REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
DIVORCE APPEAL NO. 48 OF 2023

S.K.K.....
.....APPELLANT

VERSUS

E.W.K.....
.....RESPONDENT

(Being an appeal against the judgement of Hon. M. A. Otindo (PM) at Machakos Law Courts delivered in Divorce Cause No. E029 of 2021)

JUDGEMENT

Background

1. By a Petition for divorce dated 13/8/2021, the Appellant then Petitioner sought for dissolution of the marriage between him and the Respondent on grounds of cruelty, desertion and adultery by the Respondent. He set out particulars of cruelty, desertion and adultery.

2. In response, the Respondent filed an Answer to Petition and Cross Petition dated 22/10/2021. She denied the allegations of cruelty, desertion and adultery against her. She averred that she still resides in the couple's matrimonial home. She equally pleaded desertion by the Appellant claiming that sometimes in July 2020 the Appellant deserted her without reasons. She prayed for judicial separation instead.

3. The Appellant/Petitioner's case was that the Respondent was adulterous. The marriage was unbearable and he didn't want fighting. He wanted his children to have peace. He tried to call the Respondent's parents, brother and sisters to salvage the marriage but in vain. He testified that the Respondent was reckless and disrespectful. He stated that he did not dessert the marriage but left because of peace. The marriage did not work and had irretrievably broken down and ought to be dissolved.

4. The Respondent's case was that she was not cruel or adulterous. She denied that since she got married, the Petitioner had called anyone to intervene in the marriage. She stated that her parents, siblings and even their best couple were not aware of the court case but she had

since told them about the case. The Respondent maintained that she only wanted separation not divorce. She stated that she was a Catholic and her church does not entertain divorce. She objected to the divorce because of her religion. She stated that she last had sex with her husband in **July 2020**. Her husband withdrew conjugal rights; she lived forcing him to be intimate but he refused. She stated that it is the Petitioner who moved out. She didn't want to keep the Petitioner in a complexity marriage. She stated that the Petitioner was cruel and would beat her in front of children and workers. She wanted separation so that she could heal mentally. She stated that if the Petitioner changes, he can retrieve the marriage but if he does not change, it cannot be retrieved.

5. Upon considering the Petition, Cross Petition, the evidence tendered and the Parties' submissions, the trial court held that it was persuaded that the marriage had not irretrievably broken down and Parties could still redeem the same. The trial court further held that that she was persuaded that the prayer for judicial separation in the Cross Petition merits and it was her view that it would give the Parties an opportunity to live separate for a while and reflect and make a sober decision as to the way forward in their marriage. Should they fail to agree then they shall still move the court for divorce. In the end the trial court allowed the Cross Petition and found no merit in the Petition and dismissed the same with no order as to costs.

The Appeal

6. The Petitioner/Appellant being aggrieved by the judgement of the trial court has now lodged this appeal vide a Memorandum of Appeal dated 08/03/2025 raising 4 grounds of appeal as follows: -

    1. THAT the Learned Magistrate erred in law and fact by not considering that the respondent deserted the matrimonial obligations and duties years ago.

    2. THAT the Learned Magistrate erred in law and facts by dismissing the petition on grounds that there wasn't proof of cruelty and desertion a fact that the Appellant proved.

    3. THAT the Learned Magistrate erred in law and fact by not considering that the appellant had a right to engage in another marriage as the said marriage has irretrievably broken.

4. THAT the Learned Magistrate erred in law and facts by dismissing the petition and making a finding that the marriage can be salvaged

7. The Appellant proposed to ask this Court to set aside the judgment of the Honourable Magistrate and that this Honourable Court do proceed to allow the lower Divorce Cause with costs to the Appellant.
8. The appeal was canvassed through written submissions. The Respondent did not participate in the appeal despite service.

Analysis and determination

9. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in ***Selle & another v Associated Motor Boat Co. Ltd.& others*** **and in** ***Peters v Sunday Post Limited*** **(1968) E.A 123. (1958) E.A Page 424.**

10. In the case of **Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022)**, the court held that: -

> *A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.*

11. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion

12. I have perused the Record of Appeal, considered and weighed the evidence that was adduced at the trial court as well as the Appellants submissions.

13. I will proceed to consider whether the appeal is merited.

14. **Section 66(2) of the Marriage Act** provides the grounds in which the Appellant herein relied on to seek for the dissolution of his marriage with the Respondent, one of them being dissolution of the marriage on the ground of its irretrievable breakdown.

15. **Section 66(6) of the Marriage Act** sets out the factual circumstances upon which the court may presume the marriage has irretrievably broken down. To demonstrate this, the Appellant in his petition and in his testimony highlighted to the court that his marriage was unbearable due to the fact that the Respondent was cruel, deserted the marriage and was adulterous.

16. For close to 5 years, the Parties have not consummated the marriage and have not seen eye to eye.

17. It is my considered view that the trial court erred in holding that the prayer for judicial separation in the Cross Petition merited and in giving her view that it would give the Parties an opportunity to live separate for a while and reflect and make a sober decision as to the way forward in their marriage and that should they fail to agree then they shall still move the court for divorce.

18. Additionally, the trial court erroneously opted to grant judicial separation. This was a grave misdirection in law, as judicial separation is a provisional remedy aimed at giving parties space to reconcile. It cannot be imposed where reconciliation is no longer feasible, and where one party affirmatively seeks a permanent

dissolution of the marriage. Reliance is placed on the case of **LCS v SKS [2023] KEHC 24922 (KLR)** where the court at paragraph 32 held that:

> *"I have considered the submissions by both parties and it is evident that the parties herein are no longer in the position to foster a loving relationship between themselves. What emerges from the proceedings is that the Petitioner does not want to be in the union with the Respondent as she believes he is an adulterous man and that he has been cruel to her over the years. I am in agreement with the Petitioner that trying to resuscitate this union would be akin to flogging a dead horse."*

19. Also in **ATL v CPA [2024] KEHC 6969 (KLR)** the Court at paragraph 6 held that:

> *"The glue to a marriage is love and passion to soldier on no matter what. When parties to a marriage have no love or passion left, no law can keep them together."*

20. The instant case clearly paints out a picture of a situation where none of the spouses are able or willing to live together or reconcile due to the relationship being irreversibly destroyed with no hope of resumption of spousal duties. The Appellant clearly brought out the adultery, cruelty and desertion affecting his marriage with the respondent which constitute as evidence of irretrievable breakdown of marriage.

21. The Respondent in her Cross Petition acknowledged that the couple has not continuously lived together since July 2020 to the effect that each has been living in separate homes for years now. This clearly shows that there is an irretrievable breakdown which was sufficiently established. Forcing the parties to remain legally bound serves no rational purpose where the matrimonial bond has collapsed. It is for this reason that the Appellant relies on the case of **KPO v DMK [2023] KEHC 201 (KLR)** where the court at paragraph 21 held that:

> *"From the evidence it is clear that the parties herein ceased cohabitation as man and wife in April 2019. To date despite attempts from family and friends as well as a session with a Counsellor, the couple have been unable to resolve their differences and have not resumed cohabitation. The couple have lived a part for more than two (2) years, which is proof*

that their marriage has irretrievably broken down'. There would be no benefit in compelling the warring couple to remain in a matrimonial bond when it is clear that they both want out."

22. In the case of **FOA v JA [2024] KEHC 2069 (KLR),** the court in finding that the marriage had indeed irretrievably broken down, at paragraph 16 relied on the Court of Appeal case of **JSM VS. ENB [2015] eKLR** where the court held that:

> *''In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties. What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation, the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other, commitment of the parties to the marriage, chances of the parties resuming their spousal duties, chances of the marriage ever working again, among others. These considerations would be in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down".*

23. The Marriage Act and the persuasive precedents relied on make it clear that irretrievable breakdown is sufficient to justify a complete dissolution of a marriage. Judicial separation in this case offers neither remedy nor relief, but merely prolongs the anguish of both Parties, especially the Appellant who seeks closure.

24. The very essence of marriage being companionship, intimacy, and shared life has long ceased to exist in the Parties' union. The law does not require spouses to endure emotional, psychological, or social imprisonment under the guise of marriage.

25. Accordingly, I find that there is no legitimate purpose that will be served by the retention of the marital covenant which is better untied to set each spouse free.

26. The upshot is that the appeal succeeds. The trial court's judgement delivered on 8th February 2023 is set aside. The Appellant's Petition dated 13/8/2021 is allowed meaning the marriage between him and the Respondent solemnized on 7th November 2003 is hereby dissolved.

27. A Deree Nisi shall issue forthwith to be made absolute thirty (30) days after.

28. There shall be no orders as to costs.

    It is so ordered

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 10TH FEBRUARY 2026.

NOEL I. ADAGI
JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 10TH FEBRUARY 2026.