IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJ A)

CIVIL APPEAL NO 21 OF 1979

BETWEEN

WANGARI MARY JOSEPHINE MATHAI.....APPELLANT

AND

ANDREW STEPHEN MWANGI MATHAI.....RESPONDENT

JUDGMENT OF THE COURT

Law JA I need not repeat the facts which are sufficiently set out in the judgment prepared by Miller JA. This appeal raises yet again the vexed question as to the standard of proof necessary to establish the commission of the matrimonial offences of adultery and cruelty. The learned advocates in this case have referred us to many relevant authorities, both English and Kenyan, on this point. By section 10 of the Matrimonial Causes Act (cap 152) the duty of the court is stated to be that it must inquire into the facts alleged, and "if satisfied on the evidence that the case for the petitioner has been proved" it shall pronounce a decree of divorce. English case law is relevant, as by section 3 of the Act, jurisdiction under that act shall be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. Mr Muite referred us to the relevant English cases, including *Blyth v Blyth* [1966] 1 All ER 524, *Bastable v Bastable* [1968] 3 All ER 701, *Preston-Jones v Preston-Jones* [1951] 1 All ER 124, and many others, from which cases it is apparent that a majority of judges in England are of the view that for a Court to be satisfied that a matrimonial offence has been proved, it must be satisfied "beyond reasonable doubt". At the same time, it is clear that some judges dislike applying standards of proof on the same basis as in criminal cases, although the difference between proof to the satisfaction of the court in matrimonial cases and proof beyond reasonable doubt in criminal cases seems to be largely a matter of semantics. For instance, Bucknill LJ in *Davis v Davis* [1950] 1 All ER 40 having said in relation to the standard of proof that it was "unnecessary to bring the question of criminal charges into consideration," went on to say, with reference to the expression "if satisfied on the evidence, that the case for the petition has been proved" –

> I understand that to mean that, if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged.

This does not seem to me to be very different from the position under criminal law.

In Kenya, in *McNeil v McNeil* [1952] 19 EACA 89, Sir Barclay Nihil P, referring to a passage in *Rayden on Divorce* to the effect that desertion like other matrimonial offences must be proved beyond all reasonable doubt, said:

> It may be that in the light of some recent decisions in England the learned author puts the matter too high even for adultery, but I know of no authority for the proposition that as regards any matrimonial offence a Court is entitled to decide the issue on a mere balancing of probabilities.

In *Stjernholm v Stjernholm* [1955] 18 KLR 183, Cram Ag J after an exhaustive review of all relevant authorities, expressed the view that no analogy as to the standard of proof is to be derived from the criminal law, but he held that for the purposes of section 10 of the Matrimonial Causes Act a Court could not be "satisfied" so long as it entertained a reasonable doubt, and that the word "satisfied" must be read as if it were qualified by the words "beyond reasonable doubt".

In *Ouko v Ouko* (Divorce Cause No 71 of 1975) (unreported) Chesoni J held that the standard of proof required to establish a charge of adultery "is by preponderance of probability". With respect, that is setting the standard of proof too low, and if the same learned judge had adopted that standard in the instant case, it would be difficult for this Court to uphold the finding of adultery against the appellant. But I am satisfied that the learned judge did not err in the instant case. He directed himself at great length as to the standard of proof in cases involving allegation of adultery.

He said, *inter alia*, that the standard of proof required was very high, that adultery was a serious matrimonial offence and it must, where it is alleged, be proved clearly. The charge, he said, must be clearly proved to the satisfaction of the court, and circumstantial evidence in proof of adultery ought to be carefully and cautiously considered-the Court must move with great care. He concluded by saying:

> if you cannot be satisfied as to feel sure of the guilt of the respondent then the charge of adultery has not been proved as the preponderance of probability is, in those circumstances, not clear.

The learned judge is here explaining and amplifying what he meant in *Ouko's* case when he said that the standard of proof required to establish a charge of adultery was by preponderance of probability. He meant more than a mere balance of probabilities. To be satisfied that a charge of adultery has been made out, he said, the Court must feel sure of the guilt of the respondent.

It was on this basis that the learned judge approached the issue in the instant case. After carefully analysing the evidence, in particular that of two night watchmen who he believed, he was satisfied that the corespondent stayed on many occasions, both in day-time and at night, with the appellant, at her house, on divers occasions when her husband was absent from home, and he held that the circumstances of the case were such as to lead the guarded discretion of a reasonable and just man to the conclusion that adultery had been committed on these occasions. I can see nothing wrong in the learned judge's approach to the question of adultery in this case, or any reason to differ from his conclusion that adultery had been proved to his satisfaction in that he felt sure that it had taken place. At the same time, I am of the opinion that, when considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the Court must be satisfied beyond reasonable doubt or satisfied so as to feel sure, that guilt has been proved; there is no need for a Court to preoccupy itself with other words and expressions used by other judges in other places. This can only lead to confusion.

Mr Lakha for the respondent did not seek to support that part of the learned judge's judgment in which he held that cruelty had been proved against the appellant. The appeal accordingly succeeds to that extent, but fails and must be dismissed on the issue of adultery. As Miller and Potter JA agree, it is so ordered. The parties will bear their own costs of this appeal.

Miller JA This appeal is from the judgment of the High Court, Nairobi (Chesoni, J) in Divorce Cause No 64 of 1977 wherein the learned judge granted the petition for divorce of Andrew Stephen Mwangi Mathai on the grounds of adultery and cruelty on the part of his wife Wangari Mary Josephine Mathai, the co-respondent to the adultery charge being one Waruru Kanja. Both the respondent and corespondent filed answers to the petition and appeared and testified at the hearing; but the appeal is brought by the respondent wife alone. There were two grounds of appeal against the finding on the cruelty charge; and Mr Lakha for the respondent/husband quite correctly conceded, that the learned judge's finding on the

charge of cruelty was not maintainable having regard to the nature of the evidence in that behalf, and the required standard of proof to establish that charge. I therefore concern myself with the allegation of adultery and finding thereon and as to which the following culminating finding of the learned judge reflects the nature of the evidence and his assessment thereof:

> The circumstances of this case are such as would lead the guarded discretion of a reasonable and just man to the conclusion that adultery has been committed at the petitioner's Kabarnet Road house on diverse days and I so find.

The four remaining relevant grounds of appeal which were ably argued by Mr Muite can be put in this compendious form: The learned trial judge misdirected himself and erred in the application of the law as to the standard of proof; for his decision was contrary to the weight of the evidence; arising as it did, on the finding that after August, 1975 the co-respondent's visits to the respondent's house were evidence of disposition or inclination to commit adultery.

After persuasive urgings and submissions on the facts, Mr Muite before this Court conceded that the evidence of opportunity to commit adultery was no doubt sufficient; but that a guilty inclination must also be shown; and on the whole, the evidence for the respondent must amount to proof beyond reasonable doubt as has been the guide for many years; because adultery is a grave matrimonial offence and "our Courts must maintain the family unit at all costs for the benefit of society". I proceed to examine and assess the most important aspects of the evidence in relation to the charge of adultery.

The parties were married on 31st May, 1969 and at a period of time material to the alleged offence of adultery and the hearing of the petition in the High Court, the respondent in the appeal and the co-respondent were then both members of the National Assembly and the appellant a senior lecturer at the University of Nairobi. In their evidence both men and the appellant are at one, that the two men were not only at some time associates and fellow politicians and parliamentarians; the appellant added that the corespondent was a frequent visitor of the matrimonial home since 1978 firstly at Lenana Road, but more frequently so, to the Kabarnet Road house not far away from the co-respondent's own house and on occasions when the respondent was not there. The co-respondent said that his relationship with the respondent became much closer than that of political and social friends when the respondent succeeded in the 1974 Elections as they were then both Members of Parliament. The appellant and the corespondent vehemently denied ever having had an adulterous affair. They referred to the allegation not only as positively untrue, but according to the appellant, the respondent was "picking on the co-respondent" as a convenient scapegoat by reason of his attachment to the matrimonial home, whereas indeed and in fact, all along the period of the co-respondent's frequent visits, those visits were either by reason of common political interests and ordinary friendly relationship plus the fact that the corespondent was the respondent's own appointed mediator, when the appellant and the respondent were in throes of domestic upheavals.

It is clear from the evidence however, that in the realms of human affairs, all may not have continued as smoothly as may have been expected; there came that which the appellant called "a split". Indeed the evidence shows two splits; the first no doubt professional, and the second domestic; during which time I believe it is correct to say that the most reliable evidence in relation to the first incident comes from the mouth of the appellant herself. She said:

> When my husband felt that he could pick on somebody he had to pick on Mr Kanja because there was no closer family friend than Mr Kanja.
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> Once, my husband told me that I was having an affair with Mr Rubia. By the time my husband and Mr Kanja had had a split over the JM Kariuki issue I was sympathetic to the Probe Committee. Even when they voted in Parliament they voted in opposite camps. The discussion and split continued even at home. Later my husband told me that he had been warned by the Director of CID Mr Nderi about any further association with Mr Kanja. The split started in 1975 when JM Kariuki died.

The second split came about a year later and I firmly believe the appellant's above version that "the discussion and split continued even at home". I also firmly believe the evidence of the co-respondent to the effect that split or no split, he was still a visitor of the couple's matrimonial home and even in the absence of the respondent.

There then came the second split to which *inter alia*, the respondent referred as "the last straw". The evidence shows that one evening in August, 1976 the three principal parties in the case were present at the matrimonial home with the children's attendant and a visitor one, Mr Stephen Mathai, a medical practitioner and relation of the respondent. There are various reasons given for the purpose or basic reason for that assembly. The corespondent said that his participation was for usual peacemaking between the appellant and the respondent after going there mainly on the invitation of the respondent to partake in a lamb's head feast, the lamb's head having been brought back to the home by the respondent who had just returned from a trip to Mombasa. The appellant said there was then no quarrel but a heated discussion with raised voices because the respondent had taken Sarah Wambui his half-sister with him to Mombasa, and in respect of whom there was already an existing matrimonial difference on the rumour or allegation that Sarah had been delivered of a child of which the respondent is father; and that there was no teasing of the respondent by herself and the co-respondent at the expense of the respondent as the latter claimed. Mr Mathai the respondent's cousin said that that evening the appellant and co-respondent entered the house around 10·00 pm within a short space of time of each other's arrival when the dinner party was in progress and the appellant having joined him taking some sherry. The appellant and co-respondent then engaged in a dialogue about a visit to Meru ignoring the respondent and as he personally found it distasteful, he left; there not having been as yet a quarrel or heated exchange of words. Irene Kamau took up the account of happenings. She spoke of drinking and the appellant shouting and quarrelling with the respondent, the corespondent's holding the appellant by the hand leading her to the bathroom and back; and later, the appellant's breaking furnishings of the house and the respondent asking the co-respondent to leave. Emma Nduba a house servant of the couple said, when the respondent was away on the Mombasa trip she one day took the children out for a walk for a long time leaving the appellant and co-respondent alone in the house; and although she had never seen the respondent come home drunk and disorderly the appellant used to come drunk. The respondent's account is to the effect that the appellant after having had a few drinks and being in an actual or feigned drunken state, she was escorted to the toilet and bathroom by the corespondent who held her by the hips. They emerged in that grasp, and sat together side by side for a while; then after discussing sexual intercourse in the presence of the respondent, the appellant invited the co-respondent to go to the bedroom; and as they moved towards the bedroom the respondent prevailed upon the co-respondent to leave the house, the appellant then showering abuses upon the respondent. He said that the appellant then "broke everything in the house" and as the night watchman approached, the co-respondent left the house. This incident was also related in part by Irene Kamau who had assisted in serving dinner, and was moving about the house between the kitchen and the sitting room. She however, said that she saw the appellant and the co-respondent going to the bathroom together; but that the co-respondent was holding the appellant by the hand. She also spoke of the quarrel, the appellant's shouting and breaking "everything that could break", the respondent's requesting the corespondent to leave which he did and the appellant driving away and returning to the house later. The respondent said he considered this incident "the last straw" and decided to leave the matrimonial home and before doing so, he had discussion with the *ayah* named Emma, his own night watchman Opiyo, and Samson the night watchman of the opposite house occupied by the Sudanese Embassy.

It should be mentioned in passing that the co-respondent categorically informed the trial court of such matters as "the day Mr Mathai left his home for good"; also, although the appellant herself made no mention, he spoke of an occasion when Mr Mathai left the matrimonial home and took up residence at the Hilton Hotel, no doubt founding explanation for his peacemaking interest in the Mathais' matrimonial home or difficulties; but of unquestionable importance, and in relation to time and circumstances he said in cross-examination:

> As of today Mr Mathai and I do not see eye to eye leave alone our political groupings. We no longer consult each other. He is still in the opposite camp. In 1974 we were running for an election and in 1975 we had this crisis which nearly wrecked this country after the JM's death and after the

> voting even Parliament itself was split. I was in the opposite camp and Mathai was in the other camp and we voted just likewise and this has continued in so far as the two of us are concerned in particular.

Asked "why should Mr Mathai who is also an MP involve your name and his in a domestic matter? The co-respondent replied "1 reckon so as to satisfy his ego, whatever reason he has, they are his own; and he would apply any method to achieve what he wants to achieve. 1 believe that is what led Mr Mathai to join me as a party in this case".

In August 1976 however, political groupings apart, and even although up to the date of the trial the two men did not "see eye to eye", the record in the High Court continued:

> On the evening preceding the day Mr Mathai left his matrimonial home for good, I remember it vividly. Mr Mathai had gone to Mombasa and returned with lamb's head which had been slaughtered for him so he asked me if I could go to his house and we eat it. I went there in the evening and found him with his cousin Dr Stephen Mathai who did not stay long. After finishing eating and drinking I and Hon. Mathai left in one car and drove to town. We came back and we parted and I went to my house. It is not true that I used to visit the home when Mr Mathai was not there and leave during late hours of the night. I used to visit Mr Mathai's house even when he was not there, but I never used to stay till late hours of the morning.

Upon the evidence so far reproduced, the learned judge found that "the visits by the respondent at the Lenana Road house were mainly as a friend of the petitioner politically; but those to the Kabarnet Road home were as a friend of the respondent; as these were after the death of JM Kariuki and both the respondent and co-respondent told the Court that after that time, the petitioner's relationship with the co-respondent was severed. I understand the learned judge to have reasoned, that in the circumstances of the acknowledged basis of association between the two men having ended, and certainly not in peace even up to the time of the trial as the corespondent declared to the Court, there could have been no feasible reason for the co-respondent's continuing visits to the couple's matrimonial home other than association with Mrs Mathai. The learned judge was not alone in that deduction for on the events of the fateful night in August, 1976 and the ensuing discussions the respondent had had, excusing his lay, emotional conclusion, he said:

> I formed the opinion that several adulterous activities at sundry times had taken place between the respondent and co-respondent.

Be that as it may, further evidence in the case came from Patrick Kariuki and Richard Njagi Kamau two employees of a private investigations agency named Private Eye Ltd and the two night watchmen, Opiyo and Samson. Not surprisingly, it appears that the respondent's suspicions led him to employ Private Eye to watch and report upon the movements and conduct of the appellant and the co-respondent. Much time was taken up at the trial with the Private Eye's report and two witnesses' tending to show that on the night of the 21st/22nd August, 1978, the appellant and corespondent stayed in the co-respondent's house from around 10.30 pm, to around 5.30 am the co-respondent having collected the appellant from Mr Mathai's house and returning her there.

The learned judge ruled that the Private Eye's evidence of identification of the man and woman allegedly so observed, was doubtful as against an unchallenged alibi in answer thereto; and he quite correctly discarded that portion of the petitioner's evidence even though one of the eye witnesses said that he was certain of the couple's identity, knowing them physically and having seen them on that occasion from a distance of about 15 yards off. Similarly, with respect to the evidence of Opiyo who was the Mathais' night watchman both at the Lenana Road and Kabarnet Road houses although accepting him as a witness of truth in relation to the co-respondent night visits to Mr Mathai's home during Mr Mathai's absence, and driving off whenever he went and found that Mr Mathai was at home, the learned judge was at pains to disregard that portion of Opiyo's evidence as to precision of time as it were at the tick of the clock. The learned judge considered Opiyo emotional or exaggerating in that particular. The following extract from the judgment speaks for itself:

> As I said earlier, none of the witnesses saw the respondent and the co-respondent in the very act of adultery and as such their evidence is all circumstantial. I had the privilege of watching all the witnesses including the petitioner, respondent and co-respondent in the witness box. I believe Opiyo and Samson when they said that the co-respondent was a regular visitor to the petitioner's house and these two witnesses knew him physically. Opiyo used to open the gate for the corespondent and he must have done so on a number of occasions as the co-respondent too admitted being a frequent visitor to the homes of the petitioner at Lenana Road and Kabarnet Road; but more often at the Kabarnet Road house which was nearer to the corespondent Woodley house than the Lenana Road house.
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> I also believe Opiyo's and Samson's evidence that some of the visits to the petitioner's house were made during the petitioner's absence on *safari* and when only the respondent was home. Emma saw Mr Kanja at the house of the petitioner only once. It was during the day and she left the respondent and the co-respondent alone at the house when she took the children for a walk. She was away for long. The evidence of these three witnesses Opiyo, Samson and Emma suggests opportunity on the part of the respondent to commit adultery and suspicious circumstances. Indeed evidence of adultery may be inferred from surrounding circumstances.

And in the result the learned judge after considering all the evidence and referring to celebrated authorities on divorce law and practice, and decided divorce cases where adultery was charged, he concluded his judgment as is reproduced around the commencement of this judgment.

If I correctly understand Mr Muite for the appellant, although he clung to the limb of his arguments treating of the weight of the evidence, I do not think that he unreservedly contended that the nature of the evidence in this case although circumstantial, could not found the conclusion of the commission of adultery. His more strenuous contention was that the learned judge misapplied the rules as to the standard of proof in the case; that "he was confused" as to which settled guiding principle he should have followed. This Court must therefore also scrutinise the judgment of the High Court with a view to determining the merits of this contention.

It is patent in the judgment that from the very outset of his considering the evidence in the case, the learned judge was expressly aware of the nature of the evidence and the question of the burden of proof. After correctly observing that it is not common to have eye witnesses in cases of adultery but that adultery may nevertheless be proved by circumstantial evidence, he addressed his mind to the standard of proof. Firstly he reminded himself of two previous cases he had tried; these are, *Meme v Meme* [1976] Kenya LR 13 and *Robert Ouko v Ruth Trufena Ondiek Ouko* HCDC 71 of 1975 recalling that in those two cases, he had said that "the standard of proof is very high and that adultery was a serious matrimonial offence and it must where it is alleged, be proved clearly, and that the evidence must go beyond establishing mere suspicion and opportunity to commit adultery. The charge of adultery must be clearly proved to the satisfaction of the court". The final direction accords with section 10 of the Matrimonial Causes Act (cap 152). He then referred to the conflict of opinion of English judges on the question as to whether or not the required standard of proof should be as in criminal cases "beyond reasonable doubt". He considered the English uncertainty to have been settled by Lord Denning MR in *Blyth v Blyth* [1966] I All ER 524, at p 534 but pointed out that two years later the Court of Appeal of England "took up an intermediate course" in the case of *Bastable v Bastable* [1968] 3 All ER 701, 704. I think that by an "intermediate course" the learned judge was referring to the phrase, "but there may be degrees of proof" within the standard of proof beyond reasonable doubt in criminal cases in the quotation from the *Bastable* case. It appears to me that the expressions used by some judges in giving their views might have little more than a playing with words when themselves sitting in judgment would have exercised care to be satisfied beyond reasonable doubt. I do think, however, that in order to obviate future speculation in these cases the phrase "beyond reasonable doubt" should be used if and when applied.

Returning to the instant case it must be admitted that the learned judge was extremely cautious and aware of his duty in weighing the evidence. His judgment is punctuated with these precatory reminders (1) In proportion as the offence is grave, so ought the proof to be clear, (2) The Court must move with great care (3) Proof by a preponderance of evidence, (4) The charge of adultery must be clearly proved to the

satisfaction of the court; and he finally ended his assessment in the terms I have deliberately reproduced at the earliest convenient stage of this judgment.

I have myself very carefully considered the evidence in this case, and with special regard to Mr Muite's most impressive urgings; but I find that I cannot arrive at any decision other than that of the learned trial judge on the charge of adultery. I agree with Law JA that the appeal fails in that regard but succeeds as regards cruelty and I concur in the order proposed as to costs.

Potter JA I agree that this appeal fails except on the issue of cruelty and should be dismissed on the issue of adultery. I also agree that the parties should bear their own costs of this appeal.

I agree with the analysis contained in the judgment of Law JA of the case law concerning the standard of proof required to establish the commission of the matrimonial offences of adultery or cruelty, and I hope that it will be effective to prevent further confusion. In particular I agree that, if any direction is adopted as to the meaning of the word "satisfied" in the context to section 10 of the Matrimonial Causes Act (cap 152), it should be that "satisfied" means "satisfied beyond reasonable doubt" or "satisfied so as to feel sure". And that is not because of any analogy of the criminal law, but because those words are appropriate to define the standard of proof necessary to prove these grave matrimonial offences and to displace the presumption of innocence.

Appeal dismissed.

Dated and delivered at Nairobi this 17th day of November 1980.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR