REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO 80 OF 2019

ANASTACIAH WANGU NDIRANGU.....APPELLANT

VERSUS

ANTHONY JUMA MWANGI..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Engineer Divorce Cause No.5 of 2019 by Hon. D. N. Sure (SRM) on 11th December 2019).

JUDGMENT

1. The instant appeal arose from the **Senior Principal Magistrate's Court at Engineer Divorce Cause 5 of 2019** wherein the Plaintiff (Respondent herein) sought the dissolution of his marriage union to the Appellant solemnized in 1993 under African Christian and Divorce Act on the grounds of cruelty, Cap 151, Laws of Kenya.

2. The background to the case is that the Respondent and Appellant solemnized their marriage after having cohabited since 1985. They established their matrimonial home and four (4) issues were blessed to them. The Respondent then claimed cruelty sprang in their marriage meted out by the Appellant and prayed for dissolution of the marriage

3. The Appellant opposed the Petition of divorce and asserted that the union had not broken down irretrievably.

4. The trial court ruled in favour of the Respondent and dissolved the marriage having considered the evidence given in court.

Grounds of Appeal

5. The Appellant raised 9 grounds of appeal, namely:

> ***i. That the learned trial magistrate erred in conducting the proceedings in the absence of the Appellant who had confirmed her presence and readiness to proceed with the hearing of her case.***
>
> ***ii. THAT the learned judgement erred in law and fact by purporting to deliver judgment without notifying the Appellant.***
>
> ***iii. THAT the learned magistrate erred in law and in fact by holding that the Appellant's absence at the time of hearing was without cause and that the Respondent's evidence as to the Appellant's cruelty stood unchallenged which matters if she had considered would have led to the adjournment of the hearing to another date so as not to condemn the Appellant unheard.***
>
> ***iv. THAT the learned trial magistrate erred in Law and in fact by holding that the Appellant was guilty of misconduct of a grave and weighty nature yet there was no overwhelming evidence on the part of the Respondent to prove so.***
>
> ***v. THAT the learned trial magistrate erred in law and in fact by holding that the Respondent had suffered real injury to his health and reasonable apprehension of such injury in that no evidence to prove the same was adduced by the Respondent matters which if she had considered would have led to a different finding.***
>
> ***vi. THAT the learned trial magistrate erred in law and in fact by holding that the Appellant was abusive to the Respondent and in the presence of their children and other people yet there was no direct or circumstantial and/or independent evidence to corroborate the evidence of the Respondent.***
>
> ***vii. THAT the learned trial magistrate erred in law and in fact by finding in favour of the Respondent that the Appellant had maligned the Respondent's name by claiming that the Respondent had relationships with school children; that the Appellant had***

threatened the Respondent with death and had at some point almost stabbed the Respondent with a knife yet there was no independent and/or direct and/or circumstantial evidence on the part of the Respondent to prove the said acts of the Appellant's alleged cruelty.

viii. THAT the learned magistrate erred in law and in fact by concluding that the love that existed between the Appellant and the Respondent seemed to have died soon afterward and replaced with indifference by virtue of the Respondent's alleged demeanour yet the Appellant's demenour also mattered which if the learned magistrate had considered would have led to an adjournment so as to give the Appellant an opportunity of being heard.

ix. THAT the learned trial magistrate erred in law and in fact by dissolving the marriage of 35 years between the Appellant and the Respondent without giving the Appellant an opportunity of being heard and then proceeding to deliver judgment in haste and without notifying the Appellant resulting into gross injustice on the part of the Appellant matters which if the learned trial magistrate had considered would have led to a fair trial and a difference verdict.

Submissions

Appellant's submissions

6. The Appellant filed her written submissions on 16/07/2021 in which she gave her rendition of the trial process having been served a Notice to Appear, Petition, Verifying Affidavit and Statement of the Respondent. She submitted that the trial court gave pre-trial directions on 6/11/2019 when both the Respondent and the Appellant were ready to proceed. The file was placed aside until 2:30 pm. That at 2:30 pm when the matter was called out, she was absent and the hearing proceeded ex-parte after which the Respondent closed his case. Judgment was then issued on 11/12/2019 in her absence. The Appellant contends that the trial court while delivering judgment in favor of the Respondent did not consider that the Appellant had not been notified.

7. The Appellant cited Order 21 Rule 1 of the Civil Procedure Rules in mooting that parties are entitled to a Notice of the date of delivery of judgment. Reliance was put on the authority of **Miscellaneous Application 67 of 2017 Tabro Transporters Limited vs Francis Njenga [2018] eKLR** which echoed the said provision.

8. The Appellant further relied on **Nairobi High Court Civil case No. 205 of 2016 JKG & another v General Accident Insurance Company Ltd [2019] eKLR** where the authority of **Nyeri Court of Appeal decision in Civil Application 11 of 2014 Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR** was quoted which stated that the overriding overlooked technicalities. The same case (**JKG & Another)** also cited **Civil Appeal 40 of 2020 OMN (Minor Suing Through Next Friend EMW v Jasper Nchonga Magari & another [2021] eKLR** which espoused that judgement ought to be delivered in the presence of both parties. The case of **OMN V JASPER NCHONGA MAGARI &ANOTHER [2020] eKLR** was also relied on to emphasize that a judgment should be delivered in the presence of all parties and in open court.

9. I note that **Nairobi High Court Civil case No. 205 of 2016 JKG & another v General Accident Insurance Company Ltd [2019] eKLR** was presided over by Kamau, J and not Chitembwe, J as submitted.)

10. It was the prayer of the Appellant that the trial court judgment be side aside and the court orders a retrial before a different magistrate.

Respondent's submissions

11. The Respondent in his submissions filed on 28th September, 2021 detailed that the trial court dissolved their marriage in its judgment based on sufficient evidence before it as opposed to the Appellant's contention that there were no grounds to warrant the dissolution of the marriage.

12. The Respondent defined marriage as a voluntary union which was entered into with the Respondent in 1993. That for this reason, the same should not be dissolved unless a party satisfied the grounds set out in Section 65 of the Act, among them being cruelty which the Respondent relied upon. In submitting that cruelty was proved, he cited that case of **DM vs TM (2008)1 KLR 5** as was cited in **Nairobi Family Division Divorce Cause 42 of 2015 NOO vs ACCO [2019] eKLR** where Chesoni, J (as he then was) held that cruelty is satisfied by the presence of grave misconduct, real injury and reasonable apprehension of such injury. Further that the said injury was caused by misconduct by the party accused of it and on the whole evidence of the conduct amounted to cruelty in the ordinary sense of the word.

13. The Respondent further cited the authority of Court of Appeal in **Union Insurance Co. of Kenya Ltd vs Ramzan Abdul Dhanji Civil Application No.179 of 1998** as was cited in **Mutungi Ngulo vs Pan African insurance Co. Ltd & 4 others [2019] eKLR** which stated that a court will dispense with the presence of a party in a matter if that party had been given sufficient opportunity to be present but failed to present himself or herself.

14. That in the present case, the Appellant had been given an opportunity to ventilate her case when time for hearing the case was given at 2.30 pm but she failed to turn up without a reason. In his view the marriage had irretrievably broken down and he ought to be allowed to associate with persons he feels free with as opposed to living in a miserable marriage.

15. The Respondent stated that the Appellant maligned his name having asserted that he had had relations with school children over the years. That the cruelty began in 1999 and escalated in the year 2000 when the Appellant stood over him wielding a knife threatening to kill him as he slept. He then left the home on apprehension for his life and has been living separately for nineteen years.

16. The Respondent submitted that this evidence was only disputed by the Appellant in her defence but did not cross-examine the

Respondent nor adduce contrary evidence in court. He submitted that the trial court gave her ample time to come to court but did not honour the opportunity. The Respondent asserted that on the day of the hearing, both parties were present and told court that they were ready to proceed and the matter was placed aside until 2:30 pm but when time came the Appellant was absent having left no justifiable excuse as to her absence.

17. It is the case of the Respondent that cruelty was firmly established at trial having proved that he had suffered great anguish and psychological torture. Further, that having lived apart for 19 years was a clear indication that the marriage had irretrievably broken down.

18. The Respondent therefore urged the court to dismiss the appeal.

Summary of evidence

19. The Respondent who was the Petitioner in the court below called one witnesses, himself on 27/11/19. The hearing date was set by consent of both parties. He adopted his statement dated 7/6/2019 which showed that he cohabited with the Appellant in 1985 under the Kikuyu customary law and solemnized the union in 1993 at a church wedding. They were blessed with four issues. They were living in Engineer. According to the Respondent trouble brewed in 1999 when the Appellant accused him of infidelity. The relationship deteriorated in 2000 when the Appellant made threats to his life when she drew a knife and threatened to stab him when he was asleep. This caused him mental anguish. The Appellant allegedly further maligned the name of the Respondent to his relatives and workmates and any attempts at reconciliation proved futile. He testified that he now has a lady whom he desired to marry but could not until the instant marriage was dissolved.

20. The Appellant did not appear for the hearing and judgment was entered as prayed in the Petition on 11/12/2019.

Analysis and determination

21. This is the first appellate court whose duty is reanalyze the evidence adduced before trial court and come up with its own independent conclusions. In doing so however, the court must take into account that it has neither seen nor heard the witnesses and give due regard for that. This position was emphasized in the case of ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)*** in the following manner:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse 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."***

22. I have considered the evidence adduced in the court below as well as the respective rival submissions made before this court after which I have demarcated two issues for determination, namely:

> **a)** ***Whether the grounds of Cruelty were firmly established by the Respondent to the required standard*****.**
>
> **b)** ***Whether the Appellant was accorded an opportunity to be heard and consequently whether the trial court justifiably proceeded with the case in her absence.***

Whether the grounds of Cruelty were firmly established by the Respondent to the required standard.

23. The first issue I address myself to the standard of proof in a divorce cause. It is now settled law that the standard is a preponderance of probabilities which was elaborated by the Court of Appeal in the case of **Alexander Kamweru v Anne Wanjiru Kamweru [200] e KLR** as:

> ***"Certainly cruelty or desertion may be proved by preponderance of probability, that is to say that the court ought to be satisfied as feel sure that the cruelty (all being matrimonial offences) has been (as the case may be established.)"***

24. The Respondent relied purely on the ground of cruelty to justify the dissolution of the marriage. In particular, he cited threat to his life when the Appellant is said to have attempted to stab him with a knife while he was asleep. He also alleged the maligning of his name by the Appellant who alluded that he had love affairs with school children.

25. Cruelty is a grave and weighty ground that would warrant the dissolution of a marriage. In the case of ***MULHOUSE V. MULHOUSE, [1964] 2 All ER 50,*** which Chesoni, J (as he then was) cited with approval in ***Meme v Meme [1976] KLR 13*** Sir Jocelyn Simon P. while considering the gravity and weight of the misconduct that would constitute cruelty, stated as follows:

> ***"Conduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief."***
>
> ***Thus conduct, which is part of the "reasonable wear and tear" of a marriage, does not constitute cruelty. Regarding the nature of injury to the petitioner's health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:***

> ***"[I]it must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it." (Emphasis adopted)***

26. The evidence before court was only from the Respondent which was uncontroverted by the Appellant. This is despite the fact she had intimated she was ready to proceed and that when the time came she was absent without any notification to the court. The Respondent tendered pleadings and gave oral evidence which was unchallenged. He stated that the Appellant wielded a knife over him, an allegation which ought to have been challenged as it threatened his life and by extension, life.

27. Makhandia, J (as he then was) in **In Nyeri HCCC No. 95 of 1988 Karuru Munyororo vs Joseph Nduma Murage & Another held that:**

> ***"The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."***

28. From the above case law, it is safe to conclude that a party cannot expect to succeed in a case merely on filing the pleadings alone. The pleadings must themselves be supported by evidence. That is to say that pleadings are not evidence and evidence is what establishes a party's case. Pleadings basically outline what a party's case is but it is evidence that establishes that case and therefore determines whether a party will win or lose the case.

29. From the foregoing, the Appellant had a chance to disprove the allegations levelled against her but did not take up the stand despite confirming her availability. This left the case for the Respondent unrebutted which leads the court to believe what he told the court. I would have no doubt in my mind that the Respondent left the matrimonial home due to the cruelty meted on him by the Appellant. Although there was no evidence tendered that the case was reported to the police, I hold the view that the long separation of the parties of nineteen (19) is not in vain and must have been precipitated by a just cause. I feel sure that the cruelty was real. Furthermore, as testified by the Respondent, efforts to reconcile the parties has failed. It is best time that parties found peace their own way.

30. This leads me to join up with the second issue for determination which is;

Whether the Appellant was accorded an opportunity to be heard.

31. At the material time of hearing the case, the Appellant was absent having left no reason for her absence, whimsical or otherwise. Notably is that she was in court earlier in the morning when she confirmed that she be available to proceed at 2.30 pm. The court was gracious to send a court orderly to look for her in the court precincts but returned unaccompanied and thus was deemed to have left the court compound.

32. After the Respondent finished his case, the court had a Notice issued for the delivery of the judgment on 11/12/2019 sent out to her. She cannot now claim that the court deliberately excluded her from the trial or was biased against her or wanted the case for the Respondent to succeed. At the minimum, she failed to attempt to set aside the proceedings of the day at which point she would have ventilated the reasons for her absence.

33. Of importance is that the hearing date had been taken by consent. Every party to case must facilitate the just and expeditious disposal of cases. A court will not cordon a party who crutches the wheels of justices. In this case, the Appellant just fizzled in thin air in the hope that the matter would be adjourned and thus prolong it. This is unacceptable. It mattered not whether there had been a previous adjournment. The trial court was enjoined to have the matter heard on the first date when parties consented to proceed. The Appellant was not going to have her cake and eat.

34. In so holding, I have had regard to **Section 1A (3)** of the ***Civil Procedure Act*** provides as hereunder:

> ***"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."***

35. I also find solace in the decision of the Court of Appeal in **Civil Appeal (Application) 228 of 2013 Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice.* This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed*. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.''***

36. I would add no more. It my candid view that the Appellant was granted sufficient opportunity to be heard. She blatantly abused that

opportunity by failing to honour to go to court at the agreed time. Her appeal cannot therefore see the light of the day. The Respondent established his case to the required standard. The appeal lacks merit and the same is hereby dismissed. Having regard that this is a family matter, I order that each party meets its own costs of the appeal.

37. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 3RD DAY OF FEBRUARY, 2022.

G. W. NGENYE-MACHARIA

JUDGE

1. MR. NJIHIA FOR THE APPELLANT.

2. NO APPEARANCE FOR THE RESPONDENT, DULY NOTIFIED OF THE JUDGMENT DATE.