



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 43 OF 2014
(FORMERLY KISII HCCA NO. 29 OF 2012)

BETWEEN

M A O PETITIONER

AND

S O RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. M. Shitubi, SpM at the Senior Principal's Magistrates Court in Migori in Divorce Cause No. 37 of 2010 dated 2nd February 2012)

JUDGMENT

1. This is an appeal by the appellant dismissing her petition for divorce filed in the subordinate Court.
2. In her petition, the appellant stated that she was married to the respondent under Luo customary Law in 1987 and that the marriage was blessed with two issues. The marriage lasted until 1993 when the respondent chased her away from the matrimonial home.
3. She grounded her divorce on constructive desertion, cruelty and neglect of her and the two children. She stated that despite attempts to arbitrate the matter between them respective parents and the chief, the leave continued to live since 1993.
4. The respondent, in his defence stated he married the appellant under customary law in 1975 and not in 1987. He denied all the allegations made against him. He also denied that the Court had jurisdiction to determine the divorce since it was contracted under Luo customary law, it could only be dissolved under Luo customary law.
5. The plaintiff testified that she was kidnapped in July 1976 and was forced to live with the respondent until 1983 when she went home in Tanzania. The respondent went to collect her and her two young children and when they returned he was fined for the abduction and paid 3 head of cattle. She was once again abducted in August 1983 stayed for 3 months and was chased away. She testified that during that period, attempts to arbitrate the dispute did not bear fruit. She stated that she used to be beaten and that at one time the respondent dug outside her door and planted thorns to signify that she was dead. She also accused the respondent of refusing to bury their son.
6. The plaintiff's second witness was her brother, P O O. He testified that the parties had been married since 1976 and that he did not know that the two had problems. He was of the view that

both of them were old and should not be separated.

7. The respondent testified that the appellant left the home because she practiced witchcraft. He denied chasing her away or denying her access to her matrimonial home. He wanted her to return to his home. He testified that he took care of her and there was no reason for her to divorce him. DW2, a brother to the respondent, testified that he did not understand what was happening and that he never heard that they had problem. DW 3, a co-wife of the appellant also testified and denied that there was any problem between the appellant and the respondent.
8. After analyzing the evidence, the learned Magistrate concluded that appellant had failed to prove her claims on the balance of probability.
9. As this is the first appeal. I have a duty to re-evaluate the testimony and come to an independent conclusion bearing in mind that I neither saw nor heard the witnesses testify.
10. I have considered the evidence and I find that the appellant proved her case on the balance of probabilities. She gave clear testimony on what she underwent during the period she was married. In considering her evidence, the Learned Magistrate stated that:

On claims of assault through the petitioner need not prove beyond reasonable doubt it was upon her to put forth some corroborating evidence as the claims were denied. She even (sic) produced any medical evidence of assaults.
11. In my view, corroboration of her testimony was not necessary as a matter of law nor was it necessary to prove assault by providing medical evidence. The learned magistrate did not consider or state why she did not believe the appellant's testimony as opposed to that of the respondent and his witnesses. Likewise, she found that respondent's testimony corroborated by his witnesses even though they were his brother and co-wife and would most likely favour the appellant.
12. Although, the respondent expressed the desire to continue with the marriage, it is clear that the appellant was trapped in a loveless marriage. **Eugene Cotran** in **Restatement of African Law Kenya; The Law of Marriage and Divorce, Vol 1 at P. 179** states that, "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. In my view Luo customary law allows divorce for any cogent reason.
13. The grounds and evidence adduced by the appellant established grounds for divorce. The testimony of the appellant and respondent demonstrate that the marriage between the two had become an empty shell and to force the appellant to continue in such a relationship would be violate her right to live in dignity.
14. In the circumstances I set aside the judgment and decree of the subordinate Court and substitute it with the following orders;
 - a. The marriage between **M A O** and **S O** be and is hereby dissolved.
 - b. There shall be no order as to costs.

DATED and DELIVERED at MIGORI this 13th day of April 2015.

D.S. MAJANJA

JUDGE

Appellant in person.