



**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**DIVORCE CAUSE NO. 103 OF 2015**

**R D J.....PETITIONER**

**-VS**

**A H W.....RESPONDENT**

**J U D G M E N T**

**The background:**

This judgment is in respect of a petition that Ms. R D J (hereinafter referred to as the "petitioner") filed in this Court on 9<sup>th</sup> October 2015. In the said petition the petitioner sought the following orders:

- (a) dissolution of her marriage with A H W (hereinafter referred to as the “respondent”) on the ground of cruelty;
- (b) The respondent be ordered to pay such reasonable maintenance to the issues of the marriage.
- (c) Any further relief that this Honorable Court may deem just and fit to grant.

The respondent opposed the petition for divorce vide his defence file in this Court on 23<sup>rd</sup> November 2015. He prayed Court to grant him the following orders:

- (a) That the court to dismiss the petition;
- (b) That each party to bear its own cost.

**The hearing:**

At the time of hearing, the parties proceeded to admit the following facts:

1. that the petitioner and respondent were married on 17<sup>th</sup> December, 1994; and they cohabited as husband and wife in Meru and Kitengele respectively.
2. that the petitioner and respondent have four children, namely Y D A, A A Ab, A S A and A S A .
3. that the respondent do provide for the children of the marriage with the maintenance.

In addition, the petitioner and the respondent framed the following issue:

1. Whether there are grounds of divorce in the petition.

In her testimony the petitioner, among other things, revealed she resides at Kitengela. They married in accordance with Islamic law in 1994 and registered the marriage in 1997. She stated that the marriage has irretrievably broken down and there are no prospects of a reconciliation between them. The petitioner in his pleadings stated that since sometimes in 2014 the respondent ceased to render conjugal right to her by isolating her for a period of over one year now. She further stated that during the said period the respondent deserted matrimonial home, he did not share the bedroom with the petitioner and he did shun any attempt to communicate with her for no reason whatsoever. She further testified that the respondent by his conduct caused her to live an unusual, lonely, boring, uninteresting, unsecured loveless family life causing her psychological and mental torture. The Petitioner further stated that the respondent has absolutely been un-cooperative and has despised and undermined efforts by the petitioner to sort out their problems through Family Resource center as it appears in PExt 3. Lastly, she prays for a judgment to be entered against the respondent as prayed.

The respondent denied the allegation brought against him by the petitioner, he however acknowledged the existence of matrimonial rift between him and the respondent.

The respondent stated that the petitioner left matrimonial home without his consent to Kitengela and that is what led to the current misunderstanding between both parties.

He stated that he continued visiting the petitioner and the children every weekend unless he is out of the country and he hoped that the marriage would continue. In cross examination he denied that the marriage had broken down.

I have given due consideration to the application and the ground it's based on *vis a vis* the defence, of the respondent. The question that falls for my consideration is:

a) Whether the respondent has treated the petitioner with cruelty.

Cruelty as a ground for divorce is now where defined in Islamic law as its not capable of precise definition. There cannot be any straight jacket formula for determining whether there is cruelty or not and each case depends on its own facts and circumstances. What may be cruelty in one case may not be cruelty in other and the parameter to judge cruelty as developed through judicial pronouncements is that when the conduct complained of is such that it is impossible for the parties to stay with each other without mental agony, torture and stress.

***Divorce has been allowed in Islamic Law as a remedy in incompatible union"*** see Ash-shawkani's "*Fat-hul Qadiir*" Vol. 3 pg 21

It has to be something much more than the ordinary wear and tear of married life. The conduct complained of should be grave and weighty and touch a pitch of severity to satisfy the conscience of the court that the parties cannot live together with each other anymore without mental agony, distress and torture.

The main grievance of the petitioner herein is the denial of the respondent to have normal sexual relationship with the petitioner. As per the assertion of the petitioner the last time they had sexual relationship with the defendant is more than a year ago.

The courts have through various judicial pronouncements taken a view that sex is the foundation of marriage and marriage without sex is an anathema.

In Islam, marriage is not restricted to a platonic relationship between husband and wife, nor is it solely

for procreation. The Sharia term for marriage , ' nikah' literally means sexual intercourse. so why has Islam provided extensive rules and regulation regarding intimacy? This was because Islam has fully understood that sexual instincts cannot and must not be repressed.

The legal intimacy has been openly recommended in Holy Qur'an,

**" .....when they (i.e., the wives) have cleansed themselves (after menstruation), you go into them as Allah has commanded....." See Al- Baqarah, 2;222.**

The Holy prophet (S.A.W) also encouraged his followers to marry and to fulfill their sexual urges in lawful ways as can be seen from the following hadith; The Prophet (S.A.W) said, **" O you young men! I recommend marriage to you.**

In the celebrated pronouncement of Mrs. Rita Nijhawan vs. Mr.Bal Kishan Nijhawan AIR1973Delhi200 held as under:

"In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body, the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

see also [Shankuntla Kumari vs. Om Prakash Ghai](#) AIR1983Delhi53 wherein it was held that:

"A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty.....

Hence, it is evident from the aforesaid that willful denial of sexual intercourse without reasonable cause would amount to cruelty and defeat the purpose of marriage.

Although it is difficult to exactly lay down as to how many times any healthy couple should have sexual intercourse in a particular period of time as it is not a mechanical but a mutual act, however, there cannot be any two ways about the fact that marriage without sex will be an insipid relation. Frequency of sex cannot be the only parameter to assess the success or failure of a marriage as it differs from couple to couple as to how much importance they attach to sexual relation vis a vis emotional relation. There may be cases where one partner to the marriage may be over sexual and the other partner may not have desire to the same level, but otherwise is fully potent. Marriage is an institution through which a man and a woman enter into a civil bond with overtone and undertone of religious and to state that sexual relationship is the mainstay or the motive to be achieved through marriage would be making a mockery of this pious institution. By getting married, a couple agrees to share their lives together with all its moments of joy, happiness and sorrow and the sexual relationship between them brings them close and intimate by which their marital bond is reinforced and fortified. There may not be sexual compatibility of a couple right from inception of the relationship and depending upon physical, emotional, psychological and social factors, the compatibility between some couples may be there from the beginning and amongst some may come later.

Adverting back to the fact of the present case a decree of divorce is not obtained on demand. The court has to satisfy itself on examination of all the evidence placed before it firstly, that the marriage has indeed broken down and secondly that there are no prospects of reconciliation between the parties.

In my view the plaintiff's decision to issue summons shows that there are problems in the marriage. Although the sexual relations were denied by the respondent the evidence weighed heavily in favor of the petitioner's version. Her undisputed evidence was that she had tried severally asking the respondent to fulfill his marital obligation but he failed. The respondent's evidence in cross examination was quite telling that to him everything was normal and that's why he failed to attend counseling session when required.

I believed the petitioner as her evidence had a ring of truth. It seems to me that these fact show that the marriage have broken down it is incapable of resuscitation. A decree of divorce brings finality to a family union. It affects everyone from the parties themselves to their minor children. It is not an order which the court will give lightly. Nevertheless It's the view of the court that ,Divorce since its disintegrate the family union is of course a social evil, in itself but it's a necessary social evil. It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious!

In the premise , I hold that the respondent has been treating the petitioner with cruelty and that the marriage between the petitioner and respondent is in name only and not in substance and serves no interest to exist.

**Conclusion:**

In conclusion, Court has no choice but to the make the following orders:

- (a) the marriage between the petitioner and the respondent be and is hereby dissolved.
- (b) Arising from (a) above the certificate of divorce be issued forthwith.
- (c) the respondent shall continue providing for the children of marriage.
- (d) the respondent shall provide eddat maintenance , to the petitioner, for the period of three month on a reasonable scale.
- (e) each party herein will bear her or his own costs.

**It's so ordered.**

**Dated , Delivered and Signed at Nairobi this 12<sup>th</sup> day of February, 2016.**

**Hon. A. I. Hussein**

**Kadhi**

**In Presence of;**

**Petitioner**

**Respondent**