



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 22 OF 2013**

**SMK.....APPELLANT**

**VERSUS**

**MW.....RESPONDENT**

*(Being an appeal from the Judgment of the Principal Magistrate's Court at Milimani*

*by Hon. S. Atambo, in Nairobi RMC Divorce Cause No. 302 of 2001*

*delivered on the 15<sup>th</sup> March 2013)*

**JUDGMENT**

1. This is an appeal from the decision of the Principal Magistrate (Hon. S. Atambo) who dismissed the petition for divorce that had been filed by the appellant SMK. against the respondent MW on 8<sup>th</sup> August 2011. The marriage between them had been solemnized on 2<sup>nd</sup> December 2000 at the [Particulars Withheld] Parish in Nyeri. The couple got two children, born in 2002 and 2004, respectively. The petition was grounded on cruelty. It was also alleged that the respondent had deserted the matrimonial home in April 2010 and that, for all purposes, the marriage had broken down beyond repair.

2. The respondent had filed an answer to the petition denying that she had been cruel to the appellant as pleaded, or at all. She denied that the marriage had irretrievably broken down, and stated that it was the appellant who had forced her out of the matrimonial home.

3. Both parties testified before the lower court. The applicant called three witnesses. At the conclusion of the case the court dismissed the petition on the ground that cruelty had not been proved. The court observed as follows:-

**“The petitioner in this matter seems to be looking for reason to end a marriage which probably has gone “stale.” The grounds of cruelty he has relied upon are not proved. He has not denied chasing his wife, the respondent, out of the bedroom ... This is a marriage which seems to have had its issues but then again every marriage from time has its own triumphs and tribulations and the petitioner herein seems to be looking for an easy way out ...”**

4. In the Memorandum of Appeal, the appellant complained that:-

- a) the court had erred in law and fact in finding that the actions of the respondent did not amount to cruelty;
- b) the court had erred in law and fact in failing to consider that the parties had not lived together since April 2010;
- c) the court had erred in law and fact by failing to consider that the parties had not had conjugal relationship for over three years before the separation in April 2010; and
- d) the court had erred in law and fact by not dissolving the marriage which had already been constructively dissolved by the actions of the respondent.

5. There is a first appeal. This court is, as was stated in **Selle and Another –v- Associated Motor Boat Company Ltd & Others [1968] E.A. 123**, under a duty to re-evaluate the evidence before the trial court and to draw its own conclusions, while bearing in mind that it do not

have the benefit of seeing the witnesses as they testified. This court is not bound necessarily to follow the trial court's findings of fact if it appears either that it 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.

6. The question to be determined is whether, on the evidence tendered, the appellant had proved his case on the required degree to merit the dissolution of the marriage between him and the respondent.

7. The petition was based on cruelty. It was also pleaded that, because of that cruelty, the marriage had irretrievably broken down.

8. I consider that before **Marriage Act 2014**, and this marriage having been solemnized under the **African Christian Marriage and Divorce Act (Cap. 151)**, a petitioner was required to prove any, or a combination of any, of the following grounds:-

- a) adultery;
- b) desertion for a period of at least three years immediately preceding the presentation of the petition;
- c) cruelty;
- d) unsound mind; and
- e) rape, sodomy or bestiality on the part of the husband.

These grounds were provided for in **Section 8(1)** of the **Matrimonial Causes Act (Cap. 152)**.

9. Both the **African Christian Marriage and Divorce Act** and the **Matrimonial Causes Act** were repealed by the **Marriage Act**. The petition was heard and determined under the **Matrimonial Causes Act**. Under the **Marriage Act**, in **Section 66(2)**, a party to a marriage may petition for the dissolution of the marriage on any of the following grounds:-

- a) adultery by the other spouse;
- b) cruelty by the other spouse;
- c) exceptional depravity by the other spouse;
- d) desertion by either party for at least three years; or
- e) the irretrievable breakdown of the marriage

10. **Section 98(2)** of the **Marriage Act** provides that:-

**“(2) Proceedings commenced under any written law shall, as far as practicable, be continued in accordance with the provisions of this Act.”**

11. The undisputed facts of the dispute were that the couple separated about April 2010, and since then they have not lived together. The appellant claimed the respondent walked out of the matrimonial home. The respondent alleged that the appellant is the one who locked her out. The couple did not have a sexual relationship. According to the appellant, the couple had not been intimate for three years prior to the separation. The respondent talked of two years. They did not share a bedroom. This is how the respondent described the relationship during her evidence in chief:-

**“Conjugal rights was the sole problem and I never denied him. The reverse is true. He locked me out of the bedroom and removed all my belongings. He stopped talking to me. I made attempts but in vain. All other issues are side shows. They all arise from the bedroom.”**

12. On his part, this is what the appellant told the trial court:-

**“Respondent kept badmouthing me saying I was sleeping with our house helps between 2003-2007. I was working in Mombasa then and used to come home once a month. She stated to one of my house girls that I was HIV positive. I told her to move to the other bedroom. She denied me conjugal rights for about 3 years. She would sleep in jeans and accuse me of sleeping with house girls. She moved her clothes and personal belongings into separate room. She said I was sleeping with prostitutes ...”**

13. There were other incidents that were narrated by either party. The trial concluded that the issues between the appellant and the respondent were the normal issues expected in every marriage. That certainty cannot be there. This is because the same court observed that the marriage was stale. The evidence disclosed as completely dysfunctional marital relationship between the applicant and the respondent. A relationship where for several years the couple had no intimate interaction and was each sleeping in a separate bedroom, was not a normal relationship. Up to the time of filing the petition, and up to the time of this appeal, the couple has lived apart. It would be cruel for the

respondent to have denied the appellant conjugal rights for three years. Cruelty may be physical or mental. There was mental torture on either side. Either way, the marriage between the appellant and the respondent had irretrievably broken down.

14. I allow the appeal. The orders dismissing the petition with costs are set aside, and, in their place shall be an order allowing the petition and dissolving the marriage on the grounds of cruelty and that the marriage between the appellant and the respondent had irretrievably broken down.

15. This is a family dispute. Each party will bear own costs on appeal and below.

**DATED and DELIVERED at NAIROBI this 23<sup>RD</sup> day of JULY, 2019.**

**A.O. MUCHELULE**

**JUDGE**