



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 64 of 2012

P.M.M APPELLANT

AND

C.N RESPONDENT

(Being an appeal from the judgment of Hon. Aloyce Peter Ndege, Senior Resident

Magistrate in Kehancha SPM's court Divorce Cause No.1 of 2012 dated 19th April 2012)

JUDGMENT

1. The appellant herein P.M.M was the plaintiff in Divorce Cause No.1 of 2012 filed at the Kehancha Senior Resident Magistrate's court on 1st February 2012. By a plaint dated 1st February 2012, the appellant prayed for judgment against the defendant in the following terms:-

- a) *The marriage solemnized under Kuria Customary Laws between the plaintiff and the defendant in 1994 be dissolved.*
- b) *The plaintiff be given custody of the minors namely:-*
 - i) *J.C*
 - ii) *K.B*
 - iii) *C.G*
- c) *An order requiring the defendant to return the plaintiff's certificate he confiscated.*
- d) *An injunction restraining the defendant from entering, disturbing, creating disturbance and/or in any way from interfering with the plaintiff's quiet enjoyment.*
- e) *Any other relief this honourable court may deem fit to grant.*

2. It was the appellant's case who testified as PW1 in the lower court that she got married to the respondent in August 1994 in accordance with Kuria Customary Law. That they lived peacefully until they got their first son when the respondent started assaulting her and chasing her away from home. The assaults continued until she gave birth to their second child when he got into the habit of bringing Kalenjin ladies to spend the night in their matrimonial home, a habit that caused the appellant mental

anguish loss and damage for which she held the Respondent liable. In between, she spent her time between her parents' home and the matrimonial home, and at some point, she said she had to stay with her mother-in-law because the Respondent had demolished her house.

3. The appellant stated further that when she eventually returned to her home after absence of about 2 years, the Respondent did not come to see her at the mother in-law's house but only continued to bring some women to spend the night with him on the matrimonial bed. That on one occasion he assaulted her by holding her on her back and stepping on her like a slave. She reported the matter to the police and went for medical treatment. After the assault, she did not prosecute the Respondent as none of the defendant's relatives could be her witnesses.

4. Her brother then bought her a plot in Kehancha where she is now comfortable; the Respondent has never come to see or ask about how she is coping with the children. That on 23rd February 2011, the respondent went to where she was staying at Kehancha and threatened her with dire consequences if she did not move away from Kehancha or go back to stay with him. She concluded her evidence by praying for a divorce as she felt that the respondent's actions and conduct could lead to mental anguish.

5. On cross-examination by the respondent, the appellant testified that she was a spinster at marriage; she gave birth to 3 children with the Respondent but the 4th child is not his, that she got a boyfriend who is the father of her 4th child and that the Respondent did not buy her the plot she is staying in.

6. The Respondent C.N testified as DW1 and confirmed to the court that the plaintiff is his wife, that he took cows as dowry to her parents' home, they have 3 children together and she teaches as a nursery school teacher.

7. He also confirmed that the plaintiff is his second wife, he sub-divided his land to her and had it registered in her name, she is not a business woman, he took the children to B[...] Academy, she removed them from school, she does not want him to visit the children and she has brought another man one J.N to the home where he bought for her. The man works at Kenya F[...] as a clerical officer and he is the father of the appellant's 4th son.

8. The respondent further testified that he went to the forest department to report the relationship between the appellant and her lover with a request that he leaves his wife alone, but instead, the man went to the OCS who in turn organized for him and his mother in-law to see the chief of Taranganya, they met the chief together with his mother in-law and brother in-law and it was decided that the appellant should return to her matrimonial home.

9. The appellant, being dissatisfied with the chief's decision took the respondent to the D.O. and the D.O. was of the same opinion as the chief. The appellant was still dissatisfied with the decision of the chief and D.O. and eventually came to court though the respondent insists that he is willing to forgive her for having had a child out of wedlock.

10. On cross-examination by the appellant the respondent maintained that she has the title deed of the land he bought for her in 1994, and for which he paid the sum of Kshs.20,000/= to the land owner through the appellant.

11. The respondent also maintained that he has never rejected the appellant or assaulted her; that she stays in his land, that he still loves her even if she gave birth to a child out of wedlock and he did not know if she had reported her complaint to the police or to any Women Rights Activists.

12. DW2 was S.M mother to the respondent and mother in-law to the appellant. She confirmed DW1 testimony that dowry was paid, that 3 issues were born to the parties herein, the respondent gave appellant money to purchase land, the respondent took the appellant back to school for a teaching course and the plaintiff was never at any one time assaulted by the respondent. On cross examination by the appellant, she maintained that the respondent did not chase away the appellant from the matrimonial home.

13. DW3 was John Rioba the chief of Bukira East Location. He confirmed that the appellant had complained to him that she wanted a divorce, the parties concerned talked about the issue at length and it was decided that the appellant and respondent forgive each other and go back to live together as man and wife. The appellant did not however accept the verdict of the chief and she reported to the D.O. of the area who reached the same opinion as the chief. DW2 however, said that he had never received any report of violence or cruelty in the marriage. On cross-examination by the appellant DW3 maintained that he came to court to testify on what part he played in the dispute and the work of the elders is to re-unite and not to separate the parties herein. On re-examination he confirmed that among the Kuria, any domestic disputes go through the chief at first instance and that none of the parties ever brought any accusation of violence against the other to him.

14. DW4 was D.C.B. He was the proprietor of B[...] Academy. He confirmed that he knew the respondent because he had over 8 children in the school and that he paid his children's school fees. That it was only after the respondent encountered challenges in paying school fees that the appellant removed her children from the school. On cross examination by the appellant, he confirmed that the respondent used to pay school fees by supplying them with farm produce.

15. After evaluation of the evidence before him, the learned trial magistrate held that the appellant had not proved that her marriage had broken down irretrievably to warrant a divorce. He therefore dismissed the appellant's suit and urged the parties to promote reconciliation. He gave no orders as to costs.

16. The appellant, being dissatisfied with the above judgment filed this appeal on 14th May 2012 on the following grounds:-

- 1) *The learned magistrate erred in law and in fact by failing to analyze more the evidence adduced by the appellant and therefore arrived at the wrong conclusion.*
- 2) *The learned magistrate erred in law and in fact by failing to find that the appellant had proved her case on a balance of probabilities.*
- 3) *The learned magistrate erred in law and in fact by failing to consider that the marriage between the appellant and the respondent had irretrievably broken down.*

17. The respondent filed what he called a reply to Memorandum of Appeal dated 4th October 2012 and advanced the following grounds:-

- 1) *That: according to the evidence on record, the judgment arrived at was proper in law and infact after the learned magistrate thoroughly analyzed etc the evidence adduced by both the appellant and respondent.*
- 2) *That: the learned magistrate was proper in law and infact in his findings that the appellant had not proved her case on balance of probabilities as her evidence was far short of any proof.*
- 3) *That: according to the evidence on record, the learned magistrate was proper in law and in fact that the marriage between the petitioner and respondent had not irretrievably broken down despite the shameful adulterous acts of the petitioner.*
- 4) *That: the appeal by the petitioner lacks merit as her evidence on record are far short of any proof at all.*

18. When the matter came before Justice Lagat Korir on 30th October 2012, both parties agreed to canvass the appeal by filing and exchanging written submissions. Both sets of submissions were duly filed on 27th November 2012 and 21st November 2012 respectively. The appellant submitted that the respondent and herself were married under Kuria customary law, which marriage would have been dissolved had the respondent accepted to take back his dowry which he was being offered by the

appellant's mother and brother.

19. On the proof of grounds for divorce the appellant relied on **section 8 (1)** of the **Matrimonial Causes Act Cap 152 Laws of Kenya** which provides that a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent:-

a) has since the celebration of the marriage committed adultery ; (or)

b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition (or)

c) has since the celebration of the marriage treated the petitioner with cruelty (or)

d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

20. On the issue of adultery she submitted that the respondent came to their matrimonial home with other women who he was intimate with and on issue of cruelty, she submitted that on their being separated in the year 2000, the respondent never visited nor provided for his children but only threatened her to leave Kehancha if she did not want to live with him.

21. On irreconcilable differences, the appellant submitted that she had a relationship with another man, they got a child from that relationship and the fact that she sought comfort and solace with another man showed that their marriage had broken down irretrievably.

22. Finally the appellant urged the court to set aside the judgment of the lower court and replace the same with an order that the marriage between her and the respondent is dissolved and the respondent be compelled to maintain his children.

23. The respondent in his submissions stated that the appellant never adduced any evidence to show that she had been assaulted, her testimony on adultery by the respondent was also never proved, she never called her relatives to corroborate her story that the respondent used to send her away. He also submitted that it was actually the appellant who admitted the fact that she had committed adultery and had a son from the affair.

24. In addition, he submitted that since the appellant's evidence fell far short of the threshold required to prove that the marriage had irretrievably broken down, then the marriage should not be dissolved. He also submitted that he still loves the appellant despite the fact that she has had a child out of wedlock. He said that he was still ready and willing to support his children. He also urged the court to dismiss the appellant's prayer for custody of the children.

25. The issue of determination here is whether or not the appellant had presented sufficient evidence to this court to support her plea for a divorce. Since this is a first appeal, I am under a duty, to evaluate the evidence afresh with a view to reaching my own conclusions in the matter, only remembering that I do not have the privilege of seeing and hearing the witnesses.

26. In the book, **Kenya Customary Law** by Eugene Cotran at page 121 on grounds for Divorce the author states that:-

“--- although there are “grounds” for divorce under customary law (e.g. refusal of intercourse, witchcraft, habitual theft, desertion, cruelty, failure to maintain by a husband frequent adultery by a wife) these are not “conditions precedent” to granting a divorce as in the old English law which is still the statutory law of Kenya. They are in fact reasons put forward by each party to support his or her plea for dissolution. They are factors to be taken into account, other factors being the return of the dowry and the existence and/or number of children. To that extent divorce under customary law may be likened to the principle of the breakdown of the marriage rather than the establishment

of a matrimonial offence.”

27. I have now carefully evaluated the evidence afresh. I have also carefully considered and weighed the judgment of the trial court. Now, applying the law to the facts and evidence in this case, I am not persuaded that there exists any sufficient reason for me to interfere with the findings of the learned trial magistrate. The appellant’s claim for divorce was premised on cruelty and adultery. There is however no firm evidence by the appellant to demonstrate to the court that the Respondent was cruel to her. She stated that she sought medical evidence after the assaults, but she did not bring to the attention of the court any documentary evidence such as a P3 form or some other evidence to show that she had been assaulted on the many occasions she alleged to have been assaulted. Nor did she call any witness to corroborate her testimony. As the respondent says in his submissions what may have occurred between the appellant and the respondent were normal differences of a healthy marriage.

28. The appellant also alleged that the respondent was guilty of adultery with some unnamed women who were taken in by the Respondent to defile the matrimonial bed. However, as it turned out, no names of these women were given, no witnesses were called to support the appellant in her claims. What turned out from the whole evidence is that it is the appellant who committed adultery and the evidence was there, a son born to her and her new found lover. The appellant stated she had “moved on” with her life after the alleged cruelty and adultery by the respondent. She did not even dare the respondent that she was planning to marry her lover. To my mind, she still recognized her marriage to the respondent. In any event, the dowry paid for her has not been returned, which means the marriage between her and the respondent still subsists. No offer for the return of the dowry have been made by appellant’s parents.

29. The appellant also alleged that the respondent chased her away from the matrimonial home. However, there is evidence on record to the effect that it is the appellant, who, on her own volition deserted the matrimonial home, took away the children and went to live with her lover. The Respondent told the court that inspite of what the appellant, who is his second wife has done, he is willing to have her back home so that the two of them can look after their children, including the appellant’s 4th child who was sired by another man. The respondent did not file a cross-petition for divorce and this being the case, I see no ground for dissolving the marriage which is a polygamous marriage.

30. In the premises, I find and hold that the appellant’s appeal lacks merits. The same is dismissed but with no order as to costs.

31. It is so ordered.

Dated and delivered at Kisii this 18th day of April, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Present in person for Appellant
Present in person for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.