



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

**Divorce Cause 56 of 2007**

**K.A.N .....PETITIONER**

**VERSUS**

**G.O.N.....RESPONDENT**

**J U D G M E N T**

K.A.N, the Petitioner herein, presented a petition to this court in which she sought for interalia:

- (i) *the marriage between her and G.O.N, the Respondent herein, to be dissolved*
- (ii) *An order giving her the custody of the children of the marriage*
- (iii) *Costs of the matrimonial cause*

The petition was served upon the Respondent who in turn did not deem it fit to file an answer to it. The petition was fixed for hearing after the giving of directions under rule 29 of the Matrimonial Causes Rules.

When the petition came up for hearing, the Petitioner was granted leave to proceed *exparte* when it became apparent that the Respondent was absent and that he had not filed any answer despite notice and the petition having been served upon him. K.A.N (P.W.1) testified without calling for the evidence of an independent witness. She told this court that she got married to G.O.N on 16<sup>th</sup> August 1997. On that date their marriage was solemnized at Holy Ghost Cathedral Church, Mombasa under the African Christian Marriage and Divorce Act. She produced the marriage certificate as an exhibit in her evidence. I must state from the outset that the petition for divorce should have been filed before a magistrate's court of the first class under the provisions of Section 14. Of the African Christian Marriage and Divorce Act. The aforesaid Act in Section 15 mandates this court to deal with appeals arising out of the decision of the Magistrate's court. The issue was not drawn to the attention of this court until this late stage of considering judgment. Nevertheless I will deal with the dispute on the basis that this court has the original jurisdiction in such disputes and on the basis of the fact that the aforesaid Act did not bar this court from hearing the matrimonial cause in exercise of its original jurisdiction. The only prejudice which is likely to be suffered by an aggrieved party, is that such an aggrieved party will lose the right to appeal to this court. P.W. 1 urged this court to dissolve the marriage on the basis that the Respondent had deserted the petitioner and the matrimonial home since March 2005. She claimed that the Respondent denied her conjugal rights which caused her mental anguish. She also alleged that the marriage has irretrievably broken down. I observed the petitioner as she testified and I am impressed that her demeanor did not betray her. She appeared to be firm and consistent in her testimony. Of course, I am disadvantaged in that her testimony was not tested by cross-examination. The main complaint raised against the Respondent is that he deserted the petitioner and the matrimonial home situate in Mombasa. It is alleged that the Respondent has since then gone to cohabit with another woman at [PARTICULARS WITHHELD] in Mombasa. The allegations are set out in the petition and were verbally restated by the petitioner when she testified orally before this court. The allegations have not been controverted. I have no reason to doubt the veracity of the allegations. The law requires that for any ground of desertion to succeed, one must prove that the desertion persisted for at least three years. It is clear from the testimony of the petitioner that the Respondent deserted her and the matrimonial home for three years before the

presentation of the petition for divorce. I am convinced by the evidence tendered that the Respondent deserted the matrimonial home and petitioner. The petitioner abandoned the prayer for the custody of the children because the same had been dealt with by the children's court. She instead prayed for the dissolution of the marriage and for costs.

In the end I issue the order dissolving the marriage between the Petitioner and the Respondent. A decree nisi be issued and be made absolute within 30 days from the date of this judgment. The Respondent to pay costs of the petition.

**Dated and delivered at Mombasa this 24<sup>th</sup> day of July 2008.**

**J. K. SERGON**

**J U D G E**