REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 2 OF 2018

JAM.....APPELLANT

=VRS=

SNM.....RESPONDENT

Being an appeal against the Judgement & Decree of the Hon. A. C. Towett - RM

in Nyamira CM Div. Case No. 5 of 2017 dated and delivered on the 6th day of December 2017

JUDGEMENT

The appellant sued the respondent for divorce but the lower court dismissed his petition on the ground that he did not prove the existence of a valid marriage that was capable of being dissolved by the court. The respondent did not defend those proceedings. Being aggrieved by the judgement of the trial Magistrate the appellant preferred this appeal.

The appeal is premised on grounds that: -

> **"1. The Learned Trial Magistrate erred in law and fact by not taking cognizance of the fact that the appellant's case and evidence in the lower court was, basically, uncontroverted.**
>
> **2. The Learned Magistrate erred in law and fact by failing to consider, entirely, the appellant's evidence in her judgement.**
>
> **3. The Learned Trial Magistrate failed to properly and/or evaluate the entire evidence on record and thus reached a wrong and erroneous decision.**
>
> **4. The Learned Trial Magistrate erred in law and fact when she decided the case before her on the basis of presumptions and not evidence adduced in court and on record.**
>
> **5. The Learned Trial Magistrate erred in law and fact by failing to recognize and appreciate the fact that the appellant had proved his case on a Balance of Probability.**
>
> **6. The Learned Trial Magistrate erred in law and fact by dismissing the appellant's merited petition based on trivial reasons.**
>
> **7. Had she considered and properly evaluated the appellant's evidence on record together with relevant exhibits, the learned Trial Magistrate would not have dismissed the lower court case on a trivial reason that "he had not paid any dowry to approve the marriage.".**
>
> **8. The Learned Trial Magistrate's findings in the judgement are, clearly, against the weight of evidence advanced by the appellant and this constitutes a miscarriage of justice."**

By this appeal the appellant urges this court to set aside the judgement of the lower court and to substitute it with an order dissolving the marriage between him and the respondent. He also urges this court to issue a Decree absolute and to grant him the costs of this appeal. The appeal which is vehemently opposed was canvassed by way of written submissions.

In the petition, the petitioner avers that he married the respondent in April 2008; that she had three children from a previous union and that due to unwillingness to conceive and exceptional depravity she never bore any children for him. He accuses her of being a drunkard, abusive and cruel to him as well as his children with his first wife. He contends that due to her conduct the marriage has irretrievably broken down to the extent that no amount of amends can save it and that he can no longer bear the verbal and psychological abuses she puts him through and

the marriage should therefore be dissolved.

In court, the petitioner reiterated that he married the respondent as a second wife in April 2008 but he did not pay any dowry; that she already had three children but would not bear children with him, and that she is a drunkard. He stated that she began drinking chang'aa since 2008 and despite talking to her she has refused to stop. He also testified that she insults him in front of the children and that on 19th February 2017 she beat his 14-year-old son when he intervened to ask her why she was abusing him, the petitioner.

He testified that although he took his son to hospital and reported the matter to the police no action was taken against the respondent and he wanted the marriage to be dissolved.

After considering the evidence before her the trial Magistrate found that since the petitioner had admittedly not paid dowry for the respondent there was no marriage capable of being dissolved. She therefore dismissed the petition.

As the first appellate court I have a duty to reconsider and evaluate the evidence so as to arrive at my own independent findings. In addition to doing the above I have also considered the submissions of the advocates for the parties. I am not persuaded that the petitioner proved his case on a balance of probabilities. In the first place he did not, apart from asserting he married the respondent in April 2008, prove there was a marriage. Whereas prior to the Marriage Act 2014 even a long period of cohabitation was recognized as a marriage, the petitioner did not adduce evidence of such cohabitation. He did not call any witnesses to prove that he had indeed lived with the respondent as his wife since 2008. Whereas **The Marriage Act** now defines **cohabit** as **"…..an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage"** in my mind had the alleged union between the appellant and the respondent been proved it would have just like marriages under written law or customary law been saved by the provisions of **Section 98 (1) of the Marriage Act** which states: -

> ***"(1)A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act."***

The marriage was however not proved. It is also instructive that the grounds upon which the appellant sought to dissolve the alleged marriage are grounds for dissolution of a customary law marriage. **Section 43 of the Marriage Act** provides that a customary marriage shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage and **Sub-section 2** which is most relevant to this case states: -

> ***"(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage."***

The appellant admitted that he did not pay any dowry and accordingly he cannot properly bring his petition under the ambit of a customary law marriage.

In the upshot I find no merit in this appeal and the same is dismissed with costs to the respondent. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of May 2019.

E. N. MAINA

JUDGE