



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**DIVORCE CAUSE NO. 5 OF 2010**

**E.M.M.....PETITIONER**

**VERSUS**

**C.O.....RESPONDENT**

**JUDGMENT**

E.M.M (the petitioner) has filed this divorce case against C.O (respondent).

The couple went through a marriage ceremony at the Registrar of Marriages office Mombasa on 8<sup>th</sup> June 1994 under the Marriage Act (Cap 150) and were issued with a marriage certificate produced as exhibit. Thereafter they lived in Mombasa and Watamu and were blessed with two children, C.M born in 1994 and S.M born in the year 2000.

Since the celebration of their marriage, the respondent has been unfaithful and openly engaged in an adulterous relationship. The particulars of adultery state that, for one year between 1998 and 1999, the respondent deserted the matrimonial home and went to live with one D.M.W at Mtwapa. The respondent is always on the move and has refused to honour their marriage vows. Further that, she has a habit of leaving the petitioner without permission and spending nights away from their matrimonial home. The petitioner avers that respondent has been cruel to him and has denied him his conjugal rights.

The respondent has deserted the matrimonial home resulting in the marriage breaking down irretrievably and three years have lapsed since the respondent left home. She does not provide for the petitioner or the children, and petitioner has been meeting the needs of the children single handedly. He seeks custody of the children and dissolution of the union.

The respondent in reply states that all the allegations about adultery were amicably resolved between them, by their pastor and thereafter they continued living happily and even had one issue born in the year 2000. She states that there have been no other problems in the marriage and from the time their problems were resolved, she and petitioner have been living with the respondent peacefully to date. She further points out that the issues to the marriage are girls who have always stayed with her and taking them away from her custody would disrupt their studies and schooling as the petitioner lives in Watamu and the children go to school in Mombasa.

The hearing proceeded ex parte after respondent and her counsel failed to attend court. The petitioner narrated how three years into their marriage, the respondent left their matrimonial home and cohabited

with one D.W – this was after a period of having an open love affair with the said D. She then moved to live with D in Mtwapa for two years. Thereafter, she returned to the petitioner, pleading for forgiveness and he accepted her and they got the second child. Only for her to go right back to her relatives with D. The petitioner tried to caution her to stop the relationship in vain and she would carry out deliberate provocative activities such as being picked from the matrimonial home by D. The relationship became so strained to the extent that there was no more intimacy between them. As petitioner puts it “we shared a bedroom but not each other”. Petitioner tried to involve family members to help sort out the matter but respondent carried on with her wild ways, she eventually moved back to live with Din the year 2007 and since then, she has never returned to the matrimonial home. She took with her the children. It was the petitioner’s evidence that he never approved of the respondent’s adulterous ways and he felt so provoked to the extent that he feared he might harm the respondent and realized that the best he could do was to file for dissolution of the union.

Of course the respondent while not forthrightly admitting that she was in an extramarital relationship with one D, makes no such denial either, only saying that the issue was resolved between them by their pastor and thereafter she continued living with the respondent.

She claims that they are living together todate, yet in her answer to the petitioner, she also confirms that she is living in Mombasa with the children while petitioner lives in Watamu. This in fact confirms what the petitioner has said in his testimony. It is apparent that:

(a) The couple have lived apart (with the respondent having deserted the matrimonial home since 2007) whether it is as a result of being involved in an adulterous relationship with one D.W – or whether she just prefers to live away from the petitioner.

Petitioner no longer wishes to live with her and this three year desertion is a good ground for dissolution of the union which I hereby allow.

The marriage between petitioner and respondent is dissolved, a decree nisi shall issue and be made absolute at the expiry of six (6) months. With regard to custody of the children, the two are girls in their teenage and have all along lived with their mother. Apart from the relationship with D, I haven’t been given details regarding respondent’s ability or lack of it, in taking care of the children. I recognize that the children are at a delicate stage of development. I would require more information about their current set up, given the fact that all along they have lived with respondent, the petitioner does not seem to have a lot of information which would assist the court in determining custody and this is an issue which I think would be exhaustively addressed at a hearing before the children’s court. I therefore decline to make orders on custody and direct the petitioner to file appropriate suit before the Children’s Court with regard to the question of custody.

Each party shall bear its own costs.

Delivered and dated this **29<sup>th</sup>** day of **March 2011** at Malindi.

**H. A. Omondi**  
**JUDGE**