



**EMM v NKK (Divorce Appeal E001 of 2023)
[2024] KEHC 9640 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
DIVORCE APPEAL E001 OF 2023**

**H NAMISI, J
JULY 26, 2024**

BETWEEN

EMM APPELLANT

AND

NKK RESPONDENT

(Being an Appeal against the Judgement and decree of Hon. Martha Opanga, Senior Resident Magistrate delivered on 20 December 2022 in Kangundo CMC Divorce No. E010 of 2021)

JUDGMENT

1. This appeal arises from a divorce cause in the lower court. The Appellant and Respondent got married on 22 October 2005 under the *African Christian Marriage and Divorce Act* (now repealed). After the celebration of their marriage, the Appellant and Respondent lived together as husband and wife at their matrimonial home in Matungulu, until sometime in 2018 when the parties were estranged. During their marriage, they were blessed with 2 issues.
2. By Petition dated 4th June 2021, the Appellant sought to have the marriage dissolved on the grounds of infidelity, cruelty and desertion. In response, the Respondent filed her Answer to Petition in which she equally accused the Appellant of infidelity and cruelty. The Respondent prayed that the marriage should not be dissolved as there are no valid reasons raised to support the Petition.
3. At the hearing, the Petitioner adopted his Witness Statement in which he stated that the Respondent had treated him with cruelty. The particulars of cruelty enumerated in the Petition were:
 - i. The Respondent on several occasions directed abusive and degrading language towards the Petitioner calculated to strip and undermine the Petitioner's self worth;
 - ii. The Respondent refused, failed and/or neglected to show love and affection to the Petitioner;
 - iii. The Respondent did on several occasions have extra marital affairs with other men;



- iv. The Respondent wilfully neglected the Appellant by leaving the matrimonial home;
 - v. The Respondent has shown total contempt towards the Appellant's opinions as a husband by securing chama loans and borrowing money from individuals without the Appellant's permission and then forcing the Appellant to repay;
 - vi. The Respondent has on several occasions and against the Appellant's belief brought in witch doctors to the matrimonial home;
 - vii. The Respondent refused to attend counselling and reconciliation sessions organised by our pastor at the invitation of the Appellant aimed at salvaging the marriage despite a proposal to that effect by the Appellant;
 - viii. The Respondent neglected the Appellant and denied him conjugal rights;
 - ix. The Respondent on numerous occasions showed total contempt towards the Appellant's opinions as a husband by selling their matrimonial properties without the Appellant's consent.
4. It was the Appellant's testimony that the Respondent had had numerous sexual relations with other men. Further, it had been 3 years since the Respondent deserted their matrimonial home. She left on her own and carried everything. The Appellant had made efforts to reconcile, including engaging their pastor, but all was in vain. The Appellant stated that their marriage had broken down and as a result, his health had suffered.
5. The Appellant called two witnesses in support of his case. PW2 was the Appellant's mother. She testified that since the celebration of their marriage, she had lived with both the Appellant and Respondent. On several occasions, the witness accompanied the Appellant to meetings with the church minister in a bid to reconcile the Appellant and Respondent. It was her testimony that the Respondent had used abusive language towards her son and brought witch doctors to their matrimonial home. On cross examination, the witness stated that she was not aware if the Appellant had remarried since her home was far away from theirs.
6. PW3 was the Appellant's younger brother. He testified that his home is about 50m away from the Appellant's home and he had overheard the Respondent using abusive language towards the Appellant. The witness confirmed that a family meeting was convened to try and reconcile the warring couple at which it was agreed that the Respondent should stay away from the matrimonial home for a period of time. He confirmed that the meeting was minuted.
7. In denying the allegations of cruelty and infidelity, the Respondent also enumerated particulars of cruelty and infidelity by the Appellant as follows:
- i. The Petitioner has had several women who have been indulged in relationships with him, namely M.C, who is now living with him as a wife;
 - ii. The Petitioner has threatened the Respondent with shooting her with his gun as a Police Officer stationed in Iten several times;
 - iii. The Petitioner has on several occasions physically assaulted the Respondent and chased her from the matrimonial home;
 - iv. The Petitioner has on several occasions abused the Respondent calling her a witch and the Petitioner has never asked for any apology from the Respondent facts which are elaborated in his petition and no single article of witch craft has been found on the Respondent to prove the allegations;



- v. Thae Petitioner resides in Eldoret and has never seen or found any other man having extra marital affairs with and he is put to strict proof thereof;
 - vi. The Respondent has never left the matrimonial home since she was married until when the Petitioner summoned the family members and the clan to tell her to leave;
8. At the hearing, the Respondent adopted her witness statement. It was her testimony that on 9th March 2019, the Appellant chased her away from their matrimonial home. Thereafter, she was summoned to a meeting with the clan elders, which she attended along with her parents, brother-in-law and aunt. The clan decided that the parties (Appellant and Respondent) should live apart for a year, after which the Appellant would recall the Respondent.
 9. Following this decision, the Appellant hired a pickup and ferried the Respondent back to her parents' home together with her belongings. The Respondent stated that a year later, when she tried reaching out to the Appellant, the Appellant turned off his phone and blocked her number. The Respondent has not returned to their matrimonial home since, and still awaits the Appellant's call. The Respondent tried reaching out to the Pastor, but the same did not bear any fruit.
 10. On the allegations of witch craft, the Respondent denied the same, stating that she is a parishioner at (Particulars withheld). The issue of witch craft was not discussed at the meeting with the clan.
 11. With respect to sums borrowed by the Respondent, it was her testimony that since the Appellant does not reside at their matrimonial home since he is stationed in Iten, the Respondent had to set up a small business to be able to fend for herself and to be able to repay the monies she had borrowed.
 12. On the ground of infidelity, it was the Respondent's testimony that the Appellant had since remarried and was living with another woman. She showed photos of the two together, including the Appellant's WhatsApp profile picture.
 13. The Respondent called one witness. DW2 was the Respondent's brother-in-law. He confirmed the clan meeting and the resolution that parties should live separately for a period of one year. It was further resolved that the Appellant would convene another meeting after one year to review the situation with regards to their relationship. The witness testified that it was the Appellant who did not want to live with the Respondent.
 14. Parties filed their respective submissions.
 15. In its judgement, the trial court considered one issue for determination: whether or not the Appellant had satisfied the criteria under the Marriage Act to warrant dissolution of the marriage. On the ground of adultery, the trial court found that the Appellant had not tendered any evidence to prove his allegation, whereas the Respondent provided evidence of her allegations against the Appellant.
 16. On the ground of cruelty, the trial court found that the Appellant had not demonstrated to the court that the Respondent had been cruel towards him in any way. The trial court noted that it is seldom that a decree is granted upon a single act of cruelty. On the ground of desertion, the trial court held that the Respondent's act cannot be termed as desertion since parties had agreed to live separately following the family meeting.
 17. In dismissing the case, the trial court found that the Appellant had not proved his case on a balance of convenience (*sic!*) to warrant dissolution of the marriage.
 18. Aggrieved by the judgment of the trial court, the Appellant lodged this appeal on the following grounds:



- i. That the learned trial Magistrate misdirected herself on the facts placed before her thereby arriving at wrong conclusions and applying the wrong legal principles;
 - ii. That the learned trial Magistrate erred in law and fact in relying on extraneous matters in reaching her decision completely disregarding the evidence tendered by the Appellant's witnesses;
 - iii. That the learned trial Magistrate erred in law and fact in failing to consider the submissions filed on behalf of the Appellant and this arriving at the wrong conclusion;
 - iv. That the evidence on record did not support the findings of the learned Magistrate;
 - v. That the learned trial Magistrate erred in law and in fact in failing to appreciate the Appellant's overwhelming evidence and submissions that the marriage herein had irretrievably broken down;
 - vi. That the trial Magistrate failed to take into consideration the Appellant's evidence in reaching her decision;
 - vii. That the learned Magistrate erred in law and in fact in holding that the Appellant had not proved his case on a balance of convenience to warrant dissolution of the marriage.
19. The appeal was canvassed by way of written submissions.

Analysis & Determination

20. This being the first appeal, it is on both facts and law as stated in the cases of *Peters v Sunday Post Limited* [1958] EA 424 and *Selle v Associated Motor Boat Company Ltd* [1968] EA 123. Ultimately, the issue for determination by this Court is the same as was before the trial court: whether or not the Appellant had satisfied the criteria under the [Marriage Act](#) to warrant dissolution of the marriage.
21. The Appellant petitioned the court for dissolution of marriage based on 3 grounds: Infidelity, cruelty and desertion.

Infidelity

22. Section 65 of the [Marriage Act](#) provides for the grounds for dissolution of a Christian marriage, namely:
- i. One or more acts of adultery committed by the other party;
 - ii. Cruelty, whether mental or physical inflicted by the other party on the petitioner or on the children, if any, of the marriage;
 - iii. Desertion by either party for at least three years immediately preceding the date of presentation of the petition;
 - iv. Exceptional depravity by either party;
 - v. The irretrievable break down of the marriage
23. Under Section 107 of the [Evidence Act](#), a party seeking a divorce has a legal burden to prove the grounds upon which he relies. Under sections 107, 108 and 109, it is provided that:
107. Burden of Proof



1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
108. Incidence of Burden
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
24. On the issue of adultery, the Appellant relied on the cases of *SBS v JMN* [2015] eKLR and *N v N* [2008] 1 KLR 17, in which the Court stated thus:
- “To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, illicit affection, undue familiarity and guilt attachment are some of the instances that create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided that the circumstances are relevant, cognate and compellable.”
25. On her part, the Respondent introduced new evidence in the submissions pertaining to adultery by the Appellant. Since this is an appeal, I will not consider the same. No reasons have been advanced as to why the said evidence was not produced in the trial court. I, therefore, decline the invitation to admit new evidence at this point. What is note worthy, however, is that despite the Respondent having knowledge of the Appellant’s infidelity, she still insists that she loves him and did not file a Cross Petition seeking dissolution of their marriage. She wants to give the marriage a chance.
26. For the ground of adultery to succeed, it is incumbent upon the alleging party to prove the same. In the case of *DM v JM* (2008) 1 KLR the late Justice Chesoni had this to say regarding adultery:
- “ ... that the evidence required to establish adultery must be more than the mere suspicion and opportunity: evidence of a guilty inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish adultery.”
27. In the present case, the Appellant accused the Respondent of adultery. He, however, did not call any witness or produce any evidence to prove the allegations. Even going by his own submissions, other than his averments, nothing before the trial court pointed to “an illicit affection, undue familiarity and guilty attachment” (*N v N (supra)*). Not an iota of circumstantial evidence was presented to the court. The Appellant’s allegation of infidelity against the Respondent was, therefore, not substantiated.



Cruelty

28. The Appellant accused the Respondent of various acts of cruelty, as particularised in the Petition. The question that arises is what is cruelty? In the case of *N v N*, 1 KLR, the court held, inter alia, that
- “Whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard”.
29. Cruelty was further considered in the case of *AMA v GSB* HCDC No. 134 of 2010 Nairobi wherein he held:
- “..... cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb, or health, bodily or mental or so as to give reasonable apprehension of such a danger....” (see also *Russell v Russell* (1895) P. 315, 322).
30. I concur with the trial court that the Appellant did not prove cruelty on the part of the Respondent.

Desertion

31. Under section 65 (c) of the *Marriage Act*, desertion must be for a period of at least 3 years preceding the Petition. The Appellant filed the Petition in June 2021. The uncontroverted evidence by the Respondent indicates that the Respondent was asked to leave their home on 9th March 2019. Simple arithmetic indicates that the 3 year timeline had not lapsed. The Petition was filed barely 2 years after the Respondent left.
32. Further, there was overwhelming evidence presented by the Respondent and her witnesses that the Respondent was asked to leave their matrimonial home following some resolutions made at a meeting convened by the Appellant’s clan. The occurrence of the meeting was corroborated by PW3, the Appellant’s witness. The cooling off period was meant to last one year, after which the Appellant would convene another meeting to reassess their relationship. This was never done. The Respondent, therefore, cannot be accused of deserting her matrimonial home. In fact, she was merely following instructions by her husband and his clan.
33. In conclusion, the Appellant submitted that there was a point of contention between the parties with regard to the dissolution of the marriage, with one party wanting the marriage to be dissolved and the other wanting to keep the family together. With reference to Article 45 of the *Constitution*, the Appellant argued that since there was emotional disconnect with no more love left between the Appellant and Respondent, the marriage is unsalvageable.
34. I beg to differ. Right from the onset, the Respondent made it clear that she takes her vows seriously and would like the marriage to work, in spite of the differences between them. Even in the face of adultery by the Appellant, which the Respondent proved, she has been adamant that she wishes to try and salvage her marriage. The Respondent submitted that marriage is a serious commitment and not just feelings for fun.
35. The upshot of the foregoing is that the appeal is unmeritorious and the same fails. Considering the nature of the matter, being a family matter, each party shall bear its own cost of the appeal.

DATED AND DELIVERED AT MACHAKOS THIS 26TH DAY OF JULY 2024.

HELENE R. NAMISI



JUDGE

In the presence of:-

Nzyuko for the Appellant

Mrs. Gulenywa for the Respondent

