



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

DIVORCE APPEAL NUMBER 1 OF 2018

JMN.....APPELLANT

VERSUS

JWM.....RESPONDENT

(An appeal against the judgment of the Hon. V. Ochanda, in Nakuru CMC Divorce Cause No. 43 of 2012 delivered on the 2nd day of April 2013).

JUDGMENT

1. The Appellant being dissatisfied with the judgment of the lower court delivered by Hon. V. Ochanda in Nakuru CMC Divorce Cause No. 43 of 2012 delivered on the 2nd day of April 2013, preferred this appeal on the 8 grounds raised in the amended memorandum of appeal which are as follows;

- 1. That the learned magistrate erred in law and in facts in holding that the Respondent had proved cruelty without any evidence in support of cruelty.**
- 2. That the learned magistrate erred in law and in facts in holding that the Respondent had proved adultery without any evidence in support of adultery**
- 3. That the trial magistrate failed to take into consideration the Appellant's evidence in reaching her decision.**
- 4. The learned magistrate misdirected herself and relied on the wrong principles in reaching her decision.**
- 5. The judgment of the learned magistrate was against the weight of the evidence.**
- 6. The evidence on record did not support the findings of the learned magistrate.**
- 7. The learned magistrate erred in law and in facts in dissolving the marriage between the appellant and the Respondent on the basis that the marriage had irretrievably broken down, a ground that is unknown under Kikuyu Customary law upon which the Respondent's petition and case were premised.**
- 8. The learned trail magistrate erred in law in awarding costs against the Appellant in a matrimonial cause.**

2. The appeal was disposed off by way of written submissions.

3. The issue for determination broadly is whether the grounds for divorce raised by the respondent at the trial court were proved to the required degree. The court is also to determine whether the award of costs to the respondent was proper in the circumstances.

4. This being a first appeal, this court is duty bound to re-evaluate the evidence and reach its own findings.

5. In a nutshell, the respondent by way of a plaint sued the defendant for the dissolution of their marriage and sought costs of the suit. Two grounds were relied upon being adultery and cruelty.

6. The respondent testified that the appellant used to beat her. She had marks. He cut her hand. He also used to bring women to her matrimonial bed. This was before marrying them. These women were listed as G W, J K, K W, L M and A N.

7. On cross examination she stated that the appellant took her to hospital in 1972 after a beating. She said that only her children saw her being beaten and she didn't have documents.

8. On his part, it is the appellants testimony that he had married the respondent under Kikuyu Customary Law which allows polygamy. He said that J W and A N were his wives. He denied knowledge of WK and JK. He denied ever beating the respondent who left for Mombasa in 1987 on her own volition.

9. On cross examination, the appellant stated that he married J W in 1981. She died on 25/12/2011. He didn't attend her funeral. She was buried in her father's farm. He paid Kshs. 12,000/= to J's mother. He could not remember the name of the mother.

10. I have had occasion to re-evaluate the evidence and have had due regard to the judgment of the trial court.

11. As regards cruelty, I note that the evidence adduced by the respondent at the trial court lacks in specificity of the incidents of the beatings alleged, there is no corroborating evidence to any of the incidents mentioned and neither is there any documentary evidence by way of reports to authorities, medical examination documents or treatment notes.

12. The said beatings are said to have taken place over a very long span of time. Is it probable that all these beatings would have taken place without the respondent taking any action by way of a report to police about what is obviously a cognizable offence? If the beatings were as frequent and as severe as claimed, how come there is not a single medical document to at least support one incident?

13. These are valid questions that if the trial magistrate had posed, he was likely to reach a different finding.

14. The circumstances in this case are on all fours with the decision by *Sitati J* in P.M.M. vs C.N. where the Judge stated;

“I have now carefully evaluated the evidence afresh. I have also carefully considered and weighed the judgment of the trial court. Now, applying the law to the facts and evidence in this case, I am not persuaded that there exists any sufficient reason for me to interfere with the findings of the learned trial magistrate. The appellant's claim for divorce was premised on cruelty and adultery. There is however no firm evidence by the appellant to demonstrate to the court that the Respondent was cruel to her. She stated that she sought medical evidence after the assaults, but she did not bring to the attention of the court any documentary evidence such as a P3 form or some other evidence to show that she had been assaulted on the many occasions she alleged to have been assaulted. Nor did she call any witnesses to corroborate her testimony. As the respondent says in his submissions what may have occurred between the appellant and the respondent were normal differences of a healthy marriage.”

15. The burden lay with the respondent to prove the acts of cruelty complained of. **Section 107** of the **Evidence Act** provides;

“S. 107 Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

16. Upon evaluation of the evidence before the trial court I am persuaded that the respondent did not discharge this burden.

17. Was the ground of adultery proved? A look at the evidence shows that there is concurrence from both divides about the existence of the named women and particularly J W and A N in the life of the appellant. The only divergence of view is on the status of those women.

18. The trial court made a finding that the women mentioned existed. The court also found (and this is true from the record) that the appellant admitted in evidence having brought A N to the matrimonial home before paying dowry. He did not attend the funeral of Je W who he claims was also a wife and he could not remember the names of Joyce's mother. The court concluded that adultery had been proved.

19. I have applied my mind to the evidence and re-evaluated it. It is common ground that the appellant had sexual liaisons with several women whom he claims were his wives.

20. The respondent having proved that the appellant had such liaisons with other women, she discharged her burden of proof and it was incumbent upon the appellant to prove that the said women were his wives.

21. No iota of evidence was forthcoming from the appellant to show that he had conducted any Kikuyu Customary marriage with any of the women mentioned. Indeed, in a candid admission he states in evidence that he brought J W and A N to the matrimonial home before he paid dowry. Not a single step known in Kikuyu Customary Law towards a marriage with any of the women has been demonstrated.

22. In N vs N [2008] IKLR 17 the court stated;

“To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, elicit affect undue familiarity and guilt attachment are some of the instances that create an inference upon which court can act. Circumstantial evidence can prove and establish adultery provided that the circumstances are relevant, cognate and

compellable”.

23. In our instant case there is more than circumstantial evidence. The appellant has admitted enjoying the company of the named women before he officially married them. He brought them to his matrimonial home. Indeed there is a tacit admission on the part of the appellant.

24. The cumulative effect of the above is that I find that the ground of cruelty has not been proved and the finding of the trial court on this issue is set aside. I am satisfied however that the ground of adultery has been proved to the required degree and there is no basis upon which to disturb the finding of the trial court.

25. As regards costs, it is trite law the costs follow the event. However courts have employed a cautious approach as regards costs in matrimonial matters. This is largely to insulate the parties involved from further acrimony and divisions noting the emotional toll such matters have on those affected. It is also an attempt to bring some healing therapy. I am persuaded that the order on costs made by the trial court ought to be interfered with.

26. With the result that the decision of the lower court dissolving the marriage on grounds of cruelty and adultery is set aside and substituted thereof with an order dissolving the marriage herein on grounds of adultery. Each party is to bear its own costs.

Dated and Signed at **Nakuru** this **4th** day of **April, 2019**.

A. K. NDUNG’U

JUDGE