



REPUBLIC OF KENYA



**JNW v MNN (Civil Appeal 43 of 2017)
[2023] KEHC 25913 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 43 OF 2017
MA ODERO, J
NOVEMBER 30, 2023**

BETWEEN

JNW APPELLANT

AND

MNN RESPONDENT

JUDGMENT

1. Before this court for determination is the Memorandum of appeal dated 1st November 2017 by which the appellant JNW sought the following orders:-
 1. That the judgement of the lower court be set aside and be substituted with an order dissolving the marriage between the Appellant and the Respondent.
 2. That costs be provided for.
2. The appeal was canvassed by way of written submissions. The appellant filed the written submissions dated 26th January 2023. The Respondent MNN despite having notice of the matter did not file any submissions.

Background

2. The appellant and the Respondent got married to each other under Kikuyu customary law in the year 1985. Their union was with blessed with five(5) children. On 21st August 2007 the Respondent left the matrimonial home and the couple have not lived together since then.
3. The appellant filed in the Magistrates court at Karatina a petition dated 23rd August 2012 seeking the dissolution of his marriage to the respondent. He alleged that the Respondent had deserted the matrimonial home and also accused her of cruelty.



4. The matter was heard inter partes and on 6th October 2017 Hon. F.W Macharia Senior Principal Magistrate delivered a judgement in which she dismissed the Appellants petition for divorce.
5. Being aggrieved by the said judgment the Appellant filed this Memorandum of Appeal in which he raised the following grounds:-
 - a. That the learned trial magistrate erred in law and in fact in failing to note that that parties having lived separately since 2007 the marriage of operation of law stood dissolved thereby falling into error and a miscarriage of justice.
 - b. That the judgment was against the weight of evidence
 - c. That the learned magistrate erred in law and in fact in failing to appreciate that the marriage herein had irretrievably broken down and no purpose would be served by it being allowed to subsist.
 - d. That trial magistrate erred in law and in fact in dismissing the plaintiff's suit wherein it had met the threshold of proof required by law.
6. The Respondent did not oppose the Appeal.

Analysis And Determination

7. I have carefully considered this appeal as well as the submissions filed in support thereof. This being a first appeal the duty of this court is to re-evaluate the evidence and draw its own conclusion on the same.
8. This position was emphasized in the case of *Abok James Odera Associates vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 OF 1999) in the following manner:-

“This being a first appeal , we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
9. In his petition filed in the magistrates court the Appellant cited grounds of Adultery, cruelty and Desertion as grounds for seeking the divorce. In the circumstances the Appellant had an obligation to prove the existence of any one or more of the said grounds.
10. The standard of proof required in a civil case is upon a preponderance of probability
11. On the issue of cruelty in *DM v TM* (2008) 1 KLR, Hon. Chesoni, J (as he then was) stated as follows:-

“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.”



12. In the case of *SCC VS MK* [2012] eKLR the court cited the case of *Kamweru Vs Kamweru* [2000] in which the court of Appeal gave guidelines as to proof of cruelty and desertion:-

“Applying the yardstick of the burden and standard of proof as set out above we would say that the feelings of some certainty by court, that is being satisfied as to be sure; means being satisfied on preponderance of. 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.”

13. In citing cruelty as a ground, the appellant claimed that the Respondent had physically assaulted him leaving him with a scar. The Respondent vehemently denied having ever assaulted the Appellant and stated that the scar on his cheek resulted from the Appellant being hit by a bottle during a bar brawl. The Respondent produced as an exhibit an investigation diary Exh 2. This effectively controverted the Appellants claim that the Respondent had assaulted him.
14. Indeed the same investigation diary revealed that it was in fact the Appellant who was arrested for removing the window grills of the house in which the respondent was living. Under cross-examination the Appellant admitted that he did remove the window grill but claims that he did so for safety purposes.
15. Further the Appellant did not produce before the trial court any medical evidence to support his claim that he had been assaulted.
16. In the case of *Meme v Meme* [1976] KLR 13, Hon. Justice Chesoni (deceased) cited with approval the decision in *Mulhouse v Mulhouse* [1964] ALL ER in which the court held as follows:-

“Conduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief.

Thus conduct, which is part of the “reasonable wear and tear” of a marriage, does not constitute cruelty. Regarding the nature of injury to the petitioner’s health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:

“[1] it must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it”

Therefore on the basis of the above cited case law it is clear that the ground of cruelty was not proved.

17. The appellants in his divorce petition also claimed that the Respondent had deserted the matrimonial home.
18. Whilst it was true that the Respondent left the matrimonial home in the year 2007, she later returned to said home where she resides to date.



19. The Appellant admitted that it was he who left the matrimonial home in the year 2011 claiming that he feared for his life.

Under cross-examination the Appellant admitted “currently I do not live in the matrimonial home”

20. Having been shown to have himself deserted the matrimonial home, the Appellant cannot rely on desertion as a ground for divorce.

21. Finally the Appellants accused the Respondent of adultery. However he was unable to prove even one incident of adultery, against the respondent. To merely shout adultery is not enough. A litigant must adduce concrete evidence to prove that adultery has indeed occurred.

22. Based on the analysis above it is quite evident that the Appellant failed dismally in proving to the required standard the grounds which he had cited for seeking a divorce. The trial magistrate was therefore quite correct in observing that:-

“In the light of the above discussion, I find that the plaintiff has failed to prove his case as none of the grounds for divorce was proved.....”

23. Having said that I note that the learned trial magistrate went on to find that:-

“The marriage has not irretrievably broken down”

24. In my view this finding was erroneous given the circumstances of the case. The evidence available revealed that the couple had lived separately since the year 2011 when the Appellant left the matrimonial home. By the time the judgment was being delivered in October 2017 the couple had lived separately for six (6) years. Given that long period of separation it is clear that the marital union had irretrievably broken down.

25. Section 66(2) of the *Marriage Act*, 2014 introduces irretrievable breakdown of marriage as a ground for divorce. Section 69(1)(e) of the *Marriage Act* 2014 provides that a customary marriage may be dissolved on grounds of the irretrievable breakdown of the marriage.

26. This is a situation where the parties had lived apart for several years signifying that they were unable and/or unwilling to resolve their differences. One can only remain in a marital union voluntarily. The courts cannot and ought not compel a party to remain in a marriage which by their action the parties, themselves indicated has broken down.

27. Therefore despite the fact that the cited grounds of adultery cruelty and desertion were not proved by the Appellant I am satisfied that from the evidence it is clear that this is a marriage which had irretrievably broken down. The trial magistrate erred in finding otherwise. As such the trial court ought to have granted the petition for divorce.

28. Finally the appeal succeeds and I make the following orders:-

1. The Judgment of the lower court delivered on 6th October 2017 be and is hereby set aside.
2. In its place judgement is entered allowing the petition for dissolution of the marriage between the Appellant and the Respondent.
3. Decree Nisi to issue to be made absolute within forty (40) days.
4. This being a family matter I make no orders as to costs.

DATED IN NYERI THIS 30TH DAY OF NOVEMBER, 2023



.....
HON. MAUREEN.A ODERO
JUDGE

