



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 117 OF 2016

VI.....APPELLANT

VERSUS

JTL.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Honourable M. Wambani in Eldoret CM Divorce Cause No. 20 of 2011, dated 12th July, 2016)

JUDGMENT

The appellant had filed for a divorce from the respondent citing cruelty as one of the reasons for divorce. The respondent upon being served with the divorce petition summons filed answer to the petition and a cross petition. The matter was heard and the court granted orders as,

- (a) That the divorce petition herein be and is hereby dismissed.
- (b) That parties shall bear their own costs of the divorce petition
- (c) That the cross-petition be and is hereby allowed in the following terms:
 - (i) That the petition herein be dismissed with costs
 - (ii) That the court allows reconciliation between the petitioner and the respondent
 - (iii) That the respondent be granted unlimited access to the petitioner, his residence without interference as well as the matrimonial house in Amukura.
- (d) That prayers (c), (d), (e), (f), (g) (h) and (i) of the cross petition be and are hereby dismissed with an order that both the petitioner and the respondent jointly take up their parental responsibility in an equal measure.
- (e) The parties shall bear their own costs of the cross petition.

The appellant was aggrieved by the decision of the court and preferred an appeal based on the following grounds:

- (a) The learned trial magistrate erred in law and in fact by failing to consider the evidence adduced by the petitioner during trial.
- (b) The learned trial magistrate erred in law and in fact by disregarding the petitioners written submissions.
- (c) The learned trial magistrate erred in law and in fact by being guided by the wrong principles leading her to dismiss the divorce petition and allow the cross-petition despite all conditions having been met and grounds warranting divorce having been duly proven.

Reasons wherefore the appellant prays that this honorable court be pleased to allow this appeal in its entirety with costs and to consequently quash the judgment of the trial court and to reconsider the divorce petition that had been brought forth by the appellant herein.

The parties agreed to canvass the appeal by way of written submissions.

Miss Ruto counsel for the appellant argued that the appellant and respondent were husband and wife. The court had failed to consider the evidence of PW2 who produced an OB report that the respondent together with other people had attacked the appellant. The court failed to consider the cases relied on, also it did not refer to *Section 65 and 66 of the Marriage Act No. 4 of 2014*. The appellant had established that the marriage had irretrievably broken down. They had tried to reconcile but the same had failed and thus they could not be forced to be together after a separation of 13 years. The issue of advanced age is not a factor to be considered as a principal in granting divorce.

Mr. Magare counsel for the respondent opposed the appeal. He submitted that the appellant had conceded to having an affair with one *BK* whom he had a son with and thus he cannot rely on his own adultery to file for divorce. He had cited desertion, cruelty and adultery. The allegations that the respondent had tried to torch the matrimonial home is baseless since it was established the appellant did not have a matrimonial home and he was staying in his mother's house. The evidence of the appellant was considered in determining the divorce cause. The parties had tried to reconcile but the same failed. Finally, he prayed that lower court judgment be upheld.

ANALYSIS

Issues for determination

The court has referred to the record of appeal, the submissions by the parties and the case law referred to and the following issue arise for determination.

Whether the grounds for divorce were proved.

This is an appellate court and it has the duty to reevaluate the evidence, analyse and come to its own independent decision keeping in mind that it did not see the witness and hear them testify. See *Selle v Associated Motor Boat Co. Ltd & others (1968) EA 123*.

The grounds that the court considers in granting a divorce are premised on *Section 8(1) of the Matrimonial Cases Act Cap 152* which provides that a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent:

- (i) Has since the celebration of the marriage committed adultery.
- (ii) He deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition (or)
- (iii) Has since the celebration of the marriage treated the petitioner with cruelty (or)
- (iv) Is incurably of unsound mind and has been continuously under the care and treatment for a period of at least five years preceding the presentation of the petition.

The appellant and a police officer from Langas police station testified. He testified that he had been married to the respondent since 1978 under the Teso customary law but later in 1985 they solemnized the marriage in church. The marriage was blessed with 4 issues who are adults. The respondent was a nurse while at the time he testified he had retired for about 5 years. The respondent had been suspecting him when he worked for [Particulars Withheld] news as a journalist. The respondent had an abusive language, was rude thus their relationship deteriorated. He had been providing for the family. The respondent once deserted the home and people would call asking for ransom. In 2002 she bought petrol and put it in their bedroom. He then sought for a transfer to Mombasa in 2003. The relationship became unbearable. In 2007 the respondent with other people went to his rented house in Racecourse Eldoret, he reported the same to the police. In April, 2008 there was an attempt to reconcile them but the same was not possible. The respondent once went to his hotel business and asked his workers to cook for her. They have not been staying together since 2002. On cross examination he testified that during the reconciliation meeting, the main reason given was that he was a womanizer. He agreed he had a son with *BJ*. The respondent was spying on him, there was no statement recorded pertaining the respondent coming with people to his house, he was only told by neighbours.

The police officer (PW2) testified that there was an incident reported by the appellant on 22.11.2007 at 09.20 hrs O.B No. 14. The report says the respondent was in the company of 7 men armed with crude weapons. On cross examination he said the case was never followed up.

The respondent (DW1) testified and stated that she was married to the appellant and she refused to have a divorce based on her faith. She was willing to forgive the appellant. On cross examination she testified there were issues in 2001 but they still stayed together. She had not contributed to the breakdown of the family.

DW2 *VE* testified that he was part of the people who held the reconciliation meeting. The appellant had complained that the respondent was careless with family finances and she was suicidal with hot temper. The appellant had agreed to withdraw the divorce case. The defense case was closed.

The appellant had testified that the marriage had broken down completely. The appellant confirmed in his evidence that he had a child with one *BJ*. From the evidence of the respondent there is a time she travelled to Mombasa to visit the appellant and found the lady in the house which on the part of the appellant who was seeking divorce confirmed adultery on his part.

The appellant and the respondent have not been staying together since 2002, there is no matrimonial home and from the evidence the appellant stayed at his mother's house, save for the land in Kisoko where the respondent says she has built her home.

In addition to this the other ground which must be proved is cruelty. The police officer testified and produced an OB which indicated that

the appellant reported the respondent had gone with people to his house. There was no follow up of the case. The respondent's counsel submitted that the complaint was made 5 days to filing of the divorce cause in the lower court. The appellant further cited that the respondent went to his business in Amukura and ordered the workers to cook for her and she was rude to them, and that she had kept petrol in their bedroom. He stated that it is her cruelty that made him seek for a transfer to Mombasa. This is not evidence enough that the respondent was cruel. In Nunzio Colarossi v Michelina Colarossi (1965) EA 129, the court held:

“No comprehensive definition of cruelty has ever been accepted as satisfactory-much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct by one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking the relief must prove actual or probable injury to life, limb or health.”

Under Section 66 (6) of the *Marriage Act, 2014*, irretrievable breakdown of the marriage can be proved by evidence of one or more of the following fact:

- (a) Commission of adultery;
- (b) Cruelty to the other spouse or any child of the marriage;
- (c) Willful neglect of one spouse by the other for at least two years immediately preceding the presentation of the petition;
- (d) Separation of the spouses, voluntarily or by decree of the court, for at least two years;
- (e) Desertion for at least three years immediately preceding the presentation of the petition;
- (f) The sentencing of a spouse for a term of life imprisonment or a term of seven years or more;
- (g) Certification by two doctors, one of whom is a psychiatric, that spouse suffers from incurable insanity and
- (h) Any other ground as the court may deem fit.

The trial court order that:-

- The court allows reconciliation between the petitioner and Respondent and their marriage be maintained.
- The Respondent be granted unlimited access to the petitioner, his residence without interference as well as the Matrimonial house in Amukura;

Can potentially lead to chaos as a court order is not by itself enough to make a chaotic marriage blissful. The appellant is not ready and willing to live with the Respondent as his wife and the Respondent has no way of forcing him to do so. The marriage is better of dissolved for safety of the parties even if not necessarily for their happiness.

It has irretrievably broken down and for the reason I do find the appeal merited and is allowed as prayed. Each party to meet own costs.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of April, 2019

In the absence of:

The appellant

The respondent

And in presence of Mr. Mwelem – Court assistant