Rispa. She insisted in her evidence that the respondent did beat up the petitioner and that Peter Nyakibu unsuccessfully intervened. The respondent had taken a broomstick and was threatening to beat up the petitioner with it but the petitioner was taking cover behind Mr Peter Nyakibu, who was telling the respondent not to beat the petitioner. She said she had told the truth to the court.

The petitioner then called MR GERISHON KIRIMI IKIARA (PW4), a senior Lecturer at the University of Nairobi, Department of Economics and INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES. He recalled one Sunday on 8th January, 1995 he was getting out of his compound gate at South C. ESHIMA ESTATE next to Mugoya Estate at around 2 p.m in his car Reg. No.KZV 354 Toyota Corolla when he saw some people watching a man dragging a woman along the road. That man was holding the woman by her dress at the neck, with all buttons out. She was not wearing any shoes and was crying very much. The man, to the contrary, looked very calm. Mr Ikiara drove his car towards them and

as he neared them he asked what was happening. The man retorted that the woman was his wife who was running away and he had to get her back to the house. He asked whether the woman was sick. The man replied that he did not know what had happened as he had just come and had found her leaving, and he did not want her to get lost. At that point the woman shouted out for help saying:

"Please save me. This man is trying to kill me."

Mr ikiara said the woman looked very terrified and was trying to get into his car. He thought that she was mentally confused and I asked them what they wanted me to do. The man answered and said to him that he could give any assistance.

The people who were standing by then asked him to take them to the police station. The man told him that they were living next to him at Mugoya Estate and asked him to drive first their house before going to the police station. He undertook to drive them back from the police station. The man and the woman got into his car and he drove them to their house. The man got out and opened the gate and Mr Ikiara said he could see two cars parked within the compound. The woman refused to get out of the car and she and the man talked in their vernacular language which he could not understand. After the man had gone into his house he refused to come out but his elder brother came out and he told him to tell the man to come out. That man's brother also refused to do so saying he did not want to get involved and that he had been hurt on his hands. He therefore decided to drive to Langata Police Station with the woman. He identified that woman and the man as the petitioner and respondent.

On arrival at the police station he found a police woman at the reception to whom the petitioner made a report to the effect that he hassled and had been beating her. But before she could continue the police woman interjected and told the petitioner that the police do not deal with domestic problems at police stations. He asked the policewoman what she meant by domestic problems at police stations. He asked the policewoman what she meant by a domestic problem since the petitioner appeared to have been assaulted. He was ignored by the police woman and she did not tell them how to proceed. He and the petitioner decided to wait at the reception.

The respondent then drove in, walked into the reception where they were and walked out to talk to a police man. No action was later taken by the policeman and policewoman at only that they were ushered into a room and told to wait.

He saw the respondent go into another room where he stayed for long time. He said he was surprised because the petitioner who was the reportee should have been the firm to be called. Eventually the petitioner and him were called into that room where they found the respondent and policeman. The petitioner got annoyed and requested the policeman to send the respondent out of the room before she could make her report. The policeman refused to do so, but instead asked the respondent to repeat what he had said. The respondent said that he did not understand why the petitioner was behaving in that manner, and that he had only asked the petitioner about her being unfaithful to him. The respondent complained that the petitioner had been moving about with other men and he pointed at him as one of those men. Mr Ikiara told the court that he was surprised at the false accusation because that was his first time to meet the petitioner and respondent.

In his presence the petitioner told the policeman how the respondent had beaten her a few days earlier and how, on that Sunday, she had merely gone to collect her clothes. She said she had been locked in the bedroom and told to write a letter, that she had been given a paper and pen and told what to write words to the effect that she was unfaithful to her husband. She said that she felt her life threatened and therefore she escaped through the kitchen and that the respondent had ran after her and had caught her. This is when he had found them on the road. Mr Ikiara told the court that the Petitioner then asked to be given a P3 form so that she could be examined. She also told the policeman that she needed escort to enable her to take her clothes. The respondent interjected and said that he could drive her to his house himself but the policemen insisted that, as the matter had been reported to them, the law was going to take its course and that they would escort her. The policemen then released him and he went away. He was not requested to record a statement and he did not therefore record any. Mr Ikiara said that he had not met the petitioner

and respondent before that Sunday 18th January, 1995.

In cross-examination by Mr Mogikoyo Mr Kikiara told the court that when he first saw the respondent and petitioner on the road, the respondent was holding the petitioner by her dress around the neck, she was crying loudly, looking terrified, with red eyes, tears rolling down the cheeks. He thought that the petitioner had a mental problem. He was asked whether on their way to Langata police Station they talked. Mr Ikiara said that the petitioner told him that the respondent was her husband, they had been married for some time, had three children and that she had gone to Nakuru to get her brother-in-law to mediate between them and that all the children had been sent away by the man. She told him that the cause of this problem was a love affair between her husband the respondent and another woman, and that what had sparked off this bout was the opening of clinic where the respondent wanted to make his lover a partner. Mr Ikiara said that although this was their first meeting he did not find it strange that the petitioner could tell him about her domestic problems. He said the woman was in a very degraded situation in the way she had been treated. He denied to have known the petitioner before.

Mr Ikiara said that the petitioner had said that she was very afraid of the respondent, who had beaten her continuously for about a year included that fateful week.

The petitioner then called PETER MBOGA SAMUSI (PW6) her brother-in-law. Mr Mboga told the court that the respondent is his young brother and the petitioner is the respondent's wife. He lives in Nyamira. He recalled that on the 6.1.1995 he visited the petitioner and respondent at Mugoya Estate in Nairobi South C. he did not find them at home. a Day earlier (5.1.95) When he was in Nakuru he heard that the petitioner was at his other brother's house (Joseph Nyakiba) but he did not see her. He left Nakuru on 6.1.95 for Nairobi and went straight to their house at Mugoya Estate but he did not find anybody at home. He went to town and he met the respondent's friend called Mr MAYAKA who gave him a telephone number of Dr Florence Wamboi. He telephoned that number and talked to her and he asked the whereabouts of the respondent. She said that the respondent was present and she called him to the telephone. Mr Mboga said that he talked to the respondent on telephone. He asked him where the petitioner was and why she should be out of her house. He did advise the respondent that he, the respondent, was now old enough to keep a family and should not be chasing his wife away. The respondent retorted that he was not as old as he (Mr Mboga) thought he was Mr Mboga told the court that, when he was making that call he was in fact with the petitioner and the respondent was not aware. The petitioner had travelled that morning to Nairobi. After that call they all went to the respondent's home where they found a housemaid but there were no children. The maid told them that the children had been escorted to the petitioner's parents home. The respondent did not come home that night. He came to the home the next morning on 7.1.95 and found him at home with the petitioner and the maid. Mr Mboga said that he held a discussion with the respondent about the petitioner. He advised the respondent not to chase away the petitioner but he did not listen to his advise. He therefore stopped that discussion and began to talk about the vehicle which the two of them had bought together. That day he went back to Nakuru but came back on 8.1.95 because of a discrepancy in the cheque which the respondent had given him. Instead of a cheque for Shs.35,000 the respondent had drawn it for only Shs.22,000 so he wanted to discuss with the respondent about it.

Upon his return on 8.1.95 he found the respondent at home. The maid was also there. The respondent was not happy that the he had gone back there and the two of them quarrelled. Respondent tried to chase him away but he refused to go. He insisted to be given a cheque for Shs.35,000.

The petitioner arrived at home when the two of them were quarrelling. Mr Mboga told the court that the respondent then turned on the petitioner and started to quarrel her. He begun to question the petitioner as to whether she had made friends and why she had written a degrading letter to the parents of Dr Florence Wamboi. Mr Mboga said he intervened and told the respondent that if he intended to chase the petitioner away, then he should give her whatever property belonged to her. He also told him that if he intended to discipline the petitioner then he should discipline her and let her continue living in the home as his wife. The respondent did not like this and he called the petitioner to their bedroom for a talk. The petitioner did not want to go into the bedroom and a fight started between them. The respondent was pulling the petitioner into the bedroom but the petitioner was resisting. In the process the petitioner got hold of him.

The respondent got himself armed with a broom handle and started to beat the petitioner with it. Whenever the respondent intended to hit the petitioner, he would miss and the broom would hit him. The fight went on until the petitioner yielded and agreed to go with him into the bedroom. Inside the bedroom there was no fight that he could hear but the two were talking in low voices. He could not hear what they were saying to each other. After some time the respondent came out of the bedroom leaving the petitioner inside. The maid was inside the kitchen. The respondent then asked for a pen loudly from him but he could not give him one as he was annoyed. He saw the respondent heading for his car. But before he left the sitting room the petitioner rushed out of the bedroom and was confronted by the respondent, who asked her where she thought she was going to. The petitioner said that she was going to drink water in the kitchen.

The respondent went outside the house to his car to get a pen. While she was in the kitchen, the petitioner managed to climb through the window grills and jumped over the wall and dropped into a neighbour's compound.

From where he was sitting in the common room he heard the respondent warning the petitioner that she would make things worse. Respondent then walked into the sitting room, told him that the petitioner was on the fence and he quickly walked out through the outside gate. Mr Mboga said he also walked out to see what would happen. He saw nobody go he returned back into the house. After a while the respondent returned to the sitting room and told him that the petitioner was inside somebody's car. He got out and walked to the road and found indeed the petitioner sitting on the back seat of somebody's car. There were two gentlemen in the car. One was the driver and the other a passenger. The petitioner was crying. He asked her what happened and she told him that the respondent had caught her up on the road and had beaten her. The owner of the car then asked him to solve the problem between the petitioner and respondent but he told him that he had been defeated. He then heard the petitioner asking the owner of that car to take her to Langata Police Station. She requested him to get her bag but the respondent got it for her. When she checked in, Shs.10,000 which was in her handbag was missing and she began to cry. They drove to Langata Police Station and he returned to the house.

Mr Mboga told the court that after some time the petitioner, the respondent and two other gentlemen came to the house. The two gentlemen were policemen who had come for the petitioner's security. The petitioner was given Kshs.1,000/- by the respondent but she demanded Kshs.10,000/=. The respondent refused to give her the Kshs.10,000/=. Eventually the police escorted the petitioner out. The policemen then left the respondent in his car. The petitioner did not carry any household effects except for her handbag.

Later the respondent returned along and Mr. Mboga said he asked him what had happened at the police station. Respondent said, referring to the motorist who had taken petitioner to the police station "nimemtoa jasho". The respondent then drove away after saying that the policeman was now over.

Mr. Mboga had supper cooked by the maid. Then the petitioner drove in with another man and a woman in a car. She collected some things and took the maid away.

Mr, Mboga was cross-examined at length. He told the court that he is 57 years old, was married to Teresa Nyanchama with whom he had six children. He had other women but they were not his wives as he had not paid any dowry for them. He didn't know where they had gone to. He had children with them too. He said their father died in 1981 and he took over the family responsibilities. By then the respondent was in the University. He paid for the respondent's school fees. He is the one who also had approved the petitioner and respondent's marriage. As a sign of his approval he slaughtered them a goat at Kisii. When the respondent chased the petitioner in January 1995 he said he told him that he had done wrong. He said he tried to reconcile the petitioner and respondent but the respondent refused. He recalled that there was a problem before the respondent and petitioner in Kisumu when the respondent did not want the petitioner at Kisumu but wanted her to teach at Bonyunyo Secondary School. This resulted in a separation between them for some time. He recalled in January, 1995 when the petitioner complained about the respondent's conduct, failing to be coming home regularly. He advised the respondent against marrying a second wife but the respondent said he would marry one. He was taken through the events of 6.1.1995 and 8.1.1995.

He denied lying to the court as he had no cause or reason to do so. The respondent was his mother and the petitioner was his wife. He had had no ill feelings against them.

Those were the witnesses called by the petitioner in support of her petition for judicial separation on grounds of cruelty.

The respondent gave sworn evidence and denied the acts of cruelty which were alleged by the petitioner and her witnesses.

He told the court that he stopped staying with the petitioner on 6th January, 1995. He recalled that on the 5th January, 1995 he was on duty at Kenyatta National Hospital. He reported off duty in the morning of 6th January, 1995 and he went to his home. He did not find his children and the two house maids, PAMELA AND JACQUILINE KENOSI. He said he wouldn't get any information of their whereabouts. At 6.00 p.m. the petitioner arrived home and he inquired from her where the children had gone to and she told him that she had moved them to a new home where she had intended to stay with him. She did not tell him where the new home was because she said she did not want him to visit them. The respondent therefore denied chasing his children away to be taken to the petitioner's parents. He told the court that he demanded an explanation from the petitioner later. He recalled that on the 7.1.95 he came home from duty at about 10.00 a.m. and found the petitioner and her brother Peter Mboga at home. They sat in the sitting room and we brought up the issue of the whereabouts of the children. The petitioner repeated that she had made a decision and had taken the children away and she wanted to live separately from him. He recalled that there was a hint in December 1994 that the petitioner was having an affair with another man and that his other brother JOACHIM MBUNCHA had told him about it and how the petitioner and a man called D.M.M had gone together to a house in Buru-Buru phase IV. There was also an allegation that the petitioner was in possession of a radio cassette compact containing love songs by KEN RODGERS. The initials on that compact were "DMM" which he said stood for D.M.M. He therefore decided to ask the petitioner about these allegations. He noticed that she was shying off due to the presence of PETER MBOGA in the room. So he sought privacy in his bedroom where the petitioner made a full confession of her adultery with Mr. Michira.

He requested her to put it all down. As he had no paper and then he told her that he would collect them from his car outside. The purpose was to use that confession as a bain for the divorce case. While he was opening the car door he saw the petitioner on top of the perimeter wall of a neighbour's house. As a doctor he thought the petitioner was so shocked that she wanted to commit suicide. He therefore opened the gate and followed her outside as she ran away from him. He caught up with her and assured her that he would not do anything harmful to her. She couldn't believe it. That is when Mr. Ikiara PW4 drove in and gave her assistance by driving her to Langata police station. The respondent therefore denied ever assaulting the petitioner entered on 6.1.95, 7.1.95 or on 8.1.95. He denied asking her to pack up her bags and leave the matrimonial home. He said that between 1984 August and January 1995 they had generally had a good relationship as a family and the petitioner did not complain of his alleged persistent absence from the matrimonial home.

I have taken into account that evidence given by the petitioner and her witnesses and what the respondent said in response thereto.

I find the evidence of the petitioner sufficiently corroborated in material particulars by that of her former maid PAMELA BONARERI MABEYA (PW2) MR. GERISHION KIRIMI IKIARA (PW4), AND PETER MBOGA SAMOSI (PW6). I accept that evidence and I reject the respondent's denials which I find unconvincing and unsatisfactory. There was no reason at all why Mr. Ikiara would have lied in this court. I watched his demeanor on the witness box and he struck me as a reliable and responsible person. There is no evidence to support the respondent's accusation against him that he, Mr. Ikiara, was one of the men with who the petitioner had an affair.

The totality of this evidence has shown that the respondent's misconduct to have been grave and weighty. It was more than mere trivialities. It has also been shown to my satisfaction that there was real injury to the health of the petitioner, described in detail by Pamela, Gerishon and Peter Mboga and the petitioner

herself. The evidence of Mr. Gerishon Ikiara, established conclusively that the petitioner expressed fear for her life, fear of her husband, fear that he would kill her. That fear, in my view, was held reasonably by the petitioner in the circumstances of this case. I am satisfied and it has been proved that it was the misconduct of the respondent which caused the injury to the health of the petitioner. I therefore hold that, from the circumstances of this case, the whole of the conduct of the respondent, can be properly described as cruelty in the ordinary sense of that term.

The essential elements of the matrimonial offence of cruelty as stated in the case of NUNZIO COLAROSSO-vs-MICHELINA COLAROSSO (supra) have been proved beyond reasonable doubt by the petitioner. I therefore hold that the petitioner is entitled to the decree of Judicial Separation as prayed on grounds of cruelty.

The Petitioner, as I have already stated above, also petitioned for Judicial Separation from the respondent on the ground that, since the celebration of the said marriage, the respondent has committed adultery with women known and unknown to the petitioner and that the respondent was at all material times living with a woman known to the petitioner in the matrimonial home.

Adultery is the voluntary sexual intercourse between a man and woman both of whom or one of whom is married but who are not married to each other. In this particular case it would be sexual intercourse between the petitioner and another man who was not her husband, or between the respondent and a woman who was not his wife.

Adultery is a matrimonial offence which must be proved by the petitioner beyond reasonable doubt. In this connection the same standard of proof applicable to cruelty is applicable to cases of adultery.

Proof of adultery may be through direct evidence where, for instance, a wife finds her husband having sexual intercourse with another woman. This would be finding them in the act (flagrant delicta). It may also be proved through circumstantial evidence. In which case the usual principles of I am governing circumstantial evidence apply: that before adultery is said to be proved by circumstantial evidence, evidence of its commission must be so strong as to leave no doubt, whatsoever. Suspicion is not enough. Adultery being a serious matrimonial offence must be proved by evidence which is so strong that the only irresistible inference is that it was so committed.

The petitioner gave oral evidence in this court and said that the respondent has since the celebration of their marriage committed adultery with Dr. Florence Wambui Kiboi. The petitioner told the court that the respondent was staying most of his time with Dr. Florence Wambui Kiboi at Kenyatta National Hospital where she and the respondent were working. She said that she got to know of this because the respondent used to absent himself from home and would spend nights at Kenyatta National Hospital DOCTOR'S FLATS with Dr. Kiboi. She said she used to confront Dr. Kiboi about her affair with the respondent. She also discussed this with the respondent and the respondent's response was that he wanted to marry a second wife. She wasn't agreeable and that is why they had problems.

Petitioner told the court that the respondent and Dr. Kiboi have a child called CHRIS MOGAKA NYAKIBA. She said that when she moved out of the matrimonial home on 8.1.1995 Dr. Kiboi moved into the same matrimonial home. She produced photographs of the respondent and Dr. Kiboi as Exhibit No.8.

She said that in the month of March, 1995 she re-visited the matrimonial home and found the maid PAMELA still there. She was caring for a child. Pamela told her that that child was of Dr. Kiboi. The petitioner said that she saw Dr. Kiboi graduation photograph in the living room. When she went into the main bedroom she found Dr. Kiboi's clothes in the wardrobe and a baby cot. There was also added furniture in the sitting room. There was a green sofa set. In the kitchen she found added utensils, cups, plates etc. PAMELA told her that the new furniture and utensils had been moved from Kenyatta National Hospital DOCTOR'S FLATS. Pamela also informed her that Dr. Florence was living in the house with the respondent as a wife.

The petitioner was cross-examined on these photographs Ex. 8a, 8b and Ex.8c. She denied that the pictures in Ex. 8a and 8b are not of one SARAH MWEBERI but Dr. Kiboi's. In Ex. 8c Dr. Kiboi is shown standing on the far right, her sister is standing in the middle and the respondent is standing at the far left. Petitioner said that she got these photographs from the respondent's pockets in 1993. She denied a suggestion put to her that she got them from the respondent in 1991.

The petitioner explained photograph Ex.8d and that it is a picture of herself sitting in the former matrimonial house with Pamela Mabeya and Dr. Kiboi's child Chris. Pamela is shown carrying Chris in that photograph. She denied allegation that the child in that photograph is SALOME'S son. She knew SALOME to be the respondent's sister who got married to some Luo man and the respondent's didn't like it either. She denied a suggestion that she knew that the respondent and Dr. Kiboi were committing adultery way back in 1991 and condoned it.

Pamela Mabeya gave evidence as PW2. She said that the petitioner left the matrimonial home on 8.1.95 on a Sunday but she returned next Tuesday, which would have been on the 10.1.1995. When she returned to the respondent's house at Mugoya she found another girl, a maid, a woman and a baby staying there and continued to do so. She resumed working as a maid for the respondent. She told the court that the woman with the baby was sleeping in the petitioner's bedroom. She was sharing that bedroom with the respondent. The baby used to sleep in his baby cot in the same bedroom. She came to know that woman as FLORENCE WAMBOI and the baby as CHRIS MOGAKA NYAKIBA. The girl was called WANURI, who was Florence's sister. She was shown the photographs Ex. 8a, 8b, and 8c. In Ex. 8a she identified Florence Wamboi embracing the respondent. In Ex.8b she identified Florence Wamboi and the Respondent. In Ex. 8c she identified Florence, her sister WANJURI and the respondent. In Ex.8d she identified herself in it, she was holding Florence's baby, Chris, and the petitioner. She confirmed that photograph Ex.8d was taken after the petitioner had already left the matrimonial home.

Pamela told the court that she stayed in that house working as a house maid upto April 1995. All that time the respondent, Florence Wamboi Kiboi and the baby were sleeping in the petitioner's bedroom. In cross examination, Pamela told the court that she didn't know when photographs Ex.8a, 8b, and 8c were taken but Ex.8d was taken in 1995 and that baby in that photograph was not SALOME'S but was Dr. Kiboi's son.

The petitioner called Dr. Florence Wamboi Kiboi as a witness but the latter was declared hostile. Her evidence is therefore of no use to both the petitioner and the respondent. I don't intend to make any reference to it as it is worthless.

The petitioner then called PETER MBOGA SAMOSI PW6 her brother-in-law the respondent's brother. He recalled that he went to the respondent's house on 6.2.1995 and found Dr. Florence Wamboi Kiboi living there. Also living there were Dr. Kiboi's sister and two maids. He identified Dr. Kiboi who was present in court and whom he had known very well. He also identified the boy as Chris, Dr. Kiboi's. He recalled that both the respondent and Dr. Kiboi had been at Nyamira during the Xmas of 1995 with that boy.

On the day when he returned to the respondent's home on 6.2.1995 he found Dr. Kiboi at home and she cooked for him and prepared a bed for him to sleep. Previously, that used to be done by the petitioner. He recalled that that night he saw Dr. Kiboi sleeping in the petitioner's former bedroom and the respondent slept with her in the same bedroom. He however didn't know whether the boy Chris slept in that same main bedroom or with the maids.

In his evidence the respondent denied any love affair with Dr. Florence Kiboi. He called her his professional colleague whom he meets in hospitals and other places of work. He denied having any sexual relationship with her. He denied having brought Dr. Kiboi into his house. He said the baby cot in his house was meant for a baby called N. He said Pamela had lied and his brother Peter Mboga lied on this issue.

I have given this matter the seriousness it deserves. There is no doubt whatsoever in my mind that the

petitioner left the matrimonial home on 8.1.1995 and she took along with her the maid PAMELA. There is no doubt in my mind that on Tuesday the 10.1.1995 Pamela returned to the matrimonial house to resume her work. When her return she found Dr. Florence Wamboi Kiboi had started living in that house, she had moved in from DOCTOR'S FLATS at Kenyatta National Hospital with her maid, sister and child called CHRIS. There is no doubt in my mind whatsoever that the sleeping arrangements in that house from the 8.1.95 or soon thereafter upto the month of April, 1995 is as stated by PAMELA i.e. The respondent and in Florence Kiboi shared one bedroom as man and wife. This is confirmed by PETER MBOGA SAMOSI PW6 who told the court that he returned to the respondent's house on 6.2.1995 and found Dr. Kiboi at home, she welcomed him and cooked his supper and prepared his bed, the work which the petitioner used to do. Thereafter the respondent and Dr. Kiboi returned to bed into the main bedroom.

I accept the evidence of PAMELA and PETER MBOGA as witnesses who saw both the respondent and Dr. Kiboi sharing one bedroom, and in particular PAMELA'S evidence to that effect that they shared one bedroom from 12.1.1995 to April 1995 when she left them.

There is no direct evidence to show that the respondent and Dr. Kiboi committed adultery. The circumstantial evidence in this case, the birth of CHRIS MOGAKA NYAKIBA to them, their cohabitation together as wife and husband is sufficient proof that they have had sexual intercourse together. They had sexual intercourse before the 8.1.1995 when the petitioner left the matrimonial home and had regular sexual intercourse thereafter as man and wife when Dr. Kiboi moved in the matrimonial home. This evidence is irresistible and leave no other reasonable doubt in my mind whatsoever.

I therefore hold, and make and find that the respondent, since the celebration of his marriage with the petitioner, has committed adultery with a woman known as Dr. Florence Wamboi Kiboi.

I therefore do hereby now grant J.K.N, the petitioner, the decree of Judicial Separation from NYAKIBA WILLIAM MORURI this 6th day of February, 1998.

The respondent has cross petitioned for dissolution of this marriage between him and the petitioner. In the cross petition the respondent states that the petitioner has since October, 1994 and unknown to him committed adultery with D.M.M. The respondent further stated that the petitioner herself conferred to him in January 1995 that she had committed adultery with the said D.M.M on two occasions, October 1994 and November, 1994 at the said D.M.M residence at Buru Buru estate Nairobi, that the marriage between the petitioner and him has irretrievably broken down.

The respondent gave evidence in support of this cross petition and told the court that these was a hint in the month of December, 1994 that she was having an affair an extra marital love affair. He said his brother JOACHIM MBUNCHA had told him that in the month of December, 1994 he was with the petitioner crossing from town. Joachim was going to buy spare parts for the respondent's car and the petitioner was going to have her hair made. Respondent told the court that JOACHIM explained to him that he parted with the petitioner at the Kenya Bus Station. As he was walking towards Kirinyaga Road he saw the petitioner in a pick up driven by a man. Joachim hired a taxi vehicle and followed the petitioner. The pick-up headed towards Jogoo Road and ended up in a house at Buru Buru Phase IV. Joachim positioned himself somewhere as the petitioner and the driver of the pick-up alighted from the pick-up. The man got out of the pick-up and opened the gate. The petitioner held the gate and the man then drove the pick-up into the compound. Respondent told the court that Joachim told him that he felt that there were no other people in that house and that the petitioner and the man stayed together for about one hour. Joachim told him that he could not wait any longer and he returned back to Mugoya estate. The respondent told the court that that was the hint he got about the petitioner's extra marital love affair.

Another hint was about a radio cassette compact of love songs by KEN RODGERS. That compact had initials of "DMM" endorsed on it. He said he later learnt that the initials "DMM" stood for "D.M.M". He was told about this compact by Joachim and the petitioner. This was the hint that the petitioner was having a love affair with "DMM".

He told the court that on 7.1.1995 in the morning he decided to question the petitioner about it in his

bedroom. He said his bedroom. He said that the petitioner admitted that D.M.M used to be her boyfriend and that they had had no sexual relationship. He asked her if she had another boy friend other than D.M.M since she was not a virgin when he married her. It was then that the petitioner reluctantly told him that D.M.M had had sexual intercourse with her before but only once, and that she had not gone to him again. He told the court that when he noted these inconsistencies and that she had gone to Buru Buru with D.M.M where she had stayed with him for about one hour in the house, he asked her to be sincere and to tell him the truth and that it was only the truth which would relieve them from the tension between them. He said that the petitioner kept quiet for about one minute and then decided to tell him the truth. She began by apologizing before him and asked him to promise her that he would not react violently against her after hearing it. He said he assured her. She then told him that he had met D.M.M in Nairobi in March, 1994, took a drink in a cafe then went to the CARNIVORE for Nyama Choma. D.M.M proposed to her that they renew their relationship and she agreed. The respondent said that the petitioner then told him that in late July 1994 she left her place of work in H SECONDARY SCHOOL at around lunch time, came to O[.....]and left with D.M.M in a pick-up to Buru Buru.D.M.M was a Director and owner of O[...]. At Buru Buru she and D.M.M had sexual intercourse, the first ever after their marriage. He said he couldn't believe it. He asked her if they had another occasion after that, she said that they had sexual intercourse once every month from July to December, 1994 every time between 2.00 p.m. and 4.00 p.m. She would then be dropped home at about 5.30 p.m. This was to cover up for him not to know as he would always be home after 6.00 p.m. during the days he was on duty.

The respondent said he tried to relax but his first reaction was to tell her, now that there is the HIV/AIDS disease, most people do blame men for bringing this disease to the family yet she was a major contributor to the possibility of the presence of this disease in the family. The petitioner told him that she and D.M.M had always used condoms during sexual intercourse. The respondent said he stood up and requested her if she could put all that down on paper so that he would use it in a divorce case. He went for a pen and paper from his car and when he was away the petitioner got a chance and escaped through the kitchen and jumped over the wall where she got into a motorist who drove her to Langata police station where she reported an assault case. In conclusion of his evidence in chief on this aspect the respondent said that he did not believe that the petitioner had committed adultery. But subsequently her conduct was such that she did not put up any effort to save the marriage which had now become unrepairable and unworkable.

The basis of his cross petition is therefore the information he received from Joachim and the confession of the petitioner on 7.1.1995. Nothing more.

The petitioner denied having had an affair with D.M.M but she said she knew him as her father's friend.

The respondent called JOACHIM MBUNCHE NYAKIBA (DW2) who confirmed in his evidence to have told the respondent the incident when he followed the petitioner to Buru Buru on 29.12.1994.

The respondent also called his other brothers SAMWEL MOGOYE MOGAKA DW3 a businessman who sells charcoal at his home in Kisii. He told the court that he used to come to Nairobi to visit the respondent and the petitioner at Mugoya. He realised that whenever the respondent used to work at night the petitioner used to come home late. He said that he warned her against that behavior. He said the petitioner did not stop the practice and he reported this to the respondent.

In cross examination this witness told the court that he did not know where the petitioner used to come late from. As he didn't have that information he began to think evil of her. Then there was another brother called ANDREA SANGWE MOGAKA an accountant with KIPKEBE TEA ESTATE SOTIK. He was aged 54 years and had retired in 1993. He recalled that in December 1994 he came to stay with the respondent in Nairobi and he noticed that the petitioner used to be coming home late at night whenever the respondent was not there. He also warned her against that practice. He said that the petitioner used to come home at 10.00 p.m and that, according to Kisii tradition's was late for a wife to come home. He did not however tell this to the respondent.

At the end of the evidence for the respondent in the cross petition, I am not satisfied that he has made out a case at all on which a marriage can be dissolved.

The respondent was supposed to prove that the petitioner committed adultery with D.M.M and proof was to be beyond reasonable doubt. The evidence let so far established only suspicion on the part of the respondent that the petitioner was having an affair. The events as narrated by JOACHIM, if he told the truth, proved that the petitioner and D.M.M drove to his house at Buru Buru. There was no proof that there were no other people in that house. It was not sufficient for JOACHIM to say that he "felt" that there were no people there. He had to be sure about it. Adultery is a serious matrimonial offence which cannot be proved merely by "feelings" of witnesses. As the possession of a KEN RODGERS COMPACT LOVE SONGS with initials "DMM", if at all, was such an innocent act that it is incredible it could be led in evidence to establish that the petitioner and D.M.M committed adultery. The initials "DMM" could indeed mean D.M.M just as it could mean "Domisiano Mary Marete". As I said these initials could mean anything in the world. Most important, there was no proof of the owner of that compact or who wrote those initials on it.

As for coming home late, it is possible that the petitioner did come home late. There are thousands of reasons why people in Nairobi report home late. It cannot exclusively be said that every time a man or woman comes home late from work he or she has been having sexual intercourse somewhere along the way. I reject that proposition and unreasonable and unacceptable.

There is no evidence before me to prove that the petitioner, since the celebration of her marriage with the respondent, has ever committed adultery with D.M.M or with any other man.

I hereby dismiss the cross petition for dissolution of this marriage. It is ordered to be so dismissed this 6th day of February, 1998.

The petitioner prayed the court to give her the custody of her three children. There is A.O.N born on 30th August, 1985. He is just about 12 and a half years old. There is B.K.N born on 31st January, 1990 who is eight (8) years old. Then there is N.K.N born on 25th April 1991, going to be seven years in two months time. These are all very young children indeed. It was held in the case of GITHUNGURI vs GITHUNGURI (1979) KAR 9 that custody of young children should always be given to their natural mother unless there are exceptional circumstances which would disqualify that natural mother from having custody such exceptional circumstances would include the immoral habits of their mother which would compromise the good characters of such children. Therefore in considering the custody of these three children this court will give paramount considerations to their welfare in accordance with these principles and pursuant to the provisions of Section 17 of the Guardianship of Infants Act Chapter 144 Laws of Kenya. In any case the respondent has not asked for their custody. There are interim orders as regards their custody when the court placed them under the custody and control of the petitioner on the 19th October 1995. These interim orders are hereby confirmed.

The petitioner has prayed for the maintenance of herself and the three children by the respondent. On the maintenance of the children this court made orders on 25th April, 1996 which have not been challenged or reversed. There is nothing which has been placed before me to warrant the interference or alteration or variation of those orders. I hereby confirm them i.e.

(a) The respondent will pay Kshs.1200/= per month for each child, making a total of Kshs.3,600/=.

(b) The respondent will pay Shs.1000/= per child per month for medical care, making a total of Shs.3,000/= per month for three children.

(c) The respondent has a duty to see to it that these children are comfortably. The order to the respondent to pay

Shs.600/= per month for each child for clothing is confirmed, making a total of Kshs. 1800/= per month for the three children.

In total therefore this court orders the respondent to pay the petitioner Shs.8400/= per month for the maintenance of these three children. As the respondent has retired from the Armed Forces where he used

to receive free medical treatment for his family, this amount of Kshs.8,400/= will not be reduced by the medical care amount. He will pay this lump sum of Shs.8,400/= monthly.

Then the issue of the education of these children, the petitioner submitted through her counsel that she is happy with the present schools where these children are and with the mode of payment of their school fees.

These children are attending S B SCHOOL. I don't find any basis for interfering with their attendance of that school. The Headmaster of the said school has issued to the petitioner the fees structure for the payment of fees from these children. That was produced as Exhibit No.5. According to that fees structure, fees for these children is as follows:-

(a) A.O.N Kshs.10,000/=

(b) B.K.N Kshs. 7,500/=

(c) N Kshs. 7,500/=

TOTAL Kshs.25,000/=

Then there are school accessories to be bought such as books & uniforms. The petitioner requires another Kshs.10,000/= for all the three children for this.

I have already held the view that the respondent must pay for his children's education, which he would have done anyway if he was staying with them. I don't see why the petitioner should be burdened with this responsibility. I order that the respondent pays school fees of his children at South Belevue School calculated at Shs.25,100/= by the school per term or as may be determined by the school's managers from time to time. He will also pay the respondent a further Kshs.10,000/= for the purchase of their school books and school uniforms as may be required from time to time.

As for the maintenance of the petitioner by the respondent, Mrs. Karua has submitted that at common law, which is applicable to Kenya under Section 3 of the Matrimonial Causes Act, a husband is under a duty to maintain his wife. The wife only loses that maintenance when she deserts the matrimonial home without just cause. I would add to that, when she is found guilty of having committed a matrimonial offence. This is not the case here.

Mrs. Karua further submitted that even under African customary law it is the duty of the husband to maintain his wife. She submitted that, therefore, the petitioner should be placed as near as possible to her previous status and relied on the case of MARY THOGORI MUTHEE vs PAUL KAMAU MUTHEE JS No.96 of 1994.

Mr. Mogikoyo for the respondent does not deny that it is the duty of a husband to maintain his wife. It is, he says in determining that maintenance however, the case should only award maintenance depending upon the husband's income. i.e. his net income. He said the respondent gave evidence where he showed his average income to be Shs.30,000/= a month. He relied in the case of TOLLEY vs TOLLEY 1977 KLR.

I have taken into account what has been submitted. I have also taken into account that I have ordered the respondent to foot the school fees bill, maintenance for his children who will be in the custody of their mother, and that he will also be paying for books and their school uniforms. The petitioner is a secondary school teacher and who has lived on her own for about two years now. The amount of maintenance should be reasonable so that she and the children do not unduly suffer.

In addition to the payment which I have ordered herein above, I order that the respondent do pay the sum of Kshs. 15,000/= per month towards the respondent's maintenance. I decline to order the release of any furniture or items to the petitioner which are now in use in her former matrimonial home.

These are the orders of this court.

Dated and Delivered at NAIROBI this 6th February, 1998.

A.G.A. ETYANG

JUDGE

6.2.98