



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 57 OF 2017

JMK.....PETITIONER

-VERSUS-

JWW.....RESPONDENT

An Appeal from the Judgment and Decree of the Chief Magistrate's Court at

Nairobi (Honourable Mr. P. Gesora delivered on 28th July, 2017 in Div. Cause No. 700 of 2016

JUDGMENT

1. The Appeal arose out of the Judgment delivered on 28.7.2017 in Divorce Cause No. 700 of 2016 which dismissed the Appellant's Petition for failure to meet the threshold for grant of divorce.

2. The Petitioner/Appellant had filed Divorce Cause No. 700 of 2016 seeking to dissolve the marriage between him and the Respondent's on the grounds of cruelty. He also prayed for custody of the children and costs of the petition.

3. The following are the particulars of cruelty contained in paragraph of the Petition:

(i) THAT the Respondent had withdrawn love, affection and support to the Petitioner and treated him with cold indifference.

(ii) THAT the Respondent had shown no interest in the Petitioner or in the children of the marriage and failed to look after them.

(iii) THAT on or about August 2013 the Respondent had almost caused an accident by violent twisting the steering of the Petitioner's car as they were going to work because she had forgotten bananas at home and she wanted to go for them.

(iv) THAT on several occasions the Respondent had disrespected the Petitioner and at one time told him "you are not a man, plan with your sister how your breakfast will be served tomorrow" all because the Petitioner had not partaken in family dinner.

(v) THAT the Respondent on several occasions denied the Petitioner Conjugal rights and had locked him up in the bedroom several times.

(vi) THAT the Respondent had demonstrated hatred, dishonesty and contempt towards the Petitioner both in private and public causing the petitioner great humiliation and mental anguish.

(vii) THAT during the subsistence of the marriage, the Respondent had always neglected her role as wife and mother.

(viii) THAT the Petitioner found no solace in the marriage and did not condone the said cruelty.

4. The Respondent filed an answer to the petition in which she denied the particulars of cruelty in the Petition. She averred that their marriage is strong and that left to themselves, the Petitioner and her were capable of living in harmony.

5. She further averred in the answer to Petition that their marriage suffered from adverse interference from relatives and that the Petitioner's mother and sisters had refused to let him go back to the matrimonial home. She asked for more time for reconciliation through the

intervention of Professional Marriage and Family therapists.

6. The Respondent prayed for dismissal of the Petition and for custody care and control of the children and costs of the Petition.

7. The parties gave oral evidence in Court. The Petitioner said he married the Respondent on 3.11.2007 and they have two issues who are both minors aged 7 and 4 years. The Petitioner said the Respondent was cruel to him and that is why he is seeking dissolution of the marriage and custody of the children. He adopted his written statement as his evidence in chief.

8. The Respondent denied that she was cruel and said their marriage suffered interference from the Petitioner's mother and sisters and she urged the court not to dissolve it.

9. The trial magistrate found that the evidence adduced did not meet the threshold for grant of dissolution of the marriage and he dismissed the Petition with costs.

10. The Petitioner who was aggrieved with the Judgment and has appealed against the same on the following grounds:

(i) THAT the Parties had been separated for almost a year and chances of reconciling had hit a dead end.

(ii) THAT the marriage had irretrievably broken down and the two had tried to consult a marriage counselor in vain.

(iii) THAT the trial Court erred in finding that the Appellant had failed to meet the threshold of proving particulars of cruelty when in fact the same had been met.

(iv) THAT the trial Court had failed to consider that marriage is a mutual agreement and further that parties cannot be forced to stay together once they have disagreed on issues appertaining to the marriage.

13. I have considered rival submissions filed by the parties. The first duty of the first Appellate Court is to re-evaluate the evidence before the trial court and come up with its conclusion bearing in mind that the trial court had the benefit of seeing the witnesses

14. In the case of **OKENO v REPUBLIC [1973] EA 32** , it was held:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

15. In the Current Appeal, the issues for determination are as follows:

(i) Whether the Appellant met the threshold for grant of dissolution of the marriage on the grounds of cruelty.

(ii) Whether the Appeal should be allowed.

(iii) Who pays the costs of the Appeal

16. On the issues as to whether the Appellant met the threshold for dissolution of the marriage, the Appellants said the marriage had broken down irretrievably and submitted that they cannot be forced to live together.

17. Cruelty as was quoted by Justice S.J. Chitembwe in **KAS vs MMK (Divorce Cause No. 10 of 2016)** from the Black's Law Dictionary as defined to be:

“The intentional and malicious infliction of mental and physical suffering on a living creature”.

Mental cruelty was further defined to be:-

“.....one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse...”

18. The word cruelty is defined in the Oxford Advanced learners Dictionary 6th Edition as:

“A behavior that causes suffering or pain to others, especially deliberately”

19. Justice Chesoni categorized cruelty into four elements when presiding over the case of: **DM -vs- JM (2008) IKLR 5**; The Hon. Judge

stated as follows;

“ To establish cruelty, one, the complainant must show to the satisfaction of the Court that:

(i) Misconduct of a grave insight and weighty in nature.

(ii) Where injury to the complainant’s health and reasonable apprehension of such injury.

(iii) That the injury was caused by misconduct on the part of the respondent and

(iv) That on the whole the evidence of the conduct amounted to cruelty in the ordinary service.

20. In **Civil Appeal No. 5 of 2015 J.S.M vs. E.N.B MAKHANDIA, OUKO & M’INOTI, JJ.A.**, in defining what cruelty and on a marriage that has irretrievably broken down held as follows;

“There is consistent case law on what constitutes cruelty as a matrimonial offence. In MEME V. MEME [1976-80] KLR 17, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court:

i. Misconduct of a grave and weighty nature;

ii. Real injury to the complainant’s health or reasonable apprehension of such injury;

iii. That the injury was caused by misconduct on the part of the respondent; and

iv. That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.

21. In **MULHOUSE V. MULHOUSE, [1964] 2 All ER 50**, which Chesoni, J. (as he then was) cited with approval in **MEME V. MEME** (supra), Sir Jocelyn Simon P. while considering the gravity and weight of the misconduct that would constitute cruelty, stated as follows:

“Is conduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief.”

22. Thus conduct, which is part of the “reasonable wear and tear” of a marriage, does not constitute cruelty. Regarding the nature of injury to the petitioner’s health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:

“It must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it.” And in NUNZIO COLAROSSO V. MICHELINA COLAROSSO [1965] E.A. 129, NEWBOLD, JA., speaking for the former Court of Appeal for Eastern Africa stated thus:

“An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.”

23. Chesoni J. further stated in **MEME V. MEME**, (supra), that the burden lies on the petitioner to establish injury or reasonable apprehension of injury to life, limb or health to herself, or himself before the respondent’s conduct can be described as cruel.

24. As regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, this Court, in **KAMWERU V. KAMWERU (2000) E KLR**, stated as follows:

“Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”

25. The Court of Appeal went further to hold that:

“There is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore it is not very helpful to rely on facts of previously decided cases as precedent.”

26. **Section 66 (6)** of the Marriage Act 2014 provides what constitutes a marriage that has broken down. It states that a marriage has

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 willfully neglects the other spouse for at least two years immediately preceding the date of the 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 of the 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 the recovery is improbable during the life time of the respondent in light of existing medical knowledge; or*
- h) Any other ground as the court may deem appropriate*

19. In the current case, I find that Appellant's evidence was scanty and could hardly prove cruelty , marriage is a sacred institution that should not be treated casually.

27. I accordingly find that this appeal cannot be allowed. The trial Court was right in dismissing the Petition and I uphold the decision of the trial Court.

28. This being a family matter, I direct that each party bears its own costs of this Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS DAY OF OCTOBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.