



V.M.M.....PETITIONER

-VERSUS-

S.M.M.....RESPONDENT

JUDGMENT

The petitioner pleaded that he, as a bachelor, underwent a ceremony of marriage to the respondent in **August, 1998** before the Registrar of Marriages at Mombasa. The marriage was consummated in Mombasa and the parties, for some time, lived in Mombasa, up to **September, 2005** when the respondent left the matrimonial home. The marriage was blessed with one child, a boy, born in **2000** and named **G.M.**

The petitioner moves this Court to grant orders of dissolution of the said marriage, on the grounds that, since 2005, the respondent has deserted, and has subjected him to “*extreme cruelty.*”

The particulars of desertion are set out in the petition filed on **17th February, 2009**: on **20th September, 2005** the respondent deserted, taking away the child of the family, as well as her personal effects, and she did not return; in the course of **May, 2005** the respondent would leave the matrimonial home secretly, and stay for days in Nairobi; between 2003 and 2005 when the petitioner, an employee of the (*particulars withheld*), was stationed at Nakuru, the respondent would unilaterally leave him staying alone, as she relocated to Mombasa.

The petitioner thus stated the particulars of cruelty: the respondent repeatedly showed disrespect to the petitioner, in the presence of both parties’ parents; the respondent, on **23rd February, 2005** chased away the petitioner’s brother from their matrimonial home; the respondent subjected the petitioner to harassment and intimidation; the respondent denied the petitioner conjugal rights; the respondent repeatedly showed cruelty and abusive conduct towards the petitioner’s parents and relatives.

The petitioner pleads that because of the respondent’s cruelty and desertion, he has suffered physically and mentally, and he apprehends that the marriage has irretrievably broken down.

The petitioner avers that this petition has not been brought in collusion with the respondent, and that he has not condoned or connived at the impugned acts of cruelty and desertion.

The respondent, upon being served with process, filed an Answer-to-Petition and Cross-Petition for divorce, dated **23rd March, 2009**. She denied the averments by the petitioner, and pleaded that she had not been cruel to the petitioner, “*it was in fact the petitioner who deserted the matrimonial home.*” The respondent pleaded that “*since the celebration of the said marriage [the petitioner] [has] deserted the matrimonial home, been cruel to the respondent, and committed adultery...*”

The petitioner filed an Answer-to-Cross-petition on **25th September, 2009** denying the facts set out in the respondent’s pleadings.

This matter came up for hearing on **4th October, 2010**, with learned counsel **Messrs. Nyabena** and **Anyanzwa**, respectively, representing the petitioner and the respondent.

Mr. Nyabena led the petitioner through the evidence-in-chief: it was the petitioner's testimony that he had married the respondent at the Marriage Registrar's office in Mombasa, on **11th August, 1998**; thereafter, while stationed at Nakuru, he lived there, happily, with the respondent for one year; but subsequently the respondent would unilaterally depart to Mombasa, leaving the petitioner alone; when, in 2003 the petitioner was deployed in another country, Eritrea, the respondent decided on her own to relocate to Mombasa and to take up residence at M[...]; in **February, 2005** the respondent sent away the petitioner's brother who was staying with him in the matrimonial home; while such differences were being committed to the intercession of the couple's parents, the respondent took away the child of the marriage – and she chose not to go to the petitioner's rural home, but headed to Bamburi in Mombasa, where she rented a house; the respondent thereafter lodged an accusation of the petitioner, before a Women's-rights Non-Governmental Organization, FIDA Kenya; the respondent lodged a Children's Court suit against the petitioner, **S.M v. V.M**, Mombasa Children's Court Case No.[...] of 2007; the Children's Court ordered the petitioner to provide for the child's maintenance and school fees.

The petitioner testified that he has not lived together with the respondent since **2005**; he was convinced the marriage had irretrievably broken down; he asked the Court to grant Orders dissolving the marriage.

Responding to cross-examination by learned counsel, **Mr. Anyanzwa**, the petitioner testified that the respondent had come to live with him in Nakuru immediately after the celebration of the marriage; and that the matrimonial home was then located in Nakuru. He testified that the respondent left him in Nakuru and returned to Mombasa where she rented a house; but he did not know how the rent-money was being raised. Subsequently, after his return from Eritrea, the petitioner assumed the responsibility of rent-payment for the M[...] house.

Even though the petitioner was based in Nakuru while the respondent had relocated to Mombasa, he still entertained the hope that she should have regarded the petitioner's rural home as her home: *“she refused to come to T[...]; she then took her own decision and left.”*

Learned counsel, **Mr. Anyanzwa** led the respondent through the evidence-in-chief, and she thus testified: she had met the petitioner at the Government Training Institute, Mombasa in 1997 and they became friends, and later married; she could not join the petitioner in Nakuru until 1999, as she was in training in Mombasa until **March, 1999**. It was the respondent's testimony that she suggested to the petitioner she remains in Nakuru, while he went on deployment in Eritrea, but he is the one who asked her to go to Mombasa since her relatives lived there.

Contrary to the petitioner's testimony, the respondent stated that all she did was to find the M[...] rental house, and then the petitioner *“paid all the rent; he fetched household goods from Nakuru to Mombasa; then he went to Eritrea, leaving me at M[...].”*; his younger brother and a cousin came to live at the M[...] house, and she stayed happily with them, until 2005 when problems emerged.

It was the respondent's evidence that the petitioner had helped her to establish a shop at Mopanga, and, indeed, it's his brother who assisted her in shop-work. But on **9th September, 2005**, after the petitioner introduced his father into the M[...] home, misunderstandings surfaced; and as from **10th September, 2005** the petitioner was carting away the shop's effects. The respondent alerted her parents who came along, only to find that domestic relations had badly soured. The petitioner removed his brother from his station at the shop, and placed this enterprise under lock-and-key. The respondent testified that the petitioner is the one who left her at the M[...] house, with the young school-going son; the petitioner severed all communication links, and the respondent had to resort to her parents for assistance, and they took her to Bamburi to stay with them.

The respondent testified that she found herself in mental stress; and she visited the offices of FIDA Kenya, seeking assistance – and this is how she came to file suit, for the welfare of her son. Before the filing of suit the petitioner had taken the child without the respondent's consent, and kept him for about a

year.

The respondent denied the allegation of cruelty towards the petitioner; and said she knew the petitioner had married another wife. She averred that the marriage is *irretrievably broken down*, and prayed for Orders of dissolution. The respondent asked the Court to order the petitioner to make maintenance payment to her, in the sum of Kshs.15,000 per month.

The *petitioner* has made his case to show that the marriage between the parties has irretrievably broken down, and the *respondent* agrees. The only difference is as to the facts leading to the breakdown of the marriage. The petitioner did not contest the respondent's evidence that he has already established a *new family* situation, by entering into another matrimonial union. So the *de facto* situation is that the marriage between the parties has been fundamentally undermined, and it has no impetus, even had the alleged matrimonial offences not taken place. The parties have given contradictory accounts as to **who** committed the matrimonial offences of cruelty and desertion. In the light of the facts emerging in the evidence, this Court need not specifically establish and decide upon **who** exactly committed the matrimonial offences of cruelty and desertion: it suffices that a state of desertion has existed for more than five years; that the petitioner has dislodged himself from the bonds of a monogamous marriage and entered into a different union; that both parties have testified as to the *existence* of an irretrievable breakdown of their marriage.

Marriage being a vital, primary social bond which brings the parties together in constant and intimate activities of life, is not to be *decreed to exist* when its lifeblood is well and truly gone – as is the case herein. Apart from the averments by the parties that neither of them condoned or connived at the circumstances fracturing the substratum of the marriage, it is enough that the evidence shows the reality of marriage to be no longer in place. The law is not to be declared in vain, and so this Court must incorporate the social reality in its verdict.

I hereby make a decree nisi of divorce, the same to be made absolute upon a suitable application by a party.

The Orders of the Children's Court made in Children's Case No. 321 of 2007 shall remain in force subject to any such further Orders as may be made on an application.

There shall be no Order as to costs.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 12th day of March, 2012.

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**M.A. ODERO
JUDGE**