



**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT OF KENYA AT NAIROBI**  
**MLIMANI COMMERCIAL COURTS**  
**DIVORCE CAUSE NO. 123 OF 2014**

**A A D.....PETITIONER**

**VERSUS**

**A M.....RESPONDENT**

**JUDGMENT**

The brief fact of this case are that the petitioner contracted a marriage with the respondent on 3<sup>rd</sup> August 1993 in accordance with the provisions of the Mohammedan Marriage and Divorce Registration Act (Cap.155). The couple established their matrimonial home in, Eastleigh , Nairobi. They were blessed with three children namely;

- a. MA .....16YEARS
- b. AA.....14YEARS
- c. SA.....7YEARS

On 29th April 2014, the Petitioner filed her Petition dated 24th April 2014 which was later amended on 18th August 2014 against the respondent for a decree for a dissolution of the marriage, an order for the adequate maintenance of the issues of the marriage, an order of the legal and physical custody of the issues of the marriage, and the cost of this suit. This Petition was founded on the ground of cruelty and desertion.

On 16th September 2014, the Respondent filed an answer to the petition and cross petition wherein he denied the allegations and prayed for the legal custody, care and control of SA - Daughter and AA - Son, Supervised visitation rights, Cost of the suit and other relief that this court may deems fit.

On 11th February 2015 , the petitioner testified and was cross-examined together with other witnesses. The petitioner's case was closed on 16th April,2015.

When the matter came up for the respondent's case on 16th April 2015, Counsel for the respondent informed the court that he was to call two witnesses and that one witnesses was not within the country and prayed for adjournment of one month. His prayer was granted by the court.

After a series of adjournments, the respondent neither call any witness nor produce any document in support of his claims as contained in the Reply to Petition and Cross Petition filed on 16th September 2014.

The petitioner testified on oath that she and the respondent wedded on 3<sup>rd</sup> August 1993 in Nairobi, upon which they were issued with a marriage certificate, tendered in evidence as exhibit **AAD1**. After their marriage they cohabited as husband and wife at Eastleigh in Nairobi. They cohabited until sometimes in February 2013 and since that time they have lived apart. Their marriage was not peaceful. The respondent was cruel to her, beating her all and verbally abusing her, in addition he has failed to offer financial support to the petitioner and the issues of marriage and the petitioner has been struggling single handedly in meeting numerous needs of their matrimonial home. The respondent deprived the petitioner sexual intimacy for a period of exceeding one year without any justifiable reasons. The respondent deserted the matrimonial home without knowledge, fault or provocation on the part of the respondent.

The petitioner eventually submitted school fees receipt to this court at its request, as evidence that the respondent has failed, refused and /or neglected to provide school fees for the minors, as well ,for purposes of guiding court in making appropriate awards.

The plaintiff's case is that the marriage has been rocky and has irretrievably broken down on account of the respondent's extreme cruelty and desertion, leading to the petitioner's mental torture.

She therefore asked the court to dissolve the marriage which has been rocky and irretrievably broken down on account of the respondent's extreme cruelty, desertion and negligence leading to the petitioner's torture and grant her legal and physical custody of the children, and to compel the respondent in providing adequate maintenance for the children and lastly the respondent be condemned to bear the cost of this suit.

I have given due consideration to the application and the ground it's based on *vis a vis* the defence, the respondent. The court attention was drawn to Holy Quran chapter 2 v. 231 wherein is stated that.

***"...either take them back on reasonable basis or set them free on reasonable basis but don't take them back to hurt them...."***

The court attention was also drawn, to Ash-shawkanii's. "*Fat-hul Qadiir*" Vol. 3 pg 21 where it states that.

***Divorce has been allowed in Islamic Law as a remedy in incompatible union"***

There is evidence adduced under oath by the petitioner ,which was corroborated by two witnesses, that the respondent was on several occasions cruel to the petitioner. This is manifest in his denial of sexual intimacy to her, physical and verbal abuse, negligence, and unreasonable abandonment of the matrimonial home. This conduct caused mental and psychological torture to the petitioner. There is evidence that the parties are no longer living together. There is evidence that the respondent neglected the petitioner and the children. He never contributed to the children maintenance when he deserted. Children are now attending the school and the petitioner meets the expenses. They live with the petitioner.

The foregoing evidence is not denied or rebutted by the respondent. The petitioner's case has been subsequently proved before me to the required standard by the petitioner

Looking at the evidence in totality, the entire matrimonial relations between the parties, including their conduct and personality, the respondent's conduct amounts to cruelty. This is manifest in his denial of sexual intimacy to the petitioner, physical and verbal abuse. He has also unreasonably deserted the matrimonial home. He further eventually abandoned the issues of the marriage.

The petitioner has satisfied court that the foregoing conduct on the part of the respondent has caused mental and psychological torture to the petitioner. It amounts to cruelty and desertion. I also find that the marriage between the respondent and the petitioner has irretrievably broken down. The two parties are no longer living together neither are they planning on reconciling and the existence of pre- emptory cause, particularly, assault and even a reasonable apprehension of violence render the conjugal union impossible. In short, the marriage is in existence in name and nothing more. It is a shell and hence it serves no useful purpose for it to stand.

It's the view of the court that ,Divorce since its disintegrate the family union is of course a social evil, in itself but it's a necessary social evil. It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious!

On custody of the child, Article 53(2) of the Constitution and section 4(3) of the Children Act provide that the best interests of the child shall be the primary consideration in all matters concerning children. On maintenance of the child, section 24(1) of the Children Act puts a duty on parents to maintain their children. That duty gives the child a right to education and guidance, immunization, adequate diet, clothing, shelter, and medical attention.

On the issue of custody, this court finds that the petitioner has been caring for the children, including paying their school fees. The cardinal principle on whom to grant custody of a children in cases of this nature is the welfare of the child. At this stage , the children needs to live with the parent who has cared for them rather than the parent who has been absent from their life and has not catered for them.

I am satisfied that the petitioner has proved her claim against the respondent to the required standards on all the prayers.

In the premises, there being submissions and response from the respondent and on the evidence adduced by the petitioner, I find for the petitioner. Accordingly, I make the following orders:-

- i. A decree is granted for the dissolution of the marriage between the petitioner and the respondent.
- ii. The divorce certificate be issued forthwith.
- iii. The petitioner is granted physical and legal custody of the issue of the marriage.
- iv. The respondent shall have unrestricted access of the children named herein above. The modality of such access be agreed or ordered upon after.
- v. The respondent is ordered to pay maintenance to the petitioner at sum of Ksh. 50,000/, per month, as maintenance of the issues of the marriage.
- vi. Costs of the petition are awarded to the petitioner.

**Dated , Delivered and Signed at Nairobi this 22<sup>st</sup> day of June, 2015.**

**Hon. A. I. Hussein**

**Kadhi II**

**In the Presence of:**

**Petitioner**