



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Divorce Cause 3 of 2009**

**Z W C.....PETITIONER**

**=VERSUS=**

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

**JUDGEMENT**

Z W C (the Petitioner) has filed for divorce from M K M (Respondent). The couple married on 17<sup>th</sup> July 1995 at Kilifi and their Union was solemnized under the Marriage Act (Cap 150) as per the marriage certificate produced as exhibit. Thereafter they cohabited as husband and wife in Malindi and had three issues namely;-

- 1. E N**
- 2. T M**
- 3. I S**

In the month of April 2007, the Respondent deserted their matrimonial home and since then the couple has lived separate from each other. It is Petitioner's case that Respondent has been promiscuous and has been living with another man ever since the desertion and separation. He further states that there exists no love and affection anymore between them and ever since 2007, they have not lived in harmony. He urges for dissolution of the said marriage.

The Respondent did not file any papers in response to the Petition but she entered appearance and attended and participated in the hearing of the matter.

The Petitioner testified that at the end of the year 2006, he found the Respondent inside their Ki house with another man – that was between 10.00-11.00Pm. He had just arrived home when the man walked out of his bedroom, followed by the Respondent. Petitioner had been

hearing rumours about the association so he asked the man what he was doing – the man responded

***“I did not do anything.  
I have made a mistake,  
please forgive me”***

The man then fled. In 2007, the couple wanted to expand their tailoring business, so Respondent moved to Malindi while Petitioner worked in Ukunda but he would visit the Respondent. He got to hear rumours that Respondent had a man friend and upon investigation, he found her with the man inside their rented house in Malindi, at about 11.00Pm when Petitioner questioned the man he said as follows;-

***“This is my room, this is  
no longer your wife,  
she does want you,  
please leave us alone,  
do as you please”***

When he spoke to Respondent, she said

***“I can no longer stand life  
with you, leave me alone”***

Petitioner told her there was no need for them to carry on as husband and wife and he would give her the freedom she wanted. On two other occasions, Petitioner found Respondent with another man in a bar at night. He called her away and she accompanied him home but left shortly as though she was going to the toilet, and never returned to the house.

Once Respondent realized that Petitioner was monitoring her movements, she moved residence, and Petitioner became alarmed as she had become very unfaithful and he no longer loves her. Petitioner talked to her elder brother about her conduct in the hope that he would help Respondent to change, but her brother said she had become insolent and told Petitioner to do as he deemed fit. There does not seem to be a contest on the custody of the children who are aged 18,17 and 12, and live at Petitioner’s ancestral home.

Although they owned the tailoring business jointly, Petitioner says he has no interest in the same and has left it to Respondent.

When I allowed Respondent to participate in the proceedings and present her case, it was in the mistaken belief that she had filed her answer to the Petitioner and she introduced many issues which would only have been best addressed in a formal reply to the Petitioner so as to give the Petitioner a chance to respond to them. She failed to do so and her defence in court amounted to an ambush. Unfortunately Mr Shujaa who acts for the Petitioner do not draw this fact to the Court's attention until the end of the defence case when he said she had not filed any papers.

He did not seem to suggest that Petitioner was prejudiced in any manner by Respondent's in the proceedings, so I am inclined to take into account her testimony.

Respondent did not deny that on various occasions the Petitioner found her in the company of different men, but she says the Petitioner did not understand the circumstances under which he found these men with her. It was her contention that because Petitioner lived in Ukunda while she lived in Malindi, they had issues due to the long distant relationship and Petitioner believed the rumours he had heard about her and other men. She admits renting a house in Malindi while Respondent remained at his ancestral home in K, but she says this was so as to make it easier for her to manage the tailoring business and that she was the bread winner for the whole family for about a year while Petitioner stayed at home.

She also admits that before renting the room, she had slept at her friends house – although she does not specify whether the friend was a man or a woman, nor does she offer any names. She also confirms that she last went to Petitioner's house at Ukunda in 2007, because even the last visit ended up in disagreement as he did not want her to go and live with him in Ukunda, plus she scrolled his phone and found out that he was involved in another relationship with one N.

As regards the 2006 incident, she says the man Petitioner claims to be her lover is actually a nephew to Petitioner and he had only helped her to carry some luggage to her house at night when Petitioner found him there. Petitioner became very hostile, spoiling for a fight, so she told Petitioner;-

***“Forgive me” and  
she also told Petitioner's  
nephew to apologise to him”***

She alleges that Petitioner has had four extra marital relationships and even physically met one of these women. She admits that she had a man friend in Malindi but says he was her business partner whom she even introduced to Petitioner over lunch. But did that man end up in her house at some questionable hour of the night? She says yes, but that is because he had gone to collect his newspaper which she had earlier borrowed, Now she says;-

***“I am ready to change my  
lifestyle if that will  
save our marriage”***

On cross-examination she admits that indeed in 2007 at 10.00Pm, the Petitioner found a man walking out of her bedroom and that she apologized because she realized that as a man Petitioner was offended to find another man walking out of their bedroom in his absence.

As for the Malindi man, she says he was a business friend, and yes he used to frequent her house but she insists that they used to sit at the verandah and chat BUT on the night which Petitioner refers to, the man actually got into the house and followed her.

It is apparent the couple have not lived together since 2007 due to irreconcilable differences. Respondent is keenly aware that Petitioner is categorical in his feelings – that he has no affection towards her nor does he want to live with her, but she claims she is a Christian who has learnt the virtue of forgiving even up to 70x7, so she is unwilling to a divorce, saying she swore to have him for better or for worse, even if she is aware of his relationship with other women. What emerges very clearly is that Petitioner is not propelled by rumours, it is a fact admitted by the Respondent that she has a male friend, who frequently visits and spends time with her into the night. She claims he is a business partner, without disclosing the nature of business they are involved in.

Although she claims that the other man who was found walking out of her bedroom at 10.00Pm was a nephew to the Petitioner, this appears to be an after thought as she never raised it on cross-examination. What is more she confirms that on being confronted by Petitioner regarding the man’s presence, she hastily apologized, as did the man.

Two factors clearly come out;-

- (a) The Respondent has been indulging in relationships with other men, which relationship the Petitioner did not approve of.
- (b) There has been constructive desertion, prompted by the hostilities and mistrust existing between the parties, such that for the

last three years they have not lived together as husband and wife.

The Petitioner has avoided living with the respondent because of her conduct – this I deem as reasonable cause and excuse for desertion by the Petitioner, especially taking into consideration, Respondent's own account of her liaison's with other men.

I am satisfied that there is sufficient cause to allow for the dissolution of this union because to allow for its continued existence under the circumstances would only be allowing a farce and exposing the Petitioner to further mental anguish.

I grant that the marriage between Z W C and M K M, be and is hereby dissolved by way of granting a divorce. A decree nisi shall issue, and shall be made absolute upon the expiry of six months. The Respondent shall bear the costs of this Petition.

*Delivered and dated this 14<sup>th</sup> day of September 2010 at Malindi*

***H A OMONDI***  
***JUDGE***

Mr Shujaa present for Petitioner

Respondent present in person

