



**FNN v JNN (Civil Appeal E035 of 2023)
[2024] KEHC 11652 (KLR) (Family) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E035 OF 2023
PM NYAUNDI, J
JULY 19, 2024**

BETWEEN

FNN APPELLANT

AND

JNN RESPONDENT

(Being an appeal from the judgment in Nairobi Chief Magistrate’s Court Divorce Cause No E1026 of 2021 delivered on 27th February 2023 by Hon. Langat Koech C Betty– Senior Principal Magistrate)

JUDGMENT

1. This is an Appeal against the decision of the Lower Court of the delivered on the 27th February 2023 dismissing the Appellant’s Petition for Divorce. The court held that there was no marriage capable of being dissolved because the traditional marriage had not been registered as required by law. The trial magistrate dismissed the Petition without delving into the grounds of dissolution.
2. Dissatisfied with the judgment of the trial court, the Appellant filed a Memorandum of Appeal dated 13th August 2023. The Appellant seeks orders that;
 - a. The appeal herein be allowed.
 - b. That the judgment of the Chief Magistrate’s Court delivered on 27th February,2023 be set aside and the marriage between FNN and JNN be dissolved.
 - c. That the costs of the appeal be borne by the Respondent.
3. The Grounds relied upon are as follows:



1. That the trial court erred in law and in fact in holding that there was no marriage capable of being dissolved when there is overwhelming evidence on both sides and pleadings that the parties were married pursuant to Mbeere Customs, practice and traditions in 1995 and the two parties lived together as man and wife until 2018 when they separated to date. The trial magistrate was openly wrong.
 2. That the grounds for divorce were clearly demonstrated before the trial court but the learned magistrate was so inconsiderate in dismissing the petition thereof.
 3. That the trial court contradicted herself in holding that the matter should have been tried at Embu Law Courts, yet that issue of jurisdiction was dealt by the previous magistrate before she was handed over the matter. The trial court erred in law and facts when she held that she did not have jurisdiction to deal with the matter yet she had countrywide jurisdiction to deal and handle the simple divorce herein.
 4. That the grounds for divorce were clearly proved before the honourable trial court yet the trial court turned a blind eye or/and deliberately ignored the overwhelming evidence on record on the same and dismissed the petition thereof.
 5. That the trial court erred in all the issues of facts and law that were raised by the Petitioner. The Petitioner filed comprehensive submissions with suitable authorities therein, and none of the issues were considered by the trial court.
 6. That the trial court judgment was based on imagination and fiction. The trial court never gave any reasoned analysis based on law before reaching her decision to dismiss the Petition thereof.
4. The appeal was canvassed by way of written submissions.

Appellant's Submissions.

5. The Appellant's submissions are dated 6th September 2023. The appellant submitted that the issue of jurisdiction was dealt with in the application dated 4th November 2021 when Hon. P.M Wambugu allowed the petition to be heard in Nairobi. He argued that he lives in Nairobi and it was convenient for him to file the suit in Milimani. The Respondent on the other hand did not raise the issue of jurisdiction at the trial court and therefore, she cannot raise the issue of jurisdiction now.
6. The Appellant submitted that the magistrates court have country wide jurisdiction to determine divorce matters. He relied on the decision of *CKK v CMM* [2014] eKLR.
7. The Appellant submitted that their customary marriage was celebrated in 1995. That a gazette notice was issued on 1st August 2017 requiring all customary marriages to be registered. According to him, their differences started in 2008 There was no need to register the marriage in 2017 because he was not on talking terms with the Respondent. He submitted that the magistrate was required to deliver justice without undue regard to procedural technicalities and should have dissolved the marriage as it had broken down irretrievably. He relied on the Court of Appeal decision of *TSA v SO*[1979] eKLR .
8. Lastly, he submitted that the question of whether the marriage existed or not was not a matter to be determined by the magistrate. She was required to determine whether the marriage can be dissolved based on the allegations raised by the Appellant. In this case, he had proved that the marriage had broken down irretrievably and therefore the marriage should have been dissolved on that ground. He argued that declining to dissolve the marriage was an effort to resuscitate a dead marriage. To buttress this point, he relied on the decision of *GK v DKM & Another* [2018] eKLR .



Respondent's Submissions.

9. The Respondent's submissions are dated 1st February 2024. She framed the following as issues for determination of this court;
 - i. Whether the court has jurisdiction to hear this case.
 - ii. Whether the Applicant and the Respondent are married.
 - iii. Whether the marriage has to be dissolved.
10. On the first issue, the Respondent submitted that the trial court did not have territorial jurisdiction to dissolve their marriage which was celebrated in Mbeere jurisdiction. The court in Siakago had the jurisdiction to determine this divorce. She argued that the trial magistrate did not err by dismissing the petition on the ground that the court did not have jurisdiction.
11. On the second issue, the Respondent submitted that Article 2 (4) of *the Constitution* recognises Customary marriage. That customary marriages are recognized in law as was held in the case of Kimani v Gikanga [1965] EA 735. She argued that the principles in customary marriages must be met for one to prove that the customary marriage existed. She sought to rely decision in Hortensia Wanjiku Yahwe v The Public Trustees, Civil Appeal No. August 6, 1976. In their case, she submitted that dowry was paid according to Mbeere customs and they lived together as husband and wife until 2017 when they started experiencing marital differences. A customary marriage therefore exists and they should be given an opportunity to solve their issues and live as husband and wife.
12. On the third issue, the Respondent submitted that the burden of proof that the marriage should be dissolved was upon the Appellant. He raised grounds of cruelty which he failed to prove and therefore, the marriage should not be dissolved. She relied on the decision of SCC v MK [2012] eKLR to buttress this point. . Instead, the Respondent in her evidence proved that the Applicant had deserted their home and was cruel to her. She urged the court not to dissolve the marriage.

Analysis and Determination

13. As the first Appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).
14. The Appellant testified as the sole witness, his evidence was that he formalised his marriage with the Respondent in accordance with Mbeere custom in 1995. The union was blessed with 3 children. There had been no consummation of the marriage since 2019. The Respondent had meted out violence against him, the marriage had irretrievably broken down.
15. In Response, the Respondent concurred that they have been married since 1995 and separated in 2019. It was the Appellant who had been cruel and she has sought refuge from the police on many occasions. The Appellant has deserted the home for another woman. She denied chasing him from the home. She was of the view that the marriage ought not to be dissolved as the issues they were facing as a couple were resolvable.



16. Having considered the pleadings filed herein and the relevant law, I discern the issues for determination as;
- i. Whether the trial magistrate erred by holding that the Court lacked jurisdiction to determine the matter.
 - ii. Whether the trial magistrate erred by declining to dissolve the marriage on the ground that no marriage existed between the parties herein.

Whether the trial magistrate erred by stating that she did not have jurisdiction to determine the matter

17. Although the Appellant challenges the decision on the basis that the Court erred in holding that it lacked jurisdiction to hear the matter this is not borne out by the record. I have carefully reviewed the judgment and observed that it would have been better that the Appellant had filed the matter in Embu. These are her exact words-

First, I do not understand why the petitioner had to file this case here yet there is a competent court in Embu to determine the matter. This issue of jurisdiction was not adequately canvassed by the parties as it came out during the hearing of the respondent's case (Emphasis Supplied)

18. From the excerpt above it is evident that the trial court did not make a determination on jurisdiction in any event Section 12 of the *Civil Procedure Act* on territorial jurisdiction of Courts provides a closed list of matters that must be filed within the territorial jurisdiction of a Court and matrimonial matters (divorce) are not included on that list.

Whether the trial magistrate erred by declining to dissolve the marriage on the ground that no marriage existed between the parties herein.

19. From the outset, I must emphasize that the rules of evidence do not require a party to prove a fact that is not in issue. Section 61 of the *Evidence Act* provides-

Facts admitted in civil proceedings.

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.

20. Both the Appellant and the Respondents in their pleadings and testimony averred that they were married under Mbeere Customary law. The Trial Court took the view that failure to register the marriage as required under the *Marriage Act*, 2013 nullified the marriage.
21. In doing so the Court erred as the effect of failing to register a marriage is to make it voidable at the instance of one of the parties to the marriage. The parties having conceded that there was a marriage, the only issue for determination was whether there was sufficient basis to dissolve the marriage.
22. It is the Appellant who is the wearer of the shoe. The Court cannot gloss over his lamentations. Having considered the evidence in the lower court, I am persuaded that the marriage has irretrievably broken



down as far as the Respondent is concerned. The Couple has not lived together for 5 years prior to the presentation of the Petition and their relationship was acrimonious with incidences of violence. Marriage is a union between two persons, when one of those establishes that the gel has worn off, it is the duty of the Court to give legal character to the status of that marriage. In this case the court is duty bound to grant the Petitioner the divorce he seeks.

23. In conclusion, I will allow the appeal and grant the following orders-

1. The Judgment of the lower court is reversed
2. The marriage celebrated between the Petitioner and the Respondent in 1995 under Mbeere Customary Law is dissolved
3. A decree nisi dissolving the marriage is hereby issued to be made absolute within thirty (30) days from the date of this judgment
4. Each party will bear their own costs

DELIVERED ON THE VIRTUAL PLATFORM, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JULY, 2024.

PATRICIA NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

