REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

M K M…….....……APPLICANT

VERSUS

G M……..RESPONDENT

JUDGMENT

In this case the parties were married on 14th January, 1961 under the African Christian Marriage Act. Three children of the marriage are living: all sons, born in November 1961, June 1963 and August 1964. The parties lived and cohabited as husband and wife, mostly in Nairobi, until 16th August 1966, when the wife commenced proceedings in the Resident Magistrate's Court for judicial separation on the ground of the husband's cruelty. In that suit after the wife had given evidence on 8th May 1967 the hearing was adjourned to 2nd June 1967. Before the hearing resumed on 2nd June the parties reached agreement on terms contained in a document signed by their advocates. Only paragraph 1 is relevant for the purposes of this suit. This paragraph stated that a decree for judicial separation between the wife and the husband be passed as prayed.

On 31st August, 1972, the wife filed a petition for divorce on the ground of the husband's cruelty. The husband filed an answer on 15th November 1972, merely denying cruelty and stating that it was true that the wife had committed adultery as admitted in the petition. The wife in her petition asked the Court to exercise its discretion in her favour, because she committed adultery during the marriage. The husband in his answer also prays for dissolution of the marriage. Appearance was entered on 17th November 1972 on behalf of the husband by his advocates.

On 24th September 1972, the husband launched a separate petition for divorce against his wife, charging her with adultery and cruelty. The husband joined in his petition four men as co-respondents. There was no reason why the husband's charge of cruelty was not raised in his original answer. This was the proper place for it, because the Court in considering the wife's petition had a duty to inquire into any counter-charge which is made against her. Better still, both charges of cruelty and adultery could have been raised by amendment of the original answer. This could have avoided the additional delay, expense and inconvenience caused by the separate petition which was of no advantage to the wife or the husband.

On February 25th 1974, the Court ordered the cross-suits to be consolidated. The effect of such consolidation is not merely to join two petitions so that they may be tried at the same time, but it makes the two suits effective as if the husband's counter-charge and counter-prayer had been raised by his answer. Where two suits are consolidated the earlier in date has the right to begin. Since the wife's petition was earlier in date she began.

The former proceedings in the Resident Magistrate's Court and these proceedings are between the same parties. The complete file of the former proceedings was admitted in evidence. At the hearing of this suit

the wife gave evidence which was in all material aspects the same as her testimony in the proceedings in the lower court. The incidents of cruelty alleged in the two suits, that is in the Resident Magistrate's Court proceedings and in the High Court, are mostly the same, especially the following allegations:

(a) Since September 1962, when the husband formed the habit of going home very late and totally drunk he has treated the wife with cruelty, frequently using abusive language to her and assaulting and beating her on a number of occasions.

(b) The husband assaulted the wife in September 1962 late at night and beat her until she became unconscious.

(c) He assaulted and beat her in March, November and December 1963.

(d) In June and December 1965 the husband again assaulted and beat the wife.

(e) On 28th July 1966 the husband went home late very drunk, abused the wife and broke the bedroom window. The following morning he locked the bedroom door from outside and went away to work.

(f) On 31st July and 1st August 1966 the husband assaulted and beat the wife, and she had to leave the matrimonial home at 2.00 am to save herself from further assaults. She reported the assault to Doonholm Road police station (now Jogoo Road police station) and was taken to Kenyatta National Hospital in an ambulance. She left the hospital the following morning.

(g) The husband refused to pay for the wife's and children's food and clothing in early 1965.

(h) While working in Mombasa in 1965 the husband neglected the family and did not send them money for necessities regularly.

(i) In 1964, when the wife was admitted to the Aga Khan Hospital, the husband could pay the hospital charges which the wife paid. The following incidents took place after the petition for judicial separation had been filed.

(j) On 30th October 1966 the husband assaulted the wife and tore up the clothes she was wearing taking away her suitcase from Garden Hotel where she was staying with her brother.

(k) On 31st December 1966 he assaulted the wife and threatened to kill her.

(l) In March 1967 the husband went to the wife's house at night, abused her and threatened to kill her.

The wife repeated all these allegations in her oral testimony in Court at the hearing of this petition. As regards the allegations of incidents of cruelty which occurred before 30th October 1966 and which were also made in the petition file in 1966 in the lower court, when the husband agreed to the judicial separation between himself and his wife as prayed he, in effect, was admitting that he had treated the wife with cruelty as alleged in the petition and in her oral evidence before the magistrate. The prayer in the petition for judicial separation was founded on the charge of cruelty, and, for the decree to be passed the wife had to prove cruelty, which she did when the parties reached the agreement signed by their advocates on 2nd June 1967 that a decree for judicial separation be passed as prayed. What that agreement meant was this (as far as the husband was concerned): "I agree, I have treated the wife with cruelty as alleged, and, I further agreed to a decree for judicial separation between her and me being passed as prayed in her petition".

If the husband did not admit cruelty in the lower court's proceedings, then that Court by passing the decree for judicial separation made a finding of cruelty against the husband. It was on that basis that the lower court made the decree of judicial separation in 1967. This being the case I am satisfied that the acts of cruelty stated in that suit which were committed before 30th October 1966 were established before the lower court. The husband cannot now be heard to deny or dispute those acts of cruelty.

As regards the incident that is alleged to have taken place at Garden Hotel on 30th October 1966, the wife told the Court that the husband went to the hotel where she was staying with her brother and he asked her to go with him but she refused. He then assaulted and beat her and tore up the clothes she was wearing. He took away her suitcase. Acting on the instructions of their client the wife's advocates wrote to the husband about that incident.

Mr Murimi acting for the husband objected to the letter being produced because it was secondary evidence and the letter had not been copied to the wife. I admitted the letter because it was written on the instructions of the wife and, from the nature of the case, the incident of the conduct of cruelty of 30th October 1966 having been specifically mentioned in the petition, the husband and his advocates must have known that they would be required to produce the original of the letter, which should have been in their possession. In my opinion this was a case where the requirement of notice to produce should be dispensed with. In that letter the wife's advocates pointed out that the husband had gone to the hotel and assaulted the wife as alleged. There was no denial to that allegation by way of a reply. In fact the husband admitted going to the hotel, but denied assaulting the wife.

The wife stated further in her testimony that on 31st December 1966 while she, Mugambi and Mugambi's sister were waiting for a bus near Makadara in Nairobi, the husband offered them a lift in his car. They were going to town but he took them to near the Industrial Area at Bunyala Road roundabout. There he stopped the car, took a lever or spanner from the car and threatened to kill the wife. The police took the parties to Industrial Area police station, but they were later released with no subsequent prosecution. This incident was corroborated by Mugambi's evidence. This witness recalled the husband telling his wife that she would not alight where she wanted; he would kill her on that day, and he would finish her. In an attempt to stop the husband from hitting the wife, Mugambi was hit with the tool the husband had taken out. The witness emphasized that the wife never insulted the husband who started insulting her. The wife's advocates on her instructions wrote to the husband's advocates. Their letter was admitted on the same grounds as the other letter, notwithstanding Mr Murimi's objection.

The wife stated that all the incidents of cruelty complained from 1962 to 1967 had adversely affected her mentally and also affected her health. She left her employment without knowing what she was doing. She even developed an abdominal ulcer. There was no proof of the ulcer, as she called no medical evidence.

Cruelty as a matrimonial offence upon which a petition for dissolution of a marriage may be grounded is defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger (see *Russell v Russell* [1895] P 315, 322 and *Horton v Horton* [1940] P 187). This is by no means a comprehensive judicial definition of cruelty. It is so difficult to attach a comprehensive judicial definition to that term that it is dangerous to use facts of previously decided cases as precedents. Each case of cruelty has to be decided on its own facts.

For cruelty to be established two tests must be satisfied. These are: first, whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel; and, secondly, whether the conduct has caused injury to health or reasonable apprehension of such injury. These are the tests laid down in *Gollins v Gollins* [1964] AC 644 and *Williams v Williams* [1964] AC 698. Lord Evershed said at page 670 in *Gollins v Gollins*:

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.

Thus the Court looks at the conduct of the respondent and not at his, or her, person. The respondent's conduct must be grave and weighty to such an extent that it can be described as cruel in the ordinary sense of that word. The burden of proof lies on the petitioner to establish injury or reasonable apprehension of injury to life, limb or health to herself, or himself, before the respondent's conduct can be described as cruel. In *Mulhouse v Mulhouse* [1966] P 39, Sir Jocelyn Simon P said at pages 49, 50:

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 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 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 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 has caused 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 health of 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 that term.

That was an English case, but all the same I agree with the general principles laid down by that case, which in my opinion equally apply here; that, on a charge of cruelty the above four elements must be proved to the satisfaction of the court. I have deliberately used the phrase "to the satisfaction of the court" instead of "beyond reasonable doubt" because the latter gives the impression of the case being of a criminal nature, whereas matrimonial proceedings are civil. Indeed, all the elements of cruelty must be clearly proved to the satisfaction of the court before it will affix guilt. I am in complete agreement with Willmer LJ in *Windeatt v Windeatt* (No 2) [1963] P 25, 36, that the conduct complained of must be looked at as a whole, and it must be looked at in the light of the sort of people the parties are. It must be judged what was the impact of the conduct complained of (viewed as a whole) on the personality of the complaining party. In those circumstances the question of cruelty or no cruelty is not to be decided merely by reference to other decisions reported in the law reports. It is a question of fact and degree depending on the circumstances of the individual case, and, as I said earlier, each case must be decided on its own facts.

It is against the onus and standard of proof that I have set above that I must review the credibility of those who gave evidence in this case. I have already said that the incidents of cruelty alleged to have been committed by the husband prior to 30th October 1966 were admitted by him when he agreed to a decree for judicial separation being passed as prayed in the Resident Magistrate's Court, and that if the husband did not admit the acts of cruelty enumerated in the Resident Magistrate's Court, for the Court to have ordered a decree of judicial separation in a petition in which the ground was cruelty the Court must have reached the conclusion that the wife had proved all the elements of cruelty to its satisfaction. As to what happened on 30th October and 31st December 1966, the evidence of the wife was straightforward. She impressed me as a simple honest witness who told the truth without exaggeration. Mugambi was another truthful witness, and his evidence of what took place on 31st December 1966 was in all material aspects the same as what the wife told the Court. Going back to the acts of cruelty which occurred before 30th October 1966 and which were the subject matter of the proceedings in the Resident Magistrate's Court, I venture an opinion that where in the former proceedings between the same parties the respondent admits treating the petitioner with cruelty or the Court has found cruelty against the respondent the Court may in subsequent proceedings between the same parties in respect of the same matter, accept the proposition that that cruelty has been proved to its satisfaction, unless it is shown that the lower court's decision was wrong, which has not been done here.

The conduct alleged against the husband consists of assault and beating, using abusive language, willful neglect to maintain the wife and children and threats to kill the wife. In September 1966, the husband assaulted and beat the wife until she was unconscious. He assaulted and beat her in

March, November and December 1963. In June and December 1965, he assaulted and beat the wife again.

In 1966, from February, there were regular abusive acts and threats to assault the petitioner; and in July 1966, the husband assaulted and again beat the wife. This time she had to be taken to hospital by the police. This incident was recorded in the occurrence book at Doonholm Station. The husband further assaulted the wife on 30th October and 31st December 1966; and in March 1967, he threatened to kill her. The husband willfully neglected to support the wife and children in 1965, while in Nairobi and when he went on transfer to Mombasa in August 1965.

The husband gave evidence at the hearing of this suit and he did not seriously contradict the wife's evidence except mere denials. He was rather evasive. I watched him in the witness box and formed the opinion that he occasionally tended to exaggerate or underplay his conduct. In *Gollins v Gollins* [1964] AC 644 the husband, who was frequently in debt, did not maintain his wife and children and the wife was granted an order (on the ground of persistent cruelty) that she be no longer bound to cohabit with the husband. In *Bethune v Bethune* [1891] P 205 the Court held systematic neglect and insults to the wife to be conduct constituting legal cruelty on the part of the husband, and granted a decree nisi in favour of the wife.

Mugambi stated in his evidence that the wife ran to his house on several occasions for safety when she had been assaulted. In May 1966 the wife had to run away for safety and spent a night with a lady teacher. Having reviewed the whole of the conduct which is alleged against the husband, I am satisfied that the conduct was grave and weighty and can be described as cruel, and the conduct caused a reasonable apprehension of injury to the wife's health. I am also satisfied that the conduct caused general injury to her health.

Mr Murimi for the husband argued that on the allegations that the wife was treated with cruelty from 1962 to 1966, the conduct of cruelty was condoned by the wife. That she assumed the role of a wife to the husband until August 1966, when she left. He admitted that from the time of and during the marriage there were some minor scuffles, but these did not amount to cruelty. With respect, it is not the degree of scuffles that matters, but the gravity and weight of the respondent's conduct and whether such conduct has caused injury or apprehension of injury to the petitioner's health. The husband stated that he had intercourse with the wife in 1968 when she went to see him at Nakuru. Intercourse does not necessarily amount to condonation. Condonation is the complete forgiveness of the matrimonial offence and the restoration of the respondent to the same position as he or she occupied before the offence was committed. A presumption of continuance or resumption of marital intercourse is rebuttable on the part of a petitioner by evidence sufficient to negative the necessary intent. Mutual intention is essential for there to be true forgiveness. Generally there is a *prima facie* presumption against condonation, and, the burden of disproving condonation falls on the petitioner only when circumstances suggest a suspicion of condonation. In other words the party who alleges condonation must prove it on the balance of probabilities. The husband has not, in this case, proved that the wife intended to or did condone his cruelty. I am satisfied that the wife has clearly proved cruelty on the part of the husband and she is entitled to a decree of divorce.

In his cross-petition the husband complained of cruelty by the wife. The incident complained of is an assault which took place on 17th September 1968 when the wife assaulted the husband and injured him with a knife. She was charged and convicted of causing actual bodily harm, contrary to section 251 of the Penal Code. This is the only incident worth any consideration as the other complaints mentioned in the oral evidence of the husband are, apart from mere trivialities, not worth wasting time on. The incident resulted from an argument between the parties and during the judicial separation. The husband went to the wife's house at night at 8.00 pm and a fight broke out. During the fight, when the husband held the wife by the throat, she admits that she stabbed him. In *Ingram v Ingram* [1956] P 390 the Court stated that upon proof of a conviction in a matrimonial cause (unless the subject-matter of conviction is co-extensive with the matrimonial offence charged), the Court is entitled as regards the conduct of the spouse convicted to draw such inferences as a reasonable man would normally draw, on becoming aware of the conviction against the background disclosed in evidence, and in particular such inferences as the other party to the marriage would normally draw. In considering whether a conviction constitutes cruelty in principle it does not matter if the conviction relates to sexual, violent, fraudulent or treasonable matter.

The first question in each case must be: does the single conviction viewed against the background of the particular marriage tend to strike at the root of the relationship, and has it inflicted injury on the health of the other party?

The conduct complained of occurred when the marriage relationship was already strained and the parties were living apart. It cannot, therefore, be said that the conviction tended to strike at the root of the matrimonial relationship. Further, for a conviction to constitute cruelty the petitioner's complaint must be that the conviction of the respondent amounts to cruelty, which is not the complaint in this case. Here it is the act leading to the complaint that is charged as cruelty. In my opinion taking all circumstances into consideration the incident is not of the requisite degree of gravity as to be described as cruel, and *Ingram's* case is not applicable. The husband has not established cruelty.

The second charge by the husband is that the wife committed adultery with four co-respondents. The second co-respondent did not file an answer, but the other three did, and the fourth co respondent gave evidence at the hearing of the suit. Mr Murimi for the husband conceded that there were discrepancies between the evidence of the husband and the witness Edward Kaaria who was the sole informant of the husband as to the incidents when adultery was committed. He had a stereotyped way of detecting intercourse which was the same for all the four co-respondents. All the four co-respondents came to the wife's house at night with her on various occasions, slept there and had intercourse with her. In each case Kaaria, who was the wife's house servant, took the bed-sheets in the morning for examination before washing them; and every time he found sperm stains on the sheets. This made him conclude that the wife had had intercourse with the co-respondent who slept in the house the previous day. This witness contradicted himself as to the dates and days when each of the co-respondents came to the house. In some cases they came and left on the day he was off duty. For example, he admitted he was off duty on 6th August 1972 one of the days he claimed he saw sperm stains; but he had no opportunity to examine the bed sheets that day. I shall no analyse the evidence of Kaaria in detail as I found him a most unreliable witness whose evidence did not bear a scintilla of truth. As Mr Kapila for the wife stated, this witness made a fool of himself in the witness box. He admitted that he had a strong dislike for the wife, which means that he was out to destroy her in any way and, in the circumstances, he could not have told the truth of what she did.

[His lordship then reviewed the evidence relating to the allegations against the four co-respondents. He concluded that the wife had truthfully stated that she did not know two of them. There was no proof that she had spent a night at Nakuru with another co-respondent His Lordship found nothing in two letters written by the third co-respodnent to the wife to suggest undue familiarity; further, he found no proof of an allegation that he had slept at the wife's house and that the wife had gone to Mombasa with him].

I am aware of the fact that it is not necessary to adduce direct evidence to prove adultery. The practice is to infer evidence of adultery from the surrounding circumstances, eg confessions and admissions, improper behavior, undue familiarity, suspicious circumstances, etc. But the standard of proof required in a charge of adultery is very high.

In England it has on various occasions been likened to that in criminal law, that is, beyond reasonable doubt. The evidence must therefore go beyond establishing mere suspicion and opportunity to commit adultery. The evidence in this case is purely circumstantial and therefore, unless the facts the petitioner relies on are not reasonably capable of any other explanation, the Court will not draw the inference of guilt.

As stated by Willmer J in *Beer v Beer* [1948] P 10, 13, mere suspicion is not sufficient to justify a finding of adultery. An allegation of such gravity must be proved to the satisfaction of the court; and where the evidence pointing to guilt is entirely circumstantial it seems to me that it is quite impossible for the Court to draw the inference of guilt, unless it is clearly satisfied that the facts relied on are not reasonably capable of any other explanation.

Adultery is a serious matrimonial offence and it must, where it is alleged, be proved clearly. To prove adultery evidence of a guilty inclination or passion is needed in addition to opportunity to commit it. The

evidence of a single witness is enough without corroboration. But where the evidence of a single witness arouses the suspicion of the court that a true case is not being disclosed in the sense that adultery may not in fact have been committed, as it is in this case, that evidence must be corroborated before the Court will affix guilt.

In the present case the husband has proved no more than a state of facts equally consistent with guilt or innocence. He has raised a weak suspicion against the third co-respondent but no suspicion against the other three; but suspicion of adultery is, of course, not enough. Adultery must be clearly proved to the satisfaction of the court. In this case, having heard the evidence of the wife and the husband and their witnesses and that of the fourth co-respondent, I am far from being so satisfied. The evidence in possession of the husband as to his wife's conduct is not such as to afford reasonable grounds for believing that she had committed adultery. In my judgment the husband has not made out the charge of adultery. Accordingly, the husband's cross-petition must fail.

For the reasons I have given above, and notwithstanding the wife's discretionary statement, and in exercise of my discretion I find in favour of the wife's petition and dismiss the husband's cross-petition. The marriage, the subject matter of this suit, is hereby dissolved. Decree *nisi* to issue shall be made absolute after the statutory period. The husband will pay the wife's costs in her petition and in the cross-petition. He will also pay the co-respondent's costs in the cross-petition. Custody of the children and maintenance is adjourned to chambers on a date to be fixed by the parties.

Orders accordingly.

Dated and Delivered at Nairobi this 3rd Day of November 1975

Z.R. CHESONI

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JUDGE