



**CCK v VKK (Civil Appeal E127 of 2022)  
[2024] KEHC 15508 (KLR) (Family) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E127 OF 2022  
EKO OGOLA, J  
OCTOBER 29, 2024**

**BETWEEN**

**CCK ..... APPELLANT**

**AND**

**VKK ..... RESPONDENT**

*(Being an appeal from the judgment of Senior Resident Magistrate  
in the Chief Magistrate’s Court, Divorce Cause No. E007 of  
2022 delivered on 25th November 2022 by Hon. S.N. Muchungi)*

**JUDGMENT**

1. The parties got married on 8<sup>th</sup> November 2014 in Nakuru County. Thereafter, they cohabited as husband and wife in Nairobi County. Their union was blessed with one issue.
2. On 3<sup>rd</sup> January 2022, the appellant petitioned the court for a divorce on the grounds of cruelty on the part of the respondent and irreconcilable differences. The appellant stated that the respondent subjected her to emotional cruelty, which made her feel worthless and frustrated. She added that the respondent did not take his place in the family as the man of the house, causing her to feel alone in the marriage. Further, the respondent denied her conjugal rights. Furthermore, the appellant averred that the respondent concentrated on church and political affairs and abandoned her. She stated that she felt miserable as she yearned for love and affection. The appellant averred that there was a communication breakdown between them, stating that on most occasions, she would initiate a conversation with the respondent, but her efforts bore no fruit. The appellant stated that the only communication between them concerned their parental tasks and operations of the home.
3. On the grounds of irreconcilable differences, the appellant averred that the respondent is financially irresponsible and does not consult her when making decisions such as buying a car or property. She



added that the respondent directs a considerable amount of money to the church and charitable institutions leading to a neglect of the family's financial obligations and investments.

4. The appellant stated that they had engaged counsellors, family, and friends in an attempt to solve their differences, but all actions were in vain.
5. The respondent case was that the petition be dismissed and the parties be referred to Alternative Dispute Resolution. According to him, the marriage has not irretrievably broken down as it has a chance of survival. He stated that he is committed to the marriage and has, to the best of his ability, ensured that he provided for the family's needs. The respondent argued that his efforts to provide love and affection to the appellant were met with rejection as the appellant moved out of their matrimonial bed to the daughter's bedroom. The appellant had stated that the respondent did not put any effort into asking her back to the matrimonial bed. The respondent stated that he enrolled into a program to gain personal development to make him a better husband. He stated that, indeed, their communication is strained, but they can work on it.
6. Furthermore, the respondent stated that his actions that led to the appellant's emotional distress were unintentional, and he has, on several occasions, apologized to her for the anxiety caused. He stated that he has always included the appellant in decision-making and that all the decisions were in the best interest of the family.
7. The appellant filed a response stating that if the orders sought are not granted, she will be taken back to a dark place that she is not ready to re-live as this is likely to affect her mental health.
8. The trial court delivered its judgment on 25<sup>th</sup> November 2022. The court held that the appellant had failed to prove that the marriage had broken down irretrievably. The divorce petition was, therefore, dismissed. The court directed that the parties were at liberty to try alternative means of solving their disputes.
9. Aggrieved with the decision of the trial court, the appellant filed a Memorandum of Appeal dated 15<sup>th</sup> December 2022. The grounds of appeal were as follows:-
  - a. The learned Magistrate erred in law and fact by failing to recognize that marriage is a voluntary union of contracting spouses.
  - b. The learned Magistrate erred in law and fact by failing to appreciate the weight of the appellant's evidence particularly the counsellors' reports thereby misdirecting herself on the required standard of proof.
  - c. The learned Magistrate failed to appreciate that the petitioner made out a case for the dissolution of marriage on a balance of probability.
  - d. The learned Magistrate erred in law and fact by permanently condemning the appellant to stay in a loveless marriage she does not wish to be a part of and by failing to set timelines for the parties to sort out the disputes.
  - e. That the learned Magistrate was wrong in not finding that the parties had not had any consortium in marriage since 2016 a fact that was not opposed by the respondent and which proves the irretrievable breakdown of the marriage.
  - f. That the learned Magistrate exhibited open bias against the petitioner by basing her judgment on the respondent's testimony yet no evidential material was placed before the court to prove his claims.



- g. The learned Magistrate totally misdirected herself in the skewed evaluation of the pleadings and the petitioner's evidence which left no doubt that the marriage had broken down irretrievably.
  - h. The learned Magistrate failed in law and fact, by failing to find that the petitioner made a case for divorce on the ground of cruelty.
10. The appeal was canvassed by way of written submissions. The appellant complied. The respondent opted not to file his submissions.

### **Determination**

11. I have considered this matter carefully, taking into account the evidence and submissions from the trial court which touched on various issues which I now have a chance to reflect on and make a determination.
12. *The Constitution* envisages a marriage union where every spouse participates with dignity and equality regardless of gender. According to Article 45 of *the Constitution*, the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy recognition and protection by the state.
13. The totality of the evidence would be analyzed in the instant case bearing in mind the provisions in Article 45. Therefore, based on the appellant's petition and the trial court's judgment, the following issues stand out
- a. Whether the appellant proved grounds of cruelty and that the marriage has irretrievably broken down.
  - b. Whether the marriage should be dissolved.
14. The relevant sections of the law with respect to a dissolution of a marriage contracted by couples like the appellant and the respondent who professes Christian religion is provided for under Sections 64 and 65 of the *Marriage Act* which provides as follows:
- "S.64 – the parties to a marriage celebrated under part 111 may seek services of any reconciliation bodies established for that purpose that may exist in the public or place of worship where the marriage was celebrated.
  - S.65 – A party to a marriage celebrated under Christian system of marriage may petition the court for a decree for the dissolution of the marriage on the ground of: -
    - a. one or more acts of adultery committed by the other party;
    - b. cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or
    - c. desertion by either party for at least three years immediately preceding the date of presentation of the petition;
    - d. exceptional depravity by either party;
    - e. the irretrievable breakdown of the marriage."



15. Some fundamental issues arise according to the provisions of Section 65 as to the definitive characteristics of the various elements to establish a balance of probabilities for a dissolution of marriage. For instance, the determination of the nature and gravity of cruelty is based on the court's weighing of several factors.
16. How is cruelty interpreted to qualify as a ground for dissolution of a marriage? In the case of *Hadden v Hadden* [1859] 1 Sherman J held and said: -
- “I do not think there is such a thing as legal cruelty as distinct from actual cruelty; cruelty means conduct whether in legal language or the vernacular.”
17. Furthermore, in *Russell v Russell* [1997] A-C-445 the court stated: -
- “It was conceded that indeed it is beyond controversy that it is not every act of cruelty in the ordinary and popular sense of the word which amounted to cruelty entitling the party aggrieved to a divorce; that this may be many willful and unjustifiable acts inflicting pain and misery in respect of which the relief could not be obtained. That it must be conduct of such a character as to have caused danger to life, limb or health (bodily or mental or as to give rise to a reasonable apprehension of such danger.”
18. In the Divorce Cause Appeal between *Alexander Kamweru Vs. Anne Wanjiru Kamweru* (2000) eKLR being an appeal from a Judgment of the High Court Of Kenya Divorce Cause No. 75 Of 1992, the Court of Appeal gave guidelines on the applicable burden of proof as:-
- “Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on the preponderance of probability. Certainly, cruelty or desertion may be proved by a preponderance of probability, that is to say, that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”
19. On the ground of cruelty, *Chesoni J.* (as he then was) in *DM -VS- TM* (2008) 1 KLR, 5, stated:-
- “To establish cruelty the complainant must show to the satisfaction of the court:-
- i. misconduct of a grave and weighty nature
  - ii. real injury to the complainant's health and reasonable apprehension of such injury
  - iii. that the injury was caused by misconduct on the part of the Respondent, and
  - iv. that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.”
20. The establishment by a court of law of the existence of cruelty depends on the circumstances of each case. In the present case, in order to prove the allegation of cruelty, this Court must satisfy itself that there is evidence indicating that the respondent, without any justifiable cause, deliberately conducted himself in such a manner as to endanger the other party's physical or mental health, or to cause that party anxiety over the imminence of such danger.



21. The appellant, during the trial court hearing, stated that the respondent subjected her to emotional cruelty due to a lack of his love and affection. She further stated that due to the stress from the marriage, her blood pressure shot up. The appellant deposed that her doctor suggested that she take a break from the stressor till her health is stable. Due to this, the respondent moved out of the matrimonial home for three months. Unfortunately, this separation did not solve her emotional distress and anxiety. According to the appellant, if the marriage is not dissolved, she would be taken to a dark place that she is not ready to re-live, as this will likely affect her mental health.
22. It must be appreciated that the appellant was emotionally distressed by the respondent's actions and/or inactions. The respondent had argued that this was not intentional and that he was acting in the best interest of the family. Marriage, unlike commercial contracts, has unwritten and implied terms. There is no formula in marriage. No two marriages are the same. It is for the parties to a marriage to agree on the implied terms and comply with the said terms. These terms change over time, and it is the duty of both parties to make sure that at all times they are on the same page. In this situation, the appellant and the respondents were reading from different scripts. The respondent's actions deliberately or not affect the appellant's physical and mental health.
23. Having considered the evidence adduced by the appellant in the trial court and on the basis of the above-cited authorities, I find that the allegations of cruelty made by the appellant against the respondent have been established to the required standard.
24. On the ground of the marriage having irretrievably broken down, Section 6 of the Act provides as follows;
  - a. A spouse commits adultery;
  - b. A spouse is cruel to the other spouse or to any child of the marriage;
  - c. A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;
  - d. The spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;
  - e. A spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition;
  - f. A spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;
  - g. A spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or
  - h. Any other ground as the court may deem appropriate”
25. Irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties. It is worth noting that although



adultery, cruelty and desertion are distinct and separate grounds of divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage.

26. What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, I am of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; and commitment of the parties. The respondent agreed that, indeed their communication is strained and that the appellant had moved away from the matrimonial bed. The appellant described the marriage as a dark place that she did not want to re-live.
27. The general question is, can the appellant and the respondent with their character and personality, faults and other attributes good and bad and having regard to their behaviour during the marriage reasonably be expected to live with each other? The answer is in the negative.
28. From the foregoing, there is an irretrievable breakdown of the marriage on grounds of cruelty. There is no legitimate purpose that will be served by the retention of the marital covenant which is better untied to set each spouse free.
29. The upshot is that I am satisfied the marriage celebrated on 8<sup>th</sup> November 2014 between the appellant and the respondent ought to be dissolved. The Decree Nisi be granted to both the appellant and respondent and a Decree Absolute thereafter. I make no orders as to costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER 2024**

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**E.K. OGOLA**

**JUDGE**

In the presence of:

Ms. Jane Githaiga h/b for Ms. Okili for the Appellant

Mr. Njenga for the Respondent

Ms Gisiele M court Assistant

