



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 14OF 2016

B.A.P.....APPELLANT

VERSUS

J.O.....RESPONDENT

(Being an Appeal from the Judgment and Decree of

Hon. B.Kasavuli (SRM) in Winam SRM Divorce

No.46 of 2014 delivered on 26th January, 2016)

JUDGMENT

1. B.A.Psued (hereinafter referred to as appellant) sued J.O(hereinafter referred to as respondent) in the lower court praying for dissolution of their marriage and custody of the two issues of the marriage.

The respondent filed a statement of Defence and in denying the claim conceded that the couple had been separated for 4 years but blamed the plaintiff for cohabiting with another man.

2. In a judgment delivered on **29th January, 2016**, the learned trial Magistrate found that the appellant had not proved her case on a balance of probability and dismissed it with costs to the respondent.

The Appeal

3. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 25th February, 2016 filed the Memorandum of Appeal dated 12th February, 2016 which sets out 6 grounds of appeal which I have summarized into 3 to wit:-

- 1. The Learned trial Magistrate misapprehended the evidence on record as a result of which he arrived at the wrong decision**
- 2. The trial court failed to take into account material evidence on record and hence made a decision against the weight of evidence**
- 3. The trial court erred both in law and in fact in raising the burden of proof beyond a balance of probabilities to that of beyond reasonable doubt**

SUBMISSIONS BY THE PARTIES

4. When the appeal came up for hearing on 27th February, 17; the appellant's advocate and the respondent who is acting in person made oral submissions.

Appellant's submissions

5. It was submitted for the appellant that she had cruelty and that the marriage between her and the respondent had irretrievably broken down since the couple had been separated since 2009.

Respondents' submissions

6. The respondent denied that he was cruel to the appellant but conceded that the couple had been separated for 6 years as at the time the divorce proceedings were commenced. According to the respondent, divorce under Luo customary Law would only arise after he has received the dowry he paid on behalf of the appellant.

The evidence

7. The appellant testified that she married the respondent under Luo Customary Law in August, 2000 and that they were blessed with two children. It was her evidence that they separated in 2009 after the respondent became violent and that they had not resumed cohabitation since then. She told court that she had moved on with her life and had even been blessed with another child outside the marriage.

8. The respondent on his part accused the appellant of bearing children whose paternity he doubted. He however conceded that the couple had separated in 2009 and have since then not resumed cohabitation.

Analysis and Determination

9. This being the first appeal, I have a duty to re-evaluate the evidence tendered before the trial court. I have considered the guiding principles laid down by the Court of Appeal in Makube Vs. Nyamiro [1983] KLR 403 as follows:

“...a Court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

10. Similarly, in the case of KirugavKiruga & Another (Supra); the Court accepted the principle laid down by the House of Lords in Watt v Thomas [1947] 1 All ER 582 where Sir O'Connor said:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

11. On the issues of cruelty and adultery, the learned trial magistrate after an examination of the evidence found, and rightfully so, that there was little basis on which to conclude that the Respondent was cruel to the Petitioner. He also rightfully found that the appellant was guilty of adultery having born a child after she separated with the respondent.

12. On whether the marriage had irretrievably broken down, the learned trial magistrate rightfully appreciated the fact that the appellant was not interested in the marriage as a 4th wife of the respondent but went ahead to find that that was not a good ground for divorce.

13. I have considered the evidence on record. The couple married under Luo Customary Law in 2000 and separated in 2009. The appellant moved on with her life and even had a child out of wedlock.

13. From the foregoing; I find that even if the learned trial magistrate did not believe the fact that the appellant hated being in a polygamous marriage was a ground for divorce, he failed to appreciate that adultery had been proved and that the provisions of section 66 (5) of the Marriage Act which consider a marriage to have broken down irretrievably if spouses have separated for at least two years had been met.

14. I have considered the case of N v N [2008] 1 KLR 16, where Madan J (as he then was) observed 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, then, they are entitled to be released from their matrimonial union...”

15. In the circumstances of this case where the Petitioner claimed that she was no longer interested in the marriage and having been separated for 9 years now, the most reasonable cause of action is to dissolve the marriage. In this regard, this Court is persuaded by the reasoning in NMM v SJC, Divorce Cause No. 1 of 2013 where Karanja J stated 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 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 ...”

16. The respondent's contention that divorce, under Luo Customary Law, can only take effect after he had been refunded the dowry he paid on behalf of the appellant is in the circumstances of this case repugnant to justice.

17. From the foregoing; I am satisfied that the learned trial magistrate would have arrived at a different decision had he considered that the couple had been separated for 6 years preceding the presentation of the petition. I therefore find that the best interest of the couple and the interest of justice will best be served if the marriage is dissolved and they be allowed to move on with their respective lives.

Orders

18. In the final analysis, the judgment of the trial court is set aside and substituted with the following orders: **THAT**

i. The marriage between the appellant and the Respondent be and is hereby dissolved

ii. The custody of the children shall remain with the appellant, but with access rights to the respondent if he so wishes considering that he even doubts their paternity

iii. Any aggrieved party is at liberty to apply

iv. Each party shall bear its own costs of the suit and the appeal.

DATED AND DELIVERED THIS 1ST DAY OF MARCH, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Caroline

Appellant- Mr Odeny/Otieno

Respondent - N/A