



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J)**

**CIVIL APPEAL NUMBER 164 OF 2019**

**EMN.....APPELLANT**

**VERSUS**

**DNN.....RESPONDENT**

*{An Appeal from the whole of the Judgment of Kangundo Senior Resident Magistrate, Honourable E. Agade, dated 5/12/2019 in Kangundo SPMC Divorce Cause No. 7 of 2019}.*

**BETWEEN**

**DNN.....PLAINTIFF**

**VERSUS**

**EMN.....DEFENDANT**

**JUDGEMENT**

1. The parties to this appeal were, until the decision the subject of this appeal husband and wife. The duo, who were previously married, solemnised their marriage under Kamba Customary Law in 1994. Their union was blessed with two issues, **BN** and **LWN**.

2. In his petition dated 14<sup>th</sup> May, 2019, the Petitioner (the Respondent herein) petitioned for the dissolution of the said union on the ground that the same had irretrievably broken down on account of adultery, desertion, denial of conjugal rights, cruelty and witchcraft on the part of the Respondent and that their differences had become irreconcilable. According to the Petitioner, the Respondent had on numerous occasions since 2004 committed acts of adultery with different men both known and unknown to him; that the Respondent had been spotted in different estates in Nairobi being Kariobangi, Umoja and Embakasi and had been spending all her weekends away from the matrimonial home with different men from the year 2017.

3. It was further pleaded that since 2004, the Respondent had been deserting her matrimonial home to unknown places and since 2017, she had made it a habit of deserting the matrimonial home either on Friday or Saturday evening and returning either on Sunday or Monday morning without disclosing to the Petitioner her destinations. According to the Petitioner, the Respondent had on numerous occasions denied him his conjugal rights and that as a result of the Respondent's said conduct, the couple had resorted to having protected sex from 2004 till 2013. It was averred that in June, 2013, the Respondent's sister informed the Petitioner that the Respondent had sent her to inform the Petitioner that she was HIV positive and that the Petitioner should also get tested. Upon being tested, the Petitioner was found to be negative and that ever since the couple had been having protected sex. The Petitioner complained that since the said year, the Respondent had been denying him his conjugal rights despite the Petitioner's numerous requests and that the Respondent moved from the bedroom they used to share to her own bedroom.

4. It was pleaded that the Respondent was arrogant, rude and not submissive to the Petitioner. Further, the Respondent was nagging and was using abusive language towards the Petitioner and had on numerous occasions threatened to kill the Petitioner telling him that after his death she would claim his property. The Petitioner also pleaded that the Respondent had on numerous occasions visited witchdoctors in Kitui with the aim of harming the Petitioner and had been given concoction aimed at the same. As a result, of the Petitioner consuming the said concoctions, he had sought medical treatments resulting from stomach complications caused by the same.

5. The Petitioner pleaded that despite several mediation talks between the couple and their respective families, the Respondent was adamant that she was not interested in the marriage and had declined to have the marriage registered by law.
6. It was the Petitioner's case that he had neither colluded, condoned nor been an accessory to the above acts of the Respondent.
7. He therefore sought that the marriage between the couple be dissolved and in the alternative there be a declaration that their marriage was invalid for lack of registration. He also sought the costs of the petition.
8. In answer to the petition, the Respondent denied the allegations made the Petitioner and averred that upon their marriage in 1994, the couple cohabited as husband and wife at Nairobi/Kawetei during which time the Petitioner was working in Nairobi as Senior Superintendent of Police while the Respondent was a teacher but resigned in 2005 after the Petitioner forced her to do so.
9. According to the Respondent, before that, their marriage was good and that their problems after the retirement of the Petitioner in 2004. In 2010, the Respondent, with the Petitioner's permission, started a business in Kawethei Town which entailed purchasing stock on the second weekend of every month from different parts of Nairobi County including the areas referred to by the Petitioner. The Respondent however denied having committed any adultery as alleged by the Petitioner and averred that throughout the marriage she remained faithful to the Petitioner who on his part was having extra-marital affairs with different women who were all known to the Respondent. The Respondent pleaded that during the time she went outsourcing for her items she would spend the night at her sister's place in Embakasi, a fact which was well known to the Petitioner who only feels insecure in old age.
10. The Respondent denied that she has ever deserted the matrimonial home and averred that it was in fact the Petitioner who had denied her conjugal rights. It was averred tat sometime sin 2014, the Petitioner threw the Respondent's belongings out of the matrimonial home and told the Respondent never to step back there though the Respondent returned her belongings but went on to occupy a separate room. Ever since, it was averred that the Petitioner had been locking the matrimonial bedroom and never gave the Respondent access thereto despite numerous requests. The Petitioner instead installed a spy button to ensure that the Respondent does not access the room.
11. It was pleaded that it was the Petitioner who insisted on having protected sex after she found the Petitioner sleeping with another woman on their matrimonial bed. The Respondent denied that she was HIV positive and that she insisted that the Petitioner be tested. She however pleaded that the Petitioner was unable to sustain an erection for long and was just being embarrassed as a result.
12. As regards the allegation of rudeness, it was pleaded that the Petitioner was not talking to the Respondent and that the couple were communicating in writing. According to the Respondent, the Petitioner is a dictator, tough, rude and violent hence the Respondent cannot risk to be cruel and/or issue threats to the Petitioner. The Respondent denied the allegations of witchcraft and averred that she was a Christian who upheld Christian values and never visited witchdoctors. To the contrary, she averred that it was the Petitioner who had been visiting witchdoctors to get solutions to his problems. The Respondent averred that sine their marriage, the Petitioner had always complained of stomach complications and had visited different hospitals alleging having been poisoned by the Respondent.
13. According to the Respondent, the Petitioner is unapproachable and feared by everyone including his relatives hence no mediation was ever attempted as alleged. Her letters to the Petitioner, she averred, went unanswered. It was pleaded that the Respondent had been pushing for the registration of the marriage but her requests were never responded to.
14. According to the Respondent, having been married to the Petitioner for 25 years, she had heavily invested in the marriage, loved and adored the Petitioner and was of the view that the marriage had not irretrievably broken down. She insisted that she had not committed any matrimonial offence hence there was no cause of action against her and prayed that the petition be dismissed with costs.
15. In his reply to the petition, the Petitioner denied that he was superintendent of police and that he forced the Respondent to resign from her employment but averred that the Respondent absconded from her duty and was fired. According to him the problems between them started in 200n when the Respondent started saloon business and started having extra marital affairs and infected him with sexually transmitted infections in 2004. He denied that he permitted the Respondent to start business as he was unaware of the Respondent's type of business apart from the shop he started operating in 2008. He denied having chased the Respondent from the matrimonial home and averred that the Respondent on numerous occasions walked out therefrom and returned whenever she liked. He also denied that he could not sustain an erection but admitted that he was not in talking terms with the Respondent but blamed the Respondent for not listening to him though he denied the allegations of rudeness and dictatorship. He also denied the allegations of witchcraft as being baseless and that he was unapproachable and feared. Instead he blamed the Respondent for the failure of the mediation attempts ad averred that the Respondent never made any attempt to have the marriage registered but stated that she was not interested in the marriage. In his view, the Respondent was never serious about the marriage and did not invest anything in it.
16. In his evidence, the Petitioner, while relying on his witness statement testified that he got married in September, 1994 to the Respondent. However, problems between them started in 200 when he noticed that the Respondent was having extra marital affairs during which time they were living in South C Nairobi as the Respondent would leave the house in the morning and return in the evening. One day, he testified that he called home from the office and found her not at home and when he inquired the Respondent informed him that she was at the shopping centre and upon him proceedings there he found her standing with a man. In 2001 he again saw her at Jerusalem Shopping Centre with the said man and upon him asking about their relationship the Respondent denied. The Petitioner however retrieved the man's phone number and warned him to leave the Respondent. Apart from the said man the Petitioner realised that the Respondent had other men whom he did not know and at one point the Respondent infected him with a sexual transmitted disease which though the Respondent denied was confirmed by the medical documents. It was his evidence that the Respondent nolonger took care of the children who were being taken care of by the maid since the Respondent was rarely in the house and could even be away for 4 days without disclosing her whereabouts. He came to know that she was involved in campaigns with politicians and was seen in clubs with men.
17. The Petitioner testified that in May 2018 he came to know that the Respondent's shop was broken into and she sought the services of witchdoctors in Kitui but was informed that the Petitioner had nothing to do with it. However, the Respondent was given some medicine

which she put in the Petitioner's food which caused the Petitioner diarrhoea. It was the Petitioner's evidence that this information was given to him by RM who accompanied the Respondent to the witchdoctor. It was his evidence that the Respondent threatened him several times and claimed that upon his death she would sell the petitioner's property and rent out the house.

18. Though the Respondent would claim that she was visiting her sister and the Petitioner's elder sister, the Petitioner confirmed that this was untrue. The Petitioner testified that he was tired of the marriage with the Respondent due to her threats, promiscuity, desertion and failure to take care of the home. Further, they stopped sexual intimacy in 2013.

19. According to him, in 2010 the Respondent requested her mother to ask the Petitioner to forgive her and upon being informed of the Respondent's extra marital behaviour, her mother cautioned her. The Petitioner also sought the intervention of Rev. Nzuki from CITAM who prayed for them after which the Respondent asked for forgiveness without disclosing her mistakes and upon being asked to confess everything she refused to do so. The Petitioner denied that he chased the Respondent from home and stated that he was unable to find his title deed where he had kept it. It was then that he threatened that he would burn her clothes unless she gave him the title deed and removed her clothes outside with a threat to burn them. He however ended up finding the title deed where he had not kept it. In his evidence, he did not chase the Respondent but just threatened her. In his evidence they were living well and he was capable of satisfying her sexual needs. He was however emphatic that his life was in danger and their lives could no longer return to where it used to be and he wanted to live a life free of depression hence his plea for divorce and the costs.

20. In cross-examination the Petitioner reiterated that the Respondent was not his first wife and that he had other children from his previous marriage. According to him the Respondent stopped working a year after their marriage and that when he went to work in Ethiopia they went together and returned together after his retirement. While he stated that he found the Respondent standing with a man in South C, he admitted that there was nothing wrong in standing with a man and that he never found the Respondent sleeping with a man. As for the Respondent's other adventures, she stated that he was informed by his friends though he had himself found her in compromising situations. He insisted that in 2004 he got STI and that it was the Respondent who infected him as she was diagnosed with yeast infection and was treated. After the yeast infection he decided to use condoms and denied that there was a time that his private parts were itching or that he had lime and ringworms on his face. While insisting that he had no problem with erection, he admitted that it was him who refused to make love to the Respondent and stopped talking to the Respondent. He also stopped responding to the Respondent's letters seeking forgiveness because the Respondent would repeat the same. He however denied that he was a difficult person but admitted that he doesn't like speaking a lot to people. He denied that the Respondent used to accompany him to visit witchdoctors and could not remember the date when the Respondent visited the witchdoctor in Kitui. Though she insisted that the Respondent put medicine in his food, he did not report the incident to the police.

21. He however admitted that he wanted to burn the Respondent's clothes when he could not get his title deed but stopped when he got the same and left the clothes outside. It was his evidence that the Respondent left their bedroom after he separated the bed with a pillow and had separate blankets. According to him, he is not insecure and though they tried reconciliation, the Respondent refused to ask for forgiveness and had never shown remorse.

22. In re-examination, the Petitioner insisted that he could not live with the Respondent even if he was forced to do so.

23. At the close of the Petitioner's case the Respondent testified that her marriage with the Respondent was good for a while and that they loved each other. However, after retirement, the Petitioner became insecure and that most of the allegations the Petitioner made they never discussed as the Petitioner refused speaking to her prompting the Respondent to ask her mother to speak to the Petitioner. However, when her mother went, the Petitioner got annoyed terming the same gossip.

24. The Respondent insisted that their marriage was okay and all the allegations were just propaganda and lies about her. While admitting that she was not perfect, she insisted that she loved the Petitioner and that the divorce proceedings came as a shock to her. She pleaded for an opportunity to take care of the Petitioner in old age.

25. In cross-examination, she stated that she stopped working in 1994. Though she loved the Petitioner, the Petitioner had refused to eat her food and threw her things out of their bedroom. She insisted that she was going to buy stocks in Nairobi every 2<sup>nd</sup> weekend and had receipts though she did not carry them with her to court. She also had a business licence but did not have the same with her

26. She insisted that the Petitioner introduced her to witchcraft when they went to Kitui. According to her the Petitioner instructed his children not to speak to her. She insisted that they never tried to resolve their problems because the Petitioner was unapproachable though her mother tried to intervene. She denied that she infected the Petitioner with STI and denied having sought medication though she admitted that she gets yeast infection which is not an STI but UTI. In her evidence the last time the two had sex was in 2012 after her fibroid operation and for seven years they had never had sex.

27. It was her evidence that when the Petitioner threw out her clothes she forcefully returned them back to the house and that they were staying in the same house. She denied having stolen from the Petitioner. According to her they were not on talking terms and that since 2007 she had written to the Petitioner 7 letters. According to her, she only visited the witchdoctor with the Petitioner and she still loved him despite the fact that the Petitioner had erectile dysfunction and failed to erect the last time they tried to have sex. On her part she stated that she was in her menopause.

28. In her judgement, the learned trial magistrate found that the parties were married. She however found that there was no evidence of adultery. As for cruelty, the learned trial magistrate did not find any satisfactory evidence to arrive at that conclusion. Regarding desertion, the learned trial magistrate found that the couple were living in the same house though they were not sharing anything except the roof hence there was virtual desertion.

29. The trial court found that in totality the marriage had broken down and that the marriage in fact ended long time ago and that the divorce proceedings were just a formality and that there was nothing to be saved in that marriage. She found that the parties could not be expected to live happily as the Petitioner's mind was made up and the court was obliged to grant the petition. She proceeded to grant the prayer

dissolving the marriage.

30. Aggrieved by the said decision, the Appellant who was the Respondent before the trial court appeals against the said decision on the following grounds:

- 1. The Learned Magistrate erred in fact and in law in finding that there was indeed desertion when the evidence and facts proved otherwise.**
- 2. The Learned Magistrate erred in fact and in law in failing to consider that the marriage in issue was celebrated under the Kamba Customary Law and there were no sufficient grounds for a divorce under Kamba Customary Law.**
- 3. The Learned Magistrate misdirected herself in relying on a foreign law and/or a non-existing law in determining divorce cause brought under the Customary Law.**
- 4. The Learned Magistrate erred in law and in fact in failing to consider that the conduct of the respondent in refusing to eat food prepared by the Appellant and/or engaging sexually with the Appellant was a voluntary choice and permissible under Kamba Customary Law. This did not amount to any ground for divorce envisaged in the law.**
- 5. The Learned Magistrate erred in fact and in law in failing to consider that the totality of evidence tendered did not support divorce and failed to attach any weight to the appellant's case.**

31. In this appeal it is submitted by the Appellant/Respondent that none of the matrimonial offences was proved by the Petitioner. According to the Appellant, in granting the orders of dissolution of marriage, the trial Court relied on the provisions of *Matrimonial Causes Act*, which has since been repealed and inapplicable in Divorce matters under Customary Law. It was submitted that the trial Court further failed to appreciate that failure by the Respondent to engage sexually with the appellant and refusing to eat food prepared by the appellant was a voluntary choice and permissible under Kamba Customary Law and this does not amount to grounds for divorce under the Customary Law.

32. It was therefore submitted that the totality of evidence tendered did not support divorce and as such the Respondent's Petition should have been dismissed in its entirety for failing to meet the threshold. According to her, the trial Court did not take cognizance of the grounds for divorce under Kamba Customary Law; instead it came up with its own grounds for divorce. It was contended that there was no evidence pointing to an irretrievable broken marriage since the parties herein have never attempted to solve the issues complained of by the Respondent. The Court was therefore urged to allow the appeal.

33. On behalf of the Respondent/Petitioner, it was submitted that both parties in their testimonies confirmed that the marriage was not a happy marriage. There was no communication in the marriage. They both slept in separate rooms. They both cooked and ate their own food. There was no sexual intercourse between the parties. They also confirmed that negotiations through elders and the church have failed. It was therefore submitted that the marriage between the parties herein had irretrievably broken down, a fact that was appreciated by the learned magistrate in her judgment when she stated that the marriage between the parties herein ended long time ago and the proceedings before court were just a formality. According to the Respondent/Petitioner, the learned magistrate therefore did not err in law and fact in dissolving the said marriage. It was his view that the learned magistrate relied on the *Marriage Act* and not foreign law as alleged in the memorandum of appeal.

34. The Petitioner submitted that it is not true that poisoning the Respondent's food is permissible by Kamba Customary Law. Neither is it true that failure to have conjugal rights is permissible by the Law. Reliance was placed on Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya which provides that:

**Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

35. The Petitioner also cited Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, and it was submitted that the Appellant did not bring any evidence in court that the court could have relied to rule otherwise but confirmed that the marriage had broken down and efforts to reconcile the differences had failed. The learned magistrate could not have ruled any other way other than to order that the said marriage be dissolved.

36. It was therefore submitted that the appeal is not merited and should be dismissed with costs to the Respondent.

#### **Determination**

37. I have considered the submissions made by the parties in this appeal and this is the view I form of the matter.

38. This being a first appellate court, it was held in Selle vs. Associated Motor Boat Co. [1968] EA 123 that:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must 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 this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

39. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

40. However, in Peters vs. Sunday Post Limited [1958] EA 424, it was held that:

**“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

41. It was therefore held by the Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 that:

**“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

42. In this appeal, it is clear that the determination of this appeal revolves around the question whether the Petitioner/Respondent proved to the required standard that the marriage between the Petitioner and the Respondent ought to be dissolved. Both parties were at idem that they were married under the Kamba Customary Law. The Appellant contends that the learned trial magistrate relied on the statute in dissolving the marriage instead of relying on Kamba Customary Law. To her, had the learned trial magistrate relied on the later she would have found that under Kamba Customary Law, sleeping in different rooms, failure by the Respondent to engage sexually with the appellant and refusing to eat food prepared by the appellant was a voluntary choice and permissible under Kamba Customary Law and this does not amount to grounds for divorce under the Customary Law. First and foremost, there was no evidence adduced before the trial court as regards the grounds for divorce under the Kamba Customary Law. The Court of Appeal in Wambugi W/O Gatimu vs. Stephen Nyaga Kimani [1988-92] 2 KAR 292 while citing with approval the decision in Kimani vs. Gikanga [1965] EA 735 held that:

**“Where African customary law is neither notorious nor documented it must be established for the court’s guidance by the party intending to rely on it and as a matter of practice and convenience in civil cases the relevant customary law, if incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties.”**

43. In other words, a custom that is neither notorious nor documented must be established for the court’s guidance by the party intending to rely on it. That was the position in Ernest Kinyanjui Kimani vs. Muiru Gikanga and Another [1965] EA 735 where it was held by a majority that:

**“Customary law is a part of the law in Kenya. The parties in this case are Africans and therefore the court will take judicial notice of such African Customary laws as may be applicable but subject to the provision of the law. In some cases the court will be able to take judicial notice of these customs without further proof as for instance in cases where the particular customary law is set out in a book or document of reference, but usually in the High Court or in a Magistrate’s Court, the relevant customary law will, as a matter of practice and of convenience, have to be provided by witnesses, called by the party relying on that particular law in support of his case. The court’s power to call in the aid of assessors is a discretionary power of the court and whilst it may be of great value and assistance to the court in cases dealing with customary law, yet this does not cast the burden of proof in establishing the customary law on the court and not on the litigant himself. Custom as referred to in sections 13 and 51 of the Evidence Act would include African customary laws and the onus of proof to establish a particular customary law rests on the party who relies on it in support of his case. Where a party relies on a local custom then that local custom must be proved by witnesses called by that party, and it would be incorrect for the Judge to act only on the opinions of the assessors. While witnesses as to the local custom could have their evidence tested by cross-examination and the other party would also have the opportunity of calling evidence to controvert their opinion, opinions of assessors would, in normal be given at the end of the case when the parties would have no opportunity to test their opinions by cross-**

examination, or be able to call evidence to contradict these opinions...This is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the apparent lack in Kenya of authoritative text books on the subject, or any other relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove the customary law, as he would prove the relevant facts of his case.”

44. In the absence of evidence that sleeping in different rooms by a marriage couple coupled with the disengagement in sexual intimacy as well as refusal to eat food prepared by the wife is permissible under Kamba Customary Law, this Court cannot take judicial notice of such alleged custom which is prima facie unusual unless evidence is tendered to prove it. Whereas a couple may voluntarily and mutually agree on how they relate to each other, where such unusual conduct is due to unhappiness on the part of one of the marriage partners, as is the case here, the same cannot be construed as an ingredient of a happily married couple.

45. It was submitted that the court relied on the repealed Matrimonial Causes Act. However, Section 69(1) of the Marriage Act, 2014 provides for grounds for divorce of customary marriage and states that: -

**“A party to a marriage celebrated under part V may petition the Court for the dissolution of the marriage on the ground of:**  
-

- a. Adultery
- b. Cruelty
- c. Desertion
- d. Exceptional depravity
- e. Irretrievable breakdown of the marriage or
- f. Any valid ground under the customary law of the petitioner”

46. Cotran, J in Salina Anyango vs. Sila Oyugi [1979] KLR 279; [1976-80] 1 KLR 1438 long before the advent of the said Act held that:

**“Divorce under customary law does not solely turn on establishing grounds. Reasons are advanced; but they are only some of the things to be taken into account. Other matters to be considered (and which are perhaps more important) are (a) the existence and number of children, (b) the ability and willingness of the wife’s father to return the dowry, and (c) generally whether the marriage has irretrievably broken down.”**

47. It is therefore clear that irretrievability of a marriage has always been a ground for divorce. In this case, there was no specific finding by the learned trial magistrate as to proof of any of the matrimonial offences. However, it is clear from the evidence placed before the court that the marriage between the Petitioner and the Respondent had long ceased to blossom and the manner in which they related to each other was no longer rosy. The flame that brought them together had long since died and its embers had long been extinguished. What appeared to be the smoke was a mere mirage. The love bug that had bitten them when they first met each other had lost its fangs as the age took toll on the couple. It would seem that what the Petitioner had seen in the Respondent when they became an item was no longer there and in its place he could only see an enemy. Whether or not the Petitioner was right in harbouring such feelings is another thing altogether. What is however, clear is that the marriage had been reduced to a mere shell with no flesh beneath it. No amount of resuscitation could save it. The jerking motions that the Respondent may have seen were nothing but a mirage.

48. This was a couple that had long separated their sleeping places. They no longer ate together and one of them had long ceased taking the food prepared by the other for fear of being harmed. They communicated through writing and sext between them was long forgotten. They no longer had mutual trust between them and the Petitioner was no longer interested in the union. Though the Respondent was still hanging onto it, the marriage was like a dead animal. Hanging onto is like a tick trying to such blood from a long dead animal. In Nelly Martine Germaine Combe vs. Ali Matano Alfani Mombasa HCDC No. 44 of 2005, Sergon, J held that:

**“Where it is established that the marriage has broken down beyond salvage since the parties to the marriage are unable to amicably discuss issues let alone living together and it is clear that the marriage only exists in paper, it is illusory which the Court can only do justice by dissolving it.”**

49. In the matter before the trial court, the court was merely called upon to perform the last rites of union that was long dead. By dissolving the marriage, the court was not pronouncing it dead but was simply opening way for the parties to charter their own separate paths. Had the learned trial magistrate declined to formally terminate the marriage, the result would have been absurd considering the Petitioner’s unyielding position. It is clear that the marriage between the petitioner and the Respondent has irretrievably broken down and it would not be just to tie down the petitioner to a marriage which for all intents and purposes is dead as a dodo.

50. In the premises, the decision of the learned trial magistrate cannot be faulted. I think I have said enough to show that this appeal must fail. It has no merit. Consequently, the same fails and is dismissed but with no order as to costs.

51. It is so ordered.

**READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF JULY, 2021**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mrs Nyaata for the Appellant**

**CA Geoffrey**