



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEALS NO.33 OF 2011**

*(An appeal arising from judgment by W. MOKAYA (Ms) – PRINCIPAL MAGISTRATE in Nairobi*

*CM.C. Divorce Cause No.18 of 2010 J W K –Vs- E W W delivered on 18<sup>th</sup> March 2011)*

**J W K.....APPELLANT**

**VERSUS**

**E W W.....RESPONDENT**

**JUDGMENT**

The Appellant petitioned the subordinate court to be divorced from the Respondent. The Appellant accused the Respondent of committing the matrimonial offences of adultery and cruelty. When the Respondent was served, she filed an answer to the petition denying the allegations of cruelty and adultery leveled against her. After hearing the petition, the subordinate court (W. Mokaya, Principal Magistrate) dismissed the petition. In the material part of her judgment, the learned trial court stated thus:

***“All in all, what I note is that the Petitioner’s evidence has been countered by the evidence adduced by the Respondent. It remains for the Petitioner to prove that this marriage has irretrievably broken down. This evidence does not prove so. Marriage is an institution that must be respected and protected by the law and court cannot permit any flimsy reason to form the basis of dissolving a marriage. In my view, the Petitioner does not have good reasons for wanting this marriage dissolved. If anything he merely walked out of his home without any justification and he cannot seek this court’s assistance to formally dissolve his marriage for no apparent reason. I decline to allow the petition which I dismiss accordingly. However no order on costs.”***

The Appellant was aggrieved by the decision. He has filed an appeal to this court. In his memorandum of appeal, the Appellant raised several grounds of appeal challenging the decision of the trial court. He was aggrieved that the trial court had failed to consider the totality of the evidence adduced, including the fact that the Appellant and the Respondent had been separated for a long period of time which was sufficient proof that the marriage could no longer be sustained. He was aggrieved that the trial magistrate had failed to take into consideration the fact that the Respondent had admitted the matrimonial offence of adultery, and had in fact sought forgiveness from him. He was of the view that the trial court misdirected itself when it failed to find that indeed the Respondent had committed the matrimonial offence of adultery. The Appellant was further aggrieved that the trial court did not take into consideration the evidence that was adduced by the parties which had indeed established that the marriage had irretrievably broken down with no possibility of salvage. In the premises therefore, the Appellant urged the court to allow the appeal, set

aside the decision of the trial court and either annul the marriage or in the alternative refer back the case to the subordinate court to be heard *de novo* before another court.

At the hearing of the appeal, this court heard oral submission adduced by Mr. Mbaluto for the Appellant. This was after the court had directed the case to be heard in the absence of the Respondent. The court was satisfied that the Respondent had been served with the hearing notice of the date that the appeal was scheduled to be heard. Mr. Mbaluto essentially reiterated the contents of the Memorandum of Appeal. He submitted that the evidence adduced by both parties had indeed established that the marriage had broken down with no possibility of reconciliation. He told the court that when the Respondent was served with the petition for divorce, she filed an answer to the petition and also cross-petitioned to be divorced from the Appellant. In her cross-petition, the Respondent pleaded the matrimonial offences of cruelty and desertion. He submitted the Appellant was aggrieved that the trial court had completely overlooked the cross-petition in her judgment. He explained that the Appellant had established the matrimonial offence of adultery when he produced a tape in which the Respondent was recorded confessing to having had a sexual relationship with a workmate. The Respondent's testimony corroborated his facts.

The Appellant was aggrieved that the trial court had without any justification dismissed this evidence as flimsy yet it had established to the required standard the matrimonial offence of adultery. Learned counsel submitted that the trial court had failed to take into consideration that the fact that the Appellant had left the matrimonial home on 25<sup>th</sup> March 2008. Since then, the parties had not resumed cohabitation. The Respondent had put forward her case that the Appellant had deserted the matrimonial home. This fact was admitted by the Appellant. The Appellant wondered why the court did not take into consideration the fact of desertion in her judgment. He was aggrieved that the trial court had inexplicably elevated the aspect of forgiveness without taking into account the actual facts on the ground which established to the required standard of proof on a balance of probabilities that the parties had indeed not forgiven each other and had stopped cohabitation. In the premises therefore, learned counsel urged the court to allow the appeal and grant the orders prayed in the appeal.

This being a first appeal it is the duty of this court, as the first appellate court, to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court must always keep in mind the fact that it neither saw nor heard the witnesses testifying (see *Selle –Vs- Associated Motor Boat Co. Ltd. & Another* [1968] E.A. 123 at Pg 126). This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the pleadings and the grounds of appeal put forward by the Appellant. It has also taken into account the submission made by the Appellant in this appeal. The issue for determination by this court is whether the Appellant established to the required standard of proof on a balance of probabilities the matrimonial offence of cruelty and adultery. The other issue which was raised in the cross-petition is whether the matrimonial offence of desertion was established.

In his testimony before the trial court, the Appellant testified that he came to learn that the Respondent had committed adultery with one A M who was her workmate. He confronted the Respondent. The Respondent confessed on tape that she had indeed committed the said adultery. The Appellant testified that the Respondent had denied him his conjugal rights without any justification leading to the complete breakdown of their sexual relationship. This led the Appellant to leave the matrimonial home on 31<sup>st</sup> March 2008. The couple had since not resumed cohabitation. The fact that the Respondent had committed adultery was corroborated by the testimony of PW2 D K, a church minister who testified that on 26<sup>th</sup> July 2008 he was called to facilitate a reconciliation meeting between the Appellant and the Respondent. In the meeting, the Respondent admitted that she had been unfaithful to the Appellant. She however begged to be forgiven by the Appellant. The reconciliation was however not achieved because the parties never resumed cohabitation. In her testimony, the Respondent denied confessing to having committed adultery with the said A M. She however confirmed that the Appellant had left the matrimonial home and had not returned to the said matrimonial home. At the time the judgment was delivered by the trial court, the Appellant and the Respondent had been separated for a period of three (3) years.

It was clear from the above evidence that indeed the marriage between the Appellant and the Respondent had indeed irretrievably broken down. The trial court fell in error when it failed to take into consideration the cross-petition that had been filed by the Respondent in which the Respondent had sought to be divorced from the Appellant on the ground of desertion. This court holds that the Appellant indeed proved the matrimonial offence of adultery to the required standard of proof on a balance of probabilities. The Appellant narrated how he came to learn of the affair between the Respondent and her workmate. He confronted the Respondent. She admitted to the affair. She sought forgiveness when a meeting was held to reconcile them. This confession was confirmed in the testimony of PW2. He had been called to a meeting to facilitate reconciliation. The reconciliation was not successful. The trial court overlooked the fact that since the Appellant separated from the Respondent on 31<sup>st</sup> March 2008, they had not resumed cohabitation. The fact of this separation is clear evidence that the incident of adultery had indeed caused the marriage to irretrievably break down. Forgiveness was not achieved. There was no reconciliation after the separation. The matrimonial offence of desertion was proved to the required of proof on a balance of probabilities.

In the premises therefore, this court holds that the Appellant established a case for this court to allow the appeal. The appeal is allowed as a consequence of which the decision of the trial court dismissing the Appellant's petition for divorce and the cross-petition for divorce is hereby set aside. In its place, is substituted a decision of this court allowing the petition and cross-petition for divorce on the grounds of adultery and desertion. The marriage solemnized between the Appellant and the Respondent on 11<sup>th</sup> November 2006 at the Kenya Assemblies of God (ICC) Church in Nairobi is hereby dissolved. Decree nisi dissolving the said marriage is hereby issued. The decree nisi shall be made absolute thirty (30) days from the date of this judgment. There shall be no orders as to costs. It is so ordered.

**DATED IN NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL, 2014**

L. KIMARU

**JUDGE**