RMK v FMN (Appeal E001 of 2025) [2025] KEHC 18598 (KLR) (Appeals) (18 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

APPEAL E001 OF 2025

H NAMISI, J

DECEMBER 18, 2025

BETWEEN

RMK ..... APPELLANT

AND

FMN ..... RESPONDENT

(Being an Appeal from the Judgement of Hon. Aduke Praxedes Atieno, Senior Resident Magistrate delivered on 16 December 2024 in Nairobi Magistrate Matrimonial Cause No. E903 of 2024)

JUDGMENT

1. The Appellant and Respondent, both adults of sound mind and capacity, contracted a Christian marriage on 10 August 2019. The ceremony was solemnized at the Message of the Hour Assembly in Machakos County, under the *Marriage Act*, 2014. A Certificate of Marriage was duly issued, evidencing the formal validity of their union. At the time of their marriage, the Appellant was 30 years old, while the Respondent was 25 years old.

2. The Appellant's uncontroverted testimony in the trial court paints a picture of a marriage that failed to launch. According to the Appellant, immediately following the solemnization of the marriage, the couple relocated to Nairobi with the intention of establishing their matrimonial home. However, the Respondent wilfully deserted the matrimonial home shortly thereafter.

3. The Appellant averred that the marriage was never consummated. It was his testimony that for a period approaching 5 years, the Respondent denied him consortium, companionship and conjugal rights. The Respondent reportedly relocated to Wote Town, Makueni County, effectively severing communication and marital relations. The Appellant stated that despite his efforts to woo her back and salvage the marriage—including visits to her parents' home in the company of his own parents

—the Respondent remained adamant in her refusal to cohabit or consummate the marriage. The Appellant described the situation as causing him prolonged mental, emotional, and psychological anguish, harassment, and distress. He found himself in the paradoxical legal position of being a married man who had never lived as a husband.

4. On 10 July 2024, the Appellant filed a Petition in the lower court seeking a declaration that the marriage be declared a nullity, and a decree of annulment be issued on the grounds of the Respondent's desertion and non-consummation.

5. The Respondent was served with the Notice to Appear as well as the Petition but failed to enter appearance or file a response thereto. On 2 October 2024, the Appellant testified and closed his case.

6. The learned trial Magistrate delivered her judgement on 16 December 2024. The trial court correctly identified that the Petition was founded on section 73(1)(a) of the *Marriage Act*. However, the trial court then turned its attention to the limitation clause in section 73(2)(a). The court reasoned as follows:

> "I have considered the particulars of the ground outlined in the petition. I have also noted, from the pleadings on record that this petition was filed on 11th July 2024. I have weighed this against the provisions of s.73(2)(a) of the Act and note the obvious as follows. This marriage was solemnized on 10th August 2019. The petition was filed on 11th July 2024, more than one year after the celebration of the said marriage. In view of the above, this petition is dismissed. I make no award as to costs."

7. Aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:

   i. That the learned trial Magistrate erred in fact and law by finding that annulments are still the preserve of marriages under one (1) year despite the existence of legitimate grounds to have the marriage annulled;

   ii. That the learned Magistrate erred in law and fact in failing to appreciate the recent developments in law where section 73(2)(a) of the *Marriage Act* as to the limitation of one year period to apply for annulment of marriage is unconstitutional;

   iii. That the learned Magistrate erred in fact and in law by dismissing the Appellant's petition.

8. The appeal raises fundamental questions of law that transcend the immediate interests of the parties herein, touching upon the constitutional validity of statutory limitation periods in matrimonial causes, the definition of access to justice under Article 48 of the *Constitution*, and the binding nature of superior court precedents on subordinate courts regarding the nullity of marriage. Specifically, this Court is called upon to determine whether the statutory bar contained in Section 73(2)(a) of the *Marriage Act*—which extinguishes the right to petition for annulment of a marriage after the lapse of one year—remains good law in light of the developing constitutional jurisprudence.

9. The Appellant contends that he is trapped in a 'limping marriage'—a union that is legally registered yet factually non-existent due to non-consummation and wilful refusal by the Respondent. The trial court, while acknowledging the Appellant's plight, felt constrained by the strict text of the statute to dismiss the petition as time-barred.

10. Despite being served, the Respondent did not participate in these proceedings. The appeal was canvassed by way of written submissions.

11. The Appellant argues that the trial court's reliance on section 73(2)(a) was a misdirection because that section had been declared unconstitutional in the case of S.B.M & another v Attorney General (Constitutional Petition 21 of 2021) KEHC 13920 (KLR). The Appellant submits that strict application of the one-year rule violates Article 48 on access to justice and Article 27 on equality. In the SBM case, the Court expressly declared that the limitation violates fundamental rights and that there should be no limitation to secure a remedy of annulment through the court system. The Appellant argues that the trial court failed to apply the doctrine of constitutional interpretation and vertical stare decisis.

Analysis & Determination

12. It is now well established that the role of the first appellate court is to re-evaluate, re-assess and re-analyze the evidence tendered at the trial in a bid to reach its own independent conclusion. This principle was well captured in the case of Abok James Odera t/a A.J. Odera and Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where the Court of Appeal held that:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-
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> > " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence""

13. The same principle was enunciated by the Court of Appeal in the case of Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR where it was held that:-

> " It is trite law, and we accept Mr. Kiragu's submission that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123."

14. Having examined the Record of Appeal and submissions, the following issues lend themselves for determination herein:

    i. Whether the statutory limitation of one year for filing an annulment petition under Section 73(2)(a) of the *Marriage Act* is constitutionally valid and enforceable.

    ii. Whether the learned trial magistrate erred in failing to follow the binding precedent set by the High Court in S B M & another v Attorney General regarding the unconstitutionality of Section 73(2)(a).

iii. Whether the Appellant established the substantive ground of non-consummation or wilful refusal to consummate sufficient to warrant a decree of nullity.

iv. What constitutes the appropriate relief for the Appellant in the circumstances?

15. The *Marriage Act* consolidated the various laws governing marriage in Kenya into a single statute. A critical distinction exists between annulment and dissolution (divorce). An annulment declares that a valid marriage bever existed (void) or is invalidated retroactively (voidable), while a divorce terminates a valid marriage that existed up to the date of the decree absolute. The grounds upon which an annulment can be granted include incapacity, non-consummation, lack of consent, prohibited degrees and bigamy. Divorce can be granted on the grounds of adultery, cruelty, desertion, exceptional depravity and irretrievable breakdown. The result of an annulment is that the parties are deemed never to have been married.

16. The Appellant herein sought an annulment, not a divorce. The distinction is important. An annulment addresses defects present at the inception of the union. The Appellant's case was that the marriage was voidable under section 73(1)(a) because the marriage has not been consummated since its celebration.

17. Section 73 provides the legal framework for annulment. Section 73(1) lists the grounds upon which a marriage can be annulled. Sub-section (2), however, imposes the limitation that formed the basis of the trial court's dismissal. It provides that the court shall only grant a decree of annulment if the petition is made within one year of the celebration of marriage. The text is couched in mandatory terms. On a purely literal interpretation, the Magistrate's hands appeared tied. The marriage was in August 2019, and the Petition was filed in July 2024. The one-year window had long closed.

18. The crux of this appeal lies in the constitutionality of the one-year limitation period. The precise issue was the subject of the decision in the SBM case (supra). In that case, the petitioner sought to annul a marriage after discovering, more than a year later, that her husband was already married to another person. She was barred by section 73(2)(a). Hon. Nyakundi, J held that this limitation was unconstitutional.

19. The reasoning of the Court was anchored on several constitutional pillars. The Court held that strictly limiting the period for annulment to one year creates an arbitrary procedural barrier that denies a remedy to parties who discover defects, like fraud or incapacity, after the year has elapsed. It effectively immunizes defective marriages from judicial scrutiny merely due to the passage of time. Further, the limitation treats parties in voidable marriages differently from those seeking divorce, often without a rational basis rooted in the protection of the family unit.

20. the *Constitution* guarantees the right to marry based on free consent. By forcing a party to remain in a marriage where consent was vitiated or the fundamental purpose (consummation) failed, simply because a deadline passed, the statute undermines the voluntariness of marriage. The Court declared:

> " The impugned provisions as expressly stated under section 73(2) of the Act as to limitation of one-year period does violate the petitioner's fundamental rights... Therefore, a declaration be and is hereby made to the effect that the impugned clause in section 73(2) of the aforesaid act be amended in pith and substance to give effect there shall be no limitation to secure a remedy of annulment through the courts system..."

_Vertical Stare Decisis

21. The principle of stare decisis is a cornerstone of the common law legal system, ensuring certainty, consistency and stability. Decisions of superior courts are binding on all subordinate courts. Once the High Court in the SBM Case declared Section 73(2)(a) unconstitutional, that provision was rendered void to the extent of its inconsistency with the *Constitution* (Article 2(4)). A statutory provision declared unconstitutional by the High Court ceases to have legal force unless and until that decision is overturned by the Court of Appeal or Supreme Court. To date, there is no evidence that the SBM case decision has been overturned.

22. The trial court committed a fundamental error of law by failing to take judicial notice of the SBM case judgment. By dismissing the Petition solely on the basis of a statutory provision that had been voided by a superior court, the trial court acted per incuriam and denied the Appellant his constitutional right to access justice.

23. The trial court stated thus:

> "I have weighed this against the provisions of s.73(2)(a) of the Act... this petition is dismissed."

24. This reasoning treats the statute as supreme, whereas in our legal order, the *Constitution* is supreme. The limitation period, having been struck down, could not stand as a bar to the Appellant's petition.

Proof on a Balance of Probabilities

25. Having removed the procedural barrier, this Court must now consider whether the Appellant established the substantive grounds for annulment. The Appellant relied on section 73(1)(a), that the marriage had not been consummated since its celebration.

26. In Kenyan matrimonial law, drawing from English common law, consummation requires 'ordinary and complete' sexual intercourse (vera copula). In the English case of D-E v A-G (1845) 1 Rob Eccl 279, Dr. Lushington defined consummation as requiring erection and intromission (penetration). Non-consummation can result from either incapacity (impotence/physical defect) or wilful refusal. Incapacity entails a physical or psychological inability to perform the act, while wilful refusal is a settled and definite decision not to consummate without just excuse.

27. The Appellant pleaded that the Respondent wilfully deserted the matrimonial home and failed, refused and/or neglected to offer conjugal rights. The Appellant testified that despite his attempts to start a life together the Respondent moved to a different town immediately after the wedding and refused to cohabit.

28. In A.M.A v A.M.A [2011] KEHC 4206 (KLR), the marriage was never consummated, the married couple had no matrimonial home and the petitioner never lived with respondent under one roof. The Court annulled the marriage on the ground of non-consummation.

29. In C.J.M V A.M.G [2012] KEHC 3590 (KLR), the Court granted a decree of annulment where a petitioner prayed to have their marriage declared null on void for reason that the same had not been consummated owing to the wilful refusal of the respondent.

30. With regard to desertion, while this is typically a ground for divorce, conduct that amounts to an immediate abandonment before the marriage is consummated can be evidence of a 'settled and definite'

decision not to consummate. The Respondent's actions – leaving immediately and staying away for 5 years- demonstrate a clear refusal to fulfill the essential obligations of the marriage contract.

31. In view of the foregoing, I find merit in the appeal and make the following orders:

    i. The judgement and decree of the Senior Resident Magistrate's Court at Nairobi in Matrimonial Cause No. E903 of 2024, delivered on 16 December 2024, are hereby set aside in their entirety.

    ii. Judgement is hereby entered for the Appellant as prayed in the Petition. The marriage solemnized between RMK and FMN on 10 August 2019 at the Message of the Hour Assembly, in Machakos County, is hereby declared a nullity on the ground that the marriage has not been consummated owing to wilful refusal of the Respondent.

    iii. A decree Nisi of annulment is hereby issued.

    iv. Considering the extensive period of separation and the fact that the Respondent has not contested these proceedings, I direct that the Decree Nisi shall be made Absolute within 7 days of the date hereof.

    v. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Ms Achilla h/b Mr, Onenga

For Respondent: No appearance

Court Assistant Lucy Mwangi