

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO.58 OF 2003

G.W.M.....PETITIONER

VERSUS

J.P.M.N.....RESPONDENT

J U D G M E N T

The petitioner and the respondent were on 17th May 1996 married under the **Marriage Act** at the Registrar's office in Nairobi. After celebrating the said marriage, the petitioner and the respondent cohabited together as husband and wife at an estate in Nairobi and at Ongata Rongai. The marriage was blessed with one issue born in 1996. According to the petitioner, the respondent had on two occasions deserted from the matrimonial home. In particular, the petitioner averred that the respondent, without any justification, deserted from the matrimonial home in the year 2000 and in the year 2002. In his testimony before court, the petitioner told the court that he had been separated from respondent since 2003. The petitioner accused the respondent of treating him with cruelty. He averred, inter alia, that the respondent had on numerous occasions threatened him with death and physical injury. He stated that the respondent was fond of using abusive, violent and vulgar language while communicating with him even in the presence of visitors and neighbours thus causing him to suffer embarrassment, emotional pain and anguish. The petitioner accused the respondent of committing adultery with persons unknown to him. The petitioner was of the view that his marriage to the respondent was no longer sustainable and should therefore be dissolved. The petitioner urged the court to grant him custody of the only child in marriage.

When the respondent was served with the petition, she duly entered appearance. She filed an answer to the petition and cross-petitioned for divorce. In her answer to the petition, the respondent denied the averments by the petitioner that she had committed the matrimonial offences of cruelty and adultery. She instead accused the petitioner of committing adultery with several women, and in particular one A.N.G. The respondent averred that the petitioner had subjected her to spite, ridicule, odium and neglect during the subsistence of the marriage. She set out the particulars of the acts that the petitioner is alleged to have committed in the cross-petition. She stated that the petitioner had treated her with cruelty by severally assaulting her on suspicions that had no factual foundation. She conceded that she had been separated from the petitioner since April 2003. She accused the petitioner of having deserted from the matrimonial home. In her opinion, taking into consideration the length of period that she had been separated from the respondent, her marriage to the petitioner had irretrievably broken down with no possibility of salvage. She therefore urged the court to grant her cross-petition for divorce. She further asked the court to grant her custody of the child of the marriage. She finally asked the court to compel the petitioner to provide such monthly maintenance as may be reasonable for the sustenance of the petitioner and the issue of the marriage.

At the hearing of the petition, this court heard the evidence adduced respectively by the petitioner and by the respondent. Both the petitioner and the respondent testified that they had been separated since April 2003. They rule out any chance that they may be reconciled. Both asked the court to consider the grounds that they had put forward in support of the petition and the cross-petition with a view to determine whether or not to grant the divorce. This court has carefully considered the facts of this divorce cause. It was clear to the court that the marriage between the petitioner and the respondent has indeed broken down. The petitioner and the respondent have been separated for more than eight (8) years. If the petitioner and the respondent were to be reconciled, then they would have been so reconciled in the intervening period before the hearing of this petition. This court therefore holds that the petitioner and the respondent have established the ground for divorce of desertion to the required standard of proof on a balance of probabilities.

In the premises therefore, this court will grant the petition for divorce. The marriage between the petitioner and the respondent which was

solemnized at the Registrar's office on 17th May 1996 is hereby dissolved. *Decree nisi* dissolving the said marriage is hereby issued. The *decree nisi* shall be made absolute thirty (30) days from the date of this judgment. As regard the issue of the custody of the child of the marriage and the issue of maintenance, this court did on 14th July 2003 given orders in regard to the same pending the hearing and determination of this petition for divorce. The court ordered the petitioner to pay to the respondent monthly maintenance of Kshs.15,000/- for her upkeep and that of the child of the marriage. The court granted custody of the child to the respondent. The petitioner was granted visitation rights. Since this petition for divorce has now been granted, this court is of the view that the issue regarding maintenance and custody of the child should in the first instance be dealt with by the Children's Court. In the circumstances therefore, this court is of the view that the interim orders of custody and maintenance that were granted by this court in 2003 should be vacated so that either the petitioner or the respondent shall be at liberty to canvass the same before the Children's Court. The said orders are therefore vacated. As regard costs, each party shall bear their own costs.

DATED AT NAIROBI THIS 18TH DAY OF MARCH, 2011

L. KIMARU
JUDGE