REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 126 OF 2015

C S N.....APPELANT

-VERSUS-

P M S.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. Z. J. Nyakundi, Acting Senior Principal Magistrate in Rongo Senior Principal Magistrate's Divorce Cause No. 8 of 2012 delivered on 12/08/2013).

JUDGMENT

1. This is an appeal arising from the dismissal of the Appellant's divorce cause which he filed in the Magistrate's Court at Rongo. The cause was Principal Magistrate's Divorce Cause No. 8 of 2012 (hereinafter referred to as ***"the suit"***).

2. By a Plaint dated 02/04/2012 the Appellant herein, C.S.N., sought to divorce his first wife one P.M.S., the Respondent herein. He put forth two grounds in support of the divorce being desertion and cruelty. The suit was defended by the Respondent through a Counsel who filed an Amended Statement of Defence and Counter-Claim dated 16/07/2012. The Respondent apart from opposing the suit made a counter-claim claiming ownership of a parcel of land known as **MUGIRANGO/BOSINANGE/646** and a refund of the dowries the Appellant received from the marriages of the six daughters of their marriage.

3. The suit proceeded for hearing where the Appellant appeared *propria persona* (in person) and called two witnesses further to his testimony. The witnesses were **D. O. S. (PW2)** and **S. O. B. (PW3)**. On the part the Respondent, Counsel led evidence of the Respondent and two more witnesses who were **S. S. (DW2)** and **M. N. (DW3)**. On one hand PW2 was a son to the Appellant and a step son to the Respondent while PW3 was a neighbour to the parties and on the other hand DW2 was a Senior Chief of the location from which the parties hailed from whereas DW3 was the Appellant's brother and a brother-in-law to the Respondent.

4. The trial court in its judgment rendered on 12/08/2013 dismissed the Appellant's suit dismissed with costs. However that judgment was silent on the Counter-Claim.

5. It appears that while the Appellant was dissatisfied with the judgment, the Respondent was at peace with the same. Being dissatisfied with the dismissal of the suit, the Appellant preferred an appeal and filed a Memorandum of Appeal dated 09/1/.2013 wherein he preferred the following five grounds:-

> ***1. The learned Trial Magistrate's judgment was against the weight of evidence and was based on extraneous facts.***

2. The learned Trial Magistrate ignored the unreputed evidence of the Appellant and reached a wrong decision.

3. The learned Trial Magistrate wrongly and unlawfully relied on land claim issue which did not affect the Appellant herein in the Divorce case filed.

4. The learned Trial Magistrate having arrived at judgment he was very wrong to have decided that there was no prove that the Appellant herein was assaulted by the Respondent when he had produced the Copy of P3 Form and the "OB" he had recorded with the Police.

5. There was a miscarriage of justice upon the judgment of the trial learned Magistrate when he ignored the Appellant's ground and particulars for divorce he had given and proved to the Court.

6. The Appellant thereafter filed a Record of Appeal and the appeal was then set for hearing. At the hearing of the Appeal the Appellant again appeared before this Court *propria persona* whereas the Counsel for the Respondent as well as the Respondent did not appear despite proper service. This Court ordered the hearing of the appeal to proceed.

7. The Appellant relied on his written submissions filed on 04/04/2016 in urging this Court to allow the appeal accordingly.

8. This being the Appellant's first appeal, the role of this Court as the appellate Court of first instance is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* ***Kiruga –versus- Kiruga & Another (1988) KLR 348.***

9. It was further held in the case of ***Hahn vs. Singh (1985)KLR 716*** that the appellate court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial. To that end, I wish to confirm that this Court has carefully perused the pleadings, the proceedings, the judgment, the Record of Appeal and the submissions of the Appellant in this matter.

10. The Appellant remained under a legal duty to prove the grounds he relied upon in seeking the divorce before the trial court. To that end it was upon the Appellant to prove desertion and/or cruelty on the part of the Respondent since a decree in divorce proceedings could be granted upon proof of both or any of the two grounds. In saying so, this Court remains alive to the fact that the marriage between the parties was contracted under the Abagusii customs, but for a divorce decree to issue this Court is to be satisfied that, regardless of how the marriage was contracted, the same has reached a point necessitating the grant of the decree. This Court will therefore have to apply the standard of proof used by Courts generally in dealing with the grounds of desertion and cruelty since these grounds cut across all forms of marriages. Further none of the parties has alleged that the divorce sought is strictly based on the said Abagusii customs. Had that been the scenario, this Court would have been called upon under **Article 2** of the Constitution to interrogate *inter alia* the constitutionality of the said customs in determining the appeal. That being the case, I will therefore revisit the evidence to ascertain if the grounds for the divorce as proposed by the Appellant were proved to warrant the prayers sought.

11. The Appellant married the Respondent under the Abagusii customary laws way back in 1955. That fact is readily admitted by both parties. In the course of their stay they were blessed with 15 children out of whom 5 died leaving behind 10 who comprised of one son and nine daughters. All these children were adults and married at the time the suit was instituted.

12. **In respect to the ground of desertion**, it was the Appellant's testimony that he lived with the

Respondent up to 1983 when they separated although the Respondent stays in a house within the Appellant's homestead. That was after the Appellant had married a second wife in 1970. The second wife is also blessed with several children who are all adults too.

13. **PW2** who was a son to the Appellant from the second wife did not testify on anything touching on the aspect of desertion on the part of the Respondent. Infact from his evidence it can be confirmed that the Appellant and the Respondent have all along been staying in the same homestead as a husband and wife. PW2 maintained that he knew nothing about the marriage between the parties herein.

14. **PW3** equally did not testify on anything to do with the alleged desertion on the part of the Respondent**.**

15. The Appellant however particularized the incidents of desertion in paragraph 7 of his plaint as follows:-

> *a) During their stay together as husband and wife, the Defendant failed and or refused to meet the Plaintiff's conjugal rights.*
>
> *b) The Defendant, without consent of the Plaintiff pulled down the house which the Plaintiff had built for her after which she went and built another home away from the Plaintiff.*
>
> *c) The Plaintiff who is now old and constantly sick receives absolutely none of the vital attention he direly need during old age from the Defendant.*
>
> *d) The Plaintiff has also suffered immense mental anguish and public ridicule resulting from the Defendant's act of negligence.*

16. The Respondent denied ever deserting either the Appellant or her matrimonial home and maintained that she had all along lived with the Appellant in the same homestead and in a house built by the Appellant. The Respondent contended that the Appellant often visits her in her house, in his capacity as her husband, especially when she has visitors and wonders that if the issue of desertion is to arise then it can only be on the part of the Appellant but not herself. According to the Respondent, it is the Appellant who can be said to have refused to spend with her in her house because of the second wife but on her part she has never restrained the Appellant from accessing her house in discharge of his duties as her husband. The Respondent further wondered how she could be accused of desertion and yet she has all along lived in the house the Appellant built for her and in the same homestead with the Appellant and the rest of the family members.

17. The Respondent traced the genesis of the suit to an acrimonious land dispute she had with the Appellant which solicited the intervention of DW2, the Clan Elders and the Land Disputes Tribunal, which dispute was resolved in her favour. The issue of the land dispute was confirmed by DW2 who was the Senior Chief and who oversaw the resolution of the dispute. DW2 produced several documents in support of that position. DW3 who was the Appellant's brother was indeed shocked by the suit and wondered why the Appellant sought the divorce at that late stage in life. DW3 readily agreed with the Respondent and DW2 that the suit was as a result of the land dispute.

18. Turning to the particulars of desertion in the plaint, it can be readily noted that particulars (a), (c), and (d) are not in support the allegation of desertion. That leaves ground (b) to the effect that the Respondent pulled down the matrimonial home which the Appellant had built for her and went to built another home away from the Appellant. The Appellant however did not lead any evidence of the Respondent pulling down the matrimonial home which he had built for her. The Appellant only stated that:-

> ***"Since 1983 we have not been staying together ……..***
>
> ***.....the Defendant stays within my plot that is the same homestead."***

19. The Appellant equally did not deny that he was the one who built the house the Respondent lives in within his homestead.

20. On her part the Respondent stated as follows:-

> ***"The Plaintiff wants to divorce me but I disagree. Am staying at his home as a legal wife. We have stayed together for the last 58 years….. It is the Plaintiff who has kept away from me …….."***

And, when the Respondent was cross-examined by the Appellant she stated that:-

> ***"..... In the house am staying you came ate food and you went away. You always came when visitors came. I have not stopped you from coming to sleep there. You are the one who built the house and you have refused to come and sleep there ……."***

21. It is to be always remembered that in this case it is the Appellant who alleged that the Respondent had deserted him. The burden of proving that desertion then rested upon the Appellant. That is indeed the calling of **Section 107 of the Evidence Act**, Chapter 80 of the Laws of Kenya which provides that:-

> ***"107(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."***

22. But what is desertion?

The Black's Law Dictionary, 9th Edition at Page 511 defines "*desertion*" as follows:-

> ***"desertion, n.(16c) The willful and unjustified abandonment of a person's duties or obligations, especially to military service or to a spouse or family.***
>
> - ***In Family Law, the five elements of spousal desertion are (1) a cessation of cohabitation; (2)the lapse of a statutory period; (3) an intention to abandon; (4) a lack of consent from the abandoned spouse; and (5) a lack of spousal misconduct that might justify the abandonment ...."***

22. From the above definition it seems that for one to successfully rely on the ground of desertion the five elements must be in that person's favour. Looking at the evidence on record, it cannot be said that the Appellant has proved desertion on the part of the Respondent. There is evidence that there has all along been interaction between the Appellant and the Respondent and that the Appellant visits the Respondent moreso when the family receives visitors. Second, the Respondent has no intention to abandon the Appellant whom he recognizes as her legal husband and cries to this Court that her marriage be saved. Third, the Respondent is staying in a house which the Appellant built for her and within the same homestead with the rest of the family members and so stays with the consent of the Appellant. The aspect of abandonment on the part of the Respondent has not therefore been proved and as such the ground of desertion in the suit had to and thereby fails.

23. I will now turn to the **ground of cruelty**. There is consistent case law on what constitutes cruelty as a matrimonial offense. In ***Meme -vs- Meme (1976 – 80) KLR 17***, 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 complaint'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 the word.***

24. In ***Mulhouse -vs- Mulhouse (1964) 2 All ER 50***, which Chesoni, J (as he then was) cited with approval in ***Meme -vs- Meme*** (supra), *Sir Jocelyn Simon, P.* while considering the gravity and weight of misconduct that would constitute cruelty; stated as follows:-

> ***"[M]isconduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary customs, though if carried to a point, which threaten the health of the other spouse, the law will not hesitate to give relief".***

25. On the nature of the injury to the Petitioner's health, real or apprehensive, that is necessary to prove cruelty, his Lordship stated that:-

> ***"[I]t must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the Court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it".***

26. In ***Nunzio Colarossi -vs- Michelina Colarossi (1965) EA 129***, the then Court of Appeal of Eastern Africa state that:-

> ***"An essential element of any petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury then the Court will grant the decree".***

27. The Court of Appeal in ***JSM -vs- ENB (2015)eKLR*** however came out so clearly in giving direction to Courts on how to handle the aspect of cruelty. The Court stated that:-

> ***"..... there is no comprehensive definition of cruelty. Each petition founded 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 on holistically and in light of the parties themselves. Therefore it is not very helpful to rely on facts of previously decided cases as precedent".***

28. The Appellant pleaded five particulars of cruelty in the plaint as follows:-

> *a) The Defendant violently attack and beats the Plaintiff who is old and helpless.*
>
> *b) The Defendant has failed to appreciate and/or relate well with the family of the Plaintiff which act is demeaning to the Plaintiff*
>
> *c) The Defendant has incited their children and grandchildren against the Plaintiff and influenced them not to give any financial assistance to him.*
>
> *d) The Defendant forcefully awarded herself part of the Plaintiff's land and used the same to set up a separate home away from the Plaintiff.*
>
> *e) The Defendant on many occasions confronts the Plaintiff using abusive language in manner that has caused traumatizing ridicule to him.*

Further in paragraph 9 of the plaint, the Appellant contended that the Respondent had also taken up the practice of witchcraft which he did not approve of as a Christian.

29. While testifying the Appellant stated that:-

"I want to divorce the Defendant because of the following reasons, she beats me, she is a wizard, she looks for thugs to kill me, she stays separate from me. For the said reason I want to divorce her".

On being cross-examined by the Respondent's Counsel, the Appellant stated that the Respondent normally goes to his house to disturb and abuse him. The Appellant also stated that he had refused to spend with the Respondent since the Respondent was engaging in activities which encouraged abortion. The Appellant however confirmed not to have reported those criminal activities to the police.

30. The Appellant further alleged to have reported an act of assault visited upon him by the Respondent to the police and that he obtained and produced a P3 Form as an exhibit. He also stated that he was aware that the Respondent had hired some thugs to kill him and infact knew the name of one of the thugs. However again the Appellant did not report that person to the police.

31. The Respondent denied ever assaulting the Appellant or even planning to kill him. She also denied engaging in witchcraft and sees the suit to revolve around the issue of the land dispute which she was successful over the Appellant.

32. The Appellant did not adduce any evidence to confirm that indeed the Respondent normally goes to his house to disturb and abuse him or that the Respondent engages in activities which encouraged abortion. He never made any reports to the police or to the local administration or at least to the local village elders or the clan elders. He only relied on his sole evidence on the issue which position was denied by the Respondent. That averment cannot therefore legally stand and hereby fails.

33. I have also seen the P3 Form referred to and produced by the Appellant as an exhibit in the suit. It is dated 03/03/2008. Although it confirms that the Appellant was injured on 23/07/2007 (about 8 months earlier) it reveals that the attack was by armed thugs in the night of 22/07/2007 at around 02:00am some of whom the Appellant identified. There was however no any further evidence to connect the Respondent with the said attack. I have also looked at the various letters written by the local administrators on behalf of the Appellant to the police on various issues including theft of the Appellant's animals, but none of them has any reference to the Respondent.

34. PW2 and PW3 testified about an incident which allegedly occurred on 26/03/2010 involving the Appellant and the Respondent. PW2 stated as follows:-

"I can only confirm that on 26.03.2010, it was planting time, the Defendant came and said that she wanted to kill a person, she threw the panga down violently. My father was passing, he tried to take away the panga but the panga cut him. He went to hospital and was treated."

PW3 had the following to say on the same incident:-

"What I know is what I saw in 25.3.2010 ….. In the morning when he was escorting me, ……. The Defendant took a panga and cut the Plaintiff. Those children took the Plaintiff to hospital. I went to my home."

35. It is visibly clear that the two versions relating to the same incident tend not to agree on what actually transpired on that day. That aside it appears that the matter was not reported to the police. I have also had a look at the copy of the treatment notes produced on record allegedly in proof of the said incident. It is dated 26/03/2010 and has it that the Appellant sustained a cut injury with no other details. But even if the said incident was positively proved as alleged by the Appellant, that would only amount to a single and isolated incident whose gravity remains a misery and cannot be said to amount to cruelty of such a magnitude as to warrant a divorce.

36. I have considered the evidence as recorded holistically. I find that apart from the accusations by the Appellant that the Respondent was cruel to him, the Appellant did not go forth to adduce evidence in

proof of that cruelty on the part of the Respondent. The evidence tendered by the Appellant and his witnesses fell short of proving the particulars of cruelty enumerated in the plaint or at all. The effect of such a state of affairs is that the averments made by the Appellant in the suit on the aspect of cruelty remain unproved and on a preponderance of probability that ground equally fails.

37. There is also the averment by the Appellant that his marriage with the Respondent has irretrievably broken down and that the only way out is for the parties to divorce. The Respondent is however not of that position. She was indeed forthright from the time she filed her defence that she was opposed to the divorce. That being so, the Appellant did not adduce evidence to demonstrate the steps and efforts he undertook in reconciling with his wife or at all. It is the Respondent who through DW2 confirmed that the parties had been involved in a bitter land dispute but which was eventually resolved in the Respondent's favour.

38. Whereas there may be some porches of discomfort in the marriage between the Appellant and the Respondent, the same can be best described as ***'the normal and reasonable wear and tear of a marriage'*** which do not necessarily translate to cruelty or desertion. This Court is therefore not convinced that the marriage between the Appellant and the Respondent has irretrievably broken down.

39. To that end, this Court affirms the decision of the learned trial Magistrate in dismissing the suit. However, I note the trial Magistrate did not deal with the Counter-Claim as raised by the Respondent. With tremendous respect to the learned magistrate, to that extent the trial court erred in law. Having gone through the record, I am of the considered view that the Respondent did not lay any legal basis for the grant of the orders she sought or at all and the counter-claim ought to have been dismissed as well. That is because there was absolutely no evidence which was adduced in support of the prayers on the ownership of the said parcel of land as well as the refund of the dowries. Further having found that the circumstances in the marriage between the Appellant and the Respondent did not warrant a divorce, then this Court in granting any of the prayers sought by the Respondent will lead to a further degeneration of the marriage relationship. Needless to say the Respondent never filed a cross-appeal.

40. The upshot of the foregone is that the appeal is dismissed. Each party shall bear its own costs given that they are still in marriage and with a view to foster a renewed relationship.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28TH day APRIL 2016 .

A. C. MRIMA

JUDGE