



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 49 OF 2017

E A O..... APPELLANT

-VERSUS-

S A A.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Court Divorce Cause No. 45 of 2015 delivered on 30/03/2017).

JUDGMENT

1. This is an appeal arising from the dismissal of the Appellant's divorce cause which she filed in the Magistrate's Court at Migori. The cause was **Chief Magistrate's Divorce Cause No. 45 of 2015** (hereinafter referred to as "**the suit**").
2. By a Petition dated 09/12/2015 the Appellant herein, **E A O**, sought to divorce her husband one **S A A**, the Respondent herein. The suit was defended by the Respondent who filed a Statement of Defence dated 22/03/2016.
3. The suit proceeded for hearing where both parties were represented by Counsels. The parties testified and did not call any witnesses. The trial court in its judgment rendered on 30/03/2017 dismissed the Appellant's suit and ordered each party to bear its own costs.
4. Being dissatisfied with the dismissal of the suit, the Appellant preferred an appeal and filed a Memorandum of Appeal dated 11/04/2017 wherein she wholly challenged the judgment on several grounds contending that the trial court erred in dismissing the suit despite adequate evidence in proof of the Appellant's claim.
5. The Appellant thereafter filed a Record of Appeal and on the concurrence of the Counsels and the approval by the Court, directions were given that the appeal be disposed of by way of written submissions and timelines for filing of the respective submissions were set. Whereas the Appellant filed the submissions and referred to several judicial decisions, the Respondent did not file any submissions. The Appellant's Counsel urged this Court to allow the appeal.
6. This being the Appellant's first appeal, the role of this Court as the appellate Court of first instance is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.**
7. It was further held in the case of **Hahn vs. Singh (1985) KLR 716** that the appellate court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial. To that end, I wish to confirm that this Court has carefully perused the pleadings, the proceedings, the judgment, the Record of Appeal, the submissions and the judicial decisions on record.
8. According to the trial court the Petition was premised on two grounds that of cruelty and adultery. On perusal of the evidence and the analysis of the trial court I agree with the learned magistrate that none of the two grounds were proved. The court then proceeded to dismiss the petition. However, paragraph 10 of the Petition stated as follows: -

'The marriage between the petitioner and the respondent has irretrievably broken down and consequently the cause for this divorce cause.'

9. **Section 66(2)** of the **Marriage Act No. 4 of 2014** (hereinafter referred to as "**the Act**") provide five grounds upon which a marriage may be dissolved. One of the said grounds is '**irretrievable breaking down of the marriage.**' According to the judgment, the trial court did not consider the ground that the marriage had irretrievably broken down although it was pleaded. I will therefore consider it to ascertain its effect

on the currency of the impugned judgment.

10. Traditionally, there has been three grounds upon which a marriage would be dissolved. They were adultery, desertion and cruelty. **The Act**, which repealed seven Acts of Parliament on family law introduced two more grounds for dissolution of a Christian marriage, a civil marriage and a customary marriage under **Sections 65, 66 and 69** respectively. The two grounds are ‘**exceptional depravity by either party**’ and ‘**if the marriage has irretrievable broken down**’. On the rationale behind the two further grounds, this is what I stated in **Meru High Court Civil Appeal No. 29 of 2015 Zachary Keberia Nabea -versus- Janet Karimi Zachary (2017) eKLR: -**

’35. As the three grounds in support of the Petition have failed, I would have, without any hesitation, dismissed this appeal. However, there is need to look at the Act and in view of the other grounds of divorce which were introduced on enactment. Section 65 of the Act introduced two more grounds of divorce. They are exceptional depravity by either party and if the marriage has irretrievable broken down. I believe the two further grounds were introduced as to take care of the instances where parties would not be able to remain married but fall short of the proving the traditional grounds of adultery, cruelty and desertion whose standard of proof remain high.’

11. To me the two further grounds echo the words of **Madan, J.** (as he then was) in **NVN (2008)1KLR 16** when the Learned Judge stated 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 the intolerable, or unreasonable to continue to bear them, they are entitled to be released from their matrimonial union....’

12. The evidence in this matter reveals that all is not well between the parties. The parties have been living apart since 2015 when the Respondent moved out of the matrimonial home and there seem to be no change even with the intervention of their Bishop, who according to the Appellant’s filed statement, discussed the issues with the parties on four occasions. None of the parties trust the other as far as marital fidelity is concerned. Whereas the Appellant took the steps of involving their Bishop in their issues, the Respondent has not taken any steps to salvage the marriage. He only stated before court that he still loved his wife and wanted the petition dismissed.

13. The Respondent ought to have demonstrated how he attempted to actualize his said love to the Appellant more so in the face of such serious allegations which threatened his marriage. There is no doubt in this matter that there are so many issues which may appear small to an outsider, but which are seriously undermining the marriage between the parties. Parties must be able to respect one another in a marriage otherwise what turns out may not be a marriage. I am at a loss how parties can earn their mutual respect from one another in such unique circumstances of this matter.

14. From the firm and opposite positions taken by the parties herein I do not see how the parties are likely to cope up as a married couple even when compelled to remain in such a relationship. Compelling the parties herein to remain in a marriage may be recipe for more harm than the intended good. As **Madan, J** stated such parties ‘.... **are entitled to be released from their matrimonial union....**’

15. I therefore find that the marriage between the parties herein has irretrievably broken down. Had the learned trial magistrate considered that ground, chances are high that he may have reached a different final decision on the petition. To that end, I must respectfully interfere, as I hereby do, with the impugned judgment. For completeness of this appeal I hereby affirm that the lower court rightly dealt with the issue of the custody of the children.

16. The upshot is that the following final orders are hereby issued: -

- a) **The appeal is hereby allowed and the order of the trial court dismissing the Petition is accordingly set-aside.**
- b) **The marriage between the Appellant and the Respondent herein is hereby dissolved and a *decree nisi* is issued which shall be made absolute after three months.**
- c) **Costs of this appeal as well as of the suit shall be borne by the Respondent.**

Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MERU this 12th day of July 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Owade Counsel instructed by the firm of Owade & Co. Advocates for the Appellant.

Mr. Mudeyi Counsel instructed by the firm of Mudeyi & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant