



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei-J

CIVIL APPEAL NO. 163 OF 2017

AGNETTA MUMO NYALITA.....APPELLANT

VERSUS

JOSEPH NDAMBO MULI.....RESPONDENT

(Being an appeal from the judgement of Honourable Kahuya I. M. Senior Resident Magistrate

at Machakos Chief Magistrate's Court in Divorce No. 5 of 2017,

delivered on 14th December 2017)

BETWEEN

AGNETTA MUMO NYALITA.....PETITIONER

VERSUS

JOSEPH NDAMBO MULI.....RESPONDENT

JUDGEMENT

1. This is an Appeal filed by the Appellant against the judgement of the Hon. Kahuya SRM dated 14.12.2017 dismissing the Appellant's petition for divorce involving the Appellant and the Respondent. It also seeks costs for the Appeal and other remedies the court deems fit and just.

2. The background of the case is that the Appellant lawfully got married to the Respondent in a church ceremony at the Kyale Catholic Church, Makueni on the 6th day of October, 2015 in accordance with the principles of their faith and were duly issued with a marriage certificate under the Marriage Act, 2014. They thereafter cohabited and consummated their union, and were blessed with one issue namely Barrack Muli Ndambo in 2016. Since the celebration of the marriage, the Respondent has been treating the Appellant with severe cruelty and even committed adultery. The Appellant felt that the marriage had irretrievably broken down. The Appellant then filed a Petition for divorce against the Respondent in the Chief Magistrates Court.

3. The Respondent filed no response to the Petition nor did he show up for the hearings. The cause proceeded ex-parte and judgement delivered.

4. The Hon. Magistrate in her judgement noted that the marriage can still be resuscitated with the possibility of reconciliation and proceeded to dismiss the Petition dated 20th March 2017 and filed on 22nd March 2017 with no order as to costs.

5. The Appellant being dissatisfied with the said judgement preferred this appeal which raises four grounds as follows;

i. That the Learned Trial Magistrate erred both in law and fact by dismissing the Appellant's Petition despite the fact that the Appellant had proved her case on a balance of probabilities.

ii. That the Learned Trial Magistrate misdirected herself both in law and fact by dismissing the Appellant's case yet she (the Hon. Magistrate) had found and held in her judgement that the Appellant had proved cruelty and adultery against the Respondent.

iii. That the Learned Trial Magistrate erred in law by holding that the Appellant's evidence required corroboration which position is unsupported by law of evidence.

iv. That the Learned Trial Magistrate fell into a grave error of law by failing to render judgement in accordance with the law and this violated the Appellant's right of a fair trial as envisioned in Article 50 (1) of the Constitution of Kenya.

6. The appeal was disposed of by way of written submissions. It is only submissions by the Appellant that are on record as Respondent filed none.

7. 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. The court is also to determine whether the award of costs to the Appellant was proper in the circumstances.

8. This being a first appeal, this court is duty bound to re-evaluate the evidence and reach its own findings.

9. In a nutshell, the Appellant by way of a Petition sued the Respondent for the dissolution of their marriage and sought costs of the suit. Two grounds were relied upon being adultery and cruelty.

10. The Appellant testified that the Respondent used to threaten to kill her. She averred that the Respondent deliberately and economically sabotaged her by vandalizing her business and further abandoned all his matrimonial obligations. Also, it was claimed that he had an intimate affair with a married woman during the course of their marriage.

11. I have had occasion to re-evaluate the evidence and have had due regard to the judgement of the trial court.

12. The foregoing evidence is not denied or rebutted by the Respondent. The Appellant's case had been subsequently proved to the required standards by the Appellant. Besides, there are case decisions that a party who fails to testify/give evidence or call witnesses will mean an adverse inference could be drawn. In **PUSHIA d/o ROAJIBHIA M. PATEL V. THE FLEET TRANSPORT CO. LTD (1960) EA 1026 AT PAGE 1033** The East African Court of Appeal said: ***"whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend on the particular circumstance of each case."***

In **N vs N [2008] IKLR 17** the court stated;

"To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, elicit affect undue familiarity and guilt attachment are some of the instances that create an inference upon which court can act. Circumstantial evidence can prove and establish adultery provided that the circumstances are relevant, cognate and compellable".

13. The Marriage Act 2014 under section 66(2), is very clear on the matrimonial offences that result to dissolution of a marriage as;

a) Adultery

b) Cruelty

c) Dissertation

d) Irretrievable breakdown of the marriage

14. I note that the evidence adduced by the Appellant at the trial court was sufficient enough to prove that indeed the entire matrimonial relationship between the parties seems to have broken down. There is also uncontroverted evidence that the Respondent has humiliated, verbally abused, sabotaged, threatened the appellant and abandoned his responsibilities. There is enough evidence that the marriage between the parties has irretrievably broken down. The two parties are no longer living together neither are they planning on reconciling. The marriage if any currently, is an empty shell. There is no point in sustaining it. It transpired during the reception of the evidence that the parties herein were living separately since 2016 which is an indication that the marriage is no longer workable. It was therefore erroneous for the trial magistrate to insist that the marriage could be resuscitated by involving parents to the parties. That was off the mark in that the respondent despite being served with the suit papers failed to file response and even gave the hearing a wide berth. That was sufficient proof that the chances of rescuing the marriage are nil. As the parties have already moved on, and as the allegations of adultery and cruelty have been established the trial court ought to have allowed the petition. Hence, the decision arrived at must be interfered with. Indeed, it is clear that the marriage is just but an empty shell and that there is no need to sustain it but to allow the parties to move on with their lives. It is unfair to saddle the appellant with a marriage that is not in existence anymore.

15. In the result, it is my finding that the Appellant had proved her claim against the Respondent on balance of probabilities. The appeal succeeds. The trial court's judgement dated 14/12/2017 is hereby set aside and substituted with judgement being entered for the Appellant against the respondent as follows;

a) That the marriage celebrated between the Appellant and the Respondent in Kenya on 16th October 2015 is hereby dissolved.

b) That A Decree Nisi dissolving the said marriage is hereby issued to be made absolute 30 days from date of this judgement.

c) There shall be no Orders as to costs.

It is so ordered.

Dated and delivered at **Machakos** this 22nd day of **February 2021**.

D. K. Kemei

Judge