REPUBLIC OF KENYA

AT MOMBASA

H M N …..... APPELLANT

J A N …..... RESPONDENT

The Appeal

0. The appellant who was the unsuccessful petitioner in a divorce cause before the Senior Resident Magistrate's Court at Mariakani in Divorce Cause No. 1 of 2009 appealed against the judgment of the court made on 18th May 2010 dismissing the petition on the ground that cruelty had not been proved to a degree that warrants a divorce.

0. In her memorandum of appeal the appellant has listed the following grounds of objection to the decision:

1. *THAT the learned trial magistrate erred in law and in fact in dismissing the appellant's petition.*
2. *THAT the trial magistrate erred in his assessment of the evidence before him and thereby reached an erroneous conclusion.*
3. *THAT the learned trial magistrate misapprehended the evidence before him and thereby erred in failing to reach a conclusion that the marriage between the appellant and the respondent had broken down irretrievably.*
4. *THAT the trial magistrate erred in holding that the appellant had not proved her case as required by law.*
5. *THAT the trial magistrate erred in fact in reaching a decision that was against the weight of evidence.*

0. The appellant therefore sought orders as follows:

1. *THAT this appeal be allowed with costs.*
2. *THAT the decision of the Resident Magistrate's Court dated 18th May, 2010 be annulled and/or set aside ad in lieu thereof an order be made allowing the appellant's petition with costs and a decree nisi do issue accordingly.*

0. The Respondent has opposed the appeal and the parties to the appeal have filed respective written submissions on the appeal, and judgment was reserved.

The petition

0. By her petition before the trial court the appellant petitioned for divorce on the ground that *"the respondent has since celebration of the marriage treated your petitioner with extreme cruelty and or callousness ultimately forcing her to live separately."* The particulars of cruelty pleaded are principally that the respondent had failed to provide for the petitioner and the children of the marriage and in terms of both the necessaries of life and the emotional care and support for the

family.

0. In his response to the petition by Answer to the petition dated 14th September 2009, the respondent denied the allegation and particulars of cruelty and contended that the marriage had not *'broken down irretrievably and avers that a divorce in the circumstances is not called for, as there have merely been minor squabbles in the family which can be straightened'* and he consequently prayed that the petition be dismissed with costs.
0. The petitioner and the first-born daughter of the marriage testified for the petitioner and the respondent testified on his own behalf without calling any witnesses.

"You stayed with me since birth. I recall that while in Primary School you used to pay for my tuition fees to teacher Mohamed Kibwau from Mtwapa. I was at MM Shah Primary School. I joined Star of the Sea. You are the one who used to attend all parents days. I can't tell who used to purchase our books but you used to cover them. You are the one who used to bring story books. Mum never covered our books. In secondary school you paid fro my French teacher to tutor me till I stopped myself. On the material day, I don't recall Mum saying she could not stay with a pauper. You used to bring Nyama Choma, fish and such like for us. You used to purchase them."

0. The respondent (DW1) denied any truth in the allegations of cruelty through beatings and neglect and pointed out that there had been no suit against for child support before the children's court or any report to a police station of any beatings of fighting. He professed to love the appellant and said it was because of the love relationship between them that the appellant was able to rise in rank at her employment from junior stenographer when they married to Senior Personnel Secretary at the time of their separation. He testified that the parties had not reconciled because there was a [tussle] as to who was wrong and he considered that the appellant had committed some 'small mistakes' against him and he was willing to forgive her if she sought his forgiveness.

<u>Has cruelty been proved</u>?

0. The law is that the matrimonial offence of Cruelty must be proved to the standard of beyond reasonable doubt. See *DM v. TM,* VOL. 1 KLR (Gender and Family Law Reports) at p.3, per Chesoni, J. (as he then was) citing *Mulhouse v. Mulhouse* [1966] P. 39; and *Strong v Strong,* High Court, at Eldoret January 25, 1989 (per Aganyanya J) Civil Appeal No 4 of 1988; [1990] KLR 118. See also *Meme v. Meme* (1976) KLR 13 and *Maathai v. Maathai* (1980) KLR 154, (1976-80) KLR 1689. The decisions in HC Div No. 43 of 2010 Mombasa *Emmanuelly Andrea v Patricia Kagendo Nyaga,* HC Div No. 35 of 2006 Mombasa *Gloria Mwikali Wambua v. Jimmy Mwaluma Msengo,* and Mombasa HC Div No. 55 of 2010 *Anjuman Yash Pal Devraj Sharma v. Shakhil Mohamedhussein Visram* cited by appellant are examples of situations where the court found cruelty to have been proved.

0. I do not find that cruelty has been proved to the standard of beyond reasonable doubt; in other words I do not feel sure that the alleged acts constituting cruelty has occurred, in the words of Law JA in *Maathai v. Maathai*, supra. It was not shown by credible evidence that the respondent neglected his responsibilities to his family and that the appellant shouldered the entire family burden of responsibilities. On the contrary, there was direct testimony by the appellant's own witness that the respondent indeed did meet some crucial family responsibilities such as the children educational needs.
0. Moreover, there is no supportive documentary evidence of the appellant's expenditure in household, school and other family needs, and there was no independent evidence, even from her own witness of the alleged beatings. There was no evidence that the appellant reported the alleged beatings to their close relatives, best-man or maid if there was fear of embarrassment at work.

<u>Was there constructive desertion by the respondent</u>?

0. The appellant introduced at submissions in the appeal an issue of constructive desertion urging that "the respondent was asked to leave the house because he used to quarrel and beat up the petitioner." In the petition, desertion was pleaded in an obtuse and tangential way that the

respondent had *'treated your petitioner with extreme cruelty and or callousness ultimately forcing her to live separately.'* Such pleading does not permit direct attention to a respondent to the charge of desertion to enable him effectively respond to it. Even if the appellant were excused for raising a new point on appeal, [see *Wachira v. Ndanjeru* (1987) KLR 252] the seriousness of the charge of the matrimonial offences would require that they be specifically pleaded to enable the respondent to respond directly to it in the answer to the petition and or cross-petition. Before the trial court, the appellant only submitted on the long separation as evidential of the breakdown of the marriage not as a basis for the offence of desertion.

0. Having found that cruelty had not been proved, the submission of constructive desertion cannot be maintained because constructive desertion relies on cruelty as the compelling force. As the respondent did not move out of the matrimonial home of his own will, but was 'chased out' by the appellant, desertion does not arise as it is in such circumstances founded on voluntary separation without probable cause. See section 8 (b) of the Matrimonial Causes Act.

Has the Marriage Broken Down irretrievably?

0. The spouses had been living separately for six years at the time of the hearing in March 2010, according to the petitioner, or since April 2005 according to the respondent. There is no evidence of serious attempts at reconciliation to enable the court find that reconciliation has failed to invoke the principle that where spouses are unable to live happily together and reconciliation efforts have been fruitful they are entitled to be released from their marital engagement in *N v. N & Anor.* (2008) 1 KLR (G&F) 16, per Madan J. (as he then was) that –

"28. Every person has inherent dignity and the right to have that dignity respected and protected."

Is reconciliation probable?

0. Although the respondent selfishly felt that reconciliation is only possible when the appellant seeks his forgiveness for the wrongs done to him in calling him a pauper and chasing him away from the matrimonial home, I consider that genuine reconciliation efforts from both sides may yet bear fruit, in view of the long cohabitation of 24 years and the interests of their grown up children, who from the testimony of the PW2, the eldest of the children, would appear to be embarrassed and affected by the problems their parents are going through, with the evidence that each of their parents contributed to their welfare in certain different ways.

Findings

0. Accordingly, I find that the matrimonial offences of cruelty and desertion have not been proved against the respondent and I am further not able to hold that the marriage between the parties has irretrievably broken down. I have read the judgment of the trial court and find that it considered, in detail and meticulously, the evidence presented before it against the tests for cruelty as set out in *Meme v. Meme*, supra, and came to the correct conclusion that the matrimonial offence of cruelty had not been proved to the required degree or standard to justify the making of a decree for the dissolution of the marriage.

Orders

0. Accordingly, the appellant's appeal herein is disallowed. However, in view of the matrimonial nature of the matter, there will be no orders as to costs.

<p 0.5in;"=""> **Dated, signed and delivered this 31st day of March, 2014.**

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Wafula for Ms Osino the Appellant

Mr. Ndenge in person for the Respondent

Miss Linda - Court Assistant