



REPUBLIC OF KENYA



**KENYA LAW**  
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**JDS v SKS (Divorce Cause E59 of 2022) [2024] KEMC 135 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEMC 135 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
DIVORCE CAUSE E59 OF 2022  
PA NDEGE, SPM  
MARCH 7, 2024**

**BETWEEN**

**JDS ..... PETITIONER**

**AND**

**SKS ..... RESPONDENT**

**JUDGMENT**

1. This is a Petition for Divorce by the Petitioner against the Respondent for a decree that the marriage between him and the Respondent contracted in the year 2009 be dissolved and a decree of divorce be granted, costs of the Petition and ‘any other relief that thus court may deem fit and suitable to grant’. The Respondent filed an Answer to the Petition and Cross Petition dated 09<sup>th</sup> May, 2022.
2. The Petitioner petitioned this Court for dissolution of the marriage on grounds specified under paragraphs 5, 7, 8, 9, 10 and 11 of the Petition mainly that the Respondent has treated him with cruelty, has deserted their matrimonial home and engaged irreconcilable differences. The acts of cruelty comprised of denial of conjugal rights for the last 12 years, desertion of the matrimonial home since the year 2010 and refusing to go back home despite several reconciliatory attempts, subjecting the Petitioner to loneliness by neglecting him at their matrimonial home, failure to heed calls to reconcile despite several attempts and being harsh and cruel to the petitioner thus subjecting the petitioner to mental anguish and torture. It is the Petitioners’ contention that the difference between them are irreconcilable given that every one of them has moved on with their life and the marriage between them has irretrievably broken down due to these acts of desertion and cruelty. That the respondent deliberately deserted the matrimonial home as she was no longer interested in the marriage.
3. In Answer to the Petition, the Respondent contested the allegations of desertion, cruelty and or abandonment of the marriage levelled against her. She specifically denied that she deserted her matrimonial home, but that she was kicked out by the Petitioner who was incessantly harassing and physically assaulting her. That she pursued reconciliation efforts when she dropped criminal charges she had lodged against the Petitioner after he viciously assaulted and seriously injured her with a view



to promoting reconciliation, but that the Petitioner assaulted her again thereby causing her a bone fracture despite the Petitioner having undertaken in writing not to physically abuse her. She admits that attempts to reconcile her with the Petitioner have been unsuccessful, but denied that she is the one who frustrated the efforts. She avers that the marriage has been irretrievably broken down because of the Petitioner's acts of cruelty and adultery.

4. The Respondent in the Cross-Petition accused the Petitioner of adultery and cruelty. She particularized the same in Paragraphs 12 and 13 of her Answer to Petition and Cross-Petition as follows: -
  - a. On 10<sup>th</sup> and 12<sup>th</sup> September, 2010, the Petitioner viciously attacked the Respondent at their matrimonial home. The Respondent subsequently made a report to the police which entered in the Occurrence Book OB 66/20/9/10.
  - b. On 08/01/2011 the Petitioner severely beat the Respondent seriously injuring her as a result of which she sustained a bone fracture. She was treated at Valley Hospital and also seen by Dr. Malik.
  - c. On the eve of 05/03/2011, the Petitioner abused the Respondent and clearly told her that he likes his ladies referring to his ex-girlfriend, whose name she disclosed in her Cross-Petition as N. B. The Petitioner also told her that he wanted to get back to his former wife who resided in Mombasa at the time and he subsequently visited her on 5<sup>th</sup> and 6<sup>th</sup>, March 2011.
  - d. Since the day of the marriage on 23/11/2009, the Petitioner has deliberately refused/ neglected to have a meaningful man/ wife relationship with the Respondent by his conduct.
  - e. The Petitioner does not provide funds for food, clothing, health and other material needs to the Respondent.
  - f. The Petitioner has refused to make any meaningful emotional contact and communication expected of a husband with the Respondent.
  - g. The Petitioner has denied the Respondent her conjugal rights.
  - h. The Petitioner has deprived the Respondent of love, care and companionship expected in marriage and this has caused the Respondent deep loneliness, anxiety and psychological distress.
  - i. The Petitioner has kicked the Respondent out of their matrimonial home.
  - j. The Petitioner deliberately hoodwinked the Respondent into withdrawing Nakuru H. C. Divorce Cause No. 17 of 2011 in the pretext that he wanted to reconcile with her while knowing he was engaging in a gamesmanship with sole intention to hurt the Respondent.
  - k. The Petitioner openly engages in extra marital affairs by engaging in sexual liaisons with ladies called N. B. and J. D. and he has on many occasions expressly admitted to the Respondent both orally and in writing.
  - l. Between 5<sup>th</sup> and 6<sup>th</sup> of March, 2011, the Respondent visited his former wife in Mombasa for sexual excursions.
  - m. In or about July 2021, the Petitioner travelled to United States of America and attempted to get married while the marriage between himself and the Respondent was still legally in existence.
5. It is the Respondent's case that owing to the Petitioner's cruelty and adultery, the marriage has irretrievably broken down and all hope of rescue has been shattered. That during their marriage, the



Petitioner and the Respondent jointly acquired 2 matrimonial properties namely: 2 rental properties at Nakuru Blankets estate and flats in Mombasa. That further, the Petitioner has subsequently acquired Flat No. 3X6 at Dreams House, Flat No. 2X5 (income generating) and motor vehicle registration No. KDH 1X0E Land Cruiser using income from matrimonial properties jointly acquired by both. She therefore claims 50% share of all the matrimonial properties which the Petitioner holds in trust for her benefit. As a result of these grounds, the Respondent prayed that: -

- a. The marriage celebrated between them be dissolved;
  - b. An order that the Respondent is entitled to 50% share of all matrimonial properties held by the petitioner;
  - c. The Petitioner be ordered to pay Kshs. 40,000/= monthly towards the maintenance of the Respondent; and
  - d. The Petitioner be ordered to pay costs of this Petition.
6. During the hearing of the Petition, both parties herein adduced evidence in their respective petitions/ cases. They basically reiterated the contents of the pleadings and adopted their respective statements as evidence. Both parties acknowledged that they are in a listless statutory (Civil) marriage, having been married at the Registrar's office on 23/11/2009, when the Petitioner was a businessman, while the Respondent was a house wife. It is common ground that the parties herein only lived together for a few months and that they have been separated for over 12 years. They accuse each other of matrimonial offences or misconduct, such as desertion, cruelty, adultery etc.

#### **Determination**

7. From the Petition and cross-Petition it is common ground that the marriage herein has irretrievably broken down. The following issues however arise for Court's determination.
- a. Which party is to be blamed for the breaking down of the marriage herein?
  - b. Whether the other remedies prayed for by both parties are available at this juncture.
8. The petition as deduced from the pleadings and evidence is grounded on cruelty, and desertion. As a response to the petition, it is clear from the Respondent that she also alleges cruelty and adultery on the part of the petitioner. In the first instance has the petitioner discharged the burden of proof to be granted divorce.
9. It is notable that the kind of marriage being acknowledged by the parties fall within the scope of section 68 of the [marriage Act](#). The threshold for dissolution of such a marriage takes the ambit of the following grounds; -
- a. Adultery
  - b. Cruelty
  - c. Desertion
  - d. Exception depravity
  - e. Irretrievably break down of the marriage



10. I have always wondered whether an exhaustive definition of cruelty can be settled and framed with clarity. In the light of this Sir Charles Newbold in *Colarossi v Colagrosi* [1965] EA 129 observed; -

No comprehensive definition of cruelty has ever been accepted as satisfactory much depends on the habits and circumstances of the matrimonial life of husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however that the party seeking relief must prove actual or probable injury to life, lives or health.

11. In *Naveen Kohli vrs Neelu Kohli* (AIR 2004 All 1) the Court made a commentary on what constitutes elements of cruelty thus:

Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in a day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than 'ordinary wear and tear of married life.' The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions.

12. This definition also reflects our local circumstances as stated in *A.M.A. VRS G.S.B. NBI HCDC No. 134 of 2010, Kariuki J.* (as he then was) had this to say:

It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner's health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see *Russell vs Russell* [1895] P. 315, 322. See also *D. Tolstoy on The Law and Practice of Divorce*, Sixth Edn. It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see *Gollins vs Gollins* [1964] AC 644, *Williams vs Williams* [1964] AC 698, 760 *Tolstoy 6<sup>th</sup> Edn* states that the question in all cases is whether the Respondent's conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see *Gollins vs Gollins* (supra) at page 670 and *Williams vs Williams* (supra) at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see *Jamieson vs Jamieson* [1952] A. C. 525, 535. Moreover, a deliberate intention to hurt may turn into 'cruelty conduct' which, without such intention, would not constitute cruelty.

13. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty, though, should that all be serious enough, and result in injury, then the Court will grant the decree. What the law envisages for the grant of divorce on cruelty is prove of conduct complained of by way of evidence. That



is grave and weighty for the Court to conclude that human dignity and conscience has been implored. It must be conduct more serious than ordinary wear and tear of married life.

14. Looking at human relations, marriage union is generally solemnized by two people from different social-economic; cultural/customary or even ethnic backgrounds. Although, in very clear vows the parties covenant to move together for worse, ill health, for poor, while solemnizing the marriage that alone has never sustained the marriage. As a vital step each of the parties to marriage union has to address the various inherent personal traits based on the range of possibilities and options to shift the focus on the success of the collation. Conflicts that may arise during the subsistence of the marriage need to be managed through interactive participatory and inclusive approaches for the sake of building interests, power and adjusting parties' expectations to the marriage. There is need to strike a balance among the various components of human relationships namely, goal incompatibility, attitudes, socio-economic status, cultural/customary differences, behavior, etc. to ensure peaceful co-existence to avoid any of the spouses using his or her power to suppress the perceivably weak spouse to the marital union.
15. As such the basis of cruelty as a ground for divorce is case specific within the scope of the Marriage Act. It is sufficient that one spouse or both proves to the Court that the cruelty being explained is of such a type that it is impossible for them to live together. As such the delivering of false allegations by one spouse about the other having alleged that relations with different men or women for that matter outside other recognized marriage can amount to emotional and mental cruelty. Similar circumstances abound when one forms the intention to injure, harass or hurt another's physical, or mental or emotional being without due regard to infringement of his or her human rights.
16. There is medical evidence adduced by the Respondent that the Petitioner assaulted her on or around 08<sup>th</sup>, January 2011, where she sustained grave injuries indicative of a bone injury. The same can be deduced from REXH. Nos 2 (a) to (f). The medical evidence is corroborated by an acknowledgement from the Petitioner dated 12/11/2010 committing himself not to be violent to the Respondent again in case of a misunderstanding. The Petitioner admitted issuing the undertaking, which was produced herein as REXH. NO. 1. There was no corresponding evidence of the Respondent's physical cruelty and this proves that it is the Petitioner and not the Respondent who started all these fights and cruelty. He acknowledged very earlier on into this marriage that he was cruel to the Respondent. This was barely a year into the marriage herein. This corroborates the Respondents' case and cross-petition that it is the Petition who is guilty of misconduct. He could be the reason for the separation of the parties herein and should not therefore be heard to point fingers at the Respondent. Such a spouse who is emotionally and intimately immobilized usually choose what I believe will be the least painful alternative of a separation, which the other guilty party may term as abandonment, desertion or denial of conjugal rights.
17. The undisputed position is that the marriage of the petitioner and the Respondent has in fact fallen apart as per the averments. Certain key differences cropped up between the petitioner and the respondent in the background of the averments none has stared the other of cruelty. The factual aspects are indicative of a marriage on paper. Restitution of conjugal rights is not tenable as the emotions once positive to each other have grown into full blown crisis of negativity which has turned 'love' into 'hate' on whatever they hear and feel of each other as husband and wife.
18. One of the primary obligations of spouses under the marriage Act is the duty to cohabit and consummate the marriage union. It is an intolerable interference by this Court to insist on sustaining the marriage which is against the rights of the individuals as espoused in Articles 28 and 29 of the Constitution to order that Adults of sound mind continue to live together in a marriage which has irretrievably broken down with no window of a reconciliation.



19. Having put forward these allegations in perspective, the conclusion I reach with regard to this petition is to dismiss the same for lack of proof. However, as ably submitted by the learned counsel for the Respondent, this marriage between the Petitioner and the Respondent be dissolved as prayed for in the cross- Petition. As for the other prayers in the Cross-Petition, there was no sufficient evidence of any asset or matrimonial property involved herein. No evidence of property ownership of whatever nature was adduced to the satisfaction of the court. The cheques produced as the Respondent's contribution were left hanging as there was no proof of what the payments were meant for. It was not proved that the cheques totaling to Kshs. 500,000/= led to the acquisitions of the flats, rental properties and the motor vehicle as alleged herein. This is further compounded by the undisputed evidence that the parties herein did not live as a husband and wife for sufficiently longer period to be able to contribute towards the development of themselves as a family unit or in any way. There was further proof of no issue in the marriage herein. This was at most a listless and worthless marriage. I need not to bother the parties herein any further than to grant them the divorce. Parties appear to have moved on with their lives and the other prayers by the Respondent in the Cross-petition are deemed superfluous herein and are hereby dismissed. The upshot is that the marriage between the Petitioner and the Respondent be and is hereby dissolved as prayed in the Cross-Petition. As of necessity a decree nisi be issued to the Respondent. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 07th\_ DAY OF March 2024**

.....

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of;

Petitioner's Counsel: Kavraj

Petitioner: Absent

Respondent: Absent

