

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 130 'B' OF 1997

CHRYSOSTON WANJOHI GIKUHI.....APPELLANT

-versus-

BEATRICE NJOKI NDUATI.....RESPONDENT

J U D G M E N T

When this appeal was called out for hearing the respondent was absent. This court being satisfied that the respondent was served with the hearing notice, elected to hear the appeal.

This appeal arose from the decision of the District Magistrate I wherein he dismissed the appellant's divorce petition. The appellant had sought the dissolution of the marriage with the respondent on the basic ground of desertion. Both parties gave evidence before the subordinate court. The respondent called two witnesses. I have gone through the proceedings, the memorandum of appeal and submission by learned counsel in this appeal.

In his evidence the appellant established that the respondent left the matrimonial home without his consent. The respondent also wrote to say she should not be considered as the wife of the appellant. The respondent also admitted leaving the matrimonial home to go and live in Nairobi with her son.

The respondent tried to allege that the appellant was guilty of constructive desertion. That is to say, she left home as a result of cruelty on the part of the appellant. The answer to the petition was silent on this and her evidence in court remained a mere allegation. The cases cited by the learned counsel for the appellant are in point. See P.G. Patel -v- L.P Patel (1965) E.A 560 AND Butcher -V- Butcher (1947) 1 Acc E.R. 319.

The only reason the learned trial magistrate relied upon in holding that the respondent has not deserted the petitioner's home is that "she is taking care of their sons family" with respect the conclusion had no foundation in law of the facts that emerged during the trial. The weight of the evidence adduced shows that the appellant proved his case and judgment ought to have been given in his favour. Accordingly I allow the appeal and set aside the judgment of the lower court. I substitute therefore an order that the marriage between the parties should be dissolved as prayed by the appellant/original petitioner. Each party shall bear own costs.

DECREE NISI shall issue forthwith and may be made absolute on application after expiration of one month from the date hereof.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of April, 1998.

A. MBOGHOLI MSAGHA

JUDGE

