REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 8 OF 2017

CWN.....APPELLANT

VERSUS

AN.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Embu Senior Resident Magistrate in CM Divorce Cause No. 4 of 2016. The appellant herein had filed a petition for divorce against the respondent on the grounds of cruelty, specifically physical, mental and verbal abuse, financial mistreatment, failure to provide for her and the issues of the marriage. The appellant also relied on the ground of adultery against the respondent as a ground for divorce. The trial court dismissed the petition on the grounds that the appellant had failed to prove the grounds set forth in her petition.

2. Being aggrieved by the trial court's decision the appellant herein filed the instant appeal dated 11th March 2017 that was based on 7 grounds that can be summarised as follows: -

a) That the learned trial magistrate erred in law and fact when he failed to consider that sufficient evidence had been adduced by the appellant to prove that the marriage had irretrievably broken down.

b) That the learned trial magistrate erred in law and fact when he exhibited bias against the appellant in his judgement.

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

4. It is submitted that whereas the appellant states that she left the matrimonial home in 2003 and the respondent says in 2008, Section 65 (c) of the Marriage Act provides that one of the grounds for dissolution of a Christian marriage is desertion by either party for at least 3 years immediately preceding the presentation of the petition. Reliance on this proposition is placed on the case of **D.L.E.O v K.A.A. [2009]** where it was held that *the hallmark of any successful marriage is the willingness of the concerned couple to live together.*

5. It was submitted that the fact that the appellant had shown the court that the marriage had completely broken down, that her and the respondent had not lived in the same homestead in over 10 years and that the respondent had moved on while the appellant's life remained in limbo was sufficient cause to be granted a divorce. Reliance was placed on the case of **N v N [2008] 1 KLR (G & F)** where the court held interalia that *...the law does not require or wait for tangible manifestation of cruelty before granting relief....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 then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences... To prove adultery, it is not necessary to have evidence of the same....Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling.*

6. Reliance was also placed n the case of **S.C.C. v M.K.C [2012] eKLR** where the Court of Appeal gave the yardstick on the applicable burden of proof as on cruelty and desertion: -

"Applying the yardstick of the burden and standard of proof as asset 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."

7. It was also submitted that though the respondent had averred that he had been sending the applicant money via m-pesa was not unreasonable as the two had children together and the respondent was merely carrying out his parental responsibility.

8. The appellant thus prayed that the marriage be dissolved. She relied on the case of **NMM v SJC Divorce Cause No. 1 of 2013** where it was held that *it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it could cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives…..”*

C. Respondent’s Submissions

9. It is submitted that separation in itself is not a ground to warrant a divorce and in any case the separation was only pleaded by the appellant and not by the respondent and further that the appellant failed to prove the same. The respondent submits that although the appellant was transferred to chukka, she was still coming back and sleeping at her matrimonial home.

10. It is submitted that in the trial court’s judgement the court questioned the credibility of the allegation that there were attempts for reconciliation in the first place and the appellant never brought any witness to confirm that the reconciliation was futile and a s such the court could not rely on a mere allegation as it is not the duty of the court to go on a fishing expedition to get evidence but the duty of the appellant who had alleged the same.

11. It is submitted that the appellant had no intentions of calling the children and even opposed an application by the respondent to have the children testify in court and as such cannot come back and dwell on the same.

12. It is submitted that to the extent that no evidence, documentary or otherwise was adduced to support the alleged cruelty and/or assault the trial court was right in dismissing the appellant’s petition. On the issue of separation, the respondent relied on the case of **SBS v JMN [2015] eKLR** where it was held interalia that separation due to work commitments cannot amount to desertion.

13. It was also submitted that the trial magistrate did not exhibit any biasness but it only acted upon the evidence before it. The respondent further submitted that the instant appeal lacked merit and ought to be dismissed.

D. Analysis & Determination

14. The duty of this court as the first appeal court was explained in the case of ***MWANGI VS WAMBUGU, [1984] KLR 453*** *as follows: -*

> ***“A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”***

15. I have perused the evidence in relation to the grounds of appeal and I am of the view that the following are the issues for determination:

> *i. Whether the appellant established any of the two grounds namely adultery and cruelty and whether the trial court erred in finding that she had not proved her case.*
>
> *ii. Whether, irrespective of proof, the marriage between the parties have irretrievably broken down.*
>
> *iii. Who between the parties will pay the costs of the suit.*

16. The relevant law is found in **Section 8 of the Matrimonial Causes Act Cap. 152** which provides: **-**

> ***(1) A petition for divorce may be presented to the court either by the husband the wife on the ground that the respondent—***
>
> ***(a) has since the celebration of the marriage committed adultery; or***
>
> ***(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or***
>
> ***(c) has since the celebration of the marriage treated the petitioner with cruelty; or***
>
> ***(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.***

17. In her petition for divorce dated 4/02/2016 and filed in court on 11/02/2016, the petitioner relies on the grounds of adultery and cruelty against the respondent.

18. It was stated that the parties were married on 5/12/1981 at Anglican Church of Kenya (ACK) Kagaari Church in Embu under the

Christian Marriage and Divorce Act. Cap 151 Laws of Kenya. They were blessed with four children named in the petition and who were aged 24 and 32 years at the time of filing the petition in 2016.

19. It is alleged that the respondent for the better part of 23 years of marriage, treated the petitioner with cruelty in that he continuously abused the petitioner both mentally and physically in presence of their children and subjected her to endless torment and suffering. The respondent failed to support the petitioner financially or otherwise.

20. It is further alleged that the respondent cohabited with another woman with whom he had two children. The appellant argues that he was thus guilty of adultery.

21. In her evidence, the appellant testified that due to the troubled marriage with cruelty from the respondent, she was continuously physically and mentally abused. She testified that she was assaulted during the 2nd and 3rd pregnancy to the extent that she almost aborted one of the babies.

22. The appellant's evidence was that the parties tried reconciliation through their parents which was often a temporary solution before the respondent meted out further cruelty to the appellant. Further to that, the appellant involved pastor of their church and later after separation engaged the reverend of the respondent's church but the respondent was adamant that he wanted the appellant to leave his home for she was only interested in his property.

23. Section 64 of the Marriage Act provides for reconciliation thus:

> ***The parties to a marriage celebrated under Part III may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated.***

24. The respondent denied the allegations of cruelty and adultery and said that he still loved his wife and that any separation between the parties was not due to a troubled marriage and was not legal. Rather it was caused by transfer of the appellant who was a teacher by profession from Embu to Chuka where she rented a house. Despite the parties living apart, the appellant still visited the matrimonial home occasionally and participated in family functions.

25. The respondent denied that he failed to support the appellant. He said he gave her financial support from time to time and even educated the children of the marriage.

26. The appellant relied on two cases on the burden of proof of adultery. In the case of **N Vs N 2008] 1 KLR 17** Madan, J. pronounced himself thus: -

> ***To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, illicit affection, undue familiarity and guilt attachment are some of the instances which crate an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling".***

27. In the case of **SCC Vs MK [2012] eKLR** the court cited the case of **Kamweni Vs Kamweru [2000]** in which the Court of Appeal gave guidelines as to proof of cruelty and desertion: -

> ***Applying the yardstick of the burden and standard of proof as set out above we would say that the feelings 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 probabil8ity, 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.***

28. The respondent argued that the appellant failed to call witnesses to support her allegations of cruelty and adultery. He said the court gave the appellant a chance to call the children of the marriage as witnesses but she refused to do so thus losing a golden chance in her case. The respondent argued that the case was not proved as required by the law and that the trail court rightly dismissed it.

29. In regard to calling witnesses to support the appellant's case, it is trite law that a case may be proved by one witness provided that his/her evidence is found by the court to be worthy of credit as well as reliable. It is not necessary for a petitioner to line up several witnesses to support her case. Proof of a case does not depend on the number of witnesses but on the quality of the evidence. The court takes judicial notice that some activities in a marriage will in most cases happen in the presence of only the parties and independent witnesses may not be found to testify in litigation between the parties.

30. On the issue of calling the children of the parties as witnesses, the same principle of quality of evidence applies. Firstly, it was the choice of the appellant to call witnesses or not to call witnesses. Secondly, the respondent knows very well that dragging their children to testify in a divorce case is not only traumatising but embarrassing to them.

31. On perusal of the proceedings, it is noted that the respondent is the one who applied to the court that their children be called to testify to prove his innocence on the allegations in the petition. The appellant objected to the oral application and the court agreed with her as follows:

> "*There is no need to bring children to court to give evidence in a case of this kind. I disallow the application to call children to testify".*

32. The calling of children as witnesses was not a decision by the appellant and was overruled by the court on application by the respondent

himself.

33. The appellant told the court that she left the matrimonial home in 2003 after twenty-three (23) years of a troubled marriage marked by the cruelty of the appellant. The assault on the appellant in two instances during the 2nd and 3rd pregnancy cannot be dismissed as hot air. The magistrate did not say that he did not believe the appellant but said that she did not give particulars of her allegations. The evidence on record laid emphasis on the two instances of cruelty. She said she was kicked and seriously beaten by the respondent. As a result of the 2nd incident, that she refers to her 3rd born child as a miracle baby because she survived the onslaught. I am satisfied that these two incidents were sufficient to prove cruelty.

34. There is no requirement in law as was suggested by the trial magistrate that the appellant had not reported any of the incidents of cruelty to the police. It was a misdirection for the court to dismiss the evidence of the appellant based on that kind of reasoning that had no basis on law or fact.

35. I am in agreement with the finding in the case of **N Vs N (supra)** that circumstantial evidence is sufficient to prove cruelty. The appellant said she left the matrimonial home due to the cruelty of the respondent. In her evidence, she gave several inculpatory facts as out lined in the foregoing paragraphs that prove on the balance of probabilities that the respondent continuously meted out cruelty on the her.

36. Although the respondent denied that the parties had separated for the fourteen (14) years, he betrayed himself by admitting that what the appellant did was to attend family functions like weddings, funerals and Christmas parties. The couple had children who needed their parental love and support and the separation did not mean that the appellant would not step to the matrimonial home again. It was said two of the children of the couple were married and had children. The appellant was duty bound to participate in their weddings or even customary union marriage negotiations. The appellant for over twenty (20) years had bonded with the larger family of the respondent and it was in order for her to attend respective functions and gatherings organised by them.

37. The respondent's allegation that he still loved the appellant and wanted to live with her as his wife was not only credible but dishonest on his part. The parties had two joint accounts during their marriage but the respondent later removed the name of the appellant as a signatory a fact which was not disputed. This element in a relationship is evidence of a couple who have pulled to opposite directions.

38. The appellant also testified that the respondent was in cohabitation with another woman and they were blessed with two children whom the appellant knew by name and profession having met her at their rental houses and had a conversation with her. The respondent is said to have told the appellant's mother that he had another wife which allegation he did not deny. This unlawful union in my considered view is proof of adultery on the balance of probability.

39. From the above analysis, I am not in doubt that the marriage fo the parties who had separated for about fourteen (14) years after experiencing over twenty (20) years of a troubled marriage had irretrievably broken down as was stated in the case of **MNM VS SJC Divorce Cause No. 1 of 2013** thus: -

> ***It has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives…."***

40. It is my considered view that the marriage between the parties had gone beyond repair and it was in the interests of justice that it be dissolved.

41. It is my considered view that the applicant had proved on the balance of probability before the trial court the grounds of cruelty and adultery as demonstrated in the foregoing analysis of the evidence.

42. I find that the trial court erred in law and fact in its finding that the appellant had not proved her case as required by the law.

43. I hereby set aside the judgment of the trial court and substitute it with judgment in favour of the appellant that the marriage between the parties be and is hereby dissolved.

44. It is ordered that a *decree nisi* do issue.

45. The appeal is hereby allowed with costs to the appellant.

46. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Appellant present