



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL CASE NO. 72 OF 2012
AMM..... APPELLANT
versus
TWM.....RESPONDENT

(Appeal arising from the judgment of Hon F. Macharia Senior

Resident Magistrate in Othaya Civil suit No. 3 of 2010)

JUDGMENT

1. By a plaint dated 7th October 2010 the appellant sued the Respondent for dissolution of marriage between them together with costs. It was pleaded that the appellant and the respondent had been living happily as husband and wife but the respondent became so cruel and abusive and eventually moved from matrimonial home without the appellants consent.
2. The Respondent filed a memorandum of appearance on 14th February 2011 but did not file a defence thereto. On 31st March 2011 the matter proceeded for hearing wherein the appellant testified that they got married in 1964 and separated in 1985. Their first born was born in 1965 and the last born in 1984. He was chased away from his matrimonial home under cross examination the appellant admitted that the respondent took care of him after he became sick in 1983 and after he recovered in he went to his step sisters home upto 1992.
3. The Respondent testified that they got married in 1964 and that the appellant had been living in Nakuru until 1983 when he came back home since he was ill and the respondent took care of him. She stated that in 1999 the appellant filed for divorce and also in 2009. It was the respondent testimony that in 1992 the appellant was cohabiting with another woman who died in 2008. She further testified that the appellant did all these while she was living in his home.
4. The Respondent evidence was corroborated by D.W.2 PETER NDIRANGU WAHOME who testified that he had never witnessed any fight between the appellant and the respondent and that in 1980's they had a family dispute because the appellant was cohabiting with another woman and was harvesting all the food crops so that his children could not eat.
5. Based upon the said evidence the trial court dismissed the suit and in doing so had this to say.
6. ***“No marriage certificate was produced nor evidence to prove marriage under customary law. There is however evidence on record that they lived together as husband and wife an even bore Eight (8) children. I find that the parties were married by virtue of presumption of marriage. As to the 2nd issue, the plaintiff said the wife was cruel to him. All he said was that the wife refused to cook for him. Though not proved, failure to cook does not amount to cruelty. The plaintiff did not prove that his wife deserted him.... the grounds of divorce having not been proved, I dismiss the suit..”***
- 7.
8. Being dissatisfied with the said judgment the appellant filed this appeal and raised the following

grounds of appeal.

1. That the learned magistrate erred in holding that the marriage between the appellant and respondent do exist while there has been a serious disagreement between the parties.

2. That the learned magistrate erred in holding that all what was adduced by the respondent was true while the appellant was aware that there was no truth in the evidence adduced by the respondent.

3. That the learned magistrate erred in holding that the evidence adduced by the witness of the respondent was total untrue and should not have taken his evidence as very important evidence since the witness had nothing to know about my dispute with my wife.

4. That the learned magistrate erred in holding that the appellant relationship with the respondent was all that good and there was no way that the magistrate could have reached her final decision that the marriage was existing while it was not as my prayer was for dissolution of marriage and not otherwise.

5. That the learned magistrate erred in holding that the appellant had not received enough poor treatment from the respondent and that is why the appellant used to try to avoid confrontation with the respondent while staying together.

6. Reasons wherefore the appellant part that this honourable that the judgment of the learned magistrate be set aside and the appellant be awarded costs of this appeal and of the case in the lower court.

1. At the hearing hereof the appellant filed written submissions which to my mind amounts to submitted new evidence which was never presented before the trial court that is to say in 1975 the respondent returned to her parents with their four children without his consent and deserted from matrimonial home during which period she got three children which to him was evidence of adultery. He submitted that no one can force a husband and wife to live together if they don't wish to do so.
2. The respondent submitted that their problem started in 1983 and that she had already made a decision not to leave her matrimonial home. She stated that the appellant paid dowry and has not gone back for the same and therefore they can still live together.
3. From the pleadings, evidence and submission herein, the following issues have been identified for determination in this appeal.

a. Whether the appellant had proved his case for dissolution of the marriage between him and the appellant.

b. Whether the marriage if any between the appellant and the respondent has irretrievably broken down.

1. Having analysed the evidence tendered before the trial court I agree with the same that the appellant did not prove any of the grounds set in the plaint. There was no evidence tendered to prove that the respondent had been using abusive language and that the appellant was chased from matrimonial home. It is on record that it is the appellant who left the matrimonial home to stay with his step sister further the appellant did not rebut the fact that he had been cohabiting with another woman.
2. The burden of proof was upon the appellant and the same failed to discharge the said burden. I therefore find no fault with the trial courts judgment herein and since the respondent has stated that she has no problem with the appellant and is willing to live with him I find that the marriage between the appellant has not irretrievably broken down in as much they have matrimonial

- problems just like in any marriage.
3. I therefore dismiss the appeal herein with no order as to cost.
 4. Dated, signed and delivered at Nyeri this 6th day of October 2014.

J. WAKIAGA

JUDGE

Court: Judgment is read in open court in the absence of the parties and their advocates.

J. WAKIAGA

JUDGE