



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO 37 OF 1990**

**A K .....PETITIONER**

**VERSUS**

**Z N K.....RESPONDENT**

**JUDGMENT**

The petitioner herein married the respondent at the Registrar General's office Nairobi in 1975 as per the annexed marriage certificate but before this they had been married under Muslim Law but as the certificate cannot be recognized they had to get a certificate under the Marriage Act.

The couple had three children between them namely: -

- 1) R K a girl born in 1974
- 2) M K a boy born in 1981
- 3) S G a boy born in 1982

The petition was filed in 11/4/1990. The respondent filed answer to petition which was later amended to include a cross-petition. At the commencement of the proceedings it was agreed by consent that issues of property be dealt with at a later stage either in the same proceedings or in fresh proceedings and hence this judgment deals with dissolution of marriage only.

The petitioner gave evidence based on his petition to the effect that in the beginning the marriage was okay but from 1982 it deteriorated due to his wife's excessive drinking and neglecting the home resulting into quarrels and violence. On one occasion in December, 1988 he complained about her coming home late and drinking and then he decided to go and sleep in the children's room. He woke up at night to go to the toilet through the bedroom and on his way back he was hit by the respondent he screamed for help and he was rushed to hospital by his children and neighbour. In the process of being hit he struggled with the respondent and she fell on the floor.

He came back to the house after he was given 7 stitches and after the children went to school he left the house on 19/1/1989 and in 1990 he brought this action.

He indicated that there have been no attempts at reconciliation and as far as he was concerned the marriage was over. He said he has the custody of the children and has stayed with them from the time he moved out of the house. When cross-examined he conceded the incident referred to is the same incident the respondent has referred to.

The respondent gave her evidence basing it on her answer to petition. She confirmed the number of issues between them. The places of cohabitation and place of marriage. She added that in respect of the December, 1988 incident it is the petitioner who attacked her and if she hit him it is because she was defending herself. That it is the petitioner who attacked her mercilessly but she did not go for treatment. She was nursed at home. She produced a blood stained nightdress to show that she was injured on that day. She conceded that she takes alcohol but denied excessive drinking. That she was denied access to the children.

As regards the divorce she stated that if the petitioner wants she cannot stand on his way as its useless hanging on to it.

The petitioner herein relies on cruelty. The respondent relies on cruelty. Both parties have cited one incident only which led to the split. The petitioner says there were other incidents and although he had gone away he came back for reconciliation.

Ingredients of what amounts to cruelty were set out in the case of *Meme v Meme* [1976] KLR 13. To establish cruelty the complainant must show to the satisfaction to the Court and must be misconduct of a grave and weighty nature, real injury to the complainant's, health or reasonable apprehension of such injury, that the injury was caused by misconduct on the part of the respondent and that on the whole of the evidence the conduct amounted to cruelty in the ordinary sense of that word.

The parties herein rely on one single incident. The applicant alleges the respondent way laid him. That he went to the bedroom as he wanted to go to the toilet in the bedroom. If the petitioner had moved out of the bedroom because of disagreements, wasn't there any other toilet in the house he could go to? I am sure there was one and his only reason for going to the bedroom was for purposes of confrontation. On the part of the respondent she was injured but never went for treatment.

On the whole I find that both parties have not proved cruelty to the required standard. Allegations of heavy drinking were not included in the petition. The respondent cross-petitioned but in her prayers she only prayed for dismissal of the petition and no prayer for dissolution of the marriage. However it is clear that the parties do not wish to stay together. The petitioner stated as far as he was concerned the marriage was no more. As for the respondent she never wanted to divorce but if he does not want to reconcile she cannot force him. It is worth to note that no reconciliation efforts were made.

In her submission the respondent counsel prayed for dissolution on the grounds of desertation. This was not pleaded by either party. However, one thing that is clear is that the parties are no longer interested in the marriage. No efforts were made for reconciliation from the time the petitioner moved out of the matrimonial home. The ingredients for the offence of desertion are set out in the case of *P C Patel v L P Patel* [1965] EA 560. The onus is on the person who alleges it and in this case it is the respondent. Page 565 pr E states-

“ The generally accepted test of what conduct amounts to constructive desertion in this: Has the defendant been guilty of such grave and weight misconduct that the only sensible inference is that he knew that the complainant would in all probability withdraw permanently from cohabitation with him if she acted like any reasonable person in her position.”

In this case it is the petitioner who walked out of the matrimonial home. The reason being his wife's drunkenness but this wasn't pleaded in the petition. The other reason was cruelty but this was also an isolated incident whose circumstances have been found not to have been grave. However, it appears from the conduct of the petitioner that he left the home with no point of return and no efforts for reconciliation were ever made.

In the premises I find that the respondent wife has discharged the burden of proof on her to show that the husband left home without her consent and with no intention of returning.

Having found so the burden now shifts to the petitioner husband to show that there was justifiable cause.

In this case there is none. The Court therefore finds that the husband is guilty of constructive desertion. The husband has asked for custody of the two children. The Court was informed one of the children will be turning 18 this August 1992, she is currently out of the Country.

The eldest child is growing up and independent. The 3rd child is a boy born in 1982. He has been with the father since he left the matrimonial home. The mother used to visit him in school during weekends but the Court is informed that the father takes him away during weekends these days. The respondent has not made any efforts to have the children gain access to them. The principles governing custody of young children are well settled. Their welfare is paramount. The normal practice is that they be in the custody of the mother, see the case of *Joyce Muthoni Githunguri v Stanley Munga Githunguri* [1992-1988] 1 KAR 9 in which it was held that in cases of children the paramount consideration is the welfare of the children and where they are young the practice is that they be in the custody of the mother except where there are exceptional circumstances shown to justify depriving the mother of her natural right to have the small children with her.

In this case none has been shown except the fact that the mother has made any effort to get their custody and gain access. She also added one condition that if given maintenance she can stay with the boy. The respondent has not asked for maintenance in her cross-petition. She alleges she left her job, went in to business which collapsed and she has no regular income. Her counsel has asked for maintenance to the tune of 10,000/=. In order to rule on this the Court will have to call for affidavits of means from each side stating the income and expenditure in terms of s 25 (2) of the Matrimonial Causes Act cap 152 Laws of Kenya.

The last point is the issue of costs. The principle on this is set out in the case of *P V Patel v L P Patel* [1965] EA 560 in which it was held that it is not the usual practice of the Court to condemn a wife. In costs in matrimonial proceedings except where it is shown that she has sufficient separate estate. In this case it has not been shown that the respondent has separate estate.

For the reasons given I find that the petitioner's petition fails and the same is dismissed with costs. As for the respondent cross-petition the same is allowed on the grounds of constructive desertion on the part of the husband and the same is allowed with costs to the respondent.

I therefore make the following orders: -

- 1) The marriage solemnized herein between the parties at the Registrar's office Nairobi on 8/3/1975 be and is hereby ordered to be dissolved.
- 2) The *decree nisi* shall issue forthwith and the same to be made absolute in six months time.
- 3) The petitioner father shall have temporary custody care and control of the minor M K pending the hearing and determination of the issue of maintenance for the respondent and the minor child and then thereafter the respondent will have the custody care and control of the minor with reasonable access to the father.
- 4) During the pendency of the order for the temporary custody, care and control of the minor child the petitioner father shall afford reasonable access to the mother on weekends and school holidays.
- 5) The issue of sharing the property and maintenance and alimony for the respondent and the minor child are deferred to a later date.
- 6) The petitioner husband shall pay costs to the respondent both on the petition and cross-petition.
- 7) Each party to be at liberty to apply.

**Dated and delivered at Nairobi this 30th day of July, 1992.**

**R.N NAMBUYE**

**JUDGE**