



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL APPEAL NO.25 OF 2012**

**JGW.....APPELLANT**

**VERSUS**

**TW ..... RESPONDENT**

***(The appellant having been aggrieved and dissatisfied with the Judgement delivered by Hon. D.M. Ochenja – SPM on 1<sup>st</sup> November, 2012 in Kerugoya SPM CC No.136 of 2011)***

**JUDGEMENT**

1. The appellant filed a case against the Respondent seeking dissolution of marriage on grounds of cruelty. This was denied by the Respondent who claimed that efforts are being made to reconcile them.

The matter proceeded with appellant's case who called 3 witnesses while the Respondent called 4 witnesses.

**APPELLANT'S CASE**

2. He alleged that the Respondent used to insult her and refused

to change her ID to include his names. In addition, one day he found her with another man whose names he does not know. He stated during cross examination that the man is not a witness in court but he could call the area Chief as his witness.

PW2 was his uncle and he testified that the parties failed to agree on certain issues and she used to commit adultery. On 22.12.2002, the appellant took him to Kandundu where they met Respondent with another man.

PW 3 also his uncle stated that the parties parted ways a long time ago and the Respondent refused to sleep at the matrimonial home.

**RESPONDENT'S CASE**

3. She alleged that the appellant beat her and she reported at Kagio police station where she was issued with P3 form which she produced in court. She went to her parent's home and then returned to her matrimonial home but the appellant chased her away. She reported the matter to the area Chief and D.O. She refuted the claim of adultery.

DW2 a relative confirmed the assault on the Respondent whereupon she took to her to hospital. They later heard the appellant had married another wife.

DW3 a son of the parties stated how the appellant beat the Respondent with a metal rod and that the appellant is married to another woman.

DW4 the Chairman of the clan stated that efforts to reconcile the parties have been futile and the appellant is married to another woman.

4. As per the Judgement, the court dismissed the case on ground that the appellant had failed to prove adultery, desertion and cruelty on the part of the defendant. Being aggrieved the appellant filed an appeal alleging that the learned Magistrate erred in Law and fact in;

**1. Making judgement against the weight of evidence**

**2. Finding that the Appellant called no witness**

**3. Disregarding the evidence tendered by the appellant.**

**4. Disregarding the fact that the appellant proved his case to the required standard.**

5. The parties herein conducted customary marriage in 1982 therefore **Section 69 of the Marriage Act** on dissolution of Customary marriage is applicable.

**Section 69 (1) of the Marriage Act provides:**

A party to a marriage celebrated under Part V may petition the court for the dissolution of the marriage on the ground of;

**a) Adultery**

**b) Cruelty**

**c) Desertion**

**d) Exceptional depravity**

**e) Irretrievable breakdown of the marriage or;**

**f) Any valid ground under the customary law of the Petitioner.**

6. The appeal proceeded by way of written submissions. For the appellant it was submitted that the appellant filed a suit in the lower Court seeking for dissolution of the marriage between him and the Respondent. Three witnesses testified in support of the suit while four witnesses opposed it. The trial Magistrate dismissed the suit with costs. He submits that there was ample evidence on record that the marriage between the appellant and the Respondent has irretrievably broken down. Each party gave evidence on cruelty. He submits that there is no likelihood of salvaging the marriage.

**(1). DESERTING THE MATRIMONIAL HOME IN 1997**

It is submitted that the Respondent deserted the matrimonial home for a period of 14 years to the time he filed the divorce. The Respondent said she deserted the matrimonial home in 1999.

He submits that desertion was proved and it was unreasonable for the trial Magistrate to fail to grant the divorce.

**(2). CRUELTY**

The appellant submits that he set out the particulars of cruelty. That the Respondent was caught in bed with another man. The Respondent refused to take a national identify card in the name of the appellant.

The evidence was tendered by PW2 that Respondent was assaulted on allegation that she had called the appellant a cripple.

**(3) THE MARRIAGE HAS IRRETRIEVABLY BROKEN DOWN**

It is submitted that it came out clearly from both sides that the marriage has irretrievably broken down.

It is further submitted that the trial Magistrate erred by stating that the appellant did not call witnesses when he had called two.

He cited the case of **EWV VS. PMW & ANOTHER.**

7. The Respondent submits that the main ground for seeking divorce was cruelty and he raised eight grounds. That only one ground required consideration. The allegation of adultery needed to be proved. She submits that the trial Magistrate considered the evidence adduced. Evaluated it and arrived at the correct opinion that the case was not proved. That the identity of the person who she was alleged to have committed adultery with was not given. That there is no reason to interfere with the decision of the trial Magistrate.

8. I have considered the submissions and the proceedings before the trial court. From the plaint dated 27.6.2011 the appellant had raised only one ground at Paragraph 5. This is a ground of cruelty and particulars are stated. He stated that the respondent deserted the matrimonial home. It is trite that a party is bound by his own pleadings. The appellant had not pleaded that the marriage had irretrievably broken down.

9. The Court of Appeal considered at length what constitutes cruelty.

**JSM VS. ENB [2015] eKLR**

The Court of Appeal held;

There is consistent case law on what constitutes cruelty as a matrimonial offence. In **MEME Vs. MEME [1976-80] KLR17**, it was held that to establish cruelty, the Petitioner must show to the satisfaction of the court;

- i) Misconduct of a grave and weighty nature**
- ii) Real injury to the complainant's health or reasonable apprehension of such injury**
- iii) That the injury was caused by misconduct on the part of the respondent; and**
- iv) That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word...**

**Chesoni J.** further stated in **MEME V. [supra]**, that the burden lies on the Petitioner to establish injury or reasonable

apprehension of injury to life, limb or health to herself, or himself before the Respondent's conduct can be described as cruel.

10. As regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, this Court, in **KAMWERU V. KAMWERU [2000], eKLR**, stated as follows;

“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”.

“The last point, which has been made time and again by various court, and which is worth reiterating here, is that there is no comprehensive definition of cruelty. Each petition found on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore, it is not very helpful to rely on facts of previously decided cases as precedent.

In regard to irretrievable breakdown of the marriage, the Court of Appeal proceeded to state as follows;

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.

11. 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”.

12. It is trite law that he alleges must prove. Section 107 of the Evidence Act provides;

**(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.**

The ground for dissolution of marriage in this case was only cruelty and there was absolutely no evidence of physical cruelty that was alleged. Evidence was tendered that was found with another man.

However, evidence was adduced of the appellant having beaten the respondent in 1999, she was issued with P3 form and was attended at the hospital. It has been proved that the parties have not lived together since 1999 and any attempts at reconciliation by the Respondent have been futile therefore as per Section 69(1) of the Marriage Act, the marriage could have been said to have irretrievably broken down. Though the same was not one of the grounds of dissolving the marriage herein, prolonged period of desertion may amount to cruelty given the circumstances of this case where the appellant is a person living with disability. See **Kamweru -V- [supra]**.

13. The appellant had in the particulars of cruelty alleged that the Respondent had deserted the matrimonial home for 14 years.

The Respondent alleged that he left the matrimonial home in 1999 which was a period of twelve years by the time the appellant filed divorce. Desertion is a ground of divorce under **Section 69 (1) (c) of the Marriage Act.**

The appellant proved that the Respondent had deserted for a period of over twelve years. Desertion is a ground of dissolution of marriage. The Respondent has deserted the matrimonial home for a long time. The trial Magistrate erred by stating that the evidence of the Plaintiff was not corroborated and yet he had called two witnesses.

14. The trial Magistrate erred by failing to find that desertion was proved. **Section 69(1) of the Marriage Act** sets several grounds of dissolution of the marriage. A party need not prove all the grounds. If one is proved to the satisfaction of the court, the marriage will be dissolved. Where there is a long period of desertion it amounts to cruelty based on the circumstances of this case it leads to an inference that the marriage has irretrievably broken down. The trial Magistrate erred by dismissing the suit. The appeal succeeds. I order as follows;

**(1). The judgment of the trial Magistrate is set aside.**

**(2). It is substituted with an order allowing the plaintiffs claim, that is to say the marriage between the appellant and Respondent is dissolved.**

**(3). Each party to bear its own costs.**

**Dated at KERUGOYA this 20<sup>th</sup> day of December, 2019.**

**L. W. GITARI**

**JUDGE**