



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 7 OF 2016**

**BETWEEN**

**P K K ..... APPELLANT**

**AND**

**J O O ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. N.W. Kariuki, RM in Homa Bay Chief Magistrates Court Divorce Case No. 18 of 2014 dated 11<sup>th</sup> December 2015)***

**JUDGMENT**

1. In the subordinate court the appellant's divorce petition against her husband was dismissed. The parties were married on 29<sup>th</sup> April 2001 at Shauri Moyo SDA Church under the provisions of the ***African Christian Marriage and Divorce Act (repealed)***. In a petition dated 10<sup>th</sup> November 2014, she had sought divorce on grounds that the respondent had deserted her in February 2006 and that the marriage between her and the respondent had irretrievably broken down. She also sought custody of MO, the only child of the marriage. The respondent filed an answer to the petition in which he denied the jurisdiction of the court. In the alternative, he urged that it is the appellant who had deserted him since February 2006 and as such she was not entitled to the divorce.
2. Although the respondent opposed the petition by filing an answer to the petition, he did not attend court for the hearing. Since the court was satisfied that he had been served, the matter proceeded *ex-parte*. The respondent did not attend the appeal despite being served with court process.
3. In a reserved judgment, the learned magistrate held that the court had jurisdiction to dissolve a marriage contracted under the ***African Christian Marriage and Divorce Act (repealed)*** by reason of **section 98** of the ***Marriage Act, 2014***. In considering the substance of the petition, the learned magistrate held that;

*[9] In this case, the petitioner failed to persuade the court of the alleged physical abuse she served at the hands of the respondent as per the requirements cited above. Her allegations amounted to a mere statement with evidence to support the allegation. Additionally with respect to the ground of irretrievable break down of the marriage, the petitioner has failed to provide evidence of adultery, willful neglect, voluntary or court mandated separation, cruelty or desertion which would prove this ground as provided under section 66(6) of the Marriage Act, 2014.*

4. The appellant now appeals against the judgment. In summary, the appellant contends that the

learned magistrate erred in failing to hold that the marriage had irretrievably broken down when there was cogent and uncontroverted evidence that the parties had lived separately since February 2006 upto November 2015 when the divorce cause was heard. She further contends that the learned magistrate erred in deciding the case against the weight of evidence.

5. As this is a first appeal, I am entitled to reconsider and evaluate the evidence and reach my own conclusions. I have to bear in mind that I neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123***). The appellant's testimony was not contested hence the duty of the subordinate court was to ascertain or determine whether she was truthful and whether her testimony established the conditions for the grant of a divorce under the law.
6. **Section 66** of the **Marriage Act, 2014** provides the grounds for divorce as follows;

*66. Right to petition for divorce*

*(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage*

*(2) A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—*

- (a) adultery by the other spouse;*
- (b) cruelty by the other spouse;*
- (c) exceptional depravity by the other spouse;*
- (d) desertion by the other spouse*
- (e) the irretrievable breakdown of the marriage.*

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*(6) A marriage has irretrievable broken down if –*

- (a) a spouse commits adultery;*
- (b) a spouse is cruel to the other spouse of any children of the marriage;*
- (c) a spouse wilfully neglects the other spouse for at least two years immediately preceding the date of the presentation of the petition;*
- (d) the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has*
- (e) a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;*
- (f) a spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;*
- (g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or*

(h) any other ground as the court may deem appropriate. [emphasis mine]

7. In her brief sworn testimony, the appellant stated as follows;

*From February 2006, we've not lived together because he used to beat me all the time. He chased me away from home. Our efforts to reunite had not borne fruit because he is not willing to correct himself. Our marriage has irretrievably broken down ..... There is no chance for reconciliation ..... I can't talk to the boy because the father don't (sic) allow it.*

8. The appellant was only required to prove the grounds on the balance of probabilities. In this case the learned magistrate, as the judge of the appellant's demeanour, did not suggest that the appellant could not have been telling the truth. The appellant's uncontroverted testimony established that the respondent beat her and that they had since separated and that she was not allowed to talk to their child since the child left with the father. In my assessment these facts constituted grounds upon which the court could conclude that the marriage had irretrievably broken down.
9. The learned magistrate considered the claim on the basis of cruelty and desertion which are not only independent grounds but also grounds subsumed within the rubric of "irretrievable breakdown". However, the learned magistrate did not pay attention to or consider **section 66(h)** of the **Marriage Act, 2014** which allows the court to assess the facts and consider indeed whether the marriage had broken down on any other additional grounds other than those enumerated in the preceding sections. In addition to the beatings and the fact that the parties had separated for a considerable period of time, the appellant testified that efforts to reconcile had not been successful. In other words, the marriage had irretrievably broken down.
10. The learned magistrate therefore erred in failing to have regard to **section 66(h)** of the **Marriage Act, 2014** and the uncontroverted testimony of the appellant in rejecting the petition for divorce. As the issue of the child was not subject of this appeal, I allow the appeal and set aside the decree of the subordinate court to the extent of the marriage only and substitute the same with the following orders;
- a. That the marriage between P K K and J O O solemnised on 29<sup>th</sup> April 2001 at Shauri Moyo SDA Church, Nairobi be and is hereby dissolved.
  - b. A decree nisi shall issue forthwith and be made absolute after 30 days from the date hereof.
  - c. There shall be no order as to costs.

**DATED and DELIVERED at HOMA BAY this 25<sup>th</sup> day of May 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Osoro instructed by J. O. Soire and Company Advocates for the appellant.