



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 162 OF 2003

M K K.....APPELLANT

Versus

B W K.....RESPONDENT

(Being appeal from the judgment of J. B. A. Olukoye, Resident Magistrate, in the Chief Magistrate's Divorce Cause No. 3 of 1997 at Nyeri which was delivered on 8th December 2003)

JUDGMENT

The Appellant, on 7th March 1997, petitioned in the Lower Court for divorce on the grounds:

“That the Respondent has since the celebration of the said marriage treated the Petitioner with insults and cruelty.

That the Respondent had for several times threatened to kill the Petitioner.

That the Respondent (sic) cruelty has forced the Petitioner to live apart for 8 years.

That the Respondent cruelty has forced the Petitioner to commit adultery by marrying another wife.

That the Petitioner has committed adultery with M W.”

The Respondent both in this appeal and in the divorce cause answered the petition as follows:

“That the Respondent has not threatened to kill the Petitioner, but the Petitioner was occasionally cruel and insulting to the Respondent who nevertheless forgave the offences.

That the marriage has not irretrievably broken down.

That no attempts at reconciliation have taken place.

That it is true that the Petitioner has committed adultery with one Mary Wanjiku which the Respondent has condoned and forgave.”

The Respondent in conclusion prayed for the dismissal of the petition.

At the hearing of the divorce cause only the Petitioner was present and he gave the following evidence. He stated that he married the Respondent under the Kikuyu Customary Law in 1972 which marriage was in 1974 solemnised. The Respondent, the Petitioner stated, became cruel by neglecting to take care of house work and by insulting workers. Later in 1988 she deserted the matrimonial home. The Respondent's father took the dispute to the chief and before elders who decided that the Petitioner was to remain with the children of the marriage and the Respondent was to return to her father's home. The Petitioner attributed his marital problems to his in-laws and to prove this he exhibited notes written to him by his father in-law when he said he would bring the Respondent to the Petitioner's home where he would build a cow shed. He ended that note by describing himself as a lion. The Petitioner further gave evidence of the Respondent's actions of uprooting and destroying crops and of destroying the main door with an axe. On being cross-examined the Petitioner stated that the Respondent was further cruel by disobeying his instructions. The Petitioner called a witness, G N W who took down the minutes of the hearing before the elders. He said that the elders concluded that the Petitioner's father in-law was abusive to the Petitioner. He further stated that the matter had been referred to the elders by the Petitioner's father in-law.

The Respondent did not offer any evidence. The Learned Magistrate in her considered judgment dismissed the petition. The Learned Magistrate had the following to say.

“Considering the adduced evidence and submissions the court finds the reason the Petitioner sought dissolution of their marriage was because the respondent was cruel to him but in his evidence he failed to state with certainty as to what it was that the Respondent did that amounted to cruelty.....there was finding that the marriage cannot be dissolved on the basis of the Petitioner's adultery as Respondent has not sought such orders and in the absence of any adultery on her part the marriage then stands.

That finding has aggrieved the Appellant who has preferred this appeal on the following grounds:

- 1. That the learned magistrate erred in law and in fact failing to come to the conclusion that my wife the respondent herein was very cruel to me as was adduced in my evidence which is very clear and understandable.***
- 2. That the learned Resident Magistrate erred in law and in fact when she failed to take into consideration that at no time did the respondent attend court before her but only the Respondent's counsel used to appear on her behalf which I believe according to law the respondent was supposed to attend in court at the time of hearing of the case and it was very strange to note that the counsel for the respondent used to attend I court on her behalf.***
- 3. That the learned Resident Magistrate erred in law and in fact for allowing so many adjournments of the case and the appellant suffered a lot through those adjournment and finally she dismissed the suit in favour of respondent who never attended the Honourable court as required by law.***
- 4. That the learned Resident Magistrate erred in law and in fact for not taking into consideration that the respondent deserted from matrimonial home in 1988 and left behind our children some of them who were minors under my care and for all most 15 years the Respondent has never come in matrimonial home to tell me how our issues would be cared but instead she went a head giving her parent all sort of accusation against myself and her parents gave her all support which made her to have courage to stay with her parent.***
- 5. That the learned resident Magistrate erred in law and in fact for not taking into consideration the evidence adduced by my witness who was present in chief's office where we were trying to settle the matter with the respondent and her parents, the respondent's parents had reported the matter to the chief and no solution was reached.***
- 6. That the learned Magistrate erred in law and fact in allowing the counsel for the respondent to act as the counsel for the Respondent and o the other hand behaving like respondent in the matter and to***

the best of my knowledge, justice was not fair on appellant's part in the whole process of this case.

I confirm that I have reconsidered the evidence adduced by the Petitioner and his witness. It ought to be remembered that the Respondent chose not to offer any evidence in support of her answer. The case should have been decided on a balance of probability. Having re-examined the Appellant's evidence, I find that since it was uncontroverted, that it passes the test of burden of civil proof. I am of the view that the Appellant clearly gave evidence of incidents of cruelty by the Respondent's failure to do house work, desertion of the matrimonial home, up-rooting and destroying crops and damaging a door with an axe. I am of the view that categories of what constitutes cruelty have never been closed and further whether or not acts are cruel is very subjective to the party concerned, in this case the Appellant. The Respondent in her answer acknowledged that the Appellant committed adultery after their separation but stated that she had forgiven him. It follows therefore since the Respondent had not petitioned for divorce on that ground of adultery the lower court was wrong to have refused to grant the Appellant the divorce he sought on account of that adultery. I therefore find that the appeal is merited and accordingly the appeal is allowed and I do hereby grant the Appellant the following orders:

(1) That the marriage between the Appellant and the Respondent be and is hereby dissolved and decree absolute shall issue after 30 days from this date hereof.

(2) That there shall be no orders as to costs of the lower court's divorce cause No. 3 of 1997 and of this Appeal.

Dated and delivered at Nyeri this 29th day of June 2007.

MARY KASANGO

JUDGE