



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 3 OF 2013

J W MAPPELLANT

-VERSUS-

D K MRESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Cheruto Kipkorir Delivered on 21st December, 2012 in Chief Magistrates Court at Nairobi in Divorce Cause No. 144 of 2008)

JUDGEMENT

1. On 30th May 2008 the appellant filed a divorce petition seeking dissolution of the marriage celebrated between the parties on 8th February 1997 and custody of the children of the marriage. The respondent, although having filed a memorandum of appearance upon being served with the petition, did not file an answer to the petition or a cross-petition. As a result the cause proceeded undefended. Having considered the petition, the learned Resident Magistrate dismissed the petition.
2. Being aggrieved by the said judgment the appellant filed the appeal and raised the grounds of appeal:-
 - a. That the learned Magistrate erred in law and in fact in dismissing entirely the appellant's evidence, and in particular in holding that her statement did not amount to evidence but resembled the petition and ignored the fact that the petitioner's statement contained crucial facts and evidence which if looked at objectively and independently explained her case as required under the law;
 - b. That the learned Magistrate acted in a biased manner and to the prejudice of the petitioner in that she did not record all what transpired in court and in particular failed to record the court's observation when the petitioner took to the witness box which was to the effect that 'the Court has read the petitioner's statement and was of the view that it was detailed and there was no need of offering oral evidence' and proposed that the appellant adopts her statement which she did. Hence was improper, oppressive and unlawful for the same court to express reservations on the witness statement which the court described as detailed because as a result of the court's sentiments, the petitioner adopted her statement and found no reason to add further evidence;
 - c. That the learned Magistrate erred in law and in fact in holding that the appellant had not proved her allegations on adultery and ignored the fact that in her statement the Appellant clearly stated that the respondent had since remarried before the marriage could be dissolved by a Court which is sufficient proof of adultery, since he was and continues to live in an adulterous relationship;
 - d. That the learned Magistrate misdirected herself on the facts and the law and arrived at a totally wrong judgment;
 - e. That the learned Magistrate erred both in law and in fact in basing her findings on one ground

- only, namely adultery and failed to appreciate that there were other grounds raised in the petition namely cruelty and desertion and made no mention of the said grounds at all in the judgment;
- f. That the learned Magistrate erred both in law and in fact in failing to appreciate that the appellant had in her petition prayed for the custody of the children of the marriage and failed to make a finding on the issue of the custody of the children which was a grave omission and a serious miscarriage of justice;
 - g. The learned Magistrate erred in law and in fact in failing to appreciate that the petition was uncontested and that there was no evidence at all to negate or controvert the Appellant's evidence; and
 - h. That the learned Magistrate erred in failing to appreciate that the Appellant had on a balance of probabilities as required in civil cases proved her case beyond doubt.
3. The prayers sought in the appeal herein are that the lower court's judgment be set aside and the divorce petition be allowed and the prayers sought therein be granted.
 4. The appeal came up for oral hearing on 23rd October 2014. Learned counsel Mr. Webale appeared for the appellant. There was no appearance for the respondent. Mr. Webale submitted that the lower court did not consider all the grounds of the petition. He contended that the court only considered adultery, yet there were other grounds, of cruelty and desertion.
 5. This court, being a first appellate court, has carefully considered the evidence tendered during the trial and subjected the same to fresh evaluation and analysis so as to reach its own conclusions.
 6. In her petition dated 30th May, 2008, the appellant states, at paragraph 3, that the petitioner and the respondent got married on 8th February 1997, under the African Christian Marriage and Divorce Act, Cap 151, Laws of Kenya, at the *Particulars withheld* It is her case that since the celebration of the said marriage, the respondent has treated her, and the children of the marriage, with extreme cruelty, particulars of which are contained at paragraph 6 of her petition. The other grounds that the appellant cited are desertion and adultery, the particulars of which are found at paragraph 8 and 9 of the petition, respectively.
 7. I note from the records that the appellant has attached certificate of marriage No. [particulars withheld], which indicates that the parties were married on 8th February 1997. It is further noted that the respondent, although he had entered appearance, failed to file an answer to the petition or cross-petition. He chose not to respond to the allegations made by the appellant, an indication perhaps that he had nothing to say or he has completely lost interest in the said marriage. Consequently, the divorce cause proceeded undefended. The appellant's allegations were uncontroverted. The trial court ought to have taken note of this fact.
 8. It would not serve any useful purpose to compel couples whose marriage has broken down to live together; the best a court can do is to free them from the marriage and allow each party to live their lives away from the hostility and strain caused by their differences and bitterness towards each other. It is apparent to this court in the circumstances of this case that the marriage between the parties is dead.
 9. The upshot of the foregoing is that this court allows the appeal and holds that:-
 - a. **That the marriage solemnized between D K and J W on 8th February 1997 at St. Francis Xavier's Church in Nairobi be and is hereby dissolved;**
 - b. **That the appellant is hereby granted custody of the children of the marriage; and**
 - c. **That there shall be no order as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 24TH DAY OF MARCH, 2016.

W MUSYOKA

JUDGE