



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**FAMILY DIVISION**

**HIGH COURT CIVIL APPEAL 47 OF 2016**

**(CHIEF MAGISTRATES COURT CASE 594 OF 2014)**

**JMNK.....PETITIONER**

**-VERSUS-**

**JGG.....RESPONDENT**

**JUDGMENT**

**ISSUE**

This is an appeal from the judgment of the Trial Court on 24<sup>th</sup> March 2016 whose finding was/is that the Petitioner has not been able to establish any of the grounds of divorce as required by law thus the petition for divorce was dismissed with no orders as to costs.

**PROCEEDINGS**

The matter was admitted on appeal on 22<sup>nd</sup> May 2017. The same was mentioned by Deputy Registrar Family Division on 27<sup>th</sup> November 2017 in the presence of Counsel for Appellant and Counsel for Respondent. Notices were issued.

The matter was mentioned in Court on 19<sup>th</sup> April 2018 and parties applied to file written submissions. Counsel for the Respondent intimated to Court that the appeal was overtaken by events as parties reconciled and lived together. Counsel for the Appellant stated that his client suffered trauma and left home. She is back to the home not as wife but as part owner of the home. The Court directed that if parties reconciled they were to write to Court to confirm the state of affairs so as to stop proceedings and mark the Court file closed and matter as settled. To date the confirmation of reconciliation has not been forthcoming; hence the court is proceeding with the appeal.

The Appellant filed written submissions but to date the Respondent has not filed the same.

**FACTS AS PER TRIAL COURT RECORD**

**PLEADINGS**

The appellant and respondent were lawfully married each other on 7<sup>th</sup> October 1989 and their marriage was solemnized at St Marks's Church in Westland's Nairobi on 7<sup>th</sup> October 1989. The parties cohabited in various places in Nairobi between **1989 and 2014**. The petitioner filed petition for dissolution of the marriage on 17<sup>th</sup> December 2014 based on grounds of cruelty and desertion which she argued led to the marriage breaking down irretrievably. The respondent filed answer to Petition on 17<sup>th</sup> March 2015, in his reply denied the said allegations. He confirmed that he lived/lives in the matrimonial home with the Petitioner L.R. No. [...] in Nairobi. He confirmed he financially supported the Petitioner and family celebrated her birthdays and Valentine days with her and they have been together for 25 years. The matter was heard on 10<sup>th</sup> February 2016 and the petitioner and her witness gave oral evidence reiterating the averments in her petition. The court in its judgment delivered on 24<sup>th</sup> March 2016 found that the petitioner had not been able to prove any of the grounds of divorce as required under the law.

The petitioner aggrieved by the said judgment filed her memorandum of appeal dated 22<sup>nd</sup> April 2016 and subsequently her record of appeal on 8<sup>th</sup> March 2017. She raised 5 grounds of appeal as follows;

- a) The learned trial magistrate erred in fact and in law in holding that the matrimonial offences of cruelty and depravity had**

not been proved by the petitioner.

- b) That the learned trial magistrate erred in fact and in law in holding that the marriage between the petitioner and the respondent had not irretrievably broken down.
- c) That the learned trial magistrate erred in fact and in law in failing to consider the petitioner's evidence which was clearly not controverted and or rebutted.
- d) That the learned trial Magistrate erred in holding that life is normal in the matrimonial home when there was sufficient evidence to the contrary.
- e) That the learned trial Magistrate erred in law and fact in failing to appreciate the totality of the evidence adduced and arrived at the wrong decision.

The appellant seeks for orders that;

- a) The appeal be allowed with costs
- b) That the whole judgment delivered by Senior Principal Magistrate delivered on 21<sup>st</sup> March 2016 be set aside.
- c) That the Petitioner's petition be allowed as prayed in the petition.
- d) That the cost of the appeal be awarded to the petitioner.
- e) That this court be pleased to make such other orders as it may deem fit and just in the circumstances.

#### **SUBMISSIONS**

In her submissions, the Appellant raised two issues for determination;

- a) Whether the petitioner established to the required standard of proof the grounds of divorce as required under the law.
- b) Whether in the absence of the respondent's testimony the court was entitled to disregard the petitioner's evidence that was supported by an expert testimony.

It was submitted that the petition for divorce was grounded on 2 grounds. Cruelty and exceptional depravity.

In MULHOUSE V. MULHOUSE, [1964] 2 All ER 50, which Chesoni, J. (as he then was) cited with approval in MEME V. MEME (supra), Sir Jocelyn Simon P. while considering the gravity and weight of the misconduct that would constitute cruelty, stated as follows:

*“Conduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief.”*

*Thus conduct, which is part of the “reasonable wear and tear” of a marriage, does not constitute cruelty. Regarding the nature of injury to the petitioner's health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:*

*“[I]t must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it.”*

It was submitted that the questions of cruelty and desertion are all questions of fact. In the case of; ALEXANDER KAMWERU V ANNE WANJIIRU KAMWERU [2000]eKLR, it was stated;

*“Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”*

It was submitted that there is no comprehensive definition of cruelty and each of the petitions on cruelty must be determined on its own facts. That whether cruelty is proved is a matter of fact and degree. That this court does not have power to examine and re-examine, re-evaluate the evidence and findings of facts at trial in order to determine whether the conclusion reached in evidence should stand except as stated in the case of; MOHAMMED MAHMOUD JABANE vs HIGHSTONE BUTTY TONGOI OLENJA CIVIL APPEAL 2 OF 1986;

***“If facts are based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching findings he did”.***

## **DETERMINATION**

The Trial Court record confirms evidence of **PW1** Dr Ian Kanyanya who stated as follows in part;

***“I know J. She is my patient. She has been my patient since 13<sup>th</sup> October 2015. She presented herself unwell and needed psychiatric review...She stated she felt sad, heaviness in her head unable to sleep well, withdrawn socially and having lost interest in many things including her job. I examined her mental status. She was sad and tearful but was not confused or had perceptual disturbances. She was not suicidal. She was suffering from a condition called major depressive disorder. Her history was that she had marital problems. She has been married for 26 years and the spouse has been verbally abusive to her and this was becoming unbearable. This triggered her condition”.***

**PW2** JNG testified as follows in part;

***“From 2011 I started seeing Dr Kioko and he would treat me for anxiety, ulcers and stress. The stress is attributed to the anxiety and he told me to manage my stress. I have never had any problem except my marriage. He drinks a lot and becomes more insultative. He is not physically violent. I was seen by Prof. Kioi from 2003 to date. Further he told me that I needed to go and sort out my stress. My stress was causing neurological issues and I could not sleep or work well. I have seen Dr. Fred Mukachi. I had anxiety attacks and he did tests and said my stress levels were high hence hypertension”.***

This is a civil proceeding and as such he who alleges must/shall prove as envisaged in **Section 107 of the Evidence Act cap 80**.

The Petitioner deponed in the Petition grounds/particulars of cruelty desertion and exceptional depravity on the basis of mental anguish torture and emotional stress. The Respondent deprived her of her marital rights, love and affection and abandoned his obligations as a family man.

In her testimony, as shown above she elaborated the instances as; of cruelty [though] he is very social he is also insulting in vernacular and humiliating. However with people he presents us as very happy [family]. There is deprivation of conjugal rights and they live separately in the house.

The Respondent's Answer to Petition outlines various activities that he has undertaken to support the Petitioner and family in general. These consist of financial support, membership of clubs and various trips functions and outings they have taken as family.

The Petitioner testified and called an expert witness, a doctor and she produced medical documents of her health/medical status and/or progress by Dr Kioko. Prof Kioi and Dr Bukachi. This evidence was not considered or taken into account in determination of the petition.

On the hearing date, the Respondent did not attend Court and the testimony of the witnesses was not controverted by any evidence to the contrary. No reasons were advanced for the Respondent's absence despite service nor indication of appearing before the Court on a later date to tender oral evidence.

The Testimony of PW1 & PW2 though uncontroverted, if untrue the Respondent and/or his advocate did not appear to cross examine the witnesses on the veracity of the evidence and credibility of witnesses.

The Respondent never during the proceedings tendered evidence or testified.

Each party is to discharge their burden of proof in this case on a balance of probabilities.

If the Respondent did not appear in Court, his advocate or himself cross examine witnesses how would the uncontroverted evidence on record be found insufficient or untrue in establishing the claim in the absence of evidence to the contrary?

The claim/grounds are not to be proved beyond reasonable doubt but on a balance of probabilities.

PW1 proved that the Respondent was/is cruel to her by circumstances cited/quoted above. She proved that as a result she has medical conditions as confirmed by PW1 and doctors' letters produced.

The appellant in her petition raised cruelty as one of her ground for divorce. Cruelty is defined by the Black's Law Dictionary 8<sup>th</sup> Edition as;

***“The intentional and malicious infliction of mental and physical suffering on a living creature”.***

It further defines “mental cruelty” in the following terms: -

***“As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”***

Cruelty by mental anguish to the Petitioner has been established on the basis of medical evidence and reports adduced in Court .They remain unchallenged to date. The Respondent did not testify in Court. Nor seek Counsel to cross examine the witnesses and failed to appear and/or file submissions in the instant appeal.

Cruelty is also basis for an irretrievably broken down marriage.

*Section 66(6) of the Act provides that: A marriage has 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;*

KAMWERU V. KAMWERU (2000)eKLR where it was held,

*“As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties... It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage...”*

*What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down.”*

The Petitioner also raised her grounds for divorce in the Petition that as a result of constructive desertion and cruelty the marriage has irretrievably broken down. In her testimony she ruled out chances of reconciliation. They had used friends and the Pastor and resulted in insults.

#### **DISPOSITION**

- 1. From the above, the Court finds that the evidence on record is reevaluated by this Court as the Court found there was misapprehension of the evidence based on wrong principles in reaching findings.**
- 2. The evidence of PW1 the doctor and medical reports produced were not considered and ought to be taken into account. Secondly, inspite of the Respondent’s absence and/or testimony the evidence on record that was uncontroverted was ignored. Finally, despite parties and Counsel being granted opportunity to file written submissions to the appeal or confirm to Court in writing that they are reconciled, the appeal is unopposed. The Appeal is granted.**
- 3. The marriage solemnized between the Petitioner and Respondent is hereby dissolved.**
- 4. The decree nisi to issue forthwith and decree absolute in 3 months**
- 5. The judgment of 24<sup>th</sup> March 2016 is set aside and all consequential orders.**
- 6. The parties may exercise their right of appeal to the Court of Appeal.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23<sup>rd</sup> JANUARY 2019.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**Mr. Ndolo holding brief Mwenda for the Applicant**

**No Appearance for the Respondent**

