



REPUBLIC OF KENYA

IN HIGH COURT (FAMILY DIVISION) NAIROBI

CIVIL APPEAL 71 OF 2018

(DIVORCE CAUSE 102 OF 2015)

P K M.....APPELLANT

VERSUS

A W K.....1ST RESPONDENT

D A.....2ND RESPONDENT

JUDGMENT

By a Memorandum of Appeal dated 18th July 2016 and filed on 19th July 2016, the Appellant was dissatisfied with the whole judgment and decree given by the Trial Court on 20th June 2016 and appealed on the following ground;

1. The learned Resident Magistrate erred in law and fact by holding that the grounds of adultery and cruelty had not been proved to the required threshold when on the contrary the Trial Court misapprehended and failed to properly evaluate the filed pleadings, written submissions by parties and the evidence on record.

The Appellant submitted that he had proved the allegations on his Petition as follows:

a) The Respondent had committed several specific acts of cruelty, including *inter alia* being cold and unreceptive towards the Appellant, willful lack of communication and denial of conjugal rights without lawful justification, abandoning her marriage without lawful justification and failing to provide for the Appellant, psychologically, emotionally, financially and or otherwise after the Appellant was terminated from employment of Kenya Airways, pledging credit of goods worth Kshs. 78,800/- to F N and binding the Appellant, without his knowledge or consent, despite not having any source of income to sustain himself, let alone meet substantial cost of the goods, the Respondent's loveless, spiteful and unremorseful character and her habit of coming to the matrimonial home in early mornings, helplessly drunk, despite being a young mother with a young family requiring her selfless attention and resources.

b) The ground of adultery had been proved, having not at all been controverted by the Respondent in her pleadings, and the Co Respondent having failed to enter appearance and defend the Petition, despite being served with all papers and process including pleadings mention and hearing notices.

c) The Appellant had proved the marriage had irretrievably broken down, was loveless and spiteful, the Respondent having unjustifiably abandoned her marriage in July 2014 in the face of her loveless, spiteful and unremorseful character, and that several attempts to reconcile the Appellant that the Respondent before family members, clan elders, church elders and marriage Counsellors, Dr. Julius Kimani (PHD) and Dr. Jane Kimani (PHD) were not fruitful, as the Respondent was adamant she had no future with the Appellant whom she no longer respected, loved, cherished and adored.

1) The Appellant sought that the appeal be allowed and the judgment and decree of the Trial Court of 20th June 2016 be set aside.

2) Judgment in default of appearance and defense be entered against the 2nd Respondent and damages assessed at Ksh. 100,000/=.

3) The marriage between the Appellant and Respondent is dissolved.

4) The Appellant be awarded costs of the appeal and in the subordinate Court.

5) Any further or other relief that The Court may deem fit to grant the Appellant in the circumstances of the appeal.

HEARING

The matter was mentioned for the first time in this Court on 22nd June 2017 *ex parte*; the 1st Respondent was represented by Counsel Ms Kangethe holding brief for Ms Kilonzo for the 1st Respondent and 2nd Respondent was not present in Court despite service of the Appeal and the hearing Notice. The Court granted the Respondents 14 days to file Reply to the Appeal and serve the Appellant and the hearing of the appeal to proceed on 27th July 2017.

On 27th of July 2017, the appeal came up for *interpartes* hearing. Learned Counsel, Mr. Odhiambo, appeared for the Appellant. Counsel for the Appellant confirmed service of the hearing Notice to the Respondents as evidenced by Affidavit of Service of 15th June 2017. There was no appearance for the Respondents.

Mr. Odhiambo informed Court that there was a lady in Court who stated she was from the firm of Kilonzo Advocate for 1st Respondent and informed submitted him that Counsel wanted to withdraw from acting for the 1st Respondent.

This Court could not rely on the said information as the information was not relied to this Court officially by Counsel holding brief for Ms Kilonzo advocate. Secondly, the said Counsel was in Court on 22nd June 2017 when the said hearing date was given by Court and did not make any application or file the application to cease acting for the 1st Respondent in Court and serve before the hearing date that all parties were aware of. The Respondents were served with hearing notice as per affidavit of service filed in Court on 10th July 2017. This in the Court's opinion was a ploy to derail and delay the hearing and determination of the appeal. The application was rejected and hearing of the appeal proceeded *ex parte*.

Counsel for the Appellant relied on pleadings and evidence in the Trial Court's record that the grounds of adultery and cruelty were specifically pleaded in the Petition and the Appellant's testimony confirmed the same and not controverted by the Respondent.

The Appellant submitted that the Respondent abandoned her obligations and was unreceptive making the relationship loveless and not conducive.

On irretrievable differences the Marriage Counselor's report disclosed that the Respondent was not ready to reconcile with the Appellant. The evidence on record makes clear that the parties were cruel to each other. It was submitted by the counselor on behalf of the parties that divorce was the best option as all avenues of reconciliation had failed. On the allegation of adultery, 1st Respondent admitted in her evidence that she had an open relationship with the 2nd Respondent and denied an intimate relationship with him. The 2nd Respondent did not enter appearance.

DETERMINATION

JUDGMENT OF THE TRIAL COURT OF 20TH JUNE 2016 is as follows;

Before me is a petition dated 18th February 2015 seeking orders prayed in the petition and reply to petition and cross petition dated 30th March 2015 and 26th May 2015. I have read the pleadings and evidence on record. The particulars of cruelty and adultery relied on in the petition have been unsubstantiated. So too are allegations of adultery which demand a high standard of proof. The petition is therefore hereby dismissed.

Right of appeal within 30 days.

EVIDENCE ON RECORD

PLEADINGS

The appellant filed petition on 20th February 2015 and stated as follows;

On 25th August 2012 Petitioner and 1st Respondent solemnized their marriage under Marriage Act Cap 150. They had 1 child of the marriage Z.M.M. born on 1st November 2013. They lived together until 1st July 2014 when the 1st Respondent left the matrimonial home. The Petitioner alleged that the 1st Respondent was cruel to him as follows;

The 1st Respondent was deliberately silent did not communicate and had apathy whenever confronted with family problems. When she spoke, the 1st Respondent directed unkind, demeaning and cruel verbal insults and words to the Petitioner (on their own and before close family members, clan elders and friends in solving their family problems) following his redundancy at Kenya Airways Limited which were calculated to strip, demean and undermine the Petitioner's self worth and self-esteem.

The 1st Respondent maligned and disparaged the Petitioner's character to family members, neighbors and friends as an idle person a weakling with no future despite catering for his family's needs, notwithstanding losing formal employment with Kenya Airways Limited weeks after their wedding. The 1st Respondent called him temperamental, cruel and violent person a cheat and an adulterer.

The 1st Respondent frequently stayed away from the matrimonial home and came early hours of the morning abandoning the family and she arrived at weird hours of the night completely drunk and denied the Petitioner conjugal rights and care for the minor despite tender age.

The 1st Respondent left their matrimonial home and went to live with her mother and conveniently eloped with the 2nd Respondent beyond control of and at great expense to the Petitioner who suffered emotional and psychological stress.

Between September 2013- January 2014, the 1st Respondent obtained assorted goods on the Appellant/Petitioner's credit worth KSh. 78,800/= from the Appellant's business Partner, Mr. F N without his knowledge or consent and he personally had to offset the debt and to his economic disadvantage. He annexed the Partner's affidavit as **Exhibit 3**. Annexed is a list of handbags and wallets collected and a receipt of payment of KSh 78,800/=.

The Appellant pleaded that the 1st Respondent currently lives with the 2nd Respondent at St Mary Langata but formerly resided at Ruaka contrary to their engagement and marriage vows. The Appellant confronted the 2nd Respondent severally that he lived with 1st Respondent with full knowledge that she was his lawfully wedded wife and he openly refused to bring an end to the unholy alliance claiming her to be separated from him and at liberty to be with a man of her choice taste and love.

The 1st Respondent and 2nd Respondent attended the funeral of late Gatw Mwangi on 28th November 2014 in Makuyu while he was away in Dubai on business to the consternation of family members and later spent the night at his residence in Ruaka.

In October 2014, the 2nd Respondent who 1st Respondent introduced as business partner accompanied her to a conciliation session arranged by Mrs. Cathrine Kimiti; a close family member and Christian Counselor in Runda estate, Nairobi. The meeting was called off.

When their child was admitted in Getrude Hospital on 29th -30th August 2014 the 2nd Respondent kept vigil in the hospital with 1st Respondent who introduced him as her brother, until wee hours of the morning before the Appellant arrived at the hospital.

Between 31st December 2014 and 2nd January 2015 the Respondents spent time together at Crayfish camp in Naivasha. The 1st Respondent lied to her mother that she went for a wedding, a discovery that led to her eviction from her mother's home.

The Appellant /Petitioner pleaded that their marriage has broken down irretrievably, despite several unsuccessful attempted reconciliation sessions. He made several efforts to salvage the marriage through immediate and close family members, clan elders, friends, church mediation and marriage Counselors Drs, Jane and Julius Kimani as shown by Report dated 8th February 2015 produced as **Exhibit 4**. The Counselors recorded that Patrick accepted the accusations made by Angela but denied having extra marital affairs and had apologized to Angela. Angela was unapologetic to Patrick's complaints, she was hurting and not ready to reconcile with Patrick. She asked for more time but was non committal as to timeframe. In their opinion, the Counselors found Angela was not ready to reconcile and divorce was a better option and Patrick was not ready to wait indefinitely as he had tried his best to seek reconciliation.

The 1st Respondent informally agreed to reform but failed/ refused to amend her ways, she was unapologetic, unconcerned and non committal to their marriage and she conveniently abandoned the marriage. The Appellant/Petitioner sought dissolution of their marriage.

The 1st Respondent filed Reply to Petition and Cross Petition on 31st March 2015. She denied generally, particulars of cruelty and adultery in Paragraph 7 of Petitioner's petition and put the Petitioner on strict proof thereof.

The 1st Respondent in Cross Petition she deposed that the Petitioner was cruel to her as follows;

He refused to talk to her for no reason during their marriage and during her pregnancy, he was constantly insulting her and constantly told her he missed his single life and he packed his clothes to go back to his mother's house for a while.

The Petitioner disrespected her in front of the housegirl and said she gave him all the attention he needed.

The Petitioner refused to provide for the family and she was left with the task of providing for the family.

On 5th July 2014, the 1st Respondent came from a chama meeting, the Petitioner refused to open the door for her, he threw her clothes outside and changed locks and forced the 1st Respondent to sleep in the car. On the morning of 6th July 2014, the Petitioner assaulted the 1st Respondent and their 7 month old daughter by threatening to kill the 1st Respondent if she did not leave the house immediately, the baby was saved by their house girl and the 1st Respondent was rescued by their landlady. The assault made the 1st Respondent desert her matrimonial home fearing for her life and the baby's life.

The Petitioner was maliciously sending the 1st Respondent's workmate and bosses abusive and threatening emails thus creating a difficult working environment for the Respondent.

The 1st Respondent alleged that the Petitioner was involved with the best maid Njoki, he had too much time with Njoki and even spending some nights in her apartment in the absence of her husband. The 1st Respondent also stated that the Petitioner had an adulterous affair with the house girl called Beatrice; he would desert the couple's bedroom late in the night and move to the sitting room where Beatrice was sleeping saying that he was going to watch a movie, yet they had a TV in their bedroom.

The 1st Respondent accused the Petitioner of being in possession of condoms which they did not use but he could not explain how or when he used them.

The 1st Respondent stated that their marriage had irretrievably broken down and there is no love or affection and therefore it should be dissolved.

The proceedings before the Trial Court confirm the parties reiterated what each pleaded in the Petition and Cross Petition respectively.

LAW

The parties' marriage is provided for by the successor to Marriage Act Cap 150 (repealed) Section 64 of the Marriage Act 2014 provides:

The parties to a marriage celebrated under Part III may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated

Additionally, **Section 65** states that:

A party to a marriage celebrated under Part III may Petition the court for a decree for dissolution of the marriage on the grounds 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 Children, if any, of the marriage;***
- c. Desertion by either party for at least three years immediately preceding the date of presentation of the petition;***
- d. Exceptional depravity by either party;***
- e. The irretrievable breakdown of the marriage.***

The Petitioner has raised three grounds for divorce, adultery, cruelty and irretrievable breakdown of the marriage. The Petitioner pleaded specific instances of cruelty and adultery in his pleadings and testimony. He was specific as to the 2nd Respondent as the person in an adulterous relationship with his wife and who to date lives with the 1st Respondent in Langata and formerly Ruaka. The 1st Respondent in her pleadings and in her testimony in Court generally denied the adultery claim with the 2nd Respondent and insisted he is a colleague in the office.

On the other hand, the Petitioner deposed specific details; dates and places that the 1st Respondent and 2nd Respondent attended publicly, a funeral function, Counseling session, hospital and holiday. The Petitioner confronted the 2nd Respondent on the issue to no avail as the 2nd Respondent did not deny but admitted the relationship. The annexed emails between the Petitioner and Respondents Pages 49-59 of the Memorandum of appeal explicitly raise the issue of Petitioner accusing the 2nd Respondent of having an affair with his wife 1st Respondent who reported the incident to Industrial Area Police Station and later withdrew the matter.

Cumulatively the evidence of all these incidents between the Respondents leads to the only logical and reasonable inference in the circumstances; that the Respondents are in and have a subsisting adulterous affair. The 1st Respondent in Reply to Petition did not specifically deny or tender evidence to controvert the evidence deposed by the Petitioner. Further, on appeal despite service on 2 occasions, through Counsel on record, she did not file a reply to memorandum of appeal or participate in the hearing of the appeal.

The 2nd Respondent, despite service of Petition, he did not file any pleadings or any documents in Court or attend the hearing in the Trial Court to deny and/or exonerate himself from seemingly serious allegations on his reputation. Similarly, despite service of the memorandum of appeal, he did not enter appearance, file reply or participate in the appeal proceedings.

In the absence of any appearance or participation in the proceedings or pleadings filed on appeal by Respondents; the Appellant's claim that the Trial court erred in law and fact that the grounds of adultery and cruelty were not substantiated or proved to the higher standard is uncontested. The Trial Court in its judgment of 20th June 2016 stated that;

The particulars of cruelty and adultery relied on in the petition have been unsubstantiated. So too are allegations of adultery which demand a high standard of proof. The petition is therefore hereby dismissed.

Yet the Trial Court despite all the pleadings filed and evidence adduced by parties did not even attempt to evaluate the evidence on record to arrive at the conclusion in the judgment. What was the legal standard and burden of proof applied to the facts? **Section 107 and 112 of Evidence Act** applies to the instant case; he who alleges must prove. The required standard and burden of proof is outlined by Court of Appeal in the case below;

In **ALEXANDER KAMWERU vs. ANNE WANJIRU KAMWERU (2000) eKLR** being an appeal from **HIGH COURT OF KENYA, DIVORCE CAUSE NO. 75 OF 1992**, the Court of Appeal gave guidelines on the applicable burden of proof 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."

In the instant case adultery on the part of the 1st Respondent has been proven by the 1st Respondent's living with the 2nd Respondent in Ruaka and Langata, attending public functions together, keeping vigil in hospital while the Petitioner's and 1st Respondent's child was admitted in hospital and spending a holiday together. It is evident by the Respondents' actions that the marriage between the 1st Respondent and the Appellant /Petitioner is adversely affected.

The 1st Respondent in the Trial Court stated; **'I don't love the Petitioner or trust him. Our issues cannot be resolved. I ask for divorce....The marriage is useless as I have tried my best'**

The Petitioner in the Trial Court stated; **'We have met 4 times and she was adamant that the marriage is over. Our mothers referred us to a marriage Counsellor and we had 2 sessions. The Respondent said I was holding her back. I need a divorce to give me peace of mind'**

From the above excerpts of Trial Court proceedings; The Petitioner alleged, and it has not been contested except a general denial that the 1st Respondent was cruel and in an adulterous relationship with the 2nd Respondent. The 1st Respondent similarly alleged that the Petitioner was cruel to her and he had affairs with best maid Njoki and the maid Beatrice. The Petitioner also denied. Coupled with the efforts in reconciliation exhibited by attached reports there is overwhelming evidence that the marriage irretrievably broke down. There is likelihood of salvaging the marriage at this stage. The overwhelming evidence on record confirmed proof of cruelty and adultery on preponderance of probability by the Respondents as they are together to date. The Trail Court did not evaluate the evidence on record nor apply the required burden and standard of proof.

DISPOSITION

- 1. The appeal is allowed and following orders granted.**
- 2. The marriage solemnized between the Petitioner and 1st Respondent is hereby dissolved forthwith.**
- 3. The costs of the suit and appeal be paid by the Respondents to the Petitioner as taxed by Deputy Registrar Family Division High Court.**
- 4. The issue of the marriage Z.M.M shall be maintained in line with Article 53 2 (e) & (3) of Constitution of Kenya 2010 shared between the biological parents of the child.**
- 5. Both Petitioner /Appellant and 1st Respondent have legal custody of the child of the marriage. The mother 1st Respondent shall have physical custody of the child and arranged visitation by the Appellant/Petitioner shall be allowed.**
- 6. Any dispute with regard to child custody and maintenance shall be resolved by Children Court.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 19TH MARCH 2018 .

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF :

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