



ENI v GKN (Civil Appeal E161 of 2020) [2024] KEHC 5591 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E161 OF 2020**

TW CHERERE, J

MAY 9, 2024

BETWEEN

ENI APPELLANT

AND

GKN RESPONDENT

JUDGMENT

1. The Appellant and Respondent married under African Christian Marriage and Divorce Act on 11th August, 1979.
2. Forty-three (43) years into their marriage, the Respondent by Petition filed on 18th February, 2022 sought orders of judicial separation on the following grounds:
 - i. Adultery
 - ii. Cruelty
 - iii. Desertion
 - iv. The marriage was on the verge of breaking down
3. In support of her case, Respondent stated that the Appellant deserted the matrimonial home in 2020, was cohabiting with another woman and was cruel to her more particularly that he had threatened to kill her, destroyed her property on numerous occasions in which she had lodged complaints with the police but was not willing to forgive the Appellant. Respondent stated that she wanted separation to give the parties time to reconcile their differences.
4. On 20th March, 2022, Appellant filed his answer to Petition for Judicial Separation denying the allegations made against him. He additionally filed a cross-petition seeking dissolution of the marriage on the ground of cruelty.



5. In support of his case, Appellant stated that Respondent had caused him untold cruelty by causing him to be charged for malicious damage which allegation was false and colluding with the children of the marriage to insult, ridicule and taunt him.
6. Appellant stated that the marriage had broken down completely and that instead of judicial separation, the court ought to dissolve the marriage.
7. After hearing both parties, the trial court by a judgment dated 24th November, 2022 allowed the petition for Judicial Separation and dismissed the cross-petition for divorce.

The Appeal

8. The Appellant being dissatisfied with the lower court's decision preferred this appeal and set out 9 grounds but mainly on the ground that the court erred in dismissing the cross-petition for dissolution of the marriage.

Analysis and Determination

9. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123.
10. I have considered the entire record of appeal and the submissions filed on behalf of the Appellant and the Respondent and the issue in question is whether the orders granted by the trial court were merited.
11. Section 17 (1) of the *Matrimonial Causes Act* (Cap 152, Laws of Kenya) (now repealed) provides:

“A Petition for judicial separation may be presented to the court by either the husband or the wife on any grounds on which a Petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, and the provisions of this Act relating to the duty of the court on the presentation of a Petition for divorce, and the circumstances in which such a Petition shall or may be granted or dismissed, shall apply to a Petition for judicial separation.”
12. The Respondent sought a decree for judicial separation and the Appellant from his cross-petition and submissions prayed that the marriage be dissolved.
13. Although the Respondent accused Appellant of adultery, she did not name any co-respondent nor give any credible evidence on the alleged adultery and thus failed the very high standard of proof required in proving allegations of adultery.
14. Evidence on record revealed that the parties have not cohabited since 2020 after Appellant left the matrimonial home and also that Respondent has on numerous occasions reported to police concerning complaints of cruelty against her by the Appellant.
15. It is my view that indefinite separation would unnecessary yoke parties who are in a dead marriage and this would not be in the interest of either of the parties.
16. The grounds for dissolution of a civil marriage are as per Section 66(2) of the *Marriage Act* No. 4 of 2014 which provides that:



A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—

- (a) adultery by the other spouse;
 - (b) cruelty by the other spouse;
 - (c) exceptional depravity by the other spouse;
 - (d) desertion by the other spouse for at least three years; or
 - (e) the irretrievable breakdown of the marriage.
17. The evidence by both parties revealed that the marriage has irretrievably broken down due to desertion by the Appellant. It is further undeniable that the parties have treated each other with a measure of cruelty. They have not shared conjugal relations for a long time and they have lived separately for a considerable length of time too.
18. Even though the Respondent was of the opinion that the differences between the parties could be resolved, there is clearly no evidence that the parties have made effort to reconcile since 2020.
19. The grounds of cruelty and desertion in this case meet the threshold that the marriage has irretrievably broken down and as a result satisfies the ground for which the marriage ought to have been dissolved.
20. In view of the foregoing, the cross-petition filed by the Appellant ought to have been allowed on the ground that the marriage between the parties had irretrievably broken down.
21. In the end, I hereby make the following orders-
- a. The appeal is allowed
 - b. The order of Judicial Separation made vide the judgment dated 24th November, 2022 is set aside in its entirety and substituted with an order that the marriage between the Appellant and the Respondent be and is hereby dissolved
 - c. Decree nisi shall issue forthwith, to be made absolute after 30 days
 - d. Each party shall bear its own costs of the trial and of the appeal

DELIVERED AT MERU THIS 09TH DAY OF MAY 2024

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Appellant - Mr. Karanja for E.G.Mwangi & Co. Advocates

For Respondent - Ms. Gumato for MMA LAW LLP

