IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 5 OF 2015

BETWEEN

J. S. M. ……..…….APPELLANT

AND

E. N. B. ……..……..……..RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Odero, J.) dated 16th July 2014

in

H. C. D. C. No. 76 of 2013)

****

JUDGMENT OF THE COURT

The appellant, ***J. S. M.,*** was the respondent in ***High Court Divorce Cause No. 76 of 2014*** in which her husband, ***E. N. B.,*** the respondent in this appeal, had petitioned the High Court for a decree of divorce on the grounds of cruelty and irretrievable breakdown of the marriage. In her answer to the petition, the appellant denied the cruelty alleged against her and instead accused the respondent of cruelty, desertion and adultery with several unnamed women. The appellant did not file a cross-petition for divorce, but instead prayed for a decree of divorce, maintenance of Kshs 40,000 per month, division of matrimonial property, and costs, in her answer to petition.

Odero, J. heard the petition in which the appellant and the respondent were the only witnesses. By a judgment dated ***16th July 2014,*** the learned judge dissolved the marriage on the ground of the appellant's cruelty. As regards the prayer for maintenance, the learned judge disallowed the same on the basis that the respondent was paying for the university education of the couple's two children; that the appellant was residing in a house provided by the respondent's employer; and that the appellant was in gainful employment and capable of providing for her other needs. On the prayer for division of matrimonial property, the learned judge held that there was no evidence of any property acquired by the couple, its location, its value, or how it was acquired. The Court ultimately ordered each party to bear their own costs.

The appellant was aggrieved by the judgment and lodged the appeal now before us. Although in the High

Court the appellant had prayed for the dissolution of the marriage, in this appeal, as regards the decree of divorce, she only prays that the judgment of the High Court be set aside. As her appeal now stands in that regard, all she is seeking, for all intents and purposes, is an order whose effect will be to restore a marriage that, in her own evidence, she wished to get out of.

Before we consider the appellant's grounds of appeal, it is apposite to highlight the background to the appeal and the evidence, which was adduced before the trial court.

The appellant, a senior secretary and the respondent, a medical laboratory technologist, were married under the ***Marriage Act, Cap 150,*** (now repealed), on ***3rd August 1990*** at the ***District Commissioner's Office, Kilifi***. Prior to the marriage, the two had a liaison from which a daughter, ***VK*** was born in 1979. After the marriage the couple cohabited in ***Tononoka*** and ***Ganjoni***, Mombasa and was blessed with a son, ***EMB***, who was born on 19th February 1991 and another daughter, ***EB,*** born on 27th March 1994.

Soon the marriage ran into marital tempest and doldrums, culminating in the appellant filing ***Divorce Cause No 222 of 1993***, which she subsequently withdrew on agreed written terms between herself and the respondent. What however led directly, twenty years later, to the divorce cause from which this appeal arises, is a dispute regarding the marriage of the couple's first-born daughter, V K. After the young woman decided to get married, the respondent adamantly declined to be involved in the negotiations, alleging that the prospective bridegroom came from a family or an area of the Republic, renown for witchcraft. After failing to convince the respondent to participate in the dowry negotiations, the appellant attended those negotiations at her own parents' home. The respondent alleges that dowry was negotiated and paid to the family of the appellant. On the other hand, although the appellant admits attending and participating in the dowry negotiations, she denied that any dowry was ever paid. It was her position that no dowry could have been paid for their daughter because the respondent had never paid any dowry to her (appellant's) parents.

Be that as it may, the participation of the appellant in the dowry negotiations while the respondent had made it crystal clear that his daughter would never be married to her suitor was the straw that broke the camel's back. To the respondent, the appellant's conduct, which in his view subjected him to ridicule in the eyes of his community, family and peers, amounted to cruelty within the meaning of the ***Matrimonial Causes Act, cap 152*** (now repealed). Accordingly, he moved out of the matrimonial home in December 2012 and went to live in ***Mazeras***. The parties never resumed cohabitation thereafter. Less than two years since moving out, the respondent filed Divorce Cause No. 76 of 2014.

On her part, the appellant explained that she participated in the negotiations because the respondent had left her with no choice. Her evidence was that after the respondent declined to participate in the negotiations, she had reached out to his uncle and brothers, but to no avail. VK, an independent-minded woman of over 28 years of age, madly in love, pregnant at the time, and guaranteed by the Constitution a right to marry a man of her choice, was adamant that she would marry with or without her father's approval and blessings. In the face of the intransigence on the part of both the respondent and his daughter, the appellant contended that she was left with no choice as a mother but to support her daughter through her marriage, otherwise VK was going to look like an orphan.

The learned judge found that the appellant's participation in the dowry negotiations in spite of the respondent's objection amounted to cruelty. Over and above proof of cruelty on the part of the appellant, the learned judge also found that the marriage had in any event irretrievably broken down within the meaning of section ***66(2) (e)*** of the ***Marriage Act, 2014***.

At the hearing of this appeal, the appellant appeared before us in *propria persona* while ***Mr. Geoffrey Were,*** learned counsel, represented the respondent. With the consent of both parties, the appeal was canvassed through written submissions.

The appellant relied on several grounds of appeal, some of which are not relevant, to impeach the judgment of the High Court. In the grounds that are relevant she contended that the learned judge had erred by holding that cruelty had been proved on her part; by ignoring the fact that VK had a

constitutional right to marry a person of her choice which the respondent was violating; and by finding that the respondent was entitled to dowry for VK whilst under his *Mijikenda* customs and her *Kamba* customs it was her parents who were entitled to the dowry because of the respondent's failure to pay dowry for the appellant.

It was the appellant's further submission that the learned judge had fallen into error by failing to hold that the respondent had not proved desertion because the 3 years prescribed by ***section 66(2)*** of the ***Marriage Act, 2014*** had not expired; by holding that the marriage had irretrievably broken down while the appellant and the respondent had not been separated for at least two years as required by ***section 66(6) (d)*** of the ***Marriage Act, 2014***; by failing to divide matrimonial property between the parties; and by failing to award her maintenance. It was lastly contended that the decree nisi had been made absolute irregularly.

In a rather sketchy and skeletal reply, Mr. Were for the respondent, submitted that the judgment of the High Court was sound and should not be disturbed. He contended that the High Court had the benefit of seeing and hearing both the appellant and the respondent when they testified and it chose to believe the respondent's case. He accordingly urged us to dismiss the appeal.

We have carefully considered the pleadings, the evidence on record, the judgment of the High Court, the appellant's memorandum of appeal, the submissions by both parties, as well as the law. This is a first appeal from the High Court in the exercise of its original jurisdiction. We shall accordingly reappraise the evidence with a view to drawing the necessary inferences and reaching conclusions of fact (see ***Rule 29(1) Court of Appeal Rules*** and ***SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] EA 123)***. We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable.

Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions. (See ***JABAN V. OLENJA [1986] KLR 661*** and ***RAMJI RATNA & CO LTD V. WOOD PRODUCTS (KENYA) LTD, CA NO 117 OF 2001).***

The divorce proceedings leading to this appeal were commenced on ***14th October 2013*** under the ***Matrimonial Causes Act, Cap 152***. By the time the judgment was delivered on ***16th July 2014***, the Matrimonial Causes Act had been repealed by ***section 97*** of the ***Marriage Act, 2014 (No. 14 of 2014)*** as read with the Schedule to the Act. The Marriage Act came into effect on ***20th May 2014***. The effect of the repeal of the Matrimonial Causes Act and the coming into force of the Marriage Act was, in the absence of provision to the contrary in the repealing Act, to "obliterate" the Matrimonial Causes Act. As ***Bandari, C.J***. of Punjab-Haryana High Court of India observed in ***NATIONAL PLANNERS LTD V. CONTRIBUTORIES ETC, AIR 1958 PH 230***:

"The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

(See also the judgment of this Court in ***NATIONAL SOCIAL SECURITY FUND BOARD TRUSTEES & OTHERS V. CENTRAL ORGANISATION OF TRADE UNIONS (K), CA NO. 119 OF 2014).***

Section 98 (2) of the Marriage Act, 2014 provides as follows regarding causes commenced under the repealed Act:

"(2) Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act."

In this case we have not seen anything, and none of the parties suggested that there was anything, that

could have made it impracticable to continue the cause under the new Act.

The Marriage Act, 2014 has retained cruelty as a ground for divorce in marriages of the kind contracted by the appellant and the respondent. Section 8 (c) of the repealed Matrimonial Causes Act provided for divorce if a respondent had since the celebration of the marriage treated the petitioner with cruelty, while section 65 (b) of the Marriage Act, 2014 provides as follows:

"65. A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—

(a) …;

(b) cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage…"

Other than the categorization of cruelty into mental and physical and inclusion of children of the marriage as victims of the cruelty, in our opinion there is otherwise no fundamental difference under the repealed Act and the new Act as regards cruelty as a ground for divorce. The core attributes of the matrimonial offence of cruelty in the old Act and in the new one remain the same. To that extent, we are satisfied that the case law on the attributes of that matrimonial offence under the former Act remains good law in respect of the same matrimonial offence under the new Act.

The learned judge concluded that the respondent had proved cruelty against the appellant, a finding that she bitterly contests. In finding cruelty proved, the learned judge expressed herself thus:

"The petitioner went on to testify that after his disapproval of which the respondent was fully aware, she proceeded to arrange for their daughter's suitor to pay a visit at her own parents' home. The respondent does not deny this allegation. She concedes that the said suitor paid a visit to her parents' home in Mombasa and even paid dowry to her parents. Where the father of the girl is alive and is known it is usual practice that suitors of his daughter will visit his home and pay dowry to him. What happened here was unusual to say the least. The implication here would be that this child (and by extension her mother) did not recognize the role of the petitioner as a girl's father. It is not difficult to see how this occurrence would subject the petitioner to ridicule amongst his family and peers. In her defence the respondent claims that it was the child who herself made these arrangements. However without the respondent's active participation (she concedes that she was present during this function at her parents' home) I doubt whether it would have taken place. The respondent's actions amounted to a 'slap in the face' of her husband. Her participation, encouragement and tacit approval of her daughter's plans were certainly aimed to reject and despise the petitioner who was the child's father. To participate in a ceremony which is designed to put her own husband into ridicule certainly does amount to cruelty especially in the patriarchal Kenyan society. A good and loving wife would have dissuaded her daughter from such action, would have sought a middle ground or would have worked harder to bring round her husband. By her actions the respondent was making it clear to all and sundry that she did not respect her husband and his role as their child's father. This amounts to cruelty of the emotional kind and indeed is what led the petitioner to move away from the matrimonial home in Mombasa to his rural home in Mazeras. I am satisfied that the ground of cruelty has been sufficiently proven so as to warrant the granting of the divorce."

There is consistent case law on what constitutes cruelty as a matrimonial offence. In ***MEME V. MEME [1976-80] KLR 17***, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court:

i. Misconduct of a grave and weighty nature;

ii. Real injury to the complainant's health or reasonable apprehension of such injury;

iii. That the injury was caused by misconduct on the part of the respondent; and

iv. That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.

In ***MULHOUSE V. MULHOUSE, [1964] 2 All ER 50,*** which ***Chesoni, J***. (as

he then was) cited with approval in ***MEME V. MEME (supra)***, ***Sir Jocelyn Simon P.*** while considering the gravity and weight of the misconduct that would constitute cruelty, stated as follows:

[M]isconduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief."

Thus conduct, which is part of the "reasonable wear and tear" of a marriage, does not constitute cruelty. Regarding the nature of injury to the petitioner's health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:

"[I]t must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it."

And in ***NUNZIO COLAROSSI V. MICHELINA COLAROSSI [1965] E.A. 129, NEWBOLD, JA.,*** speaking for the former Court of Appeal for Eastern Africa stated thus:

"An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree."

Chesoni J. further stated in ***MEME V. MEME, (supra),*** that the burden lies on the petitioner to establish injury or reasonable apprehension of injury to life, limb or health to herself, or himself before the respondent's conduct can be described as cruel.

As regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, this Court, in ***KAMWERU V. KAMWERU (2000) E KLR,*** stated as follows:

"Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established."

The last point, which has been made time and again by various courts, and which is worthy reiterating here, is that there is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore it is not very helpful to rely on facts of previously decided cases as precedent.

In this case, the learned judge did not at all address the question whether the evidence on record disclosed the elements of cruelty that we have set out above. She did not address the standard of proof that the respondent had to meet to establish cruelty on the part of the appellant. As the extract from the judgment we have cited above shows, the learned judge simply treated the respondent's feelings of ridicule from

one incident as cruelty within the meaning of the Marriage Act, 2014.

In our view, subjecting a spouse to constant and sustained ridicule, verbal abuse, odium and such other misconduct which lowers his or her human dignity, erodes self-confidence and self-worth, might trigger real or apprehended ill-health, such as hypertension, depression or related conditions, so as amount to cruelty. However, in the circumstances of this appeal, we are with respect, far from satisfied that cruelty within the meaning of the Marriage Act was proved against the appellant to the required standard. There was absolutely no evidence that the participation of the appellant in her daughter's dowry negotiations had resulted in actual or probable injury to life, limb or health of the respondent. All the evidence pointed merely to the respondent's hurt feelings.

In addition the learned judge heaped all the blame on the appellant without as much as considering the conduct of the respondent towards his own daughter or the extent to which his hurt feelings were of his own making. In ***MULHOUSE V. MULHOUSE*** ***(supra)*** it was emphasized that in determining in each particular case whether cruelty has been proved, the court should have regard to, among other things, *"the extent to which the complainant may have brought the trouble on himself or herself."*

The evidence on record documents the appellant's efforts to get the respondent, as the father of VK, to take his proper place in the negotiations for her marriage. Having failed, she tried to get his uncle, one ***Mr. K*** as well as his brothers, ***M N*** and ***S B*** involved, but in vain.

In these circumstances, to condemn her as cruel for supporting her daughter does not seem to us right. The trial court opted to dwell on the hurt feelings and pride of the respondent as an African man, without any regard to the fact that as a truly proud African man, the respondent would have met VK's suitor and his family and told them in no uncertain terms, that his daughter would never marry into their family. Instead, he avoided them, prevaricated, and failed to even tell his daughter that the marriage proposal was unacceptable. The appellant was thus literally left between a rock and a hard place. The choice that she took as a mother to support her daughter, given the two unpleasant choices that the respondent had literally dropped on her lap, can hardly, in our view, be described as cruelty. In any event, other than the respondent's feelings of ridicule, no evidence was led that he suffered any ill-health, physical or mental, real or apprehended, so as to constitute cruelty.

The daughter, VK, as a 28-year-old woman had a constitutional right to marry the man of her dreams, which ought not to have been arbitrarily violated. She was not obliged to seek or obtain the respondent's consent to marry, but she nevertheless had the good sense to seek her father's support and blessings, which the respondent arbitrarily denied. Rather than constituting cruelty, the appellant's conduct in the circumstances of this case, was merely supportive of VK's actualization and enjoyment of her constitutional right, which the respondent appeared hell-bent to thwart. A parent that supports her child to realize a constitutionally guaranteed right cannot by any stretch of imagination be described as cruel.

In view of the evidence adduced and the fact that the Marriage Act 2014 has recognized cruelty, whether mental or physical, inflicted on the children of the marriage as a ground for divorce, the impact of the parties' conduct on VK's constitutional right to marry, was a relevant consideration in determining whether cruelty had been established on the part of any of the parties. The learned judge ought to have considered whether the conduct of the respondent towards his daughter would have amounted to cruelty on his part and whether that of the appellant, which *prima facie* were supportive of VK's enjoyment of her constitutional right, could be described as cruel. Those considerations were totally ignored.

Accordingly we are satisfied that no cruelty within the meaning of the marriage Act, 2014 was proved on the part of the appellant.

As regards the question of dowry under *Mijikenda* and *Kamba* customary laws, we do not think anything turns on that in this appeal in light of our decision on cruelty. Whether or not VK's dowry was, under customary law payable to the respondent, or paid to the appellant's parents, is of no moment because in the circumstances of this case, it could not have constituted cruelty. In addition, as the former Court of Appeal for Eastern Africa held in ***KIMANI V. GIKANGA*** ***(1965) EA, 735***, a party propounding

customary law has to call evidence to prove that customary law. (See also ***GITUANJA V. GITUANJA [1983] KLR 575*** and ***ATEMO V. IMUJARO [2003] KLR 435)***. In this case no evidence was adduced on the applicable principles of dowry under *Mijikenda* and *Kamba* Customary laws. This ground of appeal therefore has no merit.

The ground of appeal founded on desertion equally has no merit. The learned judge did not make any finding that either party had deserted the other. The uncontroverted evidence was that the respondent left the matrimonial home in December 2012. The divorce cause was filed on 14th October 2013, which was less than one year from the date of desertion.

Under ***section 65 (c)*** of the Marriage Act, 2014, the spouse alleged to have committed desertion must have deserted the other spouse for at least three years immediately preceding the date of presentation of the petition. That was the same period that was prescribed under ***section 8 (b)*** of the repealed Matrimonial Causes Act under which the divorce cause was filed. The learned judge did not make any finding on desertion and we agree that there would have been no basis, in the circumstances, for a finding that desertion had been committed, let alone proved.

As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by ***section 66(2) (e)*** of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. 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.

Under ***section 66 (6)*** of the Act, irretrievable breakdown of the marriage can be proved by evidence of one or more of the following facts:

a. ***commission of adultery;***
b. ***cruelty to the other spouse or any child of the marriage;***
c. ***willful neglect of one spouse by the other for at least two years immediately preceding the presentation of the petition;***
d. ***separation of the spouses, voluntarily or by decree of the court, for at least two years;***
e. ***desertion for at least three years immediately preceding the presentation of the petition;***
f. ***the sentencing of a spouse for a term of life imprisonment or a term of seven years or more;***
g. ***certification by two doctors, one of whom is a psychiatrist, that a spouse suffers from incurable insanity; and***
h. ***any other ground as the court may deem fit.***

It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage. Of relevance to this appeal is section ***66(6) (e)*** which the learned judge relied upon. Under that provision, a marriage is deemed to have irretrievably broken down if "***a spouses has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition."***

The uncontroverted evidence on record is that the respondent left the matrimonial home in Ganjoni, Mombasa in December 2012 and went to live in Mazeras. By the time the petition was presented on 14th October 2013, the parties had been separated for less than one year, rather than at least three years immediately preceding the presentation of the petition, as required by the Act. Clearly the learned judge erred by finding that the marriage had irretrievably broken down in terms of ***section 66(6)(e)*** of the Marriage Act.

The error on the part of the learned judge notwithstanding, could the marriage, on the basis of the evidence that was adduced, have been dissolved as having irretrievably broken down on account of ***"any other ground as the court may deem fit"***, within the meaning of ***section 66(6)(h)*** of the Marriage Act? 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.

Madan J. (as he then was), eloquently painted the classic picture of a marriage that has irretrievable broken down in ***N V. N & ANOTHER, [2008] 1 KLR (G&F) 16,*** ironically in 1977, long before irretrievable breakdown of the marriage was recognised as a ground for divorce in Kenya. The venerable judge stated:

"This husband and wife have gotten themselves into a real grand-sized matrimonial tangle. In the words of the poet there are winds of sorrow where their voice was, silence where their love was. Their eyes loudly tell the story of their unhappiness. Their hearts are dried up and they do not stir for each other any more. They must have forgotten their reading from St Paul's letter to the Corinthians that love is patient and kind; love does not keep a record of wrongs. Love never gives up; its faith, hope and patience never fail. This husband and wife look like being soaked in misery with their hearts dead for each other…Their own road of love has petered out, they are in a cul-de-sac of their own making of their marriage which has after some years turned out to be an intolerable any longer."

In this case, both the respondent and the appellant had, in their pleadings and evidence maintained that their marriage had irretrievably broken down and each wanted out of it. Although the appellant did not file a cross petition for divorce, in her answer to petition she prayed the court to dissolve the marriage. In his evidence the respondent told the court that there was no possibility of reconciliation with the appellant and that the only solution was a decree of divorce. In his own words, the relationship between the two had reached a point of no return.

On her part, the appellant testified that her marriage to the respondent was not working; that she was living alone; that as of the date she testified in February 2014 she had lived apart from the respondent for more than one year; that one party lived in Mazeras while the other lived in Ganjoni; that the parties had not enjoyed any conjugal relationships for more than one year; that the marriage could not work; that the problems between her and the respondent could not be resolved and that she also wanted divorce.

The record does not indicate and none of the parties has suggested that there was collusion in the presentation of the petition. On our part we are satisfied that there was no collusion. In light of the evidence on record, the trial court was entitled, on the facts of this case, to find that the marriage had irretrievably broken down within the meaning of ***section 66(6)(h***) of the Marriage Act, 2014. That is the provision that the High Court should have relied upon instead of ***section 66(6) (e).***

Section 3(2) of the ***Appellate Jurisdiction Act*** vests in this Court, when it is exercising its appellate jurisdiction, the power, authority and jurisdiction vested in the High Court. Similarly ***rule 31*** of the ***Court of Appeal Rules*** empowers this Court, to among other things confirm, reverse or vary the decision of the High Court. In the circumstances we hold that the marriage between the appellant and the respondent had irretrievably broken down within the meaning of ***section 66(6) (h)*** of the ***Marriage Act, 2014***.

One more reason why we think it is not practicable to restore the marriage between the appellant and the respondent, the error of the High Court notwithstanding, is the appellant's confirmation in her submissions that after the dissolution of their marriage, the respondent has since gotten married to one ***E M H***. Even if we had not been satisfied that the marriage between the appellant and the respondent had irretrievably broken down under section 66(6)(h) of the Marriage Act, 2014, we would not have interfered with the decision of the High Court in light of these new developments.

We shall not dwell much on the two remaining grounds of appeal because they are bereft of merit. On division of matrimonial property, we agree that both from the pleadings and the evidence, no matrimonial property was identified and no evidence was led on the contribution of the parties. The appellant has attempted, in her submissions, to adduce evidence of some property, which she considers to be

matrimonial property. This evidence was never adduced before the trial court, where the appellant was represented by counsel. In addition no application was made under ***rule 29*** of the ***Court of Appeal Rules*** to adduce it. Accordingly we are unable to act on that evidence which has not been tested in any way, and in respect of which the respondent has had no opportunity to comment.

The same applies to the prayer for maintenance. Again, no evidence was placed before the trial court regarding the means of both parties, in particular their income, expenses and needs. Without this evidence, it was difficult for the trial court to make any sensible order for maintenance, unless it literally plucked figures from the air. Moreover, the record clearly indicates that the appellant informed the trial court that she was able to take care of her needs, once it was confirmed that the respondent would continue to pay for the university education for two of the children and that the appellant could continue staying at the matrimonial home. Although the appellant argues that she never stated that she was able to meet her needs, the record is very clear in that respect and we have no basis for finding otherwise.

Ultimately, this appeal has partly succeeded. We set aside the order of the High Court dissolving the marriage between the appellant and the respondent on grounds of cruelty and irretrievable breakdown of the marriage under ***section 66(6)(e)*** of the ***Marriage Act, 2014*** and substitute therefor an order dissolving the said marriage on grounds of irretrievable breakdown of the marriage under ***section 66(6) (h)*** of the ***Marriage Act, 2014***.

Save to the extent that we have stated, the appeal is otherwise dismissed. In the circumstances of this appeal, we direct each party to bear its own costs. It is so ordered.

Dated and delivered at Mombasa this 19th day of June, 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.