



REPUBLIC OF KENYA



KENYA LAW
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**G O A v R A A (Divorce Appeal E053 of 2023)
[2024] KEHC 6842 (KLR) (3 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
DIVORCE APPEAL E053 OF 2023**

RE ABURILI, J

JUNE 3, 2024

BETWEEN

G O A APPELLANT

AND

R A A RESPONDENT

(An appeal arising out of the Judgment of the Honourable M. Agutu in the Chief Magistrate's Court at Kisumu delivered on the 9th March 2023 in Kisumu Divorce No. 25 of 2019)

JUDGMENT

Introduction

1. This appeal rises from the judgement in Divorce Cause No. 25 of 2019 in the Chief Magistrate's Court at Kisumu which judgment was delivered March 9, 2023 and on the March 29, 2023, the appellant who was the respondent in the Divorce Cause filed this appeal.
2. The respondent who was the Petitioner pleaded and testified that she and the appellant started cohabiting together in 1997 and that their union was blessed with two issues. She testified that the union was blissful though plagued with marital problems culminating in a brief separation between the years only for them to reunite in the year 2008. She further testified that upon their reunion, the appellant treated her with cruelty and as result, she moved out of their matrimonial home in 2013 and did not return to date.
3. On his part, the appellant pleaded and testified that he married the respondent under Luo customary law and that they had endured marital problems including those of the petitioner leaving her matrimonial home and cohabiting with other named men but that he always took her back and believed that the marriage was retrievable as elders could arbitrate. The appellant therefore denied that the marriage had irretrievably broken down and stated that he did not wish to have the marriage dissolved because he loved the wife and he was a responsible husband and father to their children.



4. The trial court in the impugned judgement observed that from the evidence adduced, the parties had been living apart since 2013 and that the parties had moved on and were in new relationships. The trial magistrate held that the marriage had irretrievably broken down and that it would be futile to try to force the parties to live together. The trial magistrate proceeded to dissolve the marriage.
5. Aggrieved by the said judgment, the appellant filed a memorandum of appeal dated March 29, 2023 filed on the even date raising the following seven grounds of appeal:
 1. The learned trial magistrate erred in law and fact by dissolution of the marriage herein on ground that the parties have been separated for more than three years without considering all requirements as stipulated in section 66 (6) of the Marriage Act No. 4 of 2014.
 2. The learned trial magistrate erred in law and fact by disregarding the appellant's replying affidavit whereas the rules of court allow evidence to be produced by affidavit.
 3. The learned trial magistrate erred in law and fact by allowing the petitioner's petition without considering that the petitioner did not produce any evidence nor did she call any witness in court to support her case and purely relied on hearsay.
 4. The learned trial magistrate erred in law and fact by failing to find any merit in the appellant's credible reasons for separation including the temporary custody of the first child that was issued to the appellant in 2008 and/failing to consider the reasons advanced at all and the witnesses called by the appellant.
 5. That the learned trial magistrate erred in not taking the court proceedings and documents filed into consideration before exercising his discretion.
 6. The learned trial magistrate erred in fact and law in denying the appellant an opportunity to bring all his witnesses and instead limiting him to three witnesses only and also not granting the appellant enough time to defend himself.
 7. The entire decision of the learned trial magistrate is against the weight of the evidence and contrary to the law and principles of justice and equity.
6. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

7. The appellant submitted that the respondent did not call any witness or adduce any evidence to support her case of adultery but merely relied on hearsay evidence. Reliance was placed on the case of DM v JM (2008) where it was held *inter alia* that the evidence required to establish adultery must be more than mere suspicion and opportunity. It was thus submitted that the trial magistrate failed to consider that the respondent did not call any witnesses or produce any evidence in support of her case on his alleged adultery.
8. It was further submitted that the petitioner did not prove her case beyond reasonable doubt to convince the court of the cruelty and she merely relied on hearsay and as such the trial magistrate erred in law and fact by dissolving the marriage without considering the evidence adduced. He further submitted that he had never been summoned by the respondent's family at any particular time to discuss issues of adultery or even cruelty and this was clear evidence that what the petitioner presented to the court were just allegations and never had any merit at all.
9. The appellant further submitted that even when he married the second wife, he notified the family and discussed with her and that in any case he got married to the respondent under Luo Customary



Laws which allows for polygamy and as such the respondent's claim that he committed adultery was without merit.

10. The appellant submitted that an order that the respondent do maintain the issue of the marriage commands itself to justice as the Constitution mandates both parents to see to the care and protection of a child.
11. It was further submitted that despite the respondent's claims that the 2nd and 3rd children did not belong to the appellant, the law is clear that any child born in the union or marriage shall remain the children of the marriage unless the DNA is done and proves otherwise.
12. The appellant thus prayed that as he had proved his case on a balance of probabilities the judgement of the trial magistrate be set aside and the appeal be allowed for the interest of justice.

The Respondent's Submissions

13. The respondent submitted that she supported the judgement of the lower court which found that the marriage had irretrievably broken down and that it would be futile to try and force the parties to live together.
14. It was her submission that they had not been able to reconcile in the one year since the judgement was delivered and further that they had not been able to re unite since 2013 when they actually separated, which is over 10 years now and that chances of this happening were non-existent.
15. The respondent submitted that allowing the appeal and therefore the continued existence of this marriage would lead to an absurdity and the practice of keeping women tied to men when they no longer want, a practice that would be unconstitutional.
16. It was further submitted that the issue of the children is and should not be the consideration on whether or not the appeal is allowed.

Analysis and Determination

17. The role of the first appellant court is to re-evaluate, re-assess and re-analyse the evidence tendered before the trial court in order to reach its own independent conclusion. This principle is espoused in Abok James Odera t/a A.J. Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where the Court of Appeal held that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court of Appeal held *inter alia* that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

18. The parties herein both testified that they were cohabiting and got married under Luo Customary Law. It is not disputed that the appellant paid dowry to the respondent's parents. They both agreed that the



marriage was plagued with marital problems culminating in a brief separation in between the years only for them to reunite in the year 2008. The respondent testified that upon their reunion, the appellant treated her with cruelty and as a result, she moved out of their matrimonial home in 2013 and did not return, to date. Conversely, the appellant despite admitting that they had endured marital problems including the respondent committing adultery with other men and that she even had a child outside their marriage which child he accepted into his family as his own, and that indeed they had separated since 2013 to date, he denied that the marriage had irretrievably broken down. He maintained that he did not wish to have the marriage dissolved.

19. The appellant has pleaded before this court that he was denied an opportunity to call all his witnesses and further that he was denied enough time to defend himself. He further alleged that the trial court failed to take into consideration documents filed before exercising her jurisdiction.
20. I have perused the record and find that this allegation is unfounded. The appellant was granted enough time to present his case and further from the judgement, it is clear that the trial court took into consideration the pleadings filed by both parties and the evidence tendered.
21. Having re-evaluated the evidence before the trial court, I find the issue for determination to be whether the trial court erred in upholding the respondent's petition for divorce.
22. Section 66 (6) of the *Marriage Act* 2014 provides for situations where marriage is irretrievably broken down as follows:

“ 66(6) A marriage has irretrievably broken down if-

- a) A spouse commits adultery;
 - b) A spouse is cruel to the other spouse or to any child of the marriage;
 - c) A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;
 - d) The spouses have been separated for at least two years, whether voluntary or by decree of the Court, where it has;
 - e) A spouse has deserted the other for at least three years immediately preceding the date of presentation of the petition;
 - f) A spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;
 - g) A spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the Respondent in the light of existing medical knowledge; or
 - h) Any other ground as the Court may deem appropriate.
23. The respondent in her petition alleged cruelty as the ground for seeking divorce. It was her testimony that the appellant would embarrass her at her workplace calling her immoral. She admitted that she got a child outside marriage and that the appellant was aware that the child was not his. It was her testimony that the appellant had introduced another wife in the relationship and she was not ready for



- a polygamous relationship. Her firm testimony was that she wanted to move on with her life and that there was no chance of the relationship being salvaged.
24. In cross-examination, she admitted that the appellant never chased her away from their matrimonial home. She stated that the appellant met several of her friends and demeaned her in their presence ruining her reputation. It was her testimony that he would compare her with his other wife in terms of cooking and sexual prowess.
 25. The appellant on his part admitted that the respondent opened up to him about having an affair with two other men and that she even bore a child for another man, which child he accepted. It was his testimony that after reconciliation by their families, they started living together but that the respondent disappeared again and that he subsequently remarried. In cross-examination, he stated that they had separated in 2005 but reunited only to separate in 2013 from when they had never been together. The witnesses presented by the appellant confirmed that the parties had been married under Luo customary law.
 26. I have considered the evidence adduced before the trial court. There is no doubt that the respondent does not want the marriage to continue, despite the fact that the appellant desperately wants her back despite the long separation. It is also evident that the parties have been separated since 2013, a fact the appellant reiterated in cross-examination stating that they have not been intimate since then. Further, there was the uncontroverted evidence by the respondent that the appellant had humiliated her in the eyes of her colleagues stating that she was immoral. There is also no doubt of the respondent's adultery having had a child outside their marriage and also the fact that the appellant had brought in another wife and the respondent did not want to live in a polygamous relationship, despite customary marriage being potentially polygamous and therefore whoever enters into such relationship from the word go must be prepared to live in a crowded relationship.
 27. Section 65 (c) of the Marriage Act provides that:

“The desertion by either party by at least three years immediately preceding the date of presentation of Divorce petition is a ground for dissolving a Christian Marriage.”
 28. In the instant case, the parties herein had separated for seven years prior to the filing of the divorce petition. The respondent clearly left her matrimonial home and she does not want to be in a marriage with the appellant. In light of the foregoing factors, this court cannot force the parties, especially the respondent to continue in such a union. Marriage being a voluntary union, this court has no powers or jurisdiction to compel the respondent to accept a relationship that has by law, broken down irretrievably, particularly on account of the long separation between the couple.
 29. I therefore find no reason to interfere with the trial court's decision to dissolve the marriage. The judgment of the lower court is hereby upheld and the instant appeal is dismissed.
 30. The lower court file to be returned for Decree Nisi and Decree Absolute to issue forthwith.
 31. I order that each party bear their own costs of the appeal.
 32. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

