



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 19 OF 2015
(FORMERLY KISII HCCA NO. 73 OF 2011)

BETWEEN

R A d/o O.....APPELLANT

AND

C O s/o W RESPONDENT

(Being an appeal from the Judgment and

Decree of Hon. O.J. Ong'ondo,

RM in Homa Bay Chief Magistrates Court

Divorce Case No. 14 of 2010 dated 31st March 2011)

JUDGMENT

1. In the subordinate court the appellant's claim for divorce against her husband was dismissed. She had filed a suit in the subordinate court seeking dissolution of the marriage between her and the respondent and for the custody of their two children. At the time of hearing, the appellant informed the court that the issue of custody of the children was no longer an issue.
2. The appellant averred that she was married to the respondent in August, 1996 under Luo customary law and that since then they had not been living harmoniously. She outlined several grounds of divorce as follows;
 - a. The respondent chased her away from the matrimonial home in 1999.
 - b. The respondent was cruel to her, had assaulted her and had no respect for the marriage.
 - c. Attempts to reconcile had not been successful as the respondent had been negative.
 - d. That in 2009, there was an attempt to reconcile but the respondent chased her away.
 - e. The respondent was adulterous.
3. The appellant also accused the respondent of marrying two wives in a short span and that he was unable to provide for her and their children. The appellant reiterated the grounds of the divorce in her testimony. She called two witnesses, PW 2, her sister, who confirmed that the parties were married in 1999 and that the respondent paid 2 cows as dowry. She testified that the plaintiff had left home in 2009 and that she was aware that the two parties had quarrelled. PW 3, her mother, testified that the two were married and after they married the appellant kept coming home because

she had problems with her husband. She also mentioned that the respondent threatened to kill her daughter and had refused to come for arbitration.

4. The respondent in his defence denied all the allegations and prayed that the plaint be dismissed. In his testimony he blamed the appellant for deserting him in 2004 causing him to follow her and bring her back in 2005. He accused her of bringing other men to her house. He stated that he informed her parents of their difficulties but they did not intervene positively. He further stated that the appellant once again deserted him in 2007 and returned in 2009 and that when she left in 2009, she took all the household goods. He accused the appellant of failing to respect him. He denied that he had relationships with other women.
5. In his judgment, the learned magistrate concluded that the appellant had failed to prove cruelty as the area chief to whom she reported the assault was not called as a witness and that the allegation of adultery was not proved as the alleged adulterer was not joined as a co-defendant.
6. The appellant now appeals against the judgment. In summary, the appellant contends that the learned magistrate failed to consider that the marriage had broken down irretrievably. She submits that the learned magistrate failed to consider the evidence and that he gave undue weight to the respondent's evidence and therefore reached the wrong decision.
7. The respondent opposes the appeal. In his written submissions, he supports the decision by the learned magistrate. He contends that he still loves his wife and willing to live with her.
8. I have considered the judgment and in my view the learned magistrate failed to analyse the testimony of the witnesses and explain why he came to the conclusion he did. The conclusion arrived at was perfunctory and without regard to the law and evidence. 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***).
9. From the evidence, there is no dispute that both parties were married under Luo customary law. The learned magistrate did not apply his mind to Luo Customary law grounds for divorce. On this issue I would refer to **Eugene Cotran, *Restatement of African Law Kenya; The Law of Marriage and Divorce, Vol 1 at P. 179*** where the learned writer states, "*Under Luo customary law, however, there is no fixed list of grounds (as under English Law) and each case is considered on its own merits by the elders. It is however possible to enumerate certain matters which normally constitute grounds of divorce.*" Such grounds include refusal of conjugal rights without just cause, witchcraft, habitual theft, wilful desertion, incest, physical cruelty, contraction of venereal disease, failure of a husband to maintain his wife and children, failure of a wife to carry out her duties, adultery and impotence.
10. The issue for consideration is whether, on the evidence, the appellant was entitled to a divorce. The appellant was only required to prove the grounds on the balance of probabilities. The evidence is clear that the marriage was fraught with problems and that the two had ceased to cohabit. Although, the respondent wished to reconcile with his wife, there was no such expectation from the appellant. In short the marriage had broken down and it had broken down irretrievably.
11. In the circumstances, I set aside the judgment of the lower court and substitute the same with the following orders.
 - a. The marriage between R A d/o O and C O s/o W be and is hereby dissolved.
 - b. There shall be no order as to costs

DATED and DELIVERED at HOMA BAY this 20th day of March 2015.

D.S. MAJANJA

JUDGE

Ms Mimba instructed by H. O. Mimba and Company Advocates for the appellant.

Respondent in person.