



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 18 OF 2018

CB.....APPELLANT

VERSUS

DON.....RESPONDENT

JUDGMENT

1. The appellant and the respondent got married under the **African Christian Marriage and Divorce Act(now repealed)** on the 31st December 1998 at [Particulars Withheld] Church in Nyamache Sub-county, Kisii County. The Respondent in his petition dated the 11th May 2017 claimed that they started experiencing problems sometime in 2000 and alleged desertion and cruelty as grounds for divorce. The appellant opposed the petition of divorce.

2. The suit proceeded for hearing with only the parties testifying. The trial court in its judgment rendered on 12th February 2018 found the relationship between the parties to have irretrievably broken down and thereby dissolved the marriage between the petitioner and the respondent. Following the decision of the trial court, the appellant has come to this court on appeal on the following grounds-

1. *THAT the learned Resident Magistrate erred in law and in fact in granting the respondent herein the divorce when the respondent had failed to prove the grounds for divorce in his petition to the standards required for matrimonial offences.*
2. *THAT the learned Resident Magistrate's findings are not supported by the evidence on the record and constitute misdirection and wrong conclusions.*
3. *THAT the learned Resident Magistrate erred in law and fact by refusing to allow the appellant who was acting in person to call witnesses to corroborate her testimony to prove that there were no justifiable reasons/grounds for granting the divorce and by so doing denied the appellant a fair hearing as provided in the constitution.*
4. *THAT the findings and conclusions of the learned Resident Magistrate are not supported by the evidence on record.*

3. This being a first appeal, I am entitled to review the entire evidence and reach my own independent conclusions bearing in mind that I neither saw nor heard the witnesses testify (*see Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348*).

4. At the hearing before the trial court DON testified that his wife had insulted him by telling him that he was not man enough and also insulted him with her brother in law. He told court that in 2006 the appellant left home and after reconciliation they adopted 2 children, their happiness was however short lived. He told court that the appellant again left the matrimonial home in 2016. They again sought help from the church elders but their fights only intensified and the respondent claimed that the appellant would insult him. The respondent testified that in fact after the appellant left him she told the villagers that they had not been sexually intimate for 3 years purposefully to malign him before the villagers. He testified that on 1st May 2016 the appellant left and never came back.

5. The appellant testified before the trial court that on 1st May 2016 she left the matrimonial home and the respondent promised that he would come for her at home but did not. When she went back to her matrimonial home albeit late the respondent hit her. She told court that she did not want the divorce.

Determination

6. I have considered the record of appeal, the written submissions, the grounds of appeal and the law. The appellant has complained that she was not granted a fair hearing as the trial court did not allow her to call her witness to corroborate her testimony. The **Civil Procedure Act and Rules** provide for time-frame rules and filing of witness statements which is aimed at each litigant to have adequate notice, fair understanding of the litigation and to avoid trial by ambush. The appellant filed a statement of defense dated 11th July 2017 and her

statement on even date. During the hearing, after giving her testimony, she sought to introduce a witness to testify to fortify her case but this application was opposed by the petitioner who argued that she had not filed any witness statement for the said witness. I am constrained to agree with the decision of the trial court disallowing the appellant to call witness without notice to the respondent. Allowing the witness testify without the witness statement would have amounted to trial by ambush which would have been prejudicial to the respondent.

7. The issue for determination is whether the grounds for divorce raised by the respondent at the trial court were proved to the required degree. The Petition was premised on grounds of desertion and that of cruelty. The respondent had in his petition argued that appellant had deserted the matrimonial home and returned to her parents' home without a justifiable cause. **Section 65 (c) of the Marriage Act, 2014** provides that a Christian marriage may be dissolved on the ground of desertion by either party for at least three years immediately preceding the date of presentation of the petition. The appellant and the Respondent gave evidence that the appellant left the home in 2016 and the petition having been filed only after one year of desertion, the ground therefore fails. The trial court found that there were allegations of cruelty, denial of conjugal rights and adultery which were in fact never proved.

8. I also note that at paragraph 9 of the petition, the petitioner has alluded to the fact that their marriage has irretrievably broken down. The said paragraph reads as follows;

“9. That the respondent has further denied the petitioner his conjugal rights and that the marriage has irreconcilably broken down because the petitioner has tried various reconciliation methods including involving village elders and church pastors to no avail.”

The trial court held that the marriage had irretrievably broken down. **Section 66(6)** of the Act provides that *a marriage is considered to have irretrievably broken down if:-*

a. a spouse commits adultery;

b. a spouse is cruel to the other spouse or to any child of the marriage;

c. a spouse wilfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;

d. the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;

e. a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;

f. a spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;

g. a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or

h. any other ground as the court may deem appropriate.

9. In **Alexander Kamweru vs. Anne Wanjiru Kamweru [2000] eKLR**, the Court of Appeal held that

“As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.”

10. It was not disputed that the appellant left the matrimonial home after the parties had a disagreement in 2016. The respondent testified that the appellant left the matrimonial home in 2006 but they were reconciled. In 2016 they again sought help from the church elders but their fights only intensified. Their irreconcilable differences is proof that the marriage has irretrievably broken down as envisioned by **Section 66 (6) (h)** of the Marriage Act. Madan, J. (as he then was) in **NVN (2008)1KLR 16** held that:-

‘If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear them, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences. Each case must have its own measure.’

11. Having found that the marriage between the appellant and the respondent irretrievably broken down, the appeal is hereby dismissed

12. This being a family matter there shall be no order as to costs.

Dated, signed and delivered at Kisii this 13th day of June 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Onyancha For the Appellant

Mr. Abobo h/b for Oereri For the Respondent

Rael Court Clerk