



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

**AT MOMBASA**

**Divorce Cause 4 of 2008**

**C.M.A.....PALINTIFF**

**VERSUS**

**E.N.K .....DEFENDANT**

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

C.M.A, the Petitioner herein, filed the petition dated 24<sup>th</sup> January 2008, in which she sought for the following orders against E.N.K the Respondent herein:

- a) *The marriage between the Petitioner and the Respondent be dissolved.*
- b) *The Petitioner be granted custody of the children of the marriage.*
- c) *The Respondent be ordered to provide maintenance costs for the children of the marriage.*
- d) *The Respondent pay costs of the Petition.*
- e) *Any further or other relieve that this Honourable Court may deem fit or just to grant to the Petitioner in the circumstances.*

The Petition is verified by the affidavit of the Petitioner sworn on 24<sup>th</sup> January 2008. The Petitioner relied on two main grounds namely:

(i) Cruelty and (ii) Desertion. The petition plus the verifying affidavit were served upon the Respondent but the same never attracted any Response from the Respondent. Directions were taken after which the petition was fixed for hearing. When the petition came up for substantive hearing, the Respondent failed to appear despite being served with a hearing notice. For this reason the Petitioner was granted leave to proceed for hearing exparte.

C.M.A, testified without calling for the evidence of any independent witness. She told this court that she got married to E.N.K on 12<sup>th</sup> January 1989 under the Marriage Act. She produced a copy of the Marriage Certificate as an exhibit in evidence. The Petitioner said that she cohabited with the Respondent in Nakuru and Mombasa. Their marriage was blessed with issues namely: **M. K.** and **G. K.** aged 18 and 14 years respectively. The Petitioner accused the Respondent of being cruel to her. She claimed the Respondent has been abusive to her and that he has repeatedly assaulted her on various occasions. C.M.A narrated how the Respondent who is an army officer assaulted her in 1989. she said she reported her

complaint to Bamburi Police Station but she was turned away on the basis that the complaint was a domestic dispute. In the year 2000 the Respondent humiliated her in front of customers in a restaurant she was working in by abusing her. The Respondent has also been accused of withdrawing the Petitioner's conjugal rights. He is also accused of having failed to meet the medical as well as maintenance of the Petitioner and the issues of the marriage. The Petitioner produced as exhibits in evidence medical documents and expenses she incurred over the treatment of M.K, who suffers from a complicated Medical condition . M.K has been treated in both Aga Khan and the Nairobi Hospital at the expense of the Petitioner with little support from the Respondent.

The Petitioner further told this court that the Respondent deserted the matrimonial home in the year 2000 and has never returned. On the basis of the above evidence the Petitioner asked this court to grant her the order for divorce and the custody of the children.

At the end of the evidence, Mr. Onyango, learned advocate for the Petitioner made brief submissions in which he urged this court to find that the Petitioner has proved her cause to the required standards in matrimonial causes. I have considered the evidence and the learned advocate's submissions. **In Wangari Mathai =vs= Mwangi Mathai [1980] K.L.R. at page 157,** the court of Appeal stated the standard of proof as follows:

**“When considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the court must be satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved.”**

It is apparent from the evidence of the Petitioner that the Respondent has been accused of cruelty and desertion. After a careful consideration of the evidence, it is clear that the Respondent assaulted the Petitioner in 1989. The report was booked at Bamburi Police Station but no action was taken against the Respondent because he was an army officer. The police also failed to take action because they were of the attitude that the complaint was a domestic dispute. The petitioner's rights were suppressed by the police inaction which was unjustified. In the process, the Petitioner lost vital evidence in that she was unable to even obtain a P3 form to be filled by the doctor. There is some uncontroverted evidence that the Respondent failed to provide money for medical fees and maintenance. The Respondent was also abusive and had withdrawn conjugal rights for Petitioner. In sum, all the above facts amount to cruelty. I find the ground of cruelty as proved to the required standards.

The Petitioner has said that the Respondent deserted the matrimonial home since the year 2000. No evidence to controvert this claim has been tendered. I have no reason to doubt the Petitioner. I observed her demeanor as she testified and I formed the opinion that she is a truthful witness who did not exaggerate her evidence. I find the ground of desertion proved.

In the end and for the above reasons, I grant the Petitioner the order for divorce. A decree nisi do issue and be made absolute within a period of 30 days from the date hereof. The Petitioner has prayed for the custody of the children. I grant her the custody of the same up to the age of majority after which the children can choose who to live with as adults. The Respondent may have access to the children but with prior arrangement with the Petitioner. The Petitioner abandoned the other prayers hence I will not make any order but instead treat them as waived.

**Dated and delivered at Mombasa this 31<sup>st</sup> day of October 2008.**

**J. K. SERGON**

**J U D G E**