REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 131 OF 2018

DMM.....APPELLANT

VERSUS

MHM aka N.M.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. P. Muholi (Senior Resident Magistrate) in Milimani Divorce Cause No. 531 of 2018 delivered on 28th November 2018).

JUDGMENT

1. On 28th November 2018 the learned Senior Resident Magistrate dismissed the petition and cross-petition for divorce filed by the appellant D.M.M. and the respondent N.H.M. aka N.M., respectively. The couple married on 30th October 1996 at the Registrar's Office in Nairobi. The marriage was blessed with four children.

2. The petition for the dissolution of the marriage was filed on 9th April 2009. It relied on cruelty and the particulars were given. On 3rd September 2018 the respondent filed amended answer to the petition and also cross-petition for divorce. The cross-petition was grounded on cruelty. The ground was particularized.

3. It is material to point out that in paragraphs 6 and 7 of the petition the appellant pleaded as follows:-

> **"6. THAT the marriage has continued to deteriorate with little or no communication between the petitioner and the respondent.**
>
> **7. The marriage between the petitioner and the respondent has broken down irretrievably."**

4. In the amended answer to petition and cross-petition the respondent responded as follows in paragraph 5: -

> **"5. That paragraph 6, 7 and 8 are true."**

The respondent was admitting that the marriage had continued to deteriorate with little or no communication between the two, and that the marriage had irretrievably broken down.

5. Before the trial court, the applicant and the respondent briefly testified. At the end of it, the court in a reserved judgment, found that neither party had proved the case, and dismissed the petition and cross-petition. It was found that either party had not proved cruelty. This meant that the appellant and the respondent were bound to continue living as a married couple.

6. The appellant filed this appeal to challenge the findings of the trial court. He set out the following grounds: -

> **"(1) The learned magistrate erred in determining the issue of whether there was cruelty between the appellant and the respondent thus necessitating their resolve for divorce;**
>
> **(2) The learned magistrate erred in fact and in law in requiring the appellant to produce evidence of the instance of cruelty**

yet this was elaborated in the pleadings as well as the appellant's testimony in the lower court. Particulars of cruelty such as hostility, rudeness, unfaithfulness in terms of transfer of property and wasting of property was sufficient.

(3) The learned magistrate erred in law and fact by failing to consider the particulars of such adultery by the respondent such as the respondent's dalliance with one Maji Marefu.

(4) The learned magistrate erred in law and fact by concluding that the appellant and the respondent technically live together despite clear evidence by both parties that they stay in separate houses.

(5) The learned magistrate erred in law and in the way she weighed the evidence thereby concluding that the grounds had not been sufficiently proven yet both parties testified and affirmed that they wanted the marriage dissolved"

7. The respondent supported the findings by the lower court, and therefore opposed the appeal. The appellant was represented by M/s Mwadumbo and the respondent by M/s Ndirangu. Each filed written submissions which I have considered.

8. This is a first appeal. This court is obliged to reconsider the evidence tendered in the trial court, assess it and make appropriate conclusions on it, remembering that it had not seen or heard the witnesses and making due allowance for this **(Selle –v- Associated Motor Boat Company Ltd [1968]EA 123).** Secondly, an appellate court will not normally interfere with the findings of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did **(Bundi Marube –v- Joseph Onkoba Nyamuro [1983]KR 403)**. Lastly, the appellate court would not interfere with the decision arrived at by the exercise of discretion by the lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it was manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result there was injustice **(Choitram –v- Nazari [1984] KLR 327).**

9. When the appellant and the respondent pleaded cruelty as the ground for divorce and gave particulars, there was a duty on either of them to call evidence to prove those particulars. A pleading alone does not amount to evidence. It is also trite that the court will not accept evidence which was not included in the pleading. A party cannot call evidence on a matter or issue not pleaded.

10. **Section 107** of the **Evidence Act** provides that:-

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

In the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited) –v- The City Council of Nairobi [2019]eKLR,** it was observed as follows:-

"21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged……"

11. The record shows that when the appellant testified in the trial court, he stated as follows to support the allegation of cruelty:-

"I have experienced cruelty with Neema. She has been adulterous with Prof Maji Marefu who has been a longtime friend."

There was no evidence given about the incidents of cruelty. If his case was that there was adulterous between the respondent and the said Prof. MM no evidence was led to show that indeed the respondent and Prof. MM had a relationship that constituted adultery. Were the two, for instance, in communication? Were they meeting? Had they been caught in a compromising situation? What is that led the appellant to believe that the two had an affair?

12. On the part of the respondent (who had also alleged cruelty against the appellant) all that she stated in evidence was –

"I am NHM. I am a businesswoman. I live in Thome **. We got married in 1966 and have 4 children. We live in separate houses. We have never lived together. We have tried to come together with elders. We have held several sittings. M does not love me. I seek the marriage be dissolved."**

There was no mention of cruelty. There was no evidence to prove the particulars enumerated in the cross-petition.

13. It is material that either side had denied cruelty in the pleadings. Whether or not either party was cruel to the other was therefore an issue for determination. I do not therefore fault the trial court when he found that neither party had proved cruelty against the other.

14. However, the appellant had pleaded that the marriage relationship had irretrievably broken down, and the respondent had admitted it in her pleading. Each wanted the marriage to be dissolved. Could the trial court not allow the dissolution of the marriage on that basis? Under

section 66(6) of the **Marriage Act, 2014** a marriage is irretrievably broken down if:-

> **"(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 or at least three years immediately preceding the date of presentation of the petition;**
>
> **(f) a spouse has been sentenced to a term of imprisonment of the 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."**

15. Once the fact that the marriage had broken down irretrievably was expressly and unambiguously admitted, there was no further proof required. The issue was not up for determination or proof. Even without that, a look at the parties' evidence showed that their marriage existed only on paper. The appellant alleged adultery and went on to state: -

> **"We have tried reconciliation but it has not born any fruits. Our marriage has irretrievably broken down."**

When cross examined, he stated –

> **"We begun living separately since January 2009."**

16. On her part, the respondent testified that:-

> **"We live in separate houses ……..we have tried to come together with elders. We have held several sittings. M does not love me. I seek the marriage be dissolved."**

17. The appellant had pleaded that the marriage had continued to deteriorate with little or no communication between them. The respondent had in her pleadings admitted this. There was no further proof required of the fact that the relationship between the two had deteriorated to the extent that there was little or no communication.

18. A marriage relationship is a voluntary contractual relationship. Where the parties to the marriage are living in separate houses, they are not communicating, no longer love one another, are no longer happy to live together as husband and a wife, and attempts to reconcile them have failed, the court cannot, and should not, keep them together. The marriage has to be dissolved.

19. For these reasons, I find that the lower court erred by not dissolving the marriage. The result is that I allow the appeal. I set aside the judgment of the lower court. In its place, there shall be a judgment allowing the petition and cross petition on the ground that the marriage between the appellant and the respondent has irretrievably broken down. *Decree nisi* shall issue and become absolute immediately.

20. Given the nature of the dispute and the orders above, I ask that each party shall bear own costs, both here and below.

DATED and DELIVERED NAIROBI this 15TH day of FEBRUARY 2021.

A.O. MUCHELULE

JUDGE