REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO 4 OF 1988

C M S……..…..…. APPELLANT

VERSUS

S W S……..……..…….. RESPONDENT

(Appeal from the Judgment of the Senior Resident Magistrate's Court at

Eldoret (BN Olao Esq RM) in Civil Civil Suit No 18 of 1987)

JUDGMENT

This is an appeal from the decision of the Resident Magistrate Eldoret who dismissed the petition for divorce filed by **C M S** (hereinafter referred to as "the appellant"). The divorce cause was filed in court on 27th October 1986. It sought the dissolution of the marriage between the appellant and **S W S** (hereinafter referred to as "the respondent"). There was also a prayer for custody of the children of the marriage and also costs.

The petition was based on cruelty. According to the appellant he had married the respondent on 2nd March 1968 under the African Christian Marriage and Divorce Act cap 151 Laws of Kenya at the Catholic Church, Kabete in Nyeri District. After the said marriage the parties cohabited at a Government house in Nyeri until 1976 and later at a house owned by the appellant in Eldoret town from 1976 until the filing of the petition. Out of this union the parties were blessed with 2 children, namely K J, a daughter who was born in November 1969 and J N, a son born in November 1971. Both parties were or are domiciled in Kenya and there had been no previous proceedings in any court with reference to the said marriage.

The appellant listed 15 instances of cruelty upon which he was seeking the dissolution of the marriage; namely, that early after the marriage in 1968 the respondent commenced to endlessly argue with and harangue the appellant particularly as he, the appellant, was attempting to prove that the marriage would work despite opposition from his family. That the endless nagging and arguments led the appellant involving himself in pursuits outside the home including his work of repairing motor vehicles and later church activities. That the respondent was a woman of dominating personality with anyone who came into contact with her including the appellant and her son by another liaison, by the name Daniel. The appellant referred to one occasion in Nyahururu when he had to intervene to stop the respondent from beating this child more than was necessary because of his, D's, failure to come up to the expectations of the respondent.

The appellant referred to another incident in 1978 when the respondent had the delusions that he, the appellant, was involved with a woman or women in Kisumu area. On this, he said that his work involved travelling and visiting customers in the sugar growing areas of Kisumu but he never stayed overnight. Yet

despite this, the respondent went on and on about his so called affairs and this caused the appellant great concern.

That sometime in 1979 the appellant and the respondent quarrelled and the respondent thereafter locked herself into the bedroom of the matrimonial home at Eldoret saying that she was going to commit suicide with some gym exercise ropes. That the appellant and the respondent's son D, had to break down the door of that bedroom to calm down the respondent.

The appellant also referred to another incident in 1978 when the family had gone to stay at the *banda* of the Fisherman's Camp, Naivasha, when the respondent worked herself up about D's school performance and after a quarrel, the respondent went off alone into the dark threatening suicide, much to the consternation of the appellant. Then there was another quarrel in 1982 when the respondent threw a tea pot of boiling tea at the appellant burning his calf and causing the appellant some distress.

That in 1984 the respondent started having delusions that her local Church in Eldoret did not want her married to a non-Catholic as the appellant was, and she caused the appellant great concern when she alleged that a certain female friend of the family had been put on the Church Committee for that purpose.

The appellant referred to another incident in 1983/4 when, while at a party, a third party insulted the respondent and despite the appellant immediately removing the respondent and the family from the party and taking them home, the respondent ever afterwards took the appellant to task for not fighting the third party concerned and not supporting the respondent, much to the appellant's distress.

Then there was another bad day in August 1985 when the respondent picked up a quarrel with the appellant who then burst out saying "17 years of nagging". That this quarrel brought three days of recrimination from the respondent which included a four page letter begging the appellant to settle her somewhere else quietly. The appellant commented briefly on the letter but then returned it to the respondent although this had greatly upset the appellant as to the state of their marriage.

The appellant was also not happy with the respondent's behaviour during the latter part of 1985 and early 1986 when the respondent spent most of her time at her farm 10 miles out of Eldoret Town. She came home late and she was late in making meals which greatly upset the appellant. That in August 1986 the respondent started another quarrel and even suggested a split-up of the family property and separation. These quarrels occurred at the said farm outside Eldoret town and at the Coast where the whole family had gone to take a holiday. That the respondent continued to harp back on the past and was the instigator of quarrels and unhappiness affecting not only the appellant but the whole family.

That after the said holiday at the Coast the appellant felt so depressed that he had to consult a family doctor at Eldoret, namely Dr Serumaga, who then referred him to a psychiatrist at Kenyatta University, a Professor Acuda. That both parties saw the psychiatrist but there was no improvement in their relationship.

That in September 1986 the marital situation deteriorated leading to various meetings being held in Nairobi and Thika with the appellant, the respondent, family friends and the respondent's brother. That at these meetings the appellant requested he be left alone for sometime to work things out for himself but that the respondent returned to the said house in Eldoret after only three days and immediately started quarrelling and nagging the appellant knowing fully well that the latter was distressed.

Then on 5th October 1986 the respondent had emotional outbursts and the family doctor was telephoned concerning her complaints of pains in the head and chest. Yet the respondent refused to see the family doctor maintaining that he would poison her as he favoured the appellant. That the next day the respondent maintained that she had been upset because she had been told that the appellant was selling family plots in Eldoret and she would have nowhere to stay.

The appellant alleged further that on 9th October 1986 the respondent picked up a quarrel again with the appellant over supposedly a hidden cheque book from her, that he did not wish the son Daniel back to

Thika to work in his uncle's business. That all these allegations were untrue and they caused the appellant great worry as to the respondent's attitude and mental state.

Then on 10th October 1986 there was a quarrel between the parties which caused the appellant to separate from the respondent. That she commenced quarrelling at 7 pm upon waking up and continued to harangue the appellant until he left for his place of work. That the respondent followed the appellant there and shouted and abused him infront of his fellow workers and subordinate staff. That finally she left the premises but by this time she had caused the appellant lots of embarrassment and great emotional distress, leading to the appellant to leave the matrimonial home which he had not rejoined to the time this appeal was heard.

The respondent filed an answer to this petition on 11th November 1986. She did not agree that she was of a domineering or violent character. She denied treating the appellant with cruelty, endless nagging, haranguing and insults. She denied using abusive language to the appellant to cause any breakdown to his physical or mental health. She denied all the particulars of cruelty particularised in the petition and in the alternative said that if she had been cruel to the appellant, which she had denied, then the appellant had condoned it.

In paragraph 6 of the answer the respondent recalled at one time or twice having been shown some letters by the appellant which he had received from his mother in which his said mother was reminding him of his previous girl-friend which caused the respondent to ask the appellant whether he had any second thoughts about their marriage but that the matter was amicably discussed and shelved without any arguments. She denied having a dominating personality and did not agree that she had beaten up Daniel as alleged by the appellant. She denied the allegations that she had suspected the appellant of having any woman in Kisumu. She said the appellant was often tired and irritable whenever he returned from his duties in Kisumu and he tended to treat all in the house with impatience and only once did the respondent protest to him when he had shouted at J N when the latter desired to chat and sit with him after arriving from Kisumu.

She denied that she ever threatened to commit suicide in their bedroom at Eldoret town or at the Fisherman's camp at Naivasha or that any bedroom door was ever broken to calm her down.

She further said that the teapot which the appellant mentioned fell down accidentally and some tea spilled on the appellant's leg. That she had not intended to throw the teapot at the appellant.

She did not accede to the delusions alleged by the appellant about the differences over their religious conditions. Rather she said she encouraged the appellant in his Church activities although the two belonged to different Churches.

She did not accept that she had taken the appellant to task for not fighting the third party as alleged in paragraph 8 of the particulars of the petition. In paragraph 9 of the petition which alleged the remark "17 years of nagging" the respondent said the matter was settled amicably. She denied paragraphs 10, 11, 13, 14, 15 and 16 of the alleged cruelty. She admitted however that both parties had seen a psychiatrist but denied that this was necessitated by her conduct. She said that both parties had an overwhelmingly happy marriage and had achieved a lot together and that she had been a considerate, loving and patient wife to the appellant but that lately following the death of a neighbour who ailed for a long time and was well known to the appellant and the respondent, the appellant had suddenly become hypertensive.

She alleged cruelty on the part of the appellant namely that he had started secretly removing some of his personal belongings, including his pass book and some clothes from the house; taking out from the house some documents and title to property acquired through joint efforts of both parties to unknown place or for unknown purposes, refusing to answer the respondent or answering her rudely and harshly when she tried to enquire into where the items had gone, ordering the respondent to leave the matrimonial home for no reason and/or living outside the matrimonial home whenever the respondent resides there, demanding to be left alone even when the respondent was doing her best to care for the family and marital interest and the appellant's personal comfort; and so on and so forth.

The parties repeated these allegations in their separate testimonies before the lower court. The respondent did not specifically deny what the petitioner or appellant alleged against her but she gave some reasons for doing what she did or a slightly different version of what exactly happened. There was the allegation about the respondent being cruel to her son Daniel but the respondent said according to her it was usual to slap a child when that child did anything wrong.

On page 32 of the proceedings she explained exactly what happened. She told the lower court that she had wanted Daniel to be independent on his own, but he was not. He did not do well at school and she was disappointed although that did not result in her beating him. She said it was normal for children to be beaten for discipline purposes but she never kept the record of how often she disciplined Daniel. She repeated that it was natural for children to be disciplined and that she had slapped him on occasions although she did not know how often. She said all the children had been disciplined by her and so on and so forth.

The appellant maintained that he was a quiet man. The respondent in her evidence said he was not but on page 20 of the proceedings she said that D had become very quiet and so she was concerned as he was "becoming like his daddy". This would tend to confirm that actually the appellant was a quiet man. The respondent does not also appear to have been happy with D

particularly because he preferred talking to the appellant and not herself. On the complaint about the Fisherman's Camp incident, the appellant complained that the respondent had gone out after a quarrel threatening to commit suicide. The respondent denied this but said that she had got

annoyed when D had discussed family matters with her brother-inlaw and just went out as she felt like crying. She said she did not remain out for an hour and she never threatened to commit suicide. She said she only went out for a few minutes and then came back and the following day they went to Nairobi.

There was an allegation that during 1979 the respondent had locked herself in the bedroom in the matrimonial home at Eldoret and threatened to hang herself. She told the Court in her defence that although she had locked herself in the bedroom she did not threaten to hang herself. That the ropes which the appellant referred to as the ones she wanted to use to hang herself were always at the back of the door. That she was in that bedroom for about 5 minutes only and that when the appellant knocked at the door she opened it.

This incident took place after the parties had been at Mombasa where the respondent had asked the appellant for some money to enable her to visit her step brother who had been imprisoned in Nyeri but that the appellant told her to get money from her brother. So when she got to Eldoret she was feeling unhappy and so she went into the bedroom where she locked herself.

There was this incident about a tea pot being thrown at the appellant with hot tea therein in 1978. The appellant complained that the respondent had poured hot tea on him and it had burned his right leg.

She said in her defence that she did not intentionally throw the tea pot at the appellant. She said while making tea in the kitchen the appellant sent one of the drivers to her to ask for his advance pay yet the two had discussed earlier and agreed that drivers would no longer be paid advance salary on 15th day of each month. That when the respondent asked the driver to talk to the appellant about the money, the appellant refused to do so and instead alleged that she was quarrelling him. That he then took a jacket and threatened to walk out of the house but when she asked him where he was going before he took tea and he failed to reply she got angry and threw the tea pot on the floor. She said that he was not scalded as he alleged.

She agreed that in 1985 the appellant had made the remark "17 years of nagging." On this, she said they had visited a friend where somebody insulted and abused her. That they had to leave the place and go home where she asked him why he had not reacted when the man was abusing and insulting her but that the appellant said there was no need arguing with a fool. Then later on she asked the appellant what plans he had to attend a friend's wedding but that he simply burst out with the remark "17 years of nagging".

She agreed she wrote a letter to the appellant as alleged in paragraph 9 of the petition but in it she did not seek to be settled elsewhere. She did not accept that she was always out of the home for her *shamba* as alleged in paragraph 10 although she admitted that at times she would not keep time.

As to the allegation that the appellant had a woman friend in Kisumu, the respondent said she thought the two were cracking jokes with one another. She did not accept this particular incident to be the basis of a petition for divorce; and so on and so forth. I wouldn't say that in all her evidence the respondent denied what the appellant alleged against her in the petition. She admitted having committed the acts or made the allegations but to my mind she thought these were trivial things.

Cruelty as a matrimonial offence is a serious charge, and in *Mulhouse v Mulhouse* [1966] p 39 Sir Jocelyn Simon, P said at page 56: "Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt." *Bater v Bater* [1951] p 35. That it 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 more than mere trivialities. In many marriages there are occasional outburst 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 other spouse the law will not hesitate to give relief.

Secondly, it must be proved that there is a real injury to the 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 that it is the misconduct of the respondent which caused the injury to the health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the complainant and on the other hand the extent to which the complainant may have brought the trouble on himself or herself, the Court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of the term," (underlining mine).

In all circumstances the question of cruelty or no cruelty should not be decided merely by reference to every decision reported in the law reports. It is a question of fact and degree depending on the circumstances of the individual case and each case must be decided on its own facts. (*Meme v Meme* [1976] KLR page 13).

In the case subject to this appeal it was brought out that the appellant and the respondent are people of different races. They belong to different Churches and it was generally agreed that the appellant was a quiet man and although Professor Acuda (DW2) did not find the respondent as having a domineering personality, he found her more active than the appellant. No doubt there had been outbursts between the two parties at their matrimonial home in Eldoret, at the Coast and in Naivasha, to mention but a few. The matter was discussed over with relatives and friends and the respondent even disclosed that there was an attempt to see one of the pastors in Church to try and resolve the dispute, but to no avail.

The respondent admitted that sometime after the couple had come from the Coast in 1986, the appellant looked nervous and he suggested he wanted to talk to someone and this person turned out to be no other than Dr Serumaga (PW2) to whom he disclosed in an emotional plea that he was depressed because of his wife's conduct and when Dr Serumaga referred the appellant to Professor Acuda, the same reason was repeated although Professor Acuda came out with possible reasons for the depression of the appellant other than the respondent's misconduct. He said domestic problems were secondary and not the major cause of the appellant's depression.

I am in total agreement with Willmer, LJ that the conduct complained of must be looked at as a whole and it must be looked at in the law of the sort of people the parties are. I am certain this is why counsel for the appellant in his submission said it was important to consider the different backgrounds in education and culture of the parties in this case. The respondent being an African would think she was creating a joke or merely teasing the appellant when she remarked that he might have been having a woman friend in

Kisumu but could not realise the repercussions of such a remark to or how the appellant would take it.

Or for that matter although the respondent said that she simply followed the appellant to his office in Eldoret to find out what he was carrying in the boot of the company car, yet it would appear the appellant was utterly embarrassed particularly when she – the respondent – attempted to force the car boot open to see what was inside, and this is why he eventually left the matrimonial home as he found the respondent's conduct intolerable. He did not only find intolerable in that he could not stay with the respondent but that there was a reasonable apprehension of fear of an injury to his health which necessitated that he sees Dr Serumaga who later referred him to Professor Acuda.

Taking all these circumstances and viewing them as a whole, on the personality of the complaining party herein and considering the case on its own merit one would surely find that cruelty had been established in this case.

Professor Acuda had seen the appellant sometime in September 1986 and the appellant told him the cause of his severe depression arose from his domestic life. Professor Acuda said he met the appellant for two hours and made detailed notes during the interview but his report was dated 7th August 1987, almost one year after the interview. Unfortunately for Professor Acuda the notes he alleged he took down during his interview with the appellant for two hours in September were not exhibited in court to establish or confirm the genuineness of the report dated 7th August 1987.

I do not think this report would be taken seriously in view particularly of the fact that although the interview between Professor Acuda and the appellant was actually intended for the treatment of the appellant from his depression arising from his domestic life, which he attributed to the respondent, yet the person who now sought to use it in the case was the respondent who was not really in need of treatment as such by Professor Acuda!

Professor Acuda's evidence that he met both parties in the case would tend to establish that the appellant's complaint was actually of a marital nature. This is why it was necessary for Professor Acuda to interview both parties and advice them accordingly. The appellant left the matrimonial home sometime in September 1986 and upto the time of hearing of the petition in the lower court and even on appeal, he had not gone back.

Key witnesses in this case were Dr Serumaga (PW2) and Professor Acuda (DW2). When Dr Serumaga saw the appellant around August 1986 he was in an acute emotional depression. The appellant indicated to this doctor that his disturbance was related to his domestic life. Dr Serumaga prescribed some medicines to calm down the appellant's anxiety and this

doctor referred the appellant to Professor Acuda. Dr Serumaga also saw the respondent over the appellant's problem. He indicated to her that the two should see a psychiatrist who could handle their problem. According to Dr Serumaga, the problem was a complex one and required a qualified psychiatrist to counsel the couple. Why could this be so if the problem was not of a matrimonial nature? Professor Acuda saw the appellant around September 1986 after the latter had been referred to him by Dr Serumaga through a telephone call. When this Professor was introduced to the appellant he was told the appellant had severe depression and indeed when he saw the appellant he had severe depression. He interviewed the appellant as to the cause of the depression for two hours and the appellant told him that this depression arose from domestic problems.

Professor Acuda interviewed the appellant on 16th September 1986 for the first time and also on 19th September 1986. On 19th September 1986 he also interviewed the respondent and even told her that her husband was attributing his depression to her. He said when he told her this she seemed genuinely surprised. Professor Acuda even prescribed some medicine for the appellant's depression but he said he found four possible causes of the appellant's depression, namely:

(a) a depression with no definite cause ie endogenous. He said this depression comes from within.

(b) Recent death of a friend and neighbour who had died some two months before he had seen the couple. The appellant told this witness that he had been very actively involved in the funeral of that neighbour.

(c) They were going through a mid-life crisis which occurs in any couple who have been married for a long time and especially where the children have now grown up. This is common in Mr Strong's age group, the professor said.

(d) The professor agreed that frustration at work would be a chronic cause of depression particularly when one is secure in his job. Similarly chronic back pains which prevent one from leading a normal physical life could cause depression, he concluded.

The person depressed was the appellant and he gave the cause of his depression to two doctors. It was marital problems. In his petition he gave more than 10 causes which had occurred over a period of time before he eventually left the matrimonial home in September 1986, never to come back again. Nowhere in his interviews with either Dr Serumaga or Professor Acuda did he complain of backache or frustration at his job to cause him the severe depression apart from insisting that it was his wife, the respondent, causing him the same.

The appellant had to come down in tears before Dr Serumaga and had even to pray during their holiday at the Coast or Fisherman's camp alleging that the respondent had nagged him enough. How would a reasonable court look at these sort of circumstances considered cumulatively? In *Collins v Collins* (1964) AC 644 and *Williams v Williams* (1964) AC 698, Lord Evershed said at page 670 in *Collins v Collins*:

"The question in all such cases is, to my mind whether the acts or conduct of the party charged were 'cruel' according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman."

The appellant considered the various acts attributed to the respondent cruel. They led to his breakdown physically and/or mentally and this is what the doctors referred to as severe depression which caused him to go for medical treatment. Would this not be proof of injury or reasonable apprehension of injury to life or health of the appellant to warrant the conduct being weighty enough to warrant a divorce being granted?

Looking at the conduct complained of where a wife constantly beats up one of the children of the marriage under the guise of discipline, or she nags a quiet and polite husband or alleges adulterous association against him with other women or tries to commit suicide such that the husband has to come to her rescue and so on and so forth! Would this kind of conduct not cumulatively cause injury or reasonable apprehension of such injury to such a polite and quiet husband to warrant a divorce being granted?

In my view this was a borderline case where looking at the degree of the respondent's conduct depending on the circumstances of the particular case a divorce would be the only answer to the problem. I wouldn't agree with the learned resident magistrate that the tension between the couple in the case was a mere triviality since it caused the appellant lots of anxiety and severe depression. The evidence of Professor Acuda on the four possible causes of the appellant's depression left a lot to be desired. It is true that the appellant had taken an active part in funeral arrangements of a neighbour who died but he never complained that this was the cause of his severe depression.

On the other hand, the parties had been married for about 19 years but through all this period the appellant never complained of anything else not even the alleged backache, as the cause of his depression, apart from complaining about the respondent's behaviour towards him. As I said earlier, these two parties have different cultural and educational backgrounds and certainly what one of them may think was a joke or trivial may not be so to the other and hence the differences in opinions. Professor Acuda's report was made not on 16th September or 19th September 1986, the dates he had an interview or interviews with the appellant but on 7th August 1987, approximately one year after the interviews. The notes he alleged he recorded during the interviews were not exhibited to confirm the report. The appellant was working with Hughes Limited and he changed to another firm by the name Same and nowhere throughout the period

did he complain of frustration in either of the two places.

The parties have separated since October 1986 with no clue that they will ever re-unite again and this cannot be a case where a marriage should be expected to continue to subsist any longer. That the appellant at one time instructed his lawyer to withdraw the petition from the Court and later instructed the same lawyer to continue the same only goes further to show how reconciliation between the couple has failed. In the circumstances, therefore I would differ from the findings of the learned Resident Magistrate in refusing to order dissolution of the marriage between the parties herein. I would allow this appeal and order that the marriage between them be and is hereby dissolved. A *decree nisi* willissue to become absolute six months' hence. Each party to bear his/her own costs.

Dated and Delivered at Eldoret this 25th Day of January, 1989

D.K.S. AGANYANYA

…….

JUDGE