



REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE KISII

CIVIL APPEAL NO 57 OF 1978

T S AAPPELLANT

VERSUS

S O.....RESPONDENT

(Appeal against the dismissal by VO Adinda Esq in the District Magistrate's Court, Homa Bay Divorce Suit No 21 of 1977)

JUDGMENT

The appellant **T S A** and the respondent **S O** were married under Luo customary law in 1967. She was the respondent's first wife; but subsequently the respondent married two others. The appellant and respondent had no children. In September 1976 **T S A** petitioned for divorce in the District Magistrate's Court, Homa Bay, alleging (a) persistent cruelty, (b) constant references to her as a barren wife, (c) disrespect to the appellants' parents, and (d) refusal to allow the appellant to go to church.

In his answer the respondent particularised all the marvellous things he did for his wife; and, in short, said that he was a wonderful husband and loved his wife. He denied all allegations of cruelty.

The magistrate dealt with the evidence in some detail. He rejected the allegations of persistent cruelty in the sense of any physical beatings by the respondent.

He agreed that the appellant was referred to as a "barren wife", but by a co-wife and not by the respondent. The magistrate also rejected the allegations of disrespect to the appellants' parents and refusal to allow her to go to church. The magistrate consequently refused to grant a dissolution.

Upon a review of the evidence I am unable to disagree with the magistrate's finding of fact. I am of the view that persistent cruelty was not proved in this case. If this had been a statutory marriage that would have been the end of the matter because, as the law now stands in the Matrimonial Causes Act, the establishment of a ground (ie a matrimonial offence) is a condition precedent to the grant of a divorce. But this was not a statutory marriage, but a customary marriage; and different considerations therefore apply.

As to this the magistrate said:

Mr Aroka had argued that divorce may have been granted at the village. The Court does not believe this. Under the Luo customs divorce may be had either before the elders or in a Court of law. If it is before the elders, the two parties must agree to it and any returnable dowry is returned and accepted by the husband of the woman. Refusal to accept back the dowry will frustrate and vitiate the proposed divorce. And there is no machinery for compelling a husband to accept his

dowry back. The next course would be the Court. The evidence is clear that the respondent refused to accept the dowry. So divorce was effected at the home of the [appellant's] father.

The Court is not convinced that enough ground exists that may justify divorce here. As Mr Achayo (advocate) rightly said, divorce cannot be treated lightly; and it is not to be based on sympathy. The question is not whether the parties can resume cohabitation. Rather, it is whether alleged grounds have been proved on the balance of probability. This has not been done to my mind. I see no reason to interfere with this marriage. I refuse to grant divorce and dismiss the case with costs.

With respect, there are two glaring misdirections in this passage. In the first place, it is wrong to say that a husband can frustrate and vitiate a divorce by refusing to accept the dowry back. This is not the Luo law. As I understand it, customary elders could in the traditional system sanction a divorce and then order the girl's father to return the dowry. So long as the father is willing to return it to the husband, that is sufficient. The rule as stated by the magistrate is wrong; and, in any event, if it were the law it would be contrary to justice and good conscience because it would make a wife her husband's prisoner forever. The old Court of Review so held in a number of cases, and I fully agree.

Secondly, the whole approach of the magistrate in this case was a "statutory" one, rather than a "customary" one. His sole concern appears to have been whether the "alleged grounds were proved on a balance of probability."

Divorce under customary law does not solely turn on establishing grounds.

Reasons are advanced; but they are only some of the things to be taken into account. Other matters to be considered (and which are, perhaps, more important) are (a) the existence and number of children, (b) the ability and willingness of the wife's father to return the dowry, and (c) generally whether the marriage has irretrievably broken down.

If the magistrate had looked at this marriage in this light I am sure that he would have granted a divorce in this case. It is obvious that, although there was no cruelty in the statutory sense, the marriage was by no means a happy one. It is clear that the appellant resented the fact that the respondent took other wives; and that there were continual quarrels with at least one of the co-wives. The respondent is clearly a conceited man who thinks that he can do no wrong. Although he allowed his wife to go to church on Sundays he insisted that she should be back early enough to cook his meals. He may, as he says, still love his wife; but obviously this is not reciprocal.

That apart, however, it seems to me that the conditions which obtained were extremely conducive to the grant of a customary divorce. First, the appellant had no children. Second, her father was willing to return the dowry; and actually offered it to the respondent. Third, the marriage had clearly broken down. The wife left the husband in August 1976 and returned to her father's home. At the time of the lower court judgment dated 3rd August 1978 the parties had been living apart for two years, and now for over three years. There is absolutely no hope of reconciliation.

The marriage is obviously dead to all intents and purposes.

I would therefore allow this appeal with costs here and in the court below.

I would set aside the judgment of the District Magistrate II dated 3rd August 1978 and I declare the marriage between the appellant and the respondent dissolved.

Appeal allowed.

Dated and delivered at Kisii this 19th day of October 1979.

E. COTRAN

JUDGE.