IN THE COURT OF APPEAL

AT EDLORET

(CORAM: OMOLO, OKWENGU & MARAGA, JJ.A)

CIVIL APPEAL NO. 75 OF 2007

BETWEEN

D.K.T…….....……APPELLANT

AND

J.J.T……...……...RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Eldoret (**Mohammed Ibrahim, J.**) dated 14th February, 2007*

in

H.C.C.A. NO. 75 OF 2006)

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JUDGMENT OF OKWENGU, JA.

1. This appeal originates from a petition which was filed in the Chief Magistrate's court at Eldoret in Divorce Cause No. [.....]. **DKT** who is now the appellant, had brought the petition seeking dissolution of his marriage to **JJT**(now the respondent). The marriage was conducted under the **African Christian Marriage and Divorce Act,** on 12th December, 1992. The appellant contended that the respondent had committed acts of cruelty bordering on witchcraft and hypotany, which caused him mental anguish. The particulars of cruelty were given as "*washing her underpants using cooking implements namely sufurias and later using the same to cook the petitioner's meals."* The petitioner contended that as a result of the respondent's conduct, the trust between them has been eroded, and the marriage has irretrievably broken

down.

2. In her amended answer to the petition, the respondent denied the appellant's allegations as baseless and untrue, maintaining that the appellant has never brought any such accusations, either before a panel of elders or parents of both sides. The respondent maintained that the appellant had chased her away from the matrimonial home on 29th March, 2004 without any cause. As a result, her children who are under age have been forced to stay with the appellant without any motherly love. The respondent maintained that she was still the legal wife of the appellant, and urged the court to dismiss the petition as frivolous and vexatious. In the alternative, the respondent prayed for custody and maintenance for herself and the issues of the marriage.

3. After hearing the evidence of the petitioner and his two witnesses; and the respondent and her father, the Senior Resident Magistrate who heard the petition, concluded as follows:

"I find that by the respondent washing her underpants in the sufurias and the petitioner refusing to eat the food cooked by the respondent (sic) did not cause any harm to him because he actually did not consume what the respondent has washed. Under the Matrimonial Causes Act Cap 152 adultery, cruelty and desertion has to be proved by a balance of probability. If anything the respondent is the one to claim cruelty on the part of the petitioner and mental stress by refusing to eat her food with no reason. This is evident from the petitioner's testimony before court. Section 12 of the matrimonial causes act is clear.

I find that the petitioner has not proved his case on a balance of probability and therefore dismiss the petition with no order as to costs. Orders accordingly. (s*ic*)"

4. Being aggrieved by that judgment the appellant appealed to the High Court, contending that the trial magistrate had erred in dismissing the appellant's petition despite the overwhelming evidence of intense cruelty; that the magistrate relied on extraneous matters not raised by the appellant; and that in dismissing the petition the magistrate contravened the appellant's fundamental rights under the Constitution.

5. In his judgment **Ibrahim, J**. (as he then was), found that the allegations of cruelty made against the respondent were serious allegations which amounted to a criminal offence, and therefore the standard of proof in proving the allegations had to be that of beyond any reasonable doubt, and not merely on a balance of probability. The judge found that contrary to the trial magistrate's finding that the respondent 'may' have washed her underpants in the sufurias, the trial court was obliged to analyze the evidence of the witnesses on the issue, giving appropriate weight to the evidence and reach a specific finding. The learned Judge found that on the evidence, the trial magistrate was not entitled to find that the respondent washed her underpants in the sufurias. He therefore found that the petitioner did not prove the alleged acts of cruelty.

6. As regards the petitioner's contention that not granting the petition was depriving him of his constitutional rights and freedoms, the learned Judge stated that the petitioner entered into the marriage freely, willingly and without any coercion, and was bound by the laws regulating the said marriage including the Matrimonial Causes Act. He therefore upheld the judgment of the lower court, and dismissed the appeal with no orders as to costs.

7. Being dissatisfied with the judgment of the High Court, the appellant has lodged this second appeal, citing the following grounds:

(i) The learned Honourable Judge erred in law and in fact in failing to take into account the totality of the evidence and facts presented before him in arriving at the said decision.

(ii) The learned Honourable Judge erred in law and fact in arriving at a decision contrary to the fundamental rights of the appellant as provided for in the Kenya Constitution.

(iii) The learned Honourable Judge erred in law and fact by dwelling on extraneous matters in

arriving at the said decision.

(iv) The learned Honourable Judge erred in law and fact in failing to reach a conclusion and appreciate the appellant's life and that of the respondent after the divorce proceedings.

(v) The learned Honourable Judge erred in law and fact in failing to appreciate the mitigating factors the appellant had put even after the respondent had committed the acts of cruelty upon him.

8. The main issue in this appeal is whether the appellant established the ground of cruelty to justify the granting or refusal to grant a divorce. The findings of the lower court, and the High Court, are not in agreement with regard to proof of the particulars of cruelty. In our view the extract from the judgment of the lower court above quoted (paragraph 3), shows that the trial magistrate did in fact find that the respondent washed her underpants in the sufurias and used the same implements to cook the food for the appellant. The trial magistrate however found that there was no harm done to the appellant because the appellant did not actually consume what the respondent had cooked, hence the conclusion of the trial magistrate that there was no cruelty.

9. The case of **M vs. M** provides guidance in considering cruelty as a ground for divorce as follows:

"(a) that the question whether cruelty had been established was a matter of degree and fact to be decided on all the circumstances of the particular case;

to establish cruelty the complainant 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 of the evidence the conduct amounted to cruelty in the conduct amounted to cruelty in the ordinary sense of that word."

10. In applying the above guide, two things stand out here. Firstly, is whether the circumstances alleged by the appellant were established, and if so, whether the circumstances so established were sufficient to prove cruelty as a ground for divorce. The learned Judge properly directed himself in this regard stating thus:

"It is this court's view that the allegations made on the petition and which constitute the grounds and particulars of cruelty are quite serious and grave. This is the allegation that the respondent on diverse dates had washed her underpants in and using cooking utensils or what later were used to cook the petitioner's meals. If this was proven, I have no doubt that it could be deemed to amount to cruelty justifying the dissolution of the marriage between the petitioner and the respondent."

11. I am mindful of the fact that this is a second appeal in which this court is dealing with issues of law, and that generally, a second appellate court is bound by concurrent findings of fact made by the lower court. However, as I have already pointed out, the learned Judge misdirected himself on the finding of the trial magistrate with regard to the establishment of the act complained of. Therefore, there were no concurrent findings of fact regarding the circumstances complained of. Moreover, the issue whether the circumstances if proved established cruelty, was one of law.

12. The learned Judge poked holes into the appellant's evidence that the respondent committed the acts complained of, pointing out the following:

(i) That the petitioner did not call Joseph as a witness who allegedly witnessed the first incident.

(ii) That the respondent was not cross-examined on the act complained of.

(iii) That no witness other than the petitioner was called to prove the incident of 27th March 2004.

(iv) That the petitioner was alone on 29th March 2004, and did not call any witness to corroborate his evidence.

13. The learned Judge rejected the evidence of the petitioner's witness, **Isaac**, whose conduct, in intruding into the privacy of the respondent's matrimonial home, he found to be questionable. With respect I differ with the learned Judge on his treatment of the evidence of **Isaac.** The record of the lower court indicates that **Isaac** explained to the court, the circumstances under which he witnessed the first incident. He was not just being a busy body intruding into the privacy of the respondent, but was in the course of his duties, trying to gain access into the kitchen to get a jug for milking. Isaac only peeped through the window of the kitchen, because when he knocked the kitchen door, the respondent who had woken him up to do the milking, and who was in the kitchen, did not open the door. **Isaac** did not intrude into the privacy of the respondent's matrimonial home. He was in the home for a lawful reason. He did not peep into the bedroom where the respondent's privacy was justified, but peeped into the kitchen widow. Indeed the trial magistrate, who saw the witnesses testify and assessed their demeanour, did not note anything negative about Isaac's conduct.

14. I find that the learned Judge erred in rejecting Isaac's evidence. This was the person who first witnessed the alleged offensive conduct of the respondent, and alerted **J**. **Isaac** was present on 27th March 2004, when J called the petitioner and reported the matter to him. When the petitioner personally witnessed the respondent's offensive conduct on 29th March, 2004, both **J** and **Isaac** were present. In my view **Isaac** provided crucial evidence which corroborated the petitioner's evidence. In light of the evidence of two eye witnesses, i.e. the petitioner and **Isaac,** there was sufficient evidence to prove the respondent's alleged offensive conduct beyond reasonable doubt. Thus the learned Judge's finding was against the weight of evidence. The respondent's action of washing underpants in cooking utensils, and using the utensils and the dirty water to cook the petitioner's food was repulsive, unhygienic, and such as to cause reasonable apprehension of injury to the appellant's health. With respect, the learned Judge erred in failing to find that this conduct amounted to cruelty, and was such as to justify the dissolution of the marriage between the petitioner and the respondent.

15. As regards the alleged violation of the petitioner's constitutional rights through the dismissal of his petition, I concur with the learned Judge that the petitioner entered into the marriage freely under the provisions of the **African Christian Marriage & Divorce Act.** The petitioner willingly compromised his constitutional rights in that regard, and therefore the court can only dissolve the marriage in accordance with the law applicable to the marriage.

16. The upshot of the above is that I find that the learned Judge erred in dismissing the appeal as cruelty as a ground for divorce was established. As Maraga, JA. is in agreement, the appeal is allowed, the judgment of the High Court and the judgment of the lower court set aside, and substituted thereof with an order allowing the appellant's petition, and ordering that the marriage solemnized between the petitioner and the respondent on 12th December, 1992 be dissolved, and a decree absolute do issue six months from the date of this judgment. There shall be no orders for costs.

Dated and delivered at Eldoret this 18th day of September, 2012.

H. M. OKWENGU

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JUDGE OF APPEAL

JUDGMENT OF MARAGA, JA.

I have read the judgment prepared by Okwengu, JA. I agree with her fully and I have nothing useful to add. Accordingly, the appeal shall be dismissed with costs as to the respondent as proposed by

Okwengu, JA.

This judgment has been delivered under **Rule 32(3)** of the Court of Appeal Rules as Omolo , JA. is not presently performing judicial functions.

Dated and delivered at Eldoret this 18th day of September, 2012.

D. K. MARAGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR