



**PEW v RJT (Appeal E134 of 2023) [2024] KEHC 11796 (KLR)
(Family) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

APPEAL E134 OF 2023

BM MUSYOKI, J

OCTOBER 3, 2024

BETWEEN

PEW APPELLANT

AND

RJT RESPONDENT

*(Being an appeal from judgment and decree of Honourable Aduke
Jeal Praxades Atieno (SRM) in Chief Magistrate’s Court at Milimani
Commercial Courts Divorce Cause number E582 of 2021 dated 14-11-2023)*

JUDGMENT

1. The appellant filed a divorce cause in the subordinate court vide petition dated 26-05-2021 praying for the marriage between him and the respondent celebrated on 14th August 1999 to be dissolved citing irreconcilable differences. Of importance to this judgement, the appellant averred at paragraph 2 of the petition that he did not at the time of filing the petition have the marriage certificate as the same was lost and his efforts to trace the same were in vain.
2. The respondent filed a reply to the petition and a cross-petition in which she also sought dissolution of the marriage on grounds of cruelty and desertion. In paragraphs 3 and 4 of the reply to petition, the respondent averred that;The respondent admits that she was married to the petitioner on the 14th of August 1999 as detailed in paragraph 1 of the petition.In response to paragraph 2 of the petition, the respondent avers that it is well within the knowledge of the petitioner that she has been in possession of the marriage certificate and that she shall adduce the said certificate at the hearing of the petition thereof.
3. The appellant testified by adopting his pleadings. According to the appellant, he married the respondent on 14th August 1999 under the then Marriage Act Chapter 150 of the Laws of Kenya.



They had been blessed with four children born between 20th June 1998 and 20th February 2004 but the 2nd born had passed away. Their marriage started developing differences which caused strain and tension culminating to irreconcilable differences and ultimately parties separated in September 2016. He particularised the irreconcilable differences including lack of intimacy for five years. The respondent did not testify despite having been served.

4. The Honourable Magistrate dismissed the petition and as much as I can discern from the judgment, the main reason for dismissal of the petition was that, the petitioner did not prove existence of the marriage either by producing marriage certificate or calling evidence in proof of marriage including customary law experts. In dismissing the petition, the trial court made the following orders;
 1. Petition dated 26th May 2021 is dismissed.
 2. Costs awarded to the respondent.
 3. Either party is at liberty to apply for registration as under section 3, 44 and 55 of the [Marriage Act](#).
 4. Either party is at liberty to pursue any formal evidence of marriage as contemplated under section 59 of the Act, from the Registrar of Marriages.
 5. These are the orders of this court.
5. The appellant has raised 5 grounds of appeal which are contained in his memorandum of appeal dated 23rd November 2023. I have read the memorandum of appeal, the pleadings and the lower court record and the submissions by the appellant. Having done so, it is my finding that the only issue for determination is whether the lower court was wrong in finding that there was no proof of marriage between the parties. All the other issues are peripheral to this issue as they all revolve around existence or non-existence of the marriage.
6. If I understand the Magistrate's judgement well, had she found that there was proof of marriage between the parties, she would have allowed the petition. In her mind, the only way to prove marriage is by producing any of the documents mentioned in section 59 of the [Marriage Act](#). Since that was in her view lacking, she went on to consider whether there were grounds for presumption of marriage or existence of customary marriage which she also found insufficient or lacking.
7. The petition, reply to the petition and cross-petition and response to answer to the repetition and reply to cross-petition were all in agreement on all facts except on who was responsible for the irreconcilable differences. The appellant was accusing the respondent of causing the stress and strain in the marriage whereas the respondent stated that the appellant was cruel to her and deserted the matrimonial home in 2016. With these circumstances, was the petitioner bound to prove existence of marriage?
8. Divorce proceedings are civil in nature and as such standard of proof of any fact is on a balance of probabilities. It is the position of the law that a fact which is admitted in civil pleadings does not need to be proved. The respondent had admitted that she got married to the appellant on 14th August 1999. I hold the view that with this admission, there was no need of proof of the marriage. In [Synergy Industrial Credit Limited v Oxyplus International Limited & 2 Others](#) (2021) eKLR, it was held that;

'A clear and unequivocal admission of fact is conclusive, rendering it unnecessary for one party (in whose favour the admission was made) to adduce evidence to prove admitted fact, and incompetent for the other party, making the admission to adduce evidence to contradict it. The rationale for this principle is confirmed by Order 13 Rule (2) of the [Civil Procedure Rules](#). A reading of this rule leaves no doubt that admissions made either in the pleadings



or otherwise are binding on the party who makes the admission and no further evidence need be adduce by the other party in respect of those facts admitted and the court can (and should) make an order purely based on those admissions. The effect of this principle is that it is not necessary to adduce evidence to prove admitted facts.’

Notwithstanding that the respondent had admitted the marriage, the appellant made efforts to prove the fact. He had averred that he was unable to trace the marriage certificate and in answer to that, the respondent averred in paragraph 2 of her reply to petition that she was in custody of the marriage certificate and that she would produce it at the hearing. I have reproduced the admissions above. As it would turn out, the respondent never testified thereby denying the court the opportunity to inquire into the availability of the marriage certificate. Faced with the situation, the appellant went further to make efforts and attempts to get a copy of the marriage certificate which he deponed were in vain. Through an affidavit sworn on 11-07-2023, the appellant produced the following documents in proof of his efforts to get a copy of the marriage certificate;

- a. A police abstract dated 28-06-2023 in regard to the lost marriage certificate.
- b. His advocates’ letter dated 24-05-2023 addressed to the Bishop of Catholic Diocese of Marsabit requesting for a copy of the marriage certificate.
- c. An extract of marriage record from the Catholic Diocese of Marsabit which confirmed that the marriage was celebrated at Our Lady Consolata Cathedral in Marsabit which document is not in English.
- d. Forms issued by the Registrar of Marriages and filled by the same Diocese which are certified by one Father Titus Makokha evidencing that the marriage was celebrated in the said church.

9. With the above documents and evidence, it is my considered opinion that even if the marriage had not been admitted, the evidence would have been sufficient to prove the marriage. The Honourable Magistrate in my view applied a higher standard of proof than that required in civil proceedings. Her approach and interpretation of the Marriage Act was too strict and overstretched. Restricting methods of proving of marriage to those listed in section 59 of the Act did not in my view, promote a purposive and progressive application of the law. In my opinion, the extract from the church’s register and the forms filled and certified by the priest in charge were as good as a certified copy of an entry in the register provided for in Section 59(1)(d) of the Marriage Act.
10. I am of the opinion that even Section 59 of the Marriage Act was alive to the fact that there could be instances where it would not be possible to get a marriage certificate and that is why it gave various methods of proving marriage. I see nothing in section 59(1) that suggests that the five methods listed therein are the only ways to prove a marriage. That notwithstanding, it is my view that the section comes into play where there is need to prove marriage. Where there is no need or requirement of proof of marriage, the court would have no justification in resorting to the section. The evidence produced by the appellant coupled with the fact that the respondent had admitted the marriage were enough for the trial court to return a positive answer to that fact. The appellant had in his submissions cited DAK v MK (2013) eKLR where the court had proceeded to dissolve a marriage despite the lack of a marriage certificate because the marriage was conceded. The Honourable Magistrate was bound by the holding in that authority but she did not even mention it in her judgment. A subordinate court has no powers or jurisdiction to depart from a holding of the High Court.



11. The judgement of the trial court is so scanty on the marriage she was handling. She said so little about the type of marriage celebrated by the parties. She digressed by wading into the field of customary marriage and presumption of marriage. I do not think it is necessary for me to go into what the Magistrate stated in analysing whether there was customary marriage or not and whether she could presume marriage between the parties. That digressing led to the wrong conclusion.
12. The Honourable Magistrate's judgment does not address itself to the reply to petition and cross petition. It also does not address the evidence produced by the appellant through his affidavit dated 11-07-2023 which produced police abstract and the extract from the priest and other documents mentioned above. The affidavit also explained the efforts the appellant had made to get a certified copy of the marriage certificate. The only document mentioned in the judgment is a letter by the petitioner's advocates dated 24-05-2021 which was attached to the petition. This may be attributable to the fact that the court's physical file did not have these documents. After going through the record of appeal, I noticed that it contained reply to petition and cross petition, answer to the reply to the petition and reply to the cross-petition, the appellant's affidavit dated 11-07-2023 and the respondent's witness statement all of which were also mentioned in the appellant's submissions dated 24th July 2023 but were missing in the lower court physical file.
13. To satisfy myself that these missing documents had been filed, I sought assistance from the court's Case Tracking System which revealed that the documents had actually been filed on 23-06-2021, 13-07-2023, 3-08-2021 and 30-08-2021 but were not placed in the physical file. I caused the same to be printed and placed in the court file. It is most likely that the Honourable Magistrate did not go into the CTS which would have revealed that the documents had been filed. If she did, perhaps she would have come into a conclusion that there was evidence of existence of marriage between the parties. I would state that the failure to see the documents and pleadings was out of either recklessness or casual manner in which the court handled the matter since these documents were mentioned in the proceedings which clearly showed that the cause was defended. For instance, there was an application for certificate dated 15th September 2021 whose affidavit stated at paragraph 2 that the cause was defended and there was in the proceedings an advocate representing the respondent who confirmed that the cause was defended. The registry may not have printed these documents but the Magistrate was under duty to ensure that the proceedings before her were complete in terms of documentation.
14. The petition pleaded that the Marriage was conducted under the *Marriage Act* Chapter 150 which was at the time of the marriage known as civil marriage. However, it would appear from the evidence produced in court that the marriage was conducted in a church meaning that it was conducted under the then African Christian Marriage and Divorce Act Chapter 151 of the Laws of Kenya (now repealed). Be that as it may, the main point of consideration would be that the marriage existed and it would not matter now under which Act it was conducted.
15. The Magistrate did not pronounce herself as to whether the appellant had proved the ground for divorce. This being a first appeal, I should not restrict myself to what is contained in the judgment as I have a duty to re-evaluate and re-examine the evidence produced by the parties in the lower court and come to my own independent conclusion as if I was conducting the hearing.
16. I have gone through the evidence and it is clear to me that the parties' relationship had dwindled and it was no longer a marriage in real sense. It is common ground that the parties separated in September 2016. The respondent accused the appellant of desertion although she did not attend court to testify. The appellant told the court that the marriage had been infiltrated by irreconcilable differences and as such had irretrievably broken down. The children of the marriage are now adults and with the environment of animosity as shown in the evidence and pleadings, it is no longer conducive for the



parties to live together. I agree with the holding of Justice J.N. Onyiego in *CWC v JPC* (2017) eKLR where he stated that;

‘The petitioner and respondent have been living separately since 2014. There cannot be love between two parties living two worlds apart through osmosis. Marriage is a union based on love, affection and above all, sex is a tool of perfection in any working relationship.’

17. Section 66(6) of the *Marriage Act* provides that a marriage has irretrievably broken down if a spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition. The parties herein have been separated since 2016 and none of them is ready to go back to the marriage. The petition was presented in the lower court in 2021 which is clearly more than the statutory three years. It would therefore be correct to say that the union has by virtue of the said section irretrievably broken down.
18. Every person has a right of freedom to associate and exercise their consciences. If one’s conscience is hostile to a union, the courts should not close the doors to their freedom. It is only the parties who are partakers of the fruits of the marriage and a third party including a court of law should not literally be an impediment to their freeing themselves from the shackles of their differences. A marriage where none of the parties feels safe, happy, secure and obligated is a toxic and a dangerous union to cling on. I do believe that the law should free parties to a marriage to agree to part ways without much of litigation but as at now our legal system is still averse to divorce by consent and the parties must go the full stretch of divorce proceedings. Perhaps it is time we started that conversation.
19. I have considered the circumstances of the case and the evidence before me and I am satisfied that the parties have reached a point where they cannot reconcile their differences and based on this, I allow this appeal and make the following orders;
 1. The judgement and decree in the Chief Magistrate’s Court at Milimani Commercial Court divorce cause number E582 of 2021 dated 14-11-2023 is hereby set aside.
 2. The marriage between the appellant and the respondent celebrated on 14-08-1999 is hereby dissolved.
 3. Decree Nisi and Decree Absolute shall issue accordingly.
 4. Each party shall bear their own costs in this appeal and in the subordinate court.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Gathu for the appellant and in absence of counsel for the respondent.

