



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**DIVORCE CAUSE NUMBER 11 OF 2011**

**EKO.....PETITIONER**

**VERSUS**

**KON .....RESPONDENT**

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

1. On 11<sup>th</sup> January 1998 EKO (22) and KON (31) were married under the Marriage Act Cap 150 (now repealed) at the DC's office Kisii. This is evident from the Certificate of Marriage.
2. They lived together as husband and wife and had two children GO date of birth 12<sup>th</sup> May 1998 and KN date of birth 24<sup>th</sup> August 1999.
3. On 16<sup>th</sup> August, the Petitioner EKO filed this Petition seeking divorce on the ground of desertion. That in the year 2000 the respondent KON, moved out of the matrimonial home, relocated to the United States of America without informing the Petitioner.
4. It is the Petitioner's position that the marriage has irretrievably broken down. She now seeks the dissolution of the marriage, and the custody of the two (2) children.
5. On 3<sup>rd</sup> July 2020 the respondent was served at his chemist in Kisii Town, as per the Affidavit of Service filed by Samuel N. Gekanana, Court Process Server. He was also served with Hearing Notice on 22<sup>nd</sup> January 2021, 8<sup>th</sup> March 2021, 18<sup>th</sup> June 2021 through his brother, after he returned to the United States of America.
6. The respondent did not file any response despite being served. Neither did he appear on the hearing date on 18<sup>th</sup> October 2021.
7. The petitioner testified that the last time she saw the respondent was on 2<sup>nd</sup> April 2000 after which she learnt that he had travelled to the United States of America. That before that he had been abusive in the marriage. He never took up parental responsibilities for their children, and even took money from her. That all she wanted now was the dissolution of the marriage custody of her children. She told court that the respondent had never reached out to the children since he left. That in 2015 she left for Canada with her children.
8. Upon closing her case, counsel, Ms. Njoroge for the petitioner filed Submissions. She relied on **JAO vs FOO [2019] eKLR, JSM vs ENB [2015] eKLR** to support the notion that the respondent was guilty of cruelty; the case of **SKC vs FKK [2021] eKLR** to support the notion that the respondent was guilty of desertion.
9. The **Marriage Act 2014 repealed the Marriage Act Cap 150. Section 98(1) & (2) of the Marriage Act No. 4 of 2014** states;

***“(1) A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.***

***(2) Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.”***

This Petition will therefore be determined under the provisions of the said Act.

10. This was a Civil Marriage. The grounds for dissolution of Civil Marriage are set out at **Section 66 of the same Act;**

**“Dissolution of a civil marriage 66. Right to petition for separation or divorce**

**(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.**

**(2) A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—**

- (a) adultery by the other spouse;**
- (b) cruelty by the other spouse;**
- (c) exceptional depravity by the other spouse;**
- (d) desertion by the other spouse for at least three years; or**
- (e) the irretrievable breakdown of the marriage**

**(3) ...**

**(4) ...**

**(5) ...**

**6) A marriage has irretrievably broken down if—**

- (a) a spouse commits adultery;**
- (b) a spouse is cruel to the other spouse or to any child of the marriage;**
- (c) a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;**
- (d) the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;**
- (e) a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;**
- (f) a spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;**
- (g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during then life time of the respondent in the light of existing medical knowledge; or**
- (h) any other ground as the court may deem appropriate.”**

11. In this case the respondent not only left the matrimonial home but went out of the country without telling his wife and children. He literally abandoned them and for more than twenty (20) years he has not had contact with the petitioner or the children. Clearly there can be no marriage in place

12. When the Petition was filed in 2011, that was more than ten (10) years after the last contact made with the respondent. The children were still minors but they are now adults. The prayer for custody is therefore overtaken by time.

13. In the circumstances, of this case I can only find for the petitioner.

14. That there is no marriage in existence as the marriage between the parties has irretrievably broken down.

15. The marriage between EKO and KON be and is hereby dissolved.

**DATED SIGNED AND DELIVERED VIA EMAIL THIS 24TH DAY FEBRUARY, 2022.**

**MUMBUA T MATHEKA**

**JUDGE**

**EDNA COURT ASSISTANT**

**NANCY NJOROGI, KAIRU & CO. ADVOCATES**