



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.181 OF 2011**

**BETWEEN**

**P A O ..... APPELLANT**

**AND**

**M O O ..... RESPONDENT**

***(Being an appeal the judgment and decree of Hon. Nyakundi, SRM, delivered on***

***12th August 2011 in original Rongo PMCC Divorce Cause No.17 of 2010)***

**JUDGMENT**

**The Respondent's Claim**

1. By an amended plaint dated 10<sup>th</sup> December 2010, the respondent/ plaintiff averred that he contracted a presumed marriage with the appellant/defendant in the year 1999 and they stayed as husband and wife at [Particulars Withheld] ; their marriage was blessed with one issue namely (S.O.) then aged 8 years old. In addition the Respondent averred that the appellant had brought one issue to the marriage namely (O.O.) aged 12 years and that he had always loved, cared, protected and provided for the said child as his own. That the parties lived peacefully as husband and wife until sometimes in the year 2005 when the appellant became cruel and hostile to the respondent.
2. At paragraph 7 of the amended plaint, the respondent gave particulars of cruelty as follows:-
  - a. *The defendant is guilty of having been being cruel and hostile to the plaintiff on various occasions since the year 2005 by refusing to talk to the plaintiff and hurling insults at him.(sic)*
  - b. *The defendant is guilty fond of stealing the plaintiff's money and other household items to sell whenever the plaintiff is away.*
  - c. *The defendant is guilty of eloping with another man at Kisumu where she now stays in her rented house.*
  - d. *The defendant is guilty of having chased the plaintiff away from their rented house by throwing out his clothes and dumping some in cold water while saying she does not want the plaintiff near him as she does have many male friends who cares for her needs.(sic)*
  - e. *The defendant is guilty of destabilizing the education of their two children O O and S O who until end of July 2010 were in class 6 and class 1 at [Particulars Withheld] Primary School and [Particulars Withheld] Academy respectively by taking them away from school on the 31<sup>st</sup> day of July 2010. This act casts darkness in the two children's future.*

f. *The defendant is guilty of subjecting the plaintiff to mental anguish by denying him conjugal rights and deserting her matrimonial home.*

3. He further made averments at paragraph 7 (a) and set out particulars of desertion as:-

- a. *Abandoning the matrimonial house and bed without probable cause;*
- b. *The defendant abandoned the matrimonial house, removed children from school without the plaintiff's consent and/or permission;*
- c. *The defendant without reasonable cause removed the children from the matrimonial house and took them away from the plaintiff;*
- d. *The defendant without permission and or probable cause removed the plaintiff's household items namely chaster drawer, corner stand, utensils, clothes and boxes from their matrimonial house at Sony and took them to Kisumu in total disregard to the plaintiff's welfare as a husband;*

4. The respondent/plaintiff prayed for:-

- a. *Dissolution of the marriage between them;*
- b. *Costs and interest;*
- c. *Custody of their two children.*

#### The Appellant's case

5. The appellant on her part filed an amended statement of defence and counterclaim dated 21<sup>st</sup> December 2010. She contended that her marriage with the plaintiff was peaceful and harmonious until 2003 when the plaintiff started flirting with other women thus bringing difficulties to the marriage. At paragraph 14 of the amended defence, the appellant gave the particulars of adultery as follows:-

- i. *Engaging in and/or having extra marital sexual liaison with persons other than the defendant.*
- ii. *Maintaining an extra marital affair with M A and D A of [Particulars Withheld]*
- iii. *Keeping other women at Particulars Withheld]Staff Quarters, while the defendant is at the Rural Home.*
- iv. *Disappearing from the family house, without notice.*
- v. *Switching of mobile phone, while in the company of the other women.*
- vi. *Failing to uphold marital fidelity and morality.*

6. In addition the appellant counterclaimed that the respondent was guilty of cruelty as against the appellant as more particularly set out under paragraph 22 of the amended Statement of Defence:-

- i. *Chasing away the defendant and the children of the marriage from matrimonial house on the 7<sup>th</sup> February 2010.*
- ii. *Evicting the defendant from the matrimonial house on the 22<sup>nd</sup> day of February 2010.*
- iii. *Assaulting and chasing away the defendant from the matrimonial house on the 20<sup>th</sup> day of April 2010.*
- iv. *Subjecting the defendant to constant and persistent quarrels.*
- v. *Refusing and/or neglecting to supply basic necessities to the defendant and the children.*
- vi. *Adopting and leading a quarrelsome life.*
- vii. *Creating unnecessary antagonism and disharmony in the house.*
- viii. *Denying and/or depriving the defendant of her conjugal rights.*
- ix. *Refusing to talk and/or discuss the matrimonial dispute with the defendant.*

7. In her counter-claim, the appellant prayed for:-

- a. *Custody of the children of the marriage be awarded to the defendant with visitation and/or rights of access, being awarded to the plaintiff.*
- b. *The plaintiff be ordered to pay and/or provide reasonable monthly maintenance in favour of the*

- defendant and children of the marriage.*
- c. *Each party to bear his/her own costs.*
  - d. *Such further and/or other relief as the honourable court may deem fit and expedient.*

### The Respondent's Evidence

8. The plaintiff/respondent M O O testified as PW1. He told the court that he married the defendant in 1999; they had been living in [Particulars Withheld] Estate and were blessed with two children namely (B.O.) and (S.O.). That B. O. passed away but both himself and the appellant brought a child each to the marriage.
9. The respondent also testified that during the subsistence of their marriage, they stayed with the children that is (S.O.) aged 8 years old and (O.O.) aged 12 years old. That S.O. was a pupil at [Particulars Withheld] Academy (class 1) while O.O. was a pupil at [Particulars Withheld] in class VI. That he used to pay school fees for them and produced receipts for the same which were marked **P. Exhibit 4 (a), (b) and (c)**. Furthermore, that (O.O.'s) fees was by check off from his pay slip and a copy of his pay slip (August 2010) was marked as **P. Exhibit 2**.
10. The respondent admitted to having marital problems with the appellant on grounds that she used to go out of the matrimonial home at her own time when he was away at work at night and she would come back home just before he returned from work. It was respondent's case that whenever he asked the appellant where she had been she used to retort that she was an adult and she knew what she was doing. Further that it was the maid who cooked for him and washed his clothes; that the appellant often abused their neighbours causing him to be summoned at their office with the result that he had to be moved to another house. He produced the letter summoning him to the offices as **P. Exhibit 6**. He also testified that before marrying the appellant, he had another wife who passed away in 1995 and left a child named (B.O.) who lived in Kisumu.
11. The respondent further testified that consequently, the appellant moved with the 2 children to Kisumu. He received a letter from the head teacher inquiring about the whereabouts of (S.O.) which was marked **P. Exhibit 3** and from [Particulars Withheld] School as **P. Exhibit 4**. That after the children were taken away he got a letter from the children's department Rongo on 23<sup>rd</sup> August 2010 to attend a meeting on 24<sup>th</sup> August 2010. He attended the same during which the appellant was told to return the children but she declined. Furthermore, before the children left with the appellant, he used to cater for their medical treatment through the medical clinic at [Particulars Withheld].
12. The Respondent denied ever having affairs with other women, switching off his phone and ever chasing away the appellant from their matrimonial home. Instead he insisted that his marriage had broken down because the appellant could not change. He admitted that he now lived with another wife with whom he had children. That he also had brothers at home whom he was taking care of from his net salary of Kshs.20,750/= . The pay slip was marked **P. Exhibit 9**.
13. In concluding his evidence in chief, the respondent stated that he did not wish to continue living with the appellant and wanted the marriage dissolved and to be given custody of the children as he was better placed to take care of the children because he was working and able to take care of schooling and providing medical care.
14. On cross examination the respondent stated that he had never paid dowry for the appellant though he did not dispute the fact that the appellant was his wife because they stayed together as husband and wife from 1999 to July 2010. The respondent's son (S.O.) also testified and told the trial court that he wanted to stay with his father, the respondent for the reason that the respondent cared for him. He also stated that though he now attended [Particulars Withheld] Primary School at Kisumu, his preference was to continue schooling at [Particulars Withheld] Academy.
15. (O.O. ) (the child) who the appellant brought into the marriage, and who was aged 12 years told the court that he now stayed with the appellant and his grandmother at [Particulars Withheld]. Furthermore,

that while living at [Particulars Withheld] with the respondent, the respondent would buy food while at times he would not buy but he confirmed that he was never chased away from school due to lack of school fees. However, he preferred being in Kisumu [Particulars Withheld] as opposed to [particulars Withheld].

### The Appellant's Evidence

16. DW1 was the appellant. She confirmed that the respondent was her husband since 1999; that she was not formally employed. She denied ever abusing the respondent, stealing his money or eloping with another man to Kisumu. She testified that she used to wash the respondent's clothes when they were together. She was faithful to the respondent. That she did not destabilize the education of the children because even after taking away the children they were still attending school though not at [Particulars Withheld].

17. The Appellant accused the respondent of not being faithful as he was living with another woman that is D A since July 2010. The appellant also testified that the respondent used to assault her on several occasions; he was a quarrelsome person, he denied her her conjugal rights and he would on a number of occasions refuse talking to her. However, she admitted that the respondent used to provide for the family when he had his salary and when he did not have money she used to get assistance from his brothers.

18. The appellant stated that as a result of the respondent's cruelty, adultery and inability to provide for her and the children, she decided to leave the respondent and to take away her children as they were still young; that she now provides food, they go to school and she dresses them. She also contended that she had paid school fees to the school the children attended though she had no receipts. In addition the appellant stated that the respondent had not sent her money to buy food, clothes and pay rent for the house she lives in with the children. She produced a receipt for house rent as **D exhibit (a) – (b)**. She prayed for the court to grant her custody as the children were still young and to order maintenance from the Respondent. She also said she wanted a separation and not a divorce.

19. On cross examination, the appellant stated that she had no work that could bring income to her. That (B.O.) was not her biological child as his mother passed away but the child knew her as his mother. She stated that she did not move with him to Kisumu to justify getting money from the respondent. That when she left for Kisumu, the respondent was not around; that the respondent used to take care of all the children's basic needs. She corroborated the respondent's testimony that she went to the children's officer and reported that she wanted money to pay school fees but she was told to take the children back to where they were schooling at [Particulars Withheld]. She did not take the children back.

20. That she took away the children and some household items from [Particulars Withheld] without respondent's permission; that during the subsistence of their marriage with the respondent, the respondent sponsored her to do a nursing course though she did not complete the course because she delayed to register for lack of school fees; she denied staying with her mother but admitted that her mother paid rent for her. Finally, the Appellant testified that she wanted the respondent to only take care of the children as she was not ready to go back to her matrimonial home.

### Judgment of the Trial Court

21. In his judgment the trial magistrate held that the respondent was a salaried person and therefore he was able to take care of the children. For the aforesaid reason the trial court ruled that the respondent had proved his case on a balance of probabilities and granted judgment as follows:-

1. *That the marriage between the plaintiff and the defendant is dissolved.*
2. *That custody of (S.O.) is granted to the plaintiff.*
3. *No order as to costs.*

### The Appeal

22. The appellant being dissatisfied by the above orders filed the instant appeal. In her memorandum of appeal dated 1<sup>st</sup> September 2011, the appellant has advanced 16 grounds of appeal. The 16 grounds touch on two main issues: first is the custody of the minor child (S.O.) aged 8 years to the respondent as opposed to the appellant, and secondly that there was no enough evidence to warrant granting of the divorce sought by the respondent.

23. The appellant therefore prays that:-

- a. *The appeal herein be allowed and the judgment and decree of the trial magistrate dated 12<sup>th</sup> August 2011, vide Rongo SRMCC Divorce Cause No.17 of 2010, be set aside, reviewed, varied and/or quashed.*
- b. *The Honourable Court be pleased to substitute therefore an order dismissing the respondent claim and allowing the appellant's counter claim vide Rongo SRMCC Divorce Cause No.17 of 2010.*
- c. *Costs of this Appeal and Costs incurred in the subordinate court be borne by the Respondent.*
- d. *Such further and/or other relief be granted as the court may deem expedient.*

#### Issues for Determination

24. When the appeal came up before me on 30<sup>th</sup> April 2013, the parties took directions to canvass the appeal by way of written submissions which were filed and exchanged between the parties. The appellant's submissions were filed by M/s Oguttu Mboya & Co. Advocates while those for the respondent were so filed by M/s Owade & Co. Advocates

25. From the contending submissions, the following are the issues to be determined by this court:-

1. *Was the union between the appellant and the respondent a marriage in keeping with the provisions of the Marriage Laws in Kenya?*
2. *Who should get custody of the children?*

#### Findings

26. With regard to the first question I refer to **Bromley's Family Law 5<sup>th</sup> Edition page 63** where the learned author states:-

**“It has long been established law that, if a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was in fact no marriage and not upon those who rely on it to prove that it was solemnized.”**

27. Furthermore, in the case of **Horle Nsirah Wanjiku Yawe –vs- Public Trustees EACA CA No.13 of 1976 (UR)** Mustafa J.A said:-

**“The position seems to me to be this. The appellant had testified that she was married to the deceased and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died and during that time the appellant bore him four children ..... long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption .... such presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance into the appellant's favour the scale must tilt in that direction. Even if the proper ceremonial rituals were not carried out that would not invalidate the marriage.”**

28. In the instant case, none of the parties dispute the fact that they were living together as husband and

wife though they had never solemnized their union in a church nor conducted ceremonial rituals in accordance with Luo Customs. From the evidence, the respondent has clearly moved on with his life after his marriage with the appellant broke. The respondent admitted plainly that he was now living with another woman with whom he has children. He therefore sought for a divorce. The appellant on the other hand admits that even though she is not living together with the respondent she opts for a separation and not a divorce.

29. It is not disputed that the marriage between the appellant and respondent has broken down irretrievably. One cannot therefore force the respondent to stay in a union he feels does not add value to him. I therefore agree with the decision of the trial court of granting prayer (a) of the plaint because marriage is based on mutual trust. However, even though cohabitation is widely practiced in Kenya, it is not a valid/recognized form of marriage that one has to apply to court for the marriage to be dissolved. In my humble view therefore, the moment the appellant moved out of her matrimonial home and the respondent in turn brought into the matrimonial home another woman with whom he has children, that marriage between the respondent and appellant *prima facie* stood annulled.

30. With regard to the issue of custody of the children of the marriage, **Section 83 (1)** of the **Children's Act** provides as follows:-

**“83 (1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to -**

- a) the conduct and wishes of the parent or guardian of the child;**
- b) the ascertainable wishes of the relatives of the child;**
- c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;**
- d) the ascertainable wishes of the child;**
- e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;**
- f) the customs of the community to which the child belongs;**
- g) the religious persuasion of the child;**
- h) whether a care order, or a supervision order or a personal protection order or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;**
- i) the circumstances of any sibling of the child concerned; and of any other children of the home, if any;**
- j) the best interests of the child.”**

31. Although it is listed as the last of the factors to be considered by the court when determining the issue of custody of the child; the best interests of the child is of paramount importance. It is in fact at the top of the list and courts are careful to ensure that the best interests of the child take precedence in determining who between the parents will or will not have custody or whether neither of them qualifies to have custody of the child(ren).

32. In the instant case, there is evidence showing that the respondent works with [Particulars Withheld] and earns a salary as per the salary slips exhibited in court. There is also evidence to show that the

appellant has no discernible source of income and lives with her mother since walking away from the matrimonial home in the absence of the respondent. There is also evidence showing that at the time of their union, each of the parties brought their own child into the marriage. The respondent cared for all the children as if they were children of one union, so did the appellant. The respondent paid all the fees.

33. From all the above, it appears that both appellant and respondent have the best interests of the children at heart. In his judgment the learned trial magistrate said the following on the issue of custody of the children:-

**“In respect of custody of the minor children, the court interviewed the minor children with a view to ascertain [ing] their best interests; S.O. a child aged 8 years was candid that he wanted to stay with his father and (O.O.) was candid that he wanted to stay with his mother. It is clear from the evidence on record that the plaintiff is salaried person and therefore able to take care of the children. It is therefore my considered opinion that the best interest of S.O. shall be served if his request to stay with his father is granted.”**

34. It is interesting to note that the learned trial magistrate did not say anything about the interests of (O.O.), who expressed interest to stay with the mother.

35. In R.M. –vs- H.G. [2012] e KLR Makau J held, and I agree with him that:-

**“Further to the above, the general rule is that where custody of a child of tender years is in issue, the mother should have the custody unless special circumstances are established to disqualify the mother from having of such a child.”**

36. Under **Section 2** of the **Children’s Act** a child of tender years means a child under the age of 16 years.

37. In the case of K. –vs- K.[1975] E.A. 18 the Court of Appeal held:-

**“The substantial question in this appeal is whether or not the judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that in the absence of exceptional circumstances, the custody of young children should be given to the mother.”**

38. Similarly in ZMN –vs- GSG the Court of Appeal (Mombasa) C.A. No.1234 of 1997 stated that there was no arising evidence for review and that the physical custody, care and control of the children should be with the mother unless there were compelling circumstances to disqualify her from being awarded the custody.

39. In the instant case, I am satisfied that there were compelling reasons why custody of the child (S.O.) was given to the Respondent. First and foremost, the appellant appears erratic in her behaviour and in my humble view, such behaviour would not be good for the child. In any event, it is almost over three years since the custody order was made on 12<sup>th</sup> August 2011. The children have grown and are likely to have made friends in the schools where they are learning. I therefore find that overturning the trial court's custody order would not only be disruptive but would more likely than not make the child S.O. lose grip of life after picking up the pieces from the time the appellant and the respondent went their separate ways.

40. It is also my considered view that the trial court's custody order did not discriminate against the appellant in any way. Further, contrary to the contents of ground 3 of appeal, the appellant confirmed during her testimony both in evidence in chief and during cross examination that **“I am not working. I do nothing.”** The appellant also admitted the following, **“I did not get permission when I was taking the children away and property. I was going to use the household property while staying away**

**from him ---- It is my mother who pays rent --- at the moment I am not doing any business. (O. O.) is not the plaintiff's biological child; the plaintiff used to take care of him, pay fee, food and clothes.”**

41. With the above facts in mind, the learned trial magistrate acted correctly in granting custody of the child to the respondent. There was no misconception, misapprehension or misapplication of the law on the part of the trial court. I am satisfied that the provisions of **Sections 82 and 83** of the **Children's Act, No.8 of 2001** were properly applied; and the learned trial magistrate's findings were well anchored in law.

42. What I am saying above is that I find no merit in this appeal. The findings of the learned trial magistrate were well anchored in law and I so find. The appeal is accordingly dismissed in its entirety.

43. Each party shall bear its own costs of this appeal.

44. Orders accordingly.

**Dated and delivered at Kisii this 31<sup>st</sup> day of July, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:-

Miss Nekesa for Oguttu Mboya for the Appellant

Mr. Mageto for Owade for the Respondent

Mr. Bibu - Court Clerk