



REPUBLIC OF KENYA



KENYA LAW
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**VK v NGM (Divorce Appeal 61 of 2019)
[2023] KEHC 3317 (KLR) (Family) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 3317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

DIVORCE APPEAL 61 OF 2019

EKO OGOLA, J

JANUARY 19, 2023

BETWEEN

VK APPELLANT

AND

NGM RESPONDENT

(An appeal against the judgment of the Chief Magistrate's Court at Nairobi by Hon. D.O. Mbeja Chief Magistrate Divorce Cause No. 951 of 2018 delivered on the 7th day of June 2019)

JUDGMENT

1. The appellant being dissatisfied with the judgment of the lower court delivered by Hon D.O Mbeja in Chief Magistrate divorce cause No 951 of 2018 on the June 7, 2019, preferred this appeal on the five grounds raised in the memorandum of appeal dated June 13, 2019. The grounds are as follows:
 - a. The learned magistrate erred in fact and in law by failing to take into account and consider that the respondent had during the subsistence of the marriage engaged in extramarital affairs which resulted in him siring a child outside the marriage.
 - b. The learned magistrate erred in fact and in law by failing to take into account and consider that the respondent deserted the matrimonial home to an unknown destination in October 2018 and left the appellant to solely provide and care for the children.
 - c. The learned magistrate erred by holding that the appellant was a person who loved money and only wanted to get out of the marriage because the financial status of the respondent was not good yet the appellant had solely provided for the children after the respondent left.



- d. The learned magistrate erred in fact by holding that the respondent forgave the appellant of an affair despite the fact that the respondent provided no evidence to demonstrate the affair had occurred.
 - e. The learned magistrate erred in fact by failing to consider the fact that the appellant was no longer interested in the marriage.
2. The memorandum of appeal was duly served to the respondent, but the respondent failed to come on record.
 3. The appeal was disposed of by way of written submissions.
 4. Mr Muhanda learned counsel for the appellant submitted that her marriage had irretrievably broken down due to the respondent's actions of adultery, exposure of pornographic material to the children, willful neglect of his duties as a father and husband, subjecting the children to DNA testing, desertion, and discussing private family issues with his extended family.
 5. On the issue of adultery, counsel submitted that the appellant produced email communications between the respondent and other women wherein one of the relationships had culminated in the siring of a child who unfortunately died. According to counsel, the respondent contradicted himself in stating that he did not engage in an adulterous relationship but in his own testimony stated he was in an adulterous relationship which he had since ended and had not sired any children from the adulterous relationship. Counsel further relied on the case of *N v N* (2008) KLR 17 and submitted that it is not necessary to have evidence to prove adultery.
 6. On the issue of cruelty, counsel submitted that evidence was adduced to prove that the respondent had left the matrimonial home on October 6, 2018. This evidence was not controverted by the respondent. However, his reason was that he needed to establish a business after he lost his job. Counsel submitted that the parties have never resumed cohabitation to date. He further submitted that the appellant also testified how the respondent was cruel towards her by speaking to her in a manner that was emotionally draining. The respondent was also inconsistent in supporting the children's needs. Counsel cited several cases to put emphasis on the issue of cruelty. He submitted that the balance in claims of cruelty as a ground for dissolution of the marriage was in favor of giving relief to a complaint in a situation which has become intolerable.
 7. Counsel submitted that the parties had attempted to reconcile but this did not bore fruits; that there was overwhelming evidence to prove adultery and cruelty and that the marriage had irretrievably broken down.

Determination

8. The issue for determination broadly is whether the grounds for divorce raised by the appellant at the trial court were proved to the required degree.
9. This being a first appeal, this court is duty-bound to re-evaluate the evidence and reach its own findings. In a nutshell, the appellant and the respondent married on December 11, 2008, and they were blessed with two children. On November 26, 2018, the appellant applied for divorce on the ground that the marriage had completely broken down due to irreconcilable differences. She averred that the respondent had been adulterous on several occasions and with different women, one of whom allegedly sired a child with the respondent. There were allegations of the respondent consuming pornographic content in the matrimonial home, hence putting the children at risk. The appellant averred that the respondent also neglected to financially contribute to the needs of the children; that he would



return home in the wee hours of the night thus causing her distress and worry; that he deserted the matrimonial home, and that the respondent constantly divulged their intimate information to his extended family.

10. In his response to the petition, the respondent averred that the appellant deserted the matrimonial home in the year 2010 to 2013 and secretly sought employment in Tanzania. This necessitated the respondent to file divorce proceedings in 2012 and after reconciliation, the said proceedings were withdrawn. He denied all the allegations stated in the petition, stating that he lost his job in the year 2015, and yet he still managed to provide for the children. He averred that due to the financial constraints, he attempted to discuss with the appellant on the idea of relocating to an affordable estate and changing the school that the children attended. According to the respondent, the appellant refused his suggestions and threatened to date other men and file for divorce. Further to this, the respondent averred that the appellant has maintained a close friendship with her ex-boyfriend. He averred that there have been several attempts to reconcile but the appellant has been averse to them.
11. In his judgment, the trial magistrate held as follows:-

“I am required to make a finding as to whether the marriage between the petitioner and the respondent has broken down irretrievably on account of irreconcilable differences. This I decline to find in the affirmative all the circumstances of this cause considered. Both the petitioner and the respondent are encouraged to explore avenues of resolving their differences amicably as equal companions in the marriage...”
12. I have had occasion to re-evaluate the evidence on record, and the oral testimonies of the parties and I have had due regard to the judgment of the trial court.
13. As regards the standard of proof required to satisfy the court that the ground of a marriage being irretrievably broken down has been proved, the court, in *Kamweru v Kamweru* (2000) eKLR, stated as follows:

“...It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage.....

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, we are 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; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down.”
14. Mr Muhanda submitted that since the respondent left the matrimonial home sometime in 2018 the parties have not been living together to date. This is a significant length of time to live apart, taking into consideration that there are children involved. The appellant has accused the respondent of adultery. The respondent has also depicted signs of mistrust and jealousy stating that the appellant has maintained a close relationship with her ex-boyfriend, and that she wanted to leave him for other men due to his financial constraints.



15. The appellant's wishes are for the respondent to be a model father, however, according to her, he is not. Her reasons whether true or false are that the respondent has put the children in situations that could corrupt them morally; that the respondent subjected the children to DNA testing; and that he is not a provider. To a woman this is frustrating, and a model father could be one which meets her emotional needs.
 16. The respondent averred that he has on many occasions attempted to reconcile by even travelling to the appellant's rural home. His efforts bore no proof. Clearly, the appellant was not keen on resuming her spousal duties.
 17. This on-and-off situation started in 2012 and is an indicator of an antagonistic relationship filled with resentment, mistrust, unfulfillment and general unhappiness. We all have this one life to live, and if something broken cannot be mended, then why force it.
 18. For the foregoing reasons, I dissolve the marriage between the appellant and the respondent. A decree nisi to issue forthwith and to be made absolute within 30 days.
 19. Parties to bear their own cost.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2023

E.K. OGOLA

JUDGE

In the presence of:

Ms. Muhanda for the Appellant

N/A for the Respondent

Gisiele Muthoni Court Assistant.

