



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**DIVORCE CAUSE NO. 4 OF 2012**

**AMM.....PETITIONER**

**VERSUS**

**RMJ.....RESPONDENT**

**JUDGEMENT**

1. This is a petition for divorce filed by the Petitioner against the Respondent for a decree that the marriage between him and the respondent be dissolved. It also seeks for costs of the petition and any other remedy the court deems fit.

2. The background is that the petitioner lawfully married the respondent in a civil marriage at the office of the District Commissioner in Kitui. They thereafter resided in Nzambani, Kitui District and were blessed with one issue namely SM in 2003. They lived peacefully in 2004 until the respondent deserted the matrimonial home in 2004 after having committed adultery and cruelty to the petitioner. The petitioner felt that the marriage had irretrievably broken down. The petitioner then filed a petition for divorce against the respondent.

3. The respondent denied desertion and cruelty and in the cross petition averred that the petitioner committed adultery with AMC with whom he is currently cohabiting. The respondent averred that the petitioner treated her in inhumane, degrading and cruel manner and sought that the marriage be dissolved on the grounds stated in the cross petition and that she be granted permanent alimony, custody of the minor and that the petitioner pays maintenance of the minor.

4. When the matter came up for hearing, the petitioner, through his counsel, prayed to proceed in the absence of the respondent. The prayer was granted by the court. The petitioner filed sworn witness statements in line with the time schedules set by this court. However the respondent failed to file any statements of witnesses.

5. During the hearing herein the respondent failed to turn up and the petitioner proceeded with his case. The petitioner's evidence is deduced from his petition and witness statement dated 18.9.2018.

6. The petitioner testified on oath that he married the respondent on 8.5.2003 at Kitui DC's office and that they no longer cohabit together as the respondent deserted the matrimonial home in 2004 and has never returned. It was his testimony that the only issue of the marriage is now aged 16 years. He denied being cruel to the respondent and admitted sending her money as per the M-Pesa statements that are part of the list of documents filed. He wants the marriage dissolved as he saw no possibility of reconciliation. The petitioner closed his case and in light of the absence of the respondent, her case was ordered closed.

7. Learned counsel for the petitioner in his written submissions, contended that the grounds of adultery, desertion and cruelty had been established by the petitioner against the respondent, and that the marriage should be dissolved on those grounds.

8. The case commends the following legal issues:-

***a) Whether there was a valid marriage between the petitioner and the respondent.***

***b) Whether there are any grounds for divorce.***

***c) Whether the petitioner is entitled to any other remedies.***

9. With regard to the 1<sup>st</sup> issue, the petitioner attached to his list of documents a copy of his marriage certificate with the respondent to support his case that he was legally married to the respondent in a civil marriage conducted at the office of the District Commissioner in Kitui. This has not been disputed or challenged by the respondent. A civil marriage conducted under the Marriage Act cap 150 is one of the forms of marriages that are recognized in Kenya. Thus, this court finds that there was a valid marriage between the petitioner and the respondent.

Hence the first issue is resolved in the affirmative.

10. On the second issue, the position of the law now is that each of the grounds for divorce specified in the Marriage Act No.4 of 2014 is available equally to both the husband and the wife. See Section 66(2) of the Act which provides that:

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.**

11. There is evidence adduced on oath by the petitioner that the respondent has deserted the home for over 12 years. There is evidence that the parties are no longer living together. The petitioner's father swore a statement on oath dated 18.9.2018 and confirmed that the respondent had been cruel to the petitioner and that she had deserted the matrimonial home and further that attempts at reconciliation failed.

12. The foregoing evidence is not denied or rebutted by the respondent. The petitioner's case has been subsequently proved to the required standards by the petitioner. Besides, there are case decisions that a party who fails to testify/ give evidence or call witnesses will mean an adverse inference could be drawn. In **Pushia d/o Roajibhai M. Patel v The Fleet Transport Co. ltd [1960] EA 1026** at page 1033 the East African court of appeal said:

***“Whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend on the particular circumstance of each case.”***

13. Looking at the evidence in totality, the entire matrimonial relationship between the parties seems to have broken down. There is also uncontroverted evidence that the respondent has abandoned and deserted the petitioner. The desertion on the part of the respondent is unreasonable by virtue of her failure to return to the matrimonial home for a very long time now running to about 16 years. The desertion has lasted more than three years. There is enough evidence that the marriage between the respondent and the petitioner has irretrievably broken down. The two parties are no longer living together neither are they planning on reconciling. The marriage if any currently is an empty shell. There is no point in sustaining it.

14. The petitioner has proved his claim against the respondent to the required standards on all the prayers. Accordingly, judgment is entered as prayed by the petitioner against the respondent for the following orders:-

- a) The Respondent's cross petition is hereby dismissed.**
- b) The marriage between the petitioner and the respondent is hereby dissolved.**
- c) A decree nisi is to issue which shall become absolute upon expiry of three months.**
- d) Each party to bear their own costs.**

It is so ordered.

**Dated and delivered at Machakos this 18<sup>th</sup> day of December, 2019.**

**D. K. Kemei**

**Judge**