

to obey ones husband. I must say I agree with counsel for the appellant on this point. The learned trial magistrate appears to have imported his views on marriage into this case to the prejudice of the appellant. Failure to **“submit and obey”** were not some of the particulars of cruelty pleaded in the plaint. The learned trial magistrate did make other unpalatable and uncalled for comments that clearly showed that he was biased against the appellant herein. I do not intend to go deeper into that issue but as an impartial arbiter, it was wrong for the magistrate to show such open bias. He should have forgotten that he was **‘male’** and arbitrated and reasoned like a Judicial Officer which unfortunately he failed to do.

From the evidence of the trial court however, it is evident that the Appellant and the Respondent could not live together as husband and wife. Once they started suing each other in criminal proceedings it became clear that they became adversaries and it was not possible for them to remain together as husband and wife unless they chose to. It is clear therefore that their marriage had irretrievably broken down and was beyond salvage. I further note that since the orders of dissolution of the marriage was made, it is now over 8 years ago. The parties must have moved on and the court cannot force them to get back together. The order of dissolution of the marriage cannot therefore be reversed.

On the issue of the Appellant being ordered to vacate the Respondent’s land, I am constrained to say that the learned magistrate treated her as a mere trespasser on that land whose eviction was to be granted as a matter of course, or as a licensee whose licence had been cancelled. The Appellant was the Respondents wife of many years. Even though the number of their children is disputed, the Respondent admits having had 5 children with her. These children were not considered at all when the marriage was dissolved. Their right to be provided for, and their right to survival were totally ignored by the learned magistrate. He did not even mention them in his Judgment. Were they to vacate the land too? Were they trespassers, licencees or tenants at will who had no rights whatsoever in that marriage? That was wrong. When a couple divorces, and there are issues to the marriage, if they are under the age of 18 years, then their best interests must be taken into account. In this case, they appear to have been completely forgotten. This was contrary to the law. It created an injustice on the children of the marriage who were neither responsible for their parents getting married in the first place or getting divorce later.

I must therefore interfere with the learned trial magistrate’s Judgment. This appeal therefore succeeds in part. Orders No.2 and 3 of the decree relating to the appellants vacating the said land and on payment of costs are hereby set aside. In their place, I order that that Appellant and her children have a right to remain on the parcel of land in question until issues of matrimonial property, if any, or the rights of the children in that marriage (their ages were not indicated in the plaint) are determined. On the issue of costs, this being a matrimonial matter and given the circumstances surrounding the case, I order that each party bears its own costs of this appeal and the subordinate court case. It is so ordered.

Delivered, dated and signed at Embu this 11th day of May 2010.

In presence of:-Mr. Kariithi and Mr. Magee for the parties

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KARANJA

JUDGE.

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presence

of:-

Mr.

Kariithi

Mr. Magee for the parties.