



No. 2781

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

DIVORCE CAUSE NO. 9 OF 2009

F.M.O.....PETITIONER

-VERSUS-

Z. R.....RESPONDENT

JUDGMENT

F.M.O., hereinafter, ***“the petitioner”*** on or about 18th July, 1981 went through a civil marriage with **Z.T.**, hereinafter ***“the respondent”***, before the District Commissioner’s office, Kisii. Following the marriage, the two cohabited as husband and wife and were blessed with two issues:-

- **A.M. born on 7th October, 1981.**
- **M.R. born on 2nd June, 1985.**

However since, 1985, the marriage has not been a bed of roses as it was meant to be. All of a sudden the respondent started treating the petitioner and the children with utmost cruelty. He failed to provide for their maintenance, harassed them and, failed to exhibit any love and affection towards them. He eventually deserted them in 1985.

As a result the petitioner suffered mental anguish and torture. In the foregoing circumstances the marriage had irretrievably broken down and hence the petition for divorce. The same was not however presented in collusion with the respondent nor has the petitioner been accessory to or connived at or condoned the cruelty complained of. The petitioner therefore prayed that the marriage between her and the respondent be dissolved and that the respondent be condemned to pay the petitioner the costs of the petition.

The petition was duly served on the respondent. However, he never entered appearance nor filed an answer to it. The cause therefore proceeded as undefended.

On 3rd March, 2011, the hearing of the petition commenced before me but, only the petitioner testified. She testified that she married the respondent in 1981 at the District Commissioner’s office, Kisii. Thereafter they cohabited in Kisii town for 27 years until differences between them cropped up and the respondent deserted her in 1984. Before then they had been blessed with 2 issues, **A.M.** and **M.R.**. After the birth of **M.R.**, the respondent became very violent towards the family and failed to provide for their maintenance. Eventually in 1985, the respondent walked out on them and has since refused to resume cohabitation. She therefore wished to have the marriage dissolved on grounds of

desertion. She never threw out the respondent from the matrimonial home nor did she make conditions in the matrimonial home so difficult that the respondent was forced to move out.

As I have already stated, the cause was undefended. So that what the petitioner said in support of her petition is unchallenged, unrebutted and uncontroverted. In the absence of any other evidence to the contrary by the respondent it must be taken as correct what the petitioner told the court.

The law allows a petitioner to come to court and seek dissolution of a marriage on the ground of desertion if the petitioner can demonstrate that 3 years prior to the presentation of the petition in court, the respondent had deserted him/her. In this case there is clear testimony that the respondent deserted the petitioner and their children sometimes in 1984 for no apparent reason(s). Since then he has not seen any need to resume cohabitation. The petitioner and respondent have therefore been living apart for the last 27 plus years. This is a marriage, in my view, which has irretrievably broken down. The respondent walked out on the petitioner and their children and has seen no need for reconciliation. The marriage therefore only survives on paper. I think that time has come when that marriage on paper must be erased. The respondent having deserted the petitioner in 1984 and this petition having been filed in 2009, the threshold of 3 years has been attained. There is nothing on record to dissuade me from granting the petitioner her wish. She has confirmed that she has not presented the petition in collusion with the respondent, nor, has she in any manner been accessory to or connived at and or condoned the desertion complained of.

Accordingly a decree *nisi* shall forthwith issue to be made absolute within the statutory period. There shall be no order as to costs.

Judgment dated, signed and delivered at Kisii this 4th day of May, 2011

ASIKE-MAKHANDIA

JUDGE