



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

**DIVORCE CAUSE NO. 56 OF 2011**

**T.P. J.....PETITIONER**

***VERSUS***

**J.K.R.....RESPONDENT**

**JUDGMENT**

The Petitioner T.P.J and the Respondent J.K.R. were married on 8<sup>th</sup> November 1996 as evidenced by the marriage Certificate “**TPJ 1**”. They cohabited and resided in Mombasa and had 2 issues of the marriage E.M. born 27<sup>th</sup> November, 1996 and S. J. born July , 2000.

On 5<sup>th</sup> July, 2001 the Respondent deserted the matrimonial home and they have separated for almost 15 years now. The Petitioner seeks the dissolution of the said marriage, the court to order further reliefs and costs be borne by the Respondent. The Petitioner obtained a Registrar’s certificate that the matter proceeds as an undefended cause.

The matter proceeded for hearing on 27<sup>th</sup> November 2014. PW 1 reiterated the contents of the Petition. The Petitioner confirmed the Respondent deserted the home in 2001. She was left with the 2 children of the marriage whom she singlehandedly took care of. The eldest child is in USIU- 1<sup>st</sup> year and the last born is in a private primary school. She lost her job and therefore seeks financial help with the education of the children.

On 3<sup>rd</sup> July 2015 the Respondent testified in court and he conceded that he deserted the matrimonial home. The relationship turned sour and they could not live together. He felt that he could not go for work because of the quarrels with the Petitioner. Their differences extended to their relatives and also to his workplace. He stated that he had been taking care of the children and they agreed that she educates the girl aged 19 years and he educates the boy aged 15 years. He makes payment of Ksh. 20,000/- a month and would like to continue make such payments. The parties each filed their affidavit of means on 16<sup>th</sup> September 2015

**ISSUES**

1. The issue before this court is whether the marriage between the Petitioner and Respondent should be dissolved or not.
2. Who is to take the responsibility of maintenance and upkeep of the children what would be reasonable amount in the circumstances?

The **Marriage Act 2014** prescribes the grounds for divorce under **Section 66**;

**“A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.**

1. ***A party to a marriage celebrated under Part IV may only petition the court for separation of the parties or the dissolution of the marriage on the following grounds-***

***a) adultery by the other spouse;***

***b) cruelty by the other spouse;***

***c) exceptional depravity by the other spouse;***

***d) desertion by the other spouse for at least three longer years; or***

***e) the irretrievable breakdown of the marriage.***

In the instant case, the Petitioner gave in his petition and testimony the grounds of divorce as cruelty and desertion. Despite service of the Petition, the Respondent did not file answer to petition and cross petition. Therefore the Petitioner's evidence is not controverted by any other evidence and the Petitioner has proved her claim on a balance of probability.

The Respondent in his testimony also confirmed that he deserted the home in 2001 due to cruelty and therefore there is no chance of reconciliation as they have separated for almost 15 years now. Although Children matters ought to be canvassed in the Children's Court in the first instance, this Court invokes **Article 165(3)** of the **Constitution of Kenya 2010** that gives this Court original and unlimited jurisdiction in both civil and criminal matters. Instead of the children's matters being heard and determined in the Children's Court to expedite and settle the same the Court shall determine the issue.

With regard, to issue of maintenance of the children of the marriage, the Respondent does not contest paternity. **Article 53 (1) (e) and section 23 and 24 of the Children's Act 2001** prescribes parental responsibility as mandatory and statutory duty of both parents of the children. It is shared responsibility, not equal as one looks at the specific circumstances of the parents and children. The Court must uphold the best interests of the children as required by **Section 4 of the Children Act 2001** in determining the issue of the maintenance and upkeep of the children.

To determine the shared parental responsibility of the parents; the Court ought to consider,

- a. Each parents income, earning capacity and other financial resources
- b. Each parents financial needs, obligations and responsibilities
- c. The standard living before the parents went their different ways
- d. Age, qualifications and employment opportunities
- e. Contribution to the children.

The Petitioner's affidavit of means filed on 16<sup>th</sup> September, 2015 stipulates;

- a. She is not in currently in employment, she was working at Duty Free Shop which has since closed.
- b. She has expenses for her and the children of about Ksh. 50,000/= a month.
- c. School fees for the 1<sup>st</sup> born at about 120,000 a term and the younger child no estimate is attached.
- d. The Respondent only helps with the younger child's fees.
- e. He works in the Military and he is paid monthly allowances. He is a farmer and he is able to fetch a sum of 130,000/= a month.

The Court considers that there is no written agreement produced to the effect that the Petitioner and Respondent agreed that each would educate one child.

If there was, the Court would not sanction the same as it would amount to discrimination of one child over the other.

The Respondent filed the affidavit of means. He listed the assets, income, duties and liabilities and confirmed paying school fees for S school expenses and he pays Ksh. 20,000/=.

He claimed that he services two (2) bank loans with Barclays Bank at almost Ksh. 100,000/= the Respondent also attributed the fact that the Petitioner is building a house and she should not be paid alimony. The Respondent attached salary slips, bank loan documents.

The Court finds that it is important that the children of the marriage are catered for by both parents; the Respondent has responsibility to pay school fees for all children; R.A.J (4 years), S.A (15 years) and E.M.A (19 years old).

The Court will not sanction discriminatory treatment of the children of the Respondent on the basis of sex; **Article 27(3) of the Constitution** provides equal benefit and protection of the Law to all persons. The Respondent cannot choose to educate the boys and leave out the girl yet he is the father to all three (3) children.

The Respondent admits to providing for the children and the duties left to the mother. All children shall be treated equally. The Respondent has a total amount of almost 60,000/= net every month from the salary of almost 200,000/=. As a military officer he is in formal employment and has a steady income.

The children are priority and therefore despite the other financial commitments he has made, he ought to cater for all the children's school fees expenses and medical care.

The Petitioner although not in full time employment is said to be engaged in construction of a building that is or will be business income generating. The Petitioner did not attach any documents to show her income or financial resources but strangely she has been able to cater for the 1<sup>st</sup> born child's University 1<sup>st</sup> term school fees and expenses.

The Court finds that she will be responsible for both children's food, clothing, shelter and her own expenses and care.

## **FINAL ORDERS**

**The Court orders as follows;**

- 1. The marriage between the Petitioner and Respondent solemnised on 18<sup>th</sup> November, 1996 is hereby dissolved. The decree nisi to issue forthwith and decree absolute in 6 months.**
- 2. The Petitioner and Respondent have legal custody of the children of the marriage but the Petitioner has physical custody and the Respondent shall have access upon mutual agreement by the parties.**
- 3. The Respondent shall pay directly to the schools; school fees for**

**E.M.J – USIU**

**S JUNIOR – Private School**

**Pay for the school fees expenses books, uniform, transport etc and medical care.**

- 4. The Petitioner shall cater for the children' food, clothing and shelter expense.**
- 5. Each party is at liberty to apply.**
- 6. Each party to bear its own costs.**

**READ AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF OCTOBER, 2015**

**M. W. MUIGAI**

**JUDGE**

**In the presence of;**

*Mr. Amino for the Respondent*

*Mr. Kiwe for the Petitioner.*