



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 89 OF 2019

SKCAPPELLANT

VERSUS

FKK.....RESPONDENT

(Being an Appeal from the Judgment of the Honourable W.K.Chepseba Chief Magistrate in Malindi Divorce

Cause No.12 of 2018 delivered on the 30th day of September, 2019)

Coram: Hon. Justice R. Nyakundi

Richard O. & Co. Advocates for the appellant

Farida Karisa Katana – Respondent

JUDGMENT

This is an appeal against the Judgement and decree of the Chief Magistrate Court (*Hon Chepseba - CM*) sitting at Malindi which was delivered on 30.9.2019. The appeal is premised on the following grounds;-

- 1. That the Learned Magistrate erred in fact and law by failing to pronounce the divorce given the circumstances and grounds of the Petition.***
- 2. That the Learned Magistrate erred in fact and law by failing to pronounce the divorce on the ground of desertion.***
- 3. That the Learned Magistrate in fact and law by completely failing to take into consideration the issue of desertion.***
- 4. That the Learned Magistrate failed to appreciate the fact that the parties have not resumed cohabitation since the time the Respondent deserted the matrimonial home.***
- 5. That the Learned Magistrate erred in fact and law by failing to take consideration the issue of adultery.***
- 6. That the Learned Magistrate failed to reach a conclusion that the marriage between the Appellant and the Respondent had irretrievably broken down.***
- 7. That the Learned Magistrate failed to recognize that failure to pronounce a divorce given circumstances and grounds of the petition amounts to a violation and infringement of Appellant's constitutional rights and freedoms as enshrined in the Constitution of Kenya, 2010.***
- 8. That the Learned Magistrate misdirected his mind by failing to consider the facts of the case and by failing to apply the law appropriately.***

The relevant facts which emerge are that on 19.8.2018 the Appellant petitioned for a divorce against the respondent whom they duly cohabited together as husband and wife following solemnization of the marriage on 16/8/2003. Thereafter they lived happily together in their matrimonial home located at Malindi, though it lasted only for two and half years. The Respondent subsequently deserted the Appellant and the matrimonial home which has since totalled into a period of more than seven(7) years.

That the acts of desertion comprises of continuous absence from the home, with no intention to reconcile or unite with the Appellant at their matrimonial home. Hence the once existed love between the Appellant and the Respondent has lapsed. Therefore there is no valid reason why the marriage union should be considered as valid. Secondly, the Appellant asserted that the Respondent at all material times has treated him with cruelty, mental anguish, physical, psychological torture and absolute denial of conjugal rights.

It was the Appellant's averment that at no time has he condoned the cruelty or acts of desertion by the Respondent. That the marriage has since broken down irretrievably completely ruined beyond salvage.

On consideration of the matter as a whole and upon hearing the Appellant, Learned trial magistrate made a finding that there is no conflict between the Appellant and the Respondent to warrant a dissolution of marriage on any of the grounds espoused in the Marriage Act.

DETERMINATION

It is the duty of the first Appellate Court to delve into the evidence and judgement of the trial court being appealed against to analyse it, with a view of drawing its own inferences and conclusions but always remembering to give due regard and allowance for the observations made by the trial court on witnesses demeanour and truthfulness at the hearing which advantage is not availed to the Court. (*See Selle & Another V Associate Motor Boat Company Ltd and Another*[1968] EA (123).

I appreciate that the appellant has summarized the appeal on the eight grounds as stated in his Memorandum of Appeal. However the central issue in the whole appeal is whether the Learned trial magistrate was correct in making a finding that the marriage between the appellant and the respondent was still subsisting and incapable of being dissolved by the Court.

This was the basis upon which Learned Counsel anchored his submissions in support of the appeal. Learned Counsel submitted that the aforesaid marriage had broken down irretrievably on grounds of desertion, cruelty, adultery and exceptional depravity.

Looking at the matter from his perspective Learned Counsel invited the Court to be guided by the provisions of the Marriage Act (section 65 and 66) to grant the dissolution of the marriage. He also cited and relied on the following cases *N.V.N*[2008] 1KLR 17, *SBS V TMN*[2015]eKLR, *H.M.N V JAN*(2019)eKLR, *CWL V HN* [2014]eKLR.

On that premise Learned Counsel urged the Court to Interfere with the judgement by having it set aside and substituted with an order of dissolution of the marriage.

As the Appellant was aggrieved by the final decree of dismissing the petition, I would endeavour to consider the grounds cummulatively and not distinctively. It is for this purpose I evaluate the record, evidence adduced at the trial and whether it met the threshold of an order for a dissolution of the marriage.

In this case, it was crucially important for the Appellant to prove the existence of desertion from the matrimonial home by the Respondent. On this ground section 65 of the Marriage Act 2014 is very clear that a marriage can be dissolved on the basis of desertion by either party for at least three(3) years immediately preceding the date of presentation of the petition.

The facts in the Petition must be proved to the satisfaction of the Court and this is because of the importance Society accords the institution of marriage. In the case of *Lang V Lang* [1954] 3 ALL ER 571 the Court stated;-

“To establish desertion, two things must be proved; first certain outward once visible conduct – the factum of desertion and secondly the animus deserendi, the intention underlying this conduct to bring the matrimonial union to an end in ordinary desertion the factum is simple;- it is the act of the absconding party in leaving the matrimonial home. The context in such a case will be almost entirely as to animus deserendi was the intention of the party leaving the home to break it up for good, or something short of or different from that”

This was also the principle in the case of *P C Patel v L P Patel*[1965] EA 560 in which the Court stated as follows;-

“That it is generally accepted test of what conduct amounts to constructive desertion in this: Has the defendant been guilty of such grave and weight misconduct that the only sensible inference is that he knew that the complainant would in all probability withdraw permanently from cohabitation with him if she acted like any reasonable person in her position”

The law governing desertion as a ground for divorce was also discussed by *“Rayden on Divorce”* in which the Learned author stated as follows;-

“Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse, but the physical act of departure by one spouse does not necessarily make that spouse the deserting party”.

See also the *legal position taken in Halsbury's Law of England 3rd Edition Vol 12* stated in the following words;-

“In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discharged attempts at defining the desertions, there being

no general principle applicable to all cases”

Therefore in law the term desertion cannot be said to have exhaustive definition as facts and circumstances of each case may be distinctively different. The issue of the language used in its definition imports within it wilful neglect of one of the party’s towards the other in a marriage. This therefore means that one of the parties has neglected to fulfil his or her obligations in the marriage union, rendering it physically, psychologically and emotionally ruined.

In the instant case Appellant alleged desertion on the part of the Respondent in which he claimed that for seven years both of them have lived separately and outside the marriage union that brings into view of the fact that the Petitioner has not enjoyed the fruits of a marriage union like conjugal rights, companionship, partnership, physical presence, collaboration in home improvement activities etc.

From the petition and subsequent evidence adduced by the Petitioner at that trial court, it is uncontroverted that the Respondent deliberately withdrew from cohabiting and fulfilling the marriage vows and obligations. As the law recognizes it is not the withdrawal from the matrimonial home at Malindi which matters, but from a state of things.

As the Appellant proved before the Learned trial magistrate the act of desertion by the Respondent has remained continuously so for the last seven years. This aggregate period of seven years alleged in the Petition against the Respondent constitutes the criterion for one party to petition for divorce on this ground alone. Marriage is considered sacrament and parties who have consented to fulfil the obligations are encouraged to preserve it as a social institution for the well being of mankind. This special contract can only be set aside on very clear grounds as set up in the marriage act so as to render justice to the innocent parties to that union. From the record when the Petition was filed before the trial court the facts as they stood proved continuous separation of the Respondent from the matrimonial home. That conduct was also proved not be consensual during the intervening period. With this prima facie case on the part of the Appellant duly illustrated by evidence one wonders what else the trial court needed to dissolve the marriage. The deserting spouse exceeded the minimum statutory period with no intention of resumption of cohabitation or companionship.

This was a crystal clear case of desertion by the Respondent without any justification or compelling reasons. There is no corresponding evidence tested under cross-examination that the Appellant is guilty of contributing or condoning the desertion. The burden of proof which was vested with the Appellant was discharged by presenting a prima facie case that the Respondent left the marital home with the intention to permanently forsake the marriage union. The evidential burden did shift to the Respondent and there was no cogent evidence forthcoming to negative the case for the Appellant.

Having applied the law to the facts, it is apparent that the Learned trial magistrate had no basis of declining to grant divorce as prayed for by the Appellant. The Court is more persuaded by the gist of the judgement which ignored the fact that the marriage in issue between the Appellant and the Respondent had broken down irretrievably. This was corroborated by the Matrimonial Cause No.11 of 2018 duly exhibited in the record of appeal at page 17. In that cause the Respondent had accused the Appellant of adultery, desertion and cruelty.

For the court to find that the Petition had no legal foundation whatsoever and to continue to decree existence of a marriage which had since collapsed to me was misapprehension of the facts and the evidence by the Learned trial magistrate. I must confess I find myself in considerable difficulty to understand why the Learned trial magistrate took the view that the aforesaid marriage had not broken down irretrievably. It was clear that the parties were no longer interested in the marriage and that onus was mutually inclusive.

The purpose of the proceedings was not to put the parties together but to divide them so that they can lead their separate lives, which is a human rights reality in a marriage set up. If a marriage has broken irretrievably let the Courts set it asunder and leave the rest of the residual judgement to God, the *Alpha* and *Omega* of a marriage institution. Putting asunder what God hath joined would not have attracted the wrath of God over the Learned trial magistrate. For the Appellant and the Respondent had torn apart their institution of marriage as a whole.

For the reasons given I find that the appeal has merit and the same is allowed with no orders to costs save that the following orders shall abide the appeal;-

a) The marriage solemnized herein between the Appellant and the Respondent under the African Christian Marriage and Divorce Act(now repealed) on 16th day of August, 2003 be and is hereby ordered to be dissolved.

b) The Decree Nisi shall issue forthwith and the same to be made absolute in 90 days from today’s judgement.

It is so ordered.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 31ST DAY OF MAY 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rule).

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