REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 47 OF 2016

C K.....APPELLANT

VERSUS

N K C.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. R.M.Ndombi (RM)

in Kisumu CMCC Divorce No.36 OF 2013 delivered on 23rd June, 2016)

JUDGMENT

1. C K sued ***(hereinafter referred to as appellant)*** sued **NKC** ***(hereinafter referred to as respondent)*** in the lower court praying for dissolution of their marriage and custody of the issue of the marriage.

The respondent filed a statement of Defence and in denying the claim conceded that their marriage had been rocky but could still be salvaged.

2. In a judgment delivered on ***23rd June, 2016,*** the learned trial Magistrate found that the appellant had not proved his case on a balance of probability and dismissed it with an order that each party bears its own costs.

The Appeal

(1) The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 8th July, 2016 which sets out 3 grounds of appeal to wit:-

> **1) The Learned Magistrate erred in in failing to appreciate and apply the well-known principles of law regarding Divorce matters thus arriving at a decision contrary to the law**
>
> **2) The Learned Magistrate totally misdirected herself in evaluation of the pleadings and facts before her especially with regard to the facts adduced to prove that the union had irretrievably broken down**
>
> **3) The Learned Magistrate erred in law in dismissing the petition on extraneous grounds not pleaded**

SUBMISSIONS BY THE PARTIES

3. When the appeal came up for mention on 10.10.17; the parties' advocates agreed to canvass it by way of written submission which they dutifully filed.

Appellant's submissions

4. It was submitted for the appellant that the appellant had proved emotional cruelty and adultery on the grounds that the respondent used to leave the matrimonial home and spend unexplained away from the matrimonial home. To this end, the appellant relied on **SCC v MKC [2014] e KLR Divorce Cause No 16 of 2012.**

Respondents' submissions

5. The respondents urged the court to reject the appeal on the grounds that physical cruelty was proved and that adultery had been denied. Respondent relied on **Strong v Strong. [1990] KLR 118** and **N v N [2008] KLR 685.**

The evidence

6. The appellant testified that the respondent would fail to return home or return home late from her drinking escapades and that she had illicit relations with Fredrick Abuor and Evans Onyango. It was his evidence that they separated in 2012 and that efforts to reconcile them had failed.

Respondent denied that she was a heavy drinker and instead stated that she was a social drinker. She denied acts of cruelty and adultery. She conceded that they separated for 4 months in 2012, resumed cohabitation and fell out again in 2014 and have since then not resumed cohabitation.

Analysis and Determination

7. This being the first appeal, I have a duty to re-evaluate the evidence tendered before the trial court. I have considered the guiding principles laid down by the Court of Appeal in **Makube Vs. *Nyamiro [1983] KLR 403*** as follows:

> **" … a Court on appeal will not normally interfere with a finding of fact by the trial court unless it is 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 the findings he did."**

8. Similarly, in the case of ***Kiruga v Kiruga & Another (Supra)***; the Court accepted the principle laid down by the House of Lords in ***Watt v Thomas [1947] 1 All ER 582*** where Sir O'Connor said:-

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."**

9. On the issues of cruelty and adultery, the learned trial magistrate after an examination of the pleadings and the evidence found, and rightfully so, that there was little basis on which to conclude that the Respondent was cruel to the Petitioner or that she was guilty of adultery.

10. On whether the marriage had irretrievably broken down, the learned trail magistrate rightfully appreciated the provisions of section 66 (5) of the Marriage Act that a marriage is considered to have broken down irretrievably if spouses have separated for at least two years among other grounds. The learned trial magistrate also appreciated that the marriage had challenges and faulted the couple for not making any efforts to salvage it. The trial court also noted that the petitioner had stated that he was no longer interested in the marriage.

11. I have considered the case of **N v N [2008] 1 KLR 16**, where Madan J (as he then was) observed that:

> "***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 then, they are entitled to be released from their matrimonial union …"***

12. In the circumstances of this case where the Petitioner claimed that he has been undergoing emotional anguish due to the Respondent's conduct, the most reasonable cause of action is to dissolve the marriage. In this regard, this Court is persuaded by the reasoning in **NMM v SJC, Divorce Cause No. 1 of 2013** where Karanja J stated that:

> **" …** ***it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives …"***

13. The respondent conceded that the couple separated for 4 months in 2012, resumed cohabitation and fell out again in 2014 and have since then not resumed cohabitation. This petition was presented in 2016 which was 2 years after the parties separated. The separation is in my considered view is sufficient proof that the marriage between the Petitioner and the Respondent can longer be sustained.

14. From the foregoing; I am satisfied that the learned trial magistrate would have arrived at a different decision had she considered that the couple had been separated for 2 years preceding the presentation of the petition. I therefore find that the best interest of the couple and the interest of justice will be served if the marriage is dissolved and they be allowed to move on with their respective lives.

Orders

15. In the final analysis, this Court orders **THAT**:

i. The marriage between the Petitioner and the Respondent that was solemnized on 14th August, 2004 be and is hereby dissolved

ii. Decree nisi to issue forthwith

ii. Decree absolute to issue thereafter within 30 days

iv. The custody of the child to remain with the Respondent, but with access rights to the Petitioner

v. The maintenance of the children of the marriage may be canvassed upon each of the parties filing affidavit of means before the Children's Court

vi. Any aggrieved party is at liberty to apply

vii. Each party shall bear its own costs of the suit.

DATED AND DELIVERED THIS *8th* DAY OF *February*, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Caroline

Appellant -

Respondent -