



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

DIVORCE CAUSE APPEAL NO: 53A OF 2018

GKK.....APPELLANT

VERSUS

JWG.....RESPONDENT

(Being An Appeal from the Ruling and Judgment of Hon. Y.M. Baraza Magistrate Delivered On 6th July, 2018)

JUDGMENT

The Appeal arises from the Judgment in Divorce Cause No. 2 of 2018 in CMCC at Kerugoya, which was delivered on the 6th day of July, 2018.

The brief background is that the Petitioner who is now the Appellant in this appeal had filed a Petition of Divorce against the Respondent for the dissolution of Marriage on the grounds of cruelty and desertion.

The Petition was opposed. The appellant filed a Notice of Motion dated 4th of April, 2018 for the Registrar's certificate that the pleadings were in order to be issued. The directions on the place and time of hearing be given. The application was allowed on 20th June, 2018. It is however not clear whether the certificate was issued as it has not been included in the record of appeal. The matter listed for hearing, and was heard before the Trial Magistrate who in his Judgment dismissed the Petition.

The appellant was aggrieved by the Judgment of the Trial Magistrate and has filed this appeal raising the **following grounds:**

- 1. That the Learned Magistrate erred in law and fact by not considering that the respondent deserted the matrimonial home for over three years ago.**
- 2. That the Learned Magistrate erred in law and facts by dismissing the petition on ground of cruelty a fact that the respondent did not proof.**
- 3. That the Learned Magistrate erred in law and fact by not considering that the appellant had a right to engage in another marriage as the said marriage has irretrievably broken.**
- 4. That the Learned Magistrate erred in law and facts by dismissing the petition on false allegations which was not proved.**

The appellant prays that the Appeal be allowed and the said marriage be dissolved.

The brief facts of the case are that;

The appellant then a bachelor and the Respondent then a Spinster were married under a Christian marriage on 22nd September, 2007 at J. L. W. C Getuya Church.

They were not blessed with an issue of the marriage.

Thereafter the Respondent left the matrimonial home.

The Appellant claims that the Respondent has been guilty of cruelty to the Appellant and he listed the particulars of cruelty as follows;

(a) Denying the Petitioner his conjugal rights.

(b) Being cold and callous towards the Petitioner and even refusing to talk to her thus creating an environment that is unhealthy and not conducive to sustain a marriage.

(c) Being rude and using unsavory language towards the Petitioner.

(d) Being disrespectful to the Petitioner and causing her distress and mental anguish.

(e) Desertion.

The appellant claims that by reason of the cruelty he suffered great mental anguish and embarrassment.

He had not condoned or contributed to the cruelty or desertion.

In the Judgment delivered by the Trial Magistrate on 6th of July, 2018 and stated that, the appellant had failed to prove grounds of cruelty and desertion. That the appellant failed to prove this Petition on a balance of probability as required and the Petition was dismissed.

The Respondent filed a reply to the Petition and denied deserting the Matrimonial home and stated that the few times she was out she was either on business duties with permission of the Petitioner or occasioned by the Petitioner's cruelty.

The Respondent further states that the Petitioner is seeking for Divorce due to his cruelty and constructive desertion as he is planning to engage in another marriage which is not only a Criminal offence but also a nullity in Law.

The Respondent further states that the Petition has been brought in bad faith and only meant to act as a threat to the Respondent as it entirely based on imagination and fictions.

That the Petition was brought out of ill motive and corrupt intentions to threaten her and allow him contract another marriage which is illegal as they are married under A Christian Marriage.

That the marriage has not irretrievably broken down.

Her prayer was that the Appeal be dismissed.

The matter came up for directions and the parties agreed to proceed by way of written submissions.

The Appellants' Submission

The appellant submit that desertion is one of the Matrimonial offences upon which a court can order dissolution of a Marriage and she has relied on **Section 65 (C) of The Marriage Act No. 4 of 2014.**

He further submits that, he adduced evidence before the Trial Court to prove that the Respondent had left their Matrimonial home in the year 2015 which was more than three (3) before the Divorce Petition was filed on 21st February, 2018.

That during the hearing the Respondent confirmed that she had deserted the Matrimonial home though she alleged that it is the Appellant who had chased her away.

That the Respondent did not indicate that she ever returned to the Matrimonial home which is an indication that she no longer took up her responsibilities as a wife and the parties never resumed cohabitation.

He further submits that during the hearing he had testified that the Respondent was cruel towards him and said that the Respondent used to insult him and used to come home late and at one time she left sometime in the year 2015 and she switched off her phone, such that it was difficult for the two of them to have some communication.

This amounts to cruelty as she caused him psychological torture, though he had hoped that they would talk and settle their differences. However, this was not possible as the Respondent had cut all communications.

He further submits that the marriage had irretrievably broken down, that the claim by the Respondent that he wanted to marry another wife was not supported by any evidence.

He further submits that the Respondent said a lot of things which were never supported by any evidence.

He further states that he had raised the ground that the Respondent had denied him conjugal rights which was not considered by the Trial magistrate.

He has relied on the case of; K.A. S -vs- M.M. K. Divorce Cause No. 10 of 2016 High Court of Kenya at Malindi where Justice Kariuki referred to the House of Lords findings in Gollons -vs- Gollons (1963)2 ALL E.R 966 H.L. (1964 AC644 and Williams -vs- Williams (1963)2 ALL E.R. 944 H.C. (1964) AC 694 where it was stated that;

“ the balance in claims of cruelty as a ground of dissolution of the marriage was in favour of giving relief to a complainant in a situation which has become intolerable such that if the spouse causes injury to the complainant’s health or is likely to do so

It will amount to cruelty if it is grave and weighty and is that the Petitioner cannot reasonably be expected to put up with it or to tolerate it.”

That from the evidence adduced by both parties before the trial court it was clear that both parties had tried reconciliation which never bore any fruits a clear indication that the marriage is irretrievably broken down with no hope of reconciliation and redemption of the said marriage.

For The Respondent;

She has raised a Preliminary issue on the ground that the Appeal was filed out of time and she contends that the Judgment was delivered on 6th July, 2018 and the Appeal was filed on 27th August, 2018 and she was served with a purported Amended Appeal dated 27th November, 2018.

She submits that the Appeal is bad in Law as it is brought out of time and hence it should not be allowed on that ground.

She submits that sometime in the year 2017 they sat down and with the assistance of the family members they talked and she went back to the matrimonial home. The fact that she went back in the year 2017 does not qualify the appellant to file a Divorce on grounds of Desertion. It is her contention that the Appeal was brought in bad faith, as it is the Appellant who used to chase her away. The matter would be discussed by family representatives she would go back and continue living with the appellant.

That the marriage has always survived the storms and should not be torn apart.

That the grounds of dissolution of marriage have not been proved.

I have considered the Appeal and the Submissions.

The Issue which arises for determination is;

- Dissolution of Marriage.

Under Section 65 of the Marriage Act No. 4 of 2014 it is provided.

The grounds for dissolution of marriage are laid out;

The Section provides;

Grounds of dissolution of a Christian Marriage.

“A party to a marriage celebrated under part 3 may petition the court for a decree for dissolution of marriage and the ground of;-

(a) One or more acts of Adultery committed by the other party.

(b) Cruelty, whether mental or Physical inflicted by the other party on the petitioner or on the children, if any of the marriage.

(c) Desertion by either party for at least three (3) years immediately preceding the date of presentation of the petition.

(d) Exceptional depravity by either party.

(e) The irretrievable break down of the marriage.”

These are the grounds a party seeking Divorce based on a Christian marriage is required to prove.

It is the Appellant who had the legal burden to prove the allegations of cruelty and desertion.

It is trite that he who alleges must prove **Section 107 of the Evidence Act.**

Under Section 107, 108 and 109 of the Evidence Act it is provided that;

Burden of proof

(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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Under Section 65 (C) of the Marriage Act

“ The desertion by either party by at least three years immediately preceding the date of presentation of Divorce petition is a ground for dissolving a Christian Marriage.”

In his evidence the appellant testified that they had lived together for five years and the respondent left the matrimonial home and cut down communication. She then went and reported to his Bishop that he had chased her away. They sat and discussed and she agreed to go back home.

Thereafter she left the Matrimonial home again and the Respondent went and talked with her parents and she went back. She again ran away from home and later went and carried away the household items and left the matrimonial home.

In cross-examination the Appellant stated that the Respondent had stayed away from the Matrimonial home for three (3) years.

The appellant did not give the details of as to when the Respondent left the matrimonial home and when she returned.

The Appellant failed to prove that the respondent had deserted the matrimonial home for a period of three (3) years and the Law requires that a party seeking dissolution of the marriage on ground of desertion he must prove that the other party had deserted the matrimonial home for a period of at least three years.

What emerges from the evidence of the appellant is that there were discussions every time the respondent left the matrimonial home, which would lead to the Respondent returning to the Matrimonial home.

This is a clear indication that the Marriage has not irretrievably broken down.

The Trial Magistrate found that the appellant failed to prove the ground of desertion.

The Respondent in her evidence testified that it is the appellant who chased her away in 2015, alleging that she was not able to give birth.

I find that the Appellant failed to prove the ground of desertion.

The allegation of desertion must be proved with cogent evidence which I find the Appellant did not adduce. There was evidence that the appellant used to travel a lot out of the Country saying that he was going to preach.

On the Issue of cruelty the appellant did not adduce any evidence to prove any one incidence where the respondent treated him with cruelty.

He also never testified that the Respondent denied him his conjugal rights.

The appellant did not adduce evidence to prove cruelty and denial of conjugal rights.

The Trial Magistrate in his Judgment found that the appellant failed to prove grounds of cruelty and desertion.

Having considered the evidence which was tendered before the Trial Magistrate I find that;

- He arrived at the inevitable conclusion that the appellant had failed to prove the grounds upon which a

court will order dissolution of the marriage.

- He did not discharge the burden of proof.

The Respondent has pointed out that this Appeal was filed out of time without leave of the Court.

SECTION 79 (g) of The Civil Procedure Act Provides:

“ Every Appeal from a Sub-ordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period, any time which the Lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order; provided that an Appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

The Judgment of the Trial Magistrate was delivered on 6th July, 2018 and the Appeal was filed on 27th August, 2018, The appellant also filed a purported amended memorandum of appeal.

The Appeal was filed out of time and without leave of the Court. The Appeal was therefore not properly before the Court. Failure to file the Appeal in time is a procedural technicality. The Respondent did not raise the ground as an a Preliminary objection but proceeded to file submissions to the appeal. **Under Article 159 (2) (d) of The Constitution** It is provided that;

“ In exercising Judicial authority, the courts and Tribunals shall be guided by the following principles - Justice shall be administered without undue regard to procedural technicalities.”

This is buttressed **Under Section 1 A & 1 B of The Civil Procedure Act.** On the overriding objectives of the Act which calls on the court to do Substantive Justice.

SECTION 3A which gives the court power to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the Court.

As such I consider that the fact the Appeal was filed out of time is a procedural technicality which has not resulted In any prejudice to the Respondent who has ably opposed the Appeal.

In Conclusion:

I find that the finding by the Trial Magistrate was proper as the Appellant failed to discharge the burden of proof to warrant the Court to order the dissolution of the said marriage.

I find that the appeal is without merit and is dismissed.

Dated, signed at Kerugoya this 29th day of May 2020.

L. W. GITARI

JUDGE.