



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 49 OF 2016**

**S M M.....APPELLANT**

**VERSUS**

**F M S.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein petitioned for dissolution of the marriage solemnized between him and the Respondent and sought custody of the three (3) issues of the marriage. It was pleaded that they contracted marriage under the **African Christian Marriage and Divorce Act, Chapter 151 of the Laws of Kenya** on the **29<sup>th</sup> September, 2001**, a union that was blessed with three issues namely:

- i. M S – 13 years.
- ii. M S – 11 years.
- iii. A S – 6 years.

2. He averred that in the year **2013** the Respondent started antagonizing him by deserting the matrimonial home and bed, she committed adultery and was guilty of cruelty. That the marriage between them had broken down irretrievably and there was no reasonable probability of salvaging it due to the Respondent's fault and/or hurdles towards reconciliation.

3. In her answer to the Petition the Respondent denied the allegations in particular she denied having deserted the matrimonial home and averred that she was chased away by the Petitioner. She denied having committed adultery and averred that to the contrary it is the Petitioner who has committed adultery with a lady he intended to marry. She denied any cruelty on her part and prayed for dismissal of the Petition.

4. At the hearing the Petitioner stated that after he married the Respondent he sponsored her to attend Secondary School and while there she became unfaithful and on completion of school in **2014** she went back to her maiden home. In a group of ten (10) people he visited her home but they did not find her. On the **15<sup>th</sup> April, 2015** the Respondent went to his home intending to take away the children of the marriage but he declined to release them.

5. The Respondent stated that she went back to school, in form I after giving birth to their three (3) children and they started having problems while she was in form II. She investigated and established that the Petitioner was having an affair and when she challenged him he admitted committing adultery. When school closed in **2013** she went to her maiden home. He asked her to go back and she complied. But their problems escalated. They lived together but were not in talking terms. After she completed form IV she told him that she was going to her home and he told her to go back to her parents. The following day he got a motorcycle and told her to leave. She stayed until **February** when she decided to go and see her children. She encountered his brother who told her to leave. Thereafter she got a job with an Insurance Company. She concluded by stating that the Petitioner is a Pastor and has already re-married. She objected to the dissolution of their marriage.

6. The learned trial Magistrate considered evidence adduced and reached a finding that the allegations against the Respondent had not been proved. Accordingly, she dismissed the Petition.

7. Aggrieved by the Judgment the Appellant appealed on the grounds that: finding in favour of the Respondent was erroneous; the decision was against the weight of the evidence tendered on record; and founded on wrong principles.

8. This being the first Appellate Court, I have a duty to re-evaluate the evidence, assess it and make my own conclusions. (**See Selle vs. Associated Motor Boat Company Ltd (1966) EA 123; Williamson Diamonds Ltd vs. Brown (1970) EA 1**).

9. It was averred that the Respondent deserted the matrimonial home and associated with men of questionable character in adulterous

relationships without minding her marital status.

10. In the case of **DM vs. JM (2008) I KLR J Chesoni JA** stated that:

**“.... the evidence required to establish adultery must be more than the mere suspicion and opportunity; evidence of a guilty inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish adultery.”**

11. In his testimony the Appellant stated that the Respondent started being unfaithful, she had lovers and when he asked her she had no answer. These were mere allegations. It is clear that the Appellant was acting on mere suspicions therefore the allegations of adultery were not established.

12. It was further averred that the Respondent deserted the matrimonial home without the Appellant's permission and knowledge. It was argued by the Respondent that she was forced into desertion. She did not leave the Appellant's home voluntarily as he chased her away. The allegation was not disapproved by the Appellant who was required to prove it on a preponderance of probability. Having acted by chasing her away it cannot be alleged that she deserted the matrimonial home.

13. It was alleged that the Respondent has been cruel to the Appellant. He particularized the alleged cruelty as the Respondent having provoked him by challenging him to a duel in the presence of his parents and clansmen and by insulting him to an extreme degree.

14. In the case of **Nunzio Colarossi vs. Michelina Colarossi (1965) EA 129 Newbold JA** 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.”**

15. In the case of **Kamweru vs. Kamweru (2002) eKLR** the Court stated that:

**“Applying the yardstick of the burden and standard of proof as set out above we would say that the felling 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 even adultery (all being matrimonial offences) has been as the case may be established..... 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 facts 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.”**

16. In his testimony the Appellant did not allude to the particulars of alleged cruelty therefore that remained mere allegations.

17. It is stated in Paragraph 10 of the Petition that the marriage had broken down irretrievably.

18. Parties herein married under the **African Christian Marriage and Divorce Act, Cap 151 (k)**.

19. Grounds upon which a Christian Marriage can be dissolved are outlined in **Section 65** of the **Marriage Act, 2004 (Act)** which provides thus:

**“A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—**

**(a)one or more acts of adultery committed by the other party;**

**(b)cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or**

**(c)desertion by either party for at least three years immediately preceding the date of presentation of the petition;**

**(d)exceptional depravity by either party;**

**(e)the irretrievable breakdown of the marriage.”**

**Section 66(6)** of the Act provides thus:

**“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 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 recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or**

**(h) any other ground as the court may deem appropriate.”**

20. It has not been proved that the Respondent committed adultery. To the contrary it is stated and not denied that it is the Appellant who is guilty of adultery and is currently cohabiting with another woman despite the fact that he is a Pastor.

21. According to the Appellant this marriage cannot be salvaged. The Respondent on the other hand argues that she has nowhere to go. But in her testimony she stated that as a result of the illicit affair the Appellant was having in **2012** they started having mental problems. This forced her to take refuge at her maiden home. She would come from school and go back to her maiden home. She went back but the problems were not resolved. They lived together but they were not in talking terms. It will be an exercise in futility to continue binding them together when they cannot live together.

22. In the premises I allow the Appeal by setting aside the order of the Lower Court dismissing the Petition and substitute it with an order allowing the Petition thus:

i. The marriage between the Petitioner and Respondent solemnized on the **29<sup>th</sup>** day of **September, 2001** be and is hereby dissolved.

ii. A decree nisi shall issue forthwith.

iii. A decree absolute shall issue thereafter within 30 days.

iv. The Appellant who was proved to be adulterous shall pay the Respondent costs in the Lower Court and of this Appeal.

23. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of September, 2018.**

**L. N. MUTENDE**

**JUDGE**