



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 41 OF 2013

TNM.....APPELLANT

VERSUS

JNG.....RESPONDENT

(Being an appeal against the Judgment of Hon. Cheruto C. Kipkorir (Miss))

Resident Magistrate delivered on 20th May 2013)

JUDGMENT

1. The appellant TNM. and the respondent JNG. got married on 13th December 2003 in church at Uthiru in Nairobi. They lived at [Particulars withheld]. On 13th January 2005 the marriage was blessed with a baby boy. Following disagreement, the couple separated in June 2007 and has not lived together since.

2. On 10th September 2012 the appellant filed a petition before the Chief Magistrate's Court at Milimani seeking the dissolution of the marriage. The grounds relied on were cruelty and adultery. She pleaded that there had been attempts by the parties, their parents and their pastors to save the marriage but had been futile. Therefore –

“The marriage between the plaintiff and the defendant has now broken down irretrievably.”

3. The respondent opposed the petition. He denied the alleged cruelty and adultery.

4. The trial court heard the petition. Both the appellant and the respondent testified. A judgment was delivered on 20th May 2013 dismissing the petition, with each party being asked to pay own costs.

5. The appellant was aggrieved by the judgment. On 20th June 2013 she filed this appeal to challenge the same. She questioned why the court, after observing that the marriage was no more, had not dissolved the same. It was claimed in the Memorandum of Appeal that the trial court, after acknowledging the futile efforts at family level to save the marriage, was wrong in not finding that the marriage had irretrievably broken down. It was complained that the trial court had misdirected itself on the standard of proof in regard to cruelty. Lastly, the trial court had failed to consider that even the respondent was not opposed to the dissolution of the marriage.

6. The respondent did not oppose the appeal. Instead, he swore an affidavit to state that he was no longer interested in the marriage, now that the parties had not lived together and/or related for the last ten years.

7. It is the duty of this court to reconsider the evidence tendered before the trial court and to determine whether the findings made were supported by the evidence (**Selle –v- Associated Motor Boat Company [1968]E A 123**). In so doing, this court has to bear in mind that it did not see and hear the witnesses who testified before the trial court. The trial court had the advantage of seeing and hearing the witnesses as they testified. Secondly, this court should 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 is 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 to the appellant (**Choitram –v- Nazari [1984]KLR 327**).

8. In dealing with a divorce petition, the court has to bear in mind the sanctity of marriage. Indeed **Article 45(1)** of the Constitution states that:-

“45(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”

However, under **section 3(1)** of the **Marriage Act (No. 4 of 2014)** –

“Marriage is a voluntary union of a man and wife whether in a monogamous or polygamous union and registered in accordance with this Act.”

A marriage is a contractual relationship between a man and woman who have satisfied the conditions under the **Act**. That contractual relationship can be brought to an end, again as provided for under the **Act**. Under **section 66(2)** of the **Act**, marriage may be dissolved on the following grounds:-

- (a) adultery by the other spouse;
- (b) cruelty by the other spouse;
- (c) exceptional depravity by the other spouse;
- (d) desertion by the other spouse for at least three years; or
- (e) irretrievable breakdown of the marriage.

9. The marriage herein was contracted, and the petition filed and determined, before the **Marriage Act** came into place. The appeal shall be determined under the old law, but as improved by the **Act** under **section 98 (2)**.

10. Lastly, a party cannot be forced to remain in a marriage he/she no longer has value for, or believes in.

11. In **N. –v- N. & Another [2008] IKLR G & F**, the High Court was dealing with a divorce petition that was grounded on cruelty and adultery. Justice Mudan (as he then was) observed 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 and which are felt by them to be intolerable or unreasonable to continue to bear them they are entitled to be released from matrimonial union, the guilty party bearing the consequences.”

The judge further observed that:-

“Whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any other objective standard.”

The court was dealing with the standard of proof when cruelty and adultery are alleged. This was before the **Marriage Act**. What the court observed still holds for petitions filed under the **Marriage Act**. A marriage before and under the **Act** is a voluntary contractual arrangement between a man and a woman and the arrangement cannot be forced on a party who is no longer interested in it.

12. Back to the facts of this case. Both in the lower court and before this court, the parties want the marriage to be dissolved. By the time the petition was filed in 2012, the parties had lived separately for five years. The trial court found that neither cruelty nor adultery had been proved, but was the marriage, for all practical purposes, still in existence? What is it that was left in the marriage if for five years the couple was living apart and not relating in any way? The appellant had pleaded that the marriage had irretrievably broken down. The trial court observed in its judgment as follows:-

“I noted the demeanour of the parties in court at the time of the hearing and it is very clear that the marriage as between them is no more”

It was clear that there was no marriage.

13. I appreciate that the ground that the marriage has irretrievably broken down came in 2014 with the **Marriage Act**. Before then it was not ground for divorce. It is clear that the trial court’s hands were tied in that regard. However, it was pleaded in the ground of cruelty that since 21st June 2007 the appellant had been denied intimacy and conjugal rights. In evidence, the appellant stated that the last time they had sexually related was in June 2007. The respondent did not deny this. In my view, it is cruel to deny the other spouse intimacy and conjugal love. The lower court was, consequently, wrong in finding that cruelty had not been proved. Cruelty was a ground for divorce under **section 8(1)(c)** of the **Matrimonial Causes Act (Cap 152 repealed)**.

14. In conclusion, I allow the appeal. The lower court judgment and decree are hereby set aside. In their place, there shall be a judgment dissolving the marriage between the appellant and the respondent on the grounds of cruelty and that the marriage had irretrievably broken down. *Decree nisi* shall issue and become absolute immediately.

15. In the circumstances of this appeal, and because the respondent did not challenge the same, I ask that each party does bear own costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020

A.O. MUCHELULE

JUDGE