



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 75 of 2006

DAVID KIPYEGO TARUS APPELLANT

VERSUS

JULIA JEPKOSGEI TARUS

RESPONDENT

J U D G E M E N T

This is an appeal against the judgment of the Learned Senior Resident Magistrate, Eldoret Mrs. Nyakundi in Eldoret Divorce Cause No. 10/2004 delivered on 6th June, 2006. In the said decision the Learned Magistrate dismissed the Appellant's petition for a decree nisi for divorce and custody of the children of the union between the Appellant and the Respondent.

The Appellant had filed the Petition on 24th May, 2004. The main grounds for the petition for dissolution of the marriage were that:-

“.....

6. That since their marriage, the Petitioner avers that the same has been a happy one as the Respondent has committed acts of cruelty bordering on witchcraft and hypotany.

PARTICULARS OF RUELTY/MENTAL

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(i) The Respondent on diverse dates prior to filing this cause has been washing her underpants using cooking implements namely sufurias and later use the same to cook the Petitioner's meals, full details are well known to the Respondent and to be supplied at the hearing hereof.

7. That the Petitioner from the date of such discovery has undergone serious mental stress, unable to feed well and great agony.

8. That the Respondent has never been apologetic or remorseful and her acts are not only unhygienic but obnoxious, unethical and borders on witchcraft.

9. That as a result the Petitioner's marriage with the Respondent has been greatly compromised, and the

trust has been broken and the same has irretrievably broken down and no amount of reconciliation can salvage the same.

.....”

After hearing the case, the Honourable Magistrate held that the Petitioner had not proved his case on a balance of probability. The petition was dismissed with no order as to costs.

In his Memorandum of Appeal, the Appellant raises three grounds, namely:-

- “(1) The Learned Magistrate erred in law and in fact in dismissing the Appellant’s petition for divorce despite the overwhelming evidence of intense cruelty subjected by the Respondent to the Appellant.
- (2) The Learned Magistrate erred in law and fact in dismissing the said petition by relying on extraneous matters not raised by the Appellant.
- (3) The Learned Magistrate erred in law and in fact in dismissing the Petition and therefore going against the constitutional rights of an individual’s freedom.”

I have considered the grounds of Appeal, the Record of Appeal and Submissions by Counsel.

In his evidence-in-chief the Appellant testified that on the evening of 27th March, 2003 at around 5.55 p.m. while at home, a person called Joseph knocked at his door. When he opened the door, he found four persons seated outside the house. These were Isaac, Joseph, Ruth and Kipkemboi. He testified that Joseph told him that his wife, Julia was washing her pants in a sufuria. That she was doing so while sitting on and/or sufuria. The Petitioner said he got shocked and wanted to see for himself. However, Julia came in and asked what was going on.

The Appellant testified that on 29th March, 2003 he found his wife doing the same thing. He claimed he saw with his own eyes. The Petitioner called one Isaac, who was 18 years old as a witness. He is a herdsboy. He testified that on 24.3.04 at 5 a.m. he peeped through a window and saw Julie Respondent washing her panty seated on a sufuria. He said he was shocked by this act. The Bishop was asleep. The Petitioner did not call Joseph as a witness and who allegedly witnessed the first incident.

When the Respondent was cross-examined, Counsel for the Petitioner did not ask her any questions as to whether she washed her panties in a sufuria used to cook meals or tea for the family. No single questions on this regard is on record. The only question posed during cross-examination which was near the question at hand was whether bewitching was a good thing or not.

It is this Court’s view that the allegations made on the Petition and which constitute the grounds and particulars of cruelty are quite serious and grave. This is the allegation that the Respondent on diverse dates had washed her underpants in and using cooking utensils or what later were used to cook the Petitioner’s meals. If this was proven, I have no doubt that it could be deemed to amount to cruelty justifying the dissolution of the marriage between the Petitioner and the Respondent.

The burden of proof was on the Petitioner to prove this serious allegation which possibly could also constitute a criminal offence/s. The Petitioner never saw the Respondent carry out the alleged action in the first occasion. He did not call Joseph or any other witness to prove the alleged incident on 27th March, 2003. No explanation is given for this. On the second occasion, that is on 29th March, 2003, the Petitioner claims that he found the Respondent washing her underpants in a sufuria. He was alone. He did not call any witness to corroborate his evidence. Considering that the Petitioner and the Respondent had some serious differences that led to the filing of the Petition and considering the serious nature of the allegation which not only would amount to cruelty, but is of a criminal nature and if found to be true would make the Respondent a social outcast and due to the damage to the person and character, the law requires that the Petitioner proves this allegation strictly. It is my view that once that is an allegation

in civil proceedings that a person has committed a criminal offence then that must be proved beyond any reasonable doubt. The standard of proof is not on a balance of probability. It is for this reason that I think that the evidence of the Petitioner required corroboration. The same applies to the evidence of Isaac, whose conduct itself is questionable i.e. intruding into the privacy of the Respondent's matrimonial home. He has no right in peeping through a married woman's window at 5 a.m. in the morning.

In the light of the foregoing, it is the duty of this Court to state that the Learned Trial Magistrate ought to have analysed the evidence of the witnesses on this issue, and given the appropriate weight and stated her conclusion. It was not proper for her to find that the Respondent may have indeed washed her underpants in the sufurias. The Court was obliged to reach a specific finding and in this regard after following the required procedure, analysis of the evidence and resultant finding thereon. In my view, the issue of the consequential physical harm or lack of it of the act was secondary.

On the foregoing basis, this Court in exercise of its Appellate jurisdiction do hereby find that the Learned Trial Magistrate was not entitled to find that the Respondent washed her underpants in the sufurias. I do hereby hold that the Petitioner did not prove the alleged acts of cruelty as set out in the Petition.

I do not agree that the Learned Magistrate or even this Court in not allowing the prayers in the Petition has deprived the Petitioner of his Constitutional rights and freedoms of the individual. The Petitioner and Respondent were married under the provisions of African Christian Marriage and Divorce Act, Cap. 157. He entered into the said marriage freely, willing and without any coercion or otherwise. He is bound by the laws regulating the said marriage including the Matrimonial Causes Act. While the Court may not possibly grant orders forcing him to cohabit or live with the Respondent as required by this matrimony, yet the Courts will not dissolve a marriage without applying the law. This is irrespective of the hardships and realities of life that many a times marriages break down irretrievably yet parties may not be able to prove actual cruelty. Perhaps it is high time for parliament to revisit these questions considering the social, cultural and economic changes that have taken place over the years affecting the attitudes of people towards marriage, societal moves, religion etc. Legislation ought to consider that there are many situations that may require disengagement from a marriages consensually and without necessarily first proving that the other person or spouse is a Devil before the union is put asunder.

The Appeal herein is disallowed and dismissed with no order as to costs. In the circumstances, I am not obliged to delve into the question of custody of the children. This Court is comforted by the knowledge that the Children's Act is able to cater and provide for any issue touching on the children irrespective of the Orders herein.

DATED AND DELIVERED AT ELDORET ON THIS 14TH FEBRUARY, 2007

M. K. IBRAHIM

JUDGE