



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO 112 OF 2013
J N T.....APPELLANT
VERSUS
B M M.....RESPONDENT
(An Appeal arising out of the judgment of Hon. E.K. Too Ag. SRM
delivered on 7th May 2013 in Machakos Chief Magistrate's Court
Divorce Cause No. 8 of 2008)
JUDGMENT

Introduction

The Appellant was the original Respondent in Machakos Chief Magistrate's Court Divorce Cause No. 8 of 2008, and she has appealed against the judgment of the learned trial Magistrate, which was delivered in the said cause on 7th May 2013. The Respondent was the original Petitioner in the said divorce cause. The learned trial magistrate in his judgment dissolved the marriage between the Appellant and Respondent, granted custody of the parties' child to the Appellant with the Respondent being granted visitation rights.

The Appellant subsequently moved this Court through a Memorandum of Appeal dated 5th June 2013 in appealing against the said judgment. Her grounds of appeal are as follows:

1. The learned trial magistrate erred and misdirected himself in law and fact by allowing the Respondent divorce on 7/5/13 when there was no proof beyond reasonable doubt.
2. The learned trial magistrate erred in law and fact when he failed to note that the cause of all problems was the Respondent.
3. The learned trial magistrate erred in law and fact when he failed to know that the Respondent was caught red handed by the Appellant with other women which gave rise to the divorce cause.
4. The learned trial magistrate erred in law and fact when he failed to consider the evidence given out by the Appellant and her witnesses.
5. The learned trial magistrate erred in law and fact when he failed to know that there was a co-

Respondent, M N, in the divorce, and he failed to allow him to testify in the petition.

6. The learned trial magistrate erred in law and fact when he failed to weigh the whole evidence given out by the Appellant.

The Appellant therefore prays that the appeal is allowed, and that the judgment issued by the lower court be set aside and that she be awarded the costs.

The Facts and Evidence

The Respondent instituted the cause in the lower court by filling a Petition dated 24th April 2008, wherein he stated that he had entered into a marriage with the Appellant on 9th April 1994 under the African Christian Marriage and Divorce Act, and that they stayed at their matrimonial home at [particulars withheld] of Machakos District as husband and wife. Further, that they had a child called K who was then 12 years old.

The Respondent accused the Appellant of having committed acts of cruelty, adultery, witchcraft, and of taking her first child K M aged 16 years to his father and committing acts of desertion. He stated that the marriage had irretrievably broken down. He therefore prayed that the marriage between him and the Appellant is dissolved, and that he be allowed unlimited access to his child K and be allowed to put him into adequate care and attention.

In response, the Appellant filed an answer to the Petition dated 2nd May 2008. She denied the allegations in the Petition particularly those on cruelty, adultery, witchcraft and desertion. She put the Respondent to strict proof. She accused the Respondent of deserting the home and committing adultery with other women who were known to her. The Appellant stated that the Respondent was always away on weekends and holidays and does not participate in any family problems. She accused the Respondent of getting into another marriage.

Upon perusal of the record, it is shown that the trial commenced on 30th January 2012, and the Respondent testified as PW1 before Hon. S. Gacheru P.M. and was cross-examined and re-examined before closing his case. A further hearing date was set for 5th March 2012. On 5th March 2012, the matter came up for hearing before Hon. E.K. Too Ag. SRM, who gave directions that the hearing proceeds from where it stopped, and that the proceedings be typed. The matter was mentioned on 1st October 2012 to confirm if the proceedings had been typed, whereupon another mention date was set for 26th November 2012, after it was reported that the same had not been done. No other proceedings are recorded until the judgment delivered on 7th May 2013.

There is no record of any evidence adduced by the Respondent's witnesses, yet the list of witnesses and submissions filed in lower court by the Appellant's learned counsel, D.M. Mutinda & Co Advocates, dated 3rd December 2015 indicated that the Appellant and two additional defence witnesses testified. The Respondent's learned counsel, B.M Mungata & Company Advocates, filed submissions dated 15th February 2016 wherein he also averred that the evidence of the Appellant was considered in the judgment of the magistrate.

A perusal of the judgment delivered in the trial Court also shows that the Appellant gave evidence as did one M N who denied committing adultery with the Appellant. However no record exists of their evidence.

The Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

It is evident that this Court is not a position to re-evaluate the evidence given in the trial Court, arising from the incomplete record of the lower Court. Efforts to reconstruct the lower court record were unsuccessful, and both the record of appeal and supplementary record of appeal filed by the Appellant on 11th February 2014 and 25th October 2016 respectively do not have the evidence adduced by the Appellant and her witnesses, as do the typed proceedings and original record of the trial court. In the circumstances the only option left to this Court and for the interests of justice to be served, is to allow the appeal and give the opportunity for the parties to litigate their respective claims afresh.

I accordingly hereby set aside the judgment delivered by Hon. E.K. Too Ag. SRM on 7th May 2013 , and order for a retrial of the Respondent's divorce cause before a Resident Magistrate at Machakos Chief Magistrate's Courts, other than Hon. S. Gacheru and Hon. E.K. Too.

It is so ordered.

DATED AT MACHAKOS THIS 20TH DAY OF DECEMBER 2016.

P. NYAMWEYA

JUDGE