



REPUBLIC OF KENYA



**KENYA LAW**  
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**RMT v FCT (Civil Appeal E02 of 2020)  
[2023] KEHC 24706 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24706 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E02 OF 2020  
SC CHIRCHIR, J  
OCTOBER 26, 2023**

**BETWEEN**

**RMT ..... APPELLANT**

**AND**

**FCT ..... RESPONDENT**

*(From the judgment of Honourable C.N Njalae dated 27th August 2020 in the Butali senior Principal Magistrate's court in Divorce Cause No. 2B of 2018)*

**JUDGMENT**

1. By way of a plaint dated, 24<sup>th</sup> July 2018, the appellant herein sought for dissolution of her marriage from the respondent, citing cruelty as the ground for divorce.
2. The respondent filed a defence seeking for dismissal of the petition.
3. The court heard the parties and at the conclusion, dismissed the case. The Appellant being aggrieved by the outcome, filed the present Appeal.

**Memorandum of Appeal**

4. The Appellant has set out the following grounds:
  - a). The learned trial magistrate erred in law and in fact by failing to satisfactorily appreciate, consider and/or correctly apply the set grounds for divorce of customary marriage as laid out in section 69 of the Marriage Act No. 4 of 2014 in making her determination to dismiss the petition for divorce.
  - b). The learned Trial magistrate erred in law and in fact by solely placing emphasis on evidence adduced by respondent which evidence was never proved and completely ignoring evidence by the appellant.



5. The Appeal was canvassed by way of written submissions

**Appellant's submissions.**

6. The appellant submits that the Appellant proved particulars of cruelty which consisted of emotional and psychological abuse but which particulars, the court failed to take into consideration.

7. It is further submitted that the marriage has irretrievably broken down and there is nothing to salvage.

8. The Respondent did not file any submissions.

**Analysis And Determination**

**a). The pleadings**

9. This is a first appeal and the role of this court is review the evidence afresh, re- evaluate it and arrive at its own conclusion, without ignoring the conclusions arrived at by the trial court.( see Abok James Odera& Associates vs John Patrick Machira t/a Machira & Co ( 2013) e KLR.

10. The Appellant filed suit in the lower court seeking for dissolution of her marriage to the respondent on account of cruelty , particulars of which were as follows:

- a). On several occasions the Defendant subjected the plaintiff to emotional and psychological abuse.
- b). Falsely accusing the plaintiff of adultery
- c). Failing to provide maintenance for the plaintiff
- d). Failing to exhibit any love or affection towards the plaintiff
- e). Treating the plaintiff in a cruel and inconsiderate manner.
- f). Failing to provide any emotional or financial support to the plaintiff.

11. The Respondent filed a defence in which he denied the allegations raised and instead accused the Appellant of contributing to the breakdown of the marriage through acts which were itemised as follows:

- a). Neglecting the children
- b). Being cruel to her family
- c). Having extra marital affairs
- d). Deserting the matrimonial home.

**b).Evidence in brief**

12. PW1 was the Appellant herein, RMT She testified that she married the Respondent in 1982 under the kabras customary laws. They lived together as husband and wife at [Particulars Withheld] sub-location. They got two children namely;RN and HK.

13. She told the court that in 2007, the defendant chased her from her matrimonial home claiming he did not want her. He sends her away again in February 2008 and in April 2009. On each occasion she sought to come back but the Respondent kept on refusing. She managed to return in 2009 but in the year 2011 the Respondent filed for a divorce. The petition for divorce which was filed under



petition No. 1 of 2011, in which she did not make any appearance, was dismissed. The respondent chased her away again in the year 2012 and have remained separated to date. She further stated that the respondent had married another woman in 2003. She accused the Respondent of treating her cruelly, sometimes threatening to kill her. She also claimed that the respondent demolished her house in pretext of constructing her a new house.

14. She closed her case.
15. DW1, testified that he married the plaintiff in 1982; and they lived together and had two children. He accused the Appellant of running away from home without any provocation and failing to settle in her matrimonial home despite him making the necessary provisions.
16. On cross examination by the plaintiff, he denied chasing away the Appellant.
17. DW2 testified that he knew both the plaintiff and the defendant who is his cousin and the plaintiff is his in-law. He was aware about the reconciliatory meetings, as he was part of some of them.
18. In its judgment dated 27<sup>th</sup> August 2020, the trial court dismiss the suit on grounds that cruelty had not been proved.

### **c). Determination**

19. There is common ground that the parties herein contracted a customary marriage in the year 1982 and that there are two issues of the marriage who were already Adults at the time of the time of the hearing.
20. Dissolution of a customary marriages is provided for under Section 69 of the Marriage Act . The grounds upon which such a marriage may be dissolved are :
  - a) Adultery
  - b) Cruelty
  - c) Desertion
  - d) Exceptional depravity
  - e) Irretrievable breakdown of the marriage or;
  - f) Any valid ground under the customary law of the Petitioner.
21. The Appellant sought to dissolve her marriage on grounds of cruelty , particulars of which are set out in paragraph 6 of this judgment. The trial magistrate held that cruelty had not been proved.
22. Cruelty is defined by the Black's Law Dictionary ( 8th ) as “the intentional and malicious infliction of mental and physical suffering on a living creature. While it defines “mental cruelty” - “As a ground for divorce, one spouse’s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”
23. Justice G. B. M. Kariuki SC (as he then was) in W.M. M v B.M.L [2012] eKLR stated:“Courts have avoided formulation of an exhaustive definition of cruelty. Acts of cruelty, like acts of negligence in the law of torts, are said to be infinitely variable.”
24. The Court of Appeal considered at length what constitutes cruelty in JSM VS. ENB [2015] eKLR ,the Court of Appeal held; There is consistent case law on what constitutes cruelty as a matrimonial offence. In Meme vs. Meme [1976-80] KLR17, it was held that to establish cruelty, the Petitioner must show to the satisfaction of the court;



- i) Misconduct of a grave and weighty nature
  - ii) Real injury to the complainant's health or 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.
25. In *Kamweru v. Kamweru* [2000], eKLR, the court stated as follows; “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 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”.
26. There is therefore no universal or comprehensive definition of cruelty. Each claim found on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves.
27. With the above guiding decisions in mind I now turn to consider the circumstances of the present case.
28. The appellant told the court that the respondent was cruel to her and had even threatened to kill her with a somali sword. There was therefore a reasonable apprehension of injury to health and life as per the finding in *Meme's case*(supra). She also experienced emotional and psychological cruelty from the respondent. She left the matrimonial home on several occasions. This fact was not denied by the Respondent. He only differs on the reasons for her disappearance from the home. Despite the denial however there is evidence, emerging from both sides that the Appellant suffered some depravity. The respondent told the court that he was a teacher yet it emerges that the Appellant had no place she could call home. Her home was demolished by the respondent in the pretext of building her another one, but he never did. Indeed, it is instructive that one of the orders the trial court made while dismissing the suit was to direct the respondent to put up a home for the Appellant. Acts of depravity and neglect are in my view acts of cruelty.
29. It is my finding that the treats to violence and acts of depravity as aforesaid were acts of cruelty which the Appellant proved. Contrary to the findings of the trial court therefore, cruelty was indeed proved.
30. The Appellant further pleaded that as a result of the cruelty the marriage had broken down irretrievably.
31. In regard to irretrievable breakdown of the marriage, in the case of *J S M vs. E N B* [2015] eKLR, the Court of Appeal re-examined the applicable law in the light of the *Marriage Act*, 2014 and held and held
- “As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the *Marriage Act*, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, 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 for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage...” ( Emphasis added)

32. The court then went on to consider the factors may a court take into account in determining whether a marriage has irretrievably broken down and went on to state as follows: “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.”
33. The parties in this case had been separated since the year 2012. The Appellant was insistent that she no longer wants the marriage. The law ought not to force people to be together when one or both do not want to.
34. In *N v. N* [2008] 1 KLR [G & F] 16, Madan J (as he then was) stated as follows: “If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then they are entitled to be released from their matrimonial union , the guilty spouse bearing the consequences”
35. The order for maintenance was misconceived as the children of the marriage were Adults at the time of filing the divorce.
36. As for division of matrimonial property, this plea is wanting in particulars as the Appellant has not provided the what property is to shared and in what manner. This claim has not been proved therefore.
37. The Appellant has otherwise proved her case for divorce. It is evident that the marriage has broken down irretrievably.
38. Consequently, I hereby set aside the Lower courts finding and substitute it with one allowing the divorce.
39. The other prayers are dismissed.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**S. CHIRCHIR**

**JUDGE.**

**In the presence of :**

E. Zalo- Court Assistant

No appearance by the parties.

