



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(Milimani Law Courts)**

**Divorce Cause No. 72 of 2011**

**C.M.M..... PETITIONER**

**VERSUS**

**J.K.M..... RESPONDENT**

**JUDGMENT**

This petition is dated 3<sup>rd</sup> May, 2011 and was filed in Court on 5<sup>th</sup> May, 2011. The Petitioner thereby seeks orders that –

- 1. *The marriage between the Petitioner and the Respondent be dissolved and a decree of divorce do issue forthwith.***
- 2. *The Petitioner be given full and unfettered custody of the children until they reach the age of majority.***
- 3. *The Respondent be and is hereby denied visitation rights except under strict supervision.***
- 4. *This Honourable Court may give any other order which the ends of justice may require in this case.***
- 5. *Costs of this petition be provided for.***

In spite of being served with a copy of the petition and notice to enter appearance, the Respondent did not enter appearance or any answer or cross-petition. The hearing therefore proceeded *ex parte*.

In her petition, the Petitioner accuses the Respondent of having committed all the matrimonial offences of adultery, cruelty, and desertion. According to the petition before the Court, the particulars of adultery are that on 16<sup>th</sup> October, 2010 an unknown lady used the Respondent's mobile telephone to call the Petitioner to confirm that the two were together. When the Petitioner enquired about the caller, the Respondent indicated that the lady was a bar maid and further enquiry made by the Petitioner's father and sister yielded the same results that the lady who had called the Petitioner using the Respondent's mobile telephone was indeed a bar maid. Three months after the telephone incident, the Respondent was diagnosed with HIV/AIDS while the Petitioner is still free of HIV/AIDS as confirmed by several medical tests the last one having been carried out on 31<sup>st</sup> March, 2011.

Regarding cruelty, the Petitioner accuses her spouse of subjecting her with continuous mental torture by

way of unexplained threats of imminent danger by continuously telling her that **“You do not know what I am capable of doing”**. As a result, the Petitioner had been forced to remain awake most of the nights for fear of the unknown. On one occasion around 2<sup>nd</sup> December, 2010, while in the matrimonial house, the Petitioner was forced by the Respondent to remove her clothes for unexplained reasons and asked the Petitioner what she would do if he raped her and infected her with HIV/AIDS. These incidents forced the Petitioner to leave the matrimonial bedroom and started to sleep in the children’s bedroom for fear of being raped and infected with HIV/AIDS.

With respect to desertion, the Petitioner’s case is that the Respondent refused to jointly service a mortgage of a house for which the Petitioner had taken a loan on the understanding that both of them would jointly repay the loan and this resulted in the financial strain to the Petitioner. Moreover, the Respondent refused and/or neglected to pay all family bills and left such payments to be effected solely by the Petitioner. He also refused to be committed in paying the children’s school fees and only made such payments when he wished. This forced the Petitioner to be the one to pay regularly in order to avoid interruption of the children’s education. The Respondent also refused to provide the basic needs of the family such as food, shelter and clothing.

In her sworn evidence in Court, the Petitioner testified on oath that the parties were married in 2002 and lived together until 2006 when disagreements started. It was her evidence that the Respondent tortured her psychologically and that he was always threatening her. At one time she found a knife under his pillow which she impounded. She reported her problems to her parents and then consulted a Counsellor. Both spouses submitted themselves to a counseling session but the Respondent declined to attend any other session. He thereafter would ridicule the Petitioner by asking her sarcastically what she had gained from telling her parents or seeing the psychiatrist. At the time of her appearance in Court, she didn’t know where the Respondent was and he obviously didn’t know what his children were doing or eating. It was the Petitioner’s evidence that the Respondent never helped her with school fees for the children and she prayed the Court to grant divorce and custody of the children.

After considering the pleadings and the Petitioner’s oral evidence, I find that the accusation that the Respondent had contracted HIV/AIDS is very serious. Many people would hate being stigmatized with that epidemic. If the accusation was false, one would have expected the Respondent to react immediately and vigorously in his own self defence. However, he did no such thing. Instead, he acquiesced to the accusation without a word and this suggests that the accusation was probably correct. If so, it is probable that the Respondent contracted the disease from outside the marriage since his spouse claims to be free from HIV/AIDS. However, the Respondent’s threats in the form of asking the Petitioner what she would do if he raped her and infected her with HIV/AIDS is bound to cause the Petitioner great mental anguish and psychological distress. In the event that she was thus infected, she would live in mortal fear for the lives of the children since this scourge does not have a cure. It is bound to shorten many people’s lives. If the children also got to know such an exchange between the parents, they are bound to live in mortal fear of their lives. That would be very uncomfortable for the children of the marriage. The only take from the allegations of cruelty is that by his conduct, the Respondent has definitely subjected the Petitioner to untold mental anguish on account of her fears of the unknown.

Failure to maintain the family by way of provisions of food, shelter and clothing and failure to pay school fees for the children also exert their impact on the Petitioner. Although she calls this desertion, it is not desertion especially in the sense used in matrimonial causes matters. In such matters, desertion implies leaving the family, actually and constructively, but it does not extend to failure to supply the family with their basic needs. In my view, this last aspect would apply to reinforce the view that a marriage has irretrievably broken down.

On account of the foregoing, and against the background of the Respondent’s failure to answer the accusations, I find that the Petitioner has proved her case against the Respondent in respect of the matrimonial offences of adultery and mental cruelty. For these reasons, I further find that the marriage between the parties herein has irretrievably broken down and the two cannot live comfortably together any longer. I accordingly make the following orders –

1. *The marriage solemnized at Kitale between the Petitioner and the Respondent in September, 2002 be and is hereby dissolved herewith.*
2. *Decree nisi to issue.*
3. *The decree nisi to become absolute after 90 days upon application by either of the spouses.*
4. *The Petitioner be and is hereby granted custody of the children until they reach the age of majority.*
5. *The Respondent be at liberty to apply for conditions under which he may visit the children.*
6. *Each party to bear its own costs of this petition.*

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 22<sup>nd</sup> day of March, 2012.

**L. NJAGI**  
**JUDGE**