



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Case 66 of 2000**

**SABINA SYOVINYA MUSYOKA ..... APPELLANT**

**VERSUS**

**PETER MUSYOKA MWANZIA ..... RESPONDENT**

*(From the decree and order of M Ithiga, Principal Magistrate, in Kitui Divorce Cause No. 14 of 1996)*

**J U D G E M E N T**

The appellant was the wife of the respondent/petitioner in the lower court. The petitioner/respondent, had sought a divorce and custody of the children of the marriage. In her answer to the Petition, the appellant/respondent herein had sought a dismissal of the petition and in the alternative had sought for maintenance and division of family property. The trial court granted divorce to the respondent herein but refused to grant maintenance and division of family joint property. For that reason the respondent/appellant appealed to this court.

The grounds of appeal include the following:

- (a) That the grounds upon which divorce proceedings were based and brought which included desertion, adultery and cruelty, were not proved within the standards set by law.
- (b) That the lower court erred in failing to order for the maintenance of the respondent and for the division of the matrimonial or joint family property.
- (c) That the petitioner had condoned the matrimonial offences alleged and the court should not have granted divorce on the condoned grounds.
- (d) That the marriage had not irretrievably broken down to warrant the granting of the divorce.
- (e) That sharing joint matrimonial property was a matter in issue and holding otherwise by the court was a misdirection and an error in law.
- (f) That the divorce was granted against insufficiency of evidence.

The facts of the case show that the appellant got married to the respondent in accordance with Kamba Customary Law in 1960. Both parties are in agreement. They sired twelve children after the marriage. There was no agreement in their evidence about this because the appellant claimed that all the twelve children were sired by the respondent while the latter alleged that some were sired by other men. It is

noted however that the respondent in her petition had clearly pleaded that he sired all the children. In my opinion, he was not entitled to depart from his pleadings without amending his petition. Accordingly the court's view and finding is that all the twelve children were sired by him.

The petitioner/respondent had relied on adultery, desertion and cruelty as the grounds upon which she wanted divorce. In his evidence she made generalized assertion about and gave no concrete evidence to prove any of them. He called no witness to support his generalized assertions. In my view and finding, the grounds of adultery and cruelty were not proved on the balance of probability as ought. The burden of proof was really on him since he was the one who pleaded and relied on them. Nor in my view did he prove desertion. He claimed that his wife left home in 1965 and never returned home except on intermittent visits. But again he produced no credible evidence to prove the same apart from merely claiming that the appellant lived and practiced as a whore in Mombasa and Matuu. He even claimed that she was during certain periods arrested and imprisoned at Thika but once again to support of his allegations came forth. This court therefore agrees that the evidence on record was not sufficient to prove adultery, nor cruelty.

On the other hand, there was adequate evidence which was admitted in evidence by the appellant, that the respondent has not lived with her for a long period. He never ate from her house because of fear of being poisoned. He never entered her bed room for a long period which started in about 1979 when he chased her from his bed and made her to sleep on the floor until he married a second wife and took up a concubine. After that it got worse with her, although he was good to the children for whom he paid school fees. It is not clear whether it was the appellant who deserted the respondent or vice versa, although the evidence appears more to tilt against the respondent than the appellant. The court's conclusion therefore is that there was desertion and whether it was from the appellant or the respondent, may not matter much in this case. As touching the issue of whether the marriage still is intact, it is the view of the court that the two have lived apart and confronted each other for so long that ordering to bring them together would be a futile exercise. The marriage, in other words, has irretrievably broken down, and it will be to the relief and even safety of both that the marriage should legally be brought to an end. That is exactly what the court has decided to do. Accordingly therefore the marriage between the appellant and the respondent was rightly dissolved by the honourable trial magistrate whose decision this court hereby upholds.

As touches the division of the matrimonial or family property, the trial court in my view, was once again right in recognizing that such property is liable to be divided in suitable circumstances. As held in Susan Kavutha Mutinda versus Justus Mutinda Masya, Nairobi Civil Appeal No. 45 of 1994 which was cited to that court, a woman need not adduce evidence to show the specific share or contribution of material or otherwise she made. It is enough that she was living with her husband as a wife, taking care of him by giving him the home and family comfort in various ways. Such comfort may include washing the husband's clothes, cooking for him, cleaning and maintaining the house where they live and extending sexual and other intimacy and comfort that is available between married couples. She does not have to generate any income from employment or business in order to claim a share of any property that a husband may purchase and it would not matter if such property when purchased is registered in joint names or in the sole name of the husband. In my understanding, the reverse situation where the wife is the bread earner does not alter the situation.

Having come to the above correct position, the honourable magistrate found in this case that there was no clear evidence of what could be called family property as there was no list of such property filed by the respondent. He noted that some properties were mentioned by the parties at one time or another but more was required before a clear system of division would be ordered. That court's view was that a full inventory of such property should be done so that the exercise of sharing would be made all at once. Sadly, however, the trial court at this point in the case, started to escape from the issues before it. He decided to narrow the issues before him in saying that all he was supposed to decide was whether the customary marriage between the parties before him should be dissolved or not and not whether the respondent was entitled to share in the joint family property. He then proceeded to exclude or ignore the latter issue. We have considered that finding and find that the honourable magistrate decided to become blind to a reality before him. Perusal of the Answer filed by the appellant sought two reliefs. The first

was that the court dismisses the petition. The second and the alternative prayer was that if the court granted the divorce it should also then grant her and the children of the marriage maintenance and then divide the joint family property. That is why the case of Susan Mutinda versus Justus Mutinda Masya, was cited and that is why the trial magistrate referred to the principles applied in the case. The mere fact that the appellant failed to attach a clear inventory of the family properties was not enough, not to make the basic decision as to whether she was in particular entitled to such division or not. This court however notes that the trial court nevertheless gave leave to the appellant to apply formally to this court under Section 17 of the Married Women's Property Act of 1882 so that this court can determine whether or not the appellant is entitled to the share of the properties and to what extent. He did not explain why he avoided deciding this issue which was before him and why the appellant should file a fresh case to determine the issue. Did he fear that he had no jurisdiction to determine the issue? Whatever were his reasons, the parties have approached this court through a formal appeal which in our view gives the court full jurisdiction to resolve the issue finally.

In considering to resolve the issue fully, this court will obviously require the accepted full list of all family properties which are liable to distribution, as distribution is liable to be ordered. This court will not be oblivious to the fact that the appellant is not the only wife of the respondent, a matter which obviously affects the intended division. Nor should the parties themselves be oblivious to the fact that the properties that will be liable to division will be those acquired by the respondent or appellant when the two had not ceased cohabitation whenever that happened. This means that any property acquired by either after the two ceased cohabitation will belong solely the party who bought it.

The appropriate orders of this court therefore will be as follows:

**Orders:**

- 1) This appeal is dismissed as the divorce granted by the lower court is hereby confirmed.
- 2) The properties acquired by either or both parties from 1960 to the time when cohabitation ceased shall be divided equally among (1) the appellant, (2) Jemima Musyoka, the 2<sup>nd</sup> wife married in 1966 and (3) the respondent.
- 3) All the three parties above to file an inventory of the properties acquired between 1960 and the date of separation or cessation of cohabitation showing the exact date each such property was obtained and how it was so obtained, within 30 days.
- 4) Mention of the case for further directions on 28/3/2006.
- 5) As to the issue of maintenance, parties to fix the matter for further arguments to show that the appellant is or is not entitled to maintenance under customary law or common law or statute.

Dated and delivered at Machakos this 20<sup>th</sup> day of December, 2005.

**D.A. ONYANCHA**

**JUDGE**