IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 140 OF 2004

BETWEEN

E.C.N.G.....APPELLANT

AND

F.N.N.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya

at Nairobi (Aganyanya, J.) dated 5th July, 2001

in

H.C. DIVORCE CASE NO. 143 OF 1999)

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JUDGMENT OF THE COURT

The appellant in this appeal ***E.C.N.G*** and the respondent ***F.N.N*** were married at Presbyterian Church of East Africa (PCEA) Ihururu, Nyeri on 4th December 1971. That union was blessed with three children, all of whom were adults as on 17th November 1999. They are now all married and working. Both parties agree that the marriage remained happy until sometimes in the year 1994 when problems started arising between them. The appellant, in his petition for divorce filed on 17th November 1999 cites the month of February 1994 as the time when the first instance of what he termed as cruelty took place whereas the respondent, in her answer to the petition, maintained that the allegations of cruelty against her were made by the appellant sometimes in the year 1994 after the appellant had started an adulterous relationship with one R. Although the appellant did not mention R in his petition as one would have expected him to do, that being a divorce petition, nonetheless, he accepted that he was in such a relationship and would not stop it. It would appear from the petition and the answer to the petition, that the parties had minor disagreements between themselves which culminated in the respondent leaving the matrimonial home in Nairobi on 22nd May 1994 with the appellant's company car and according to the appellant, she was away for over a week whereas the respondent's version is that she had used the company car, as she was always using it, to visit their up country home in Nyeri and returned after one day. From that date, the appellant said the respondent refused to have sexual intercourse with him, an allegation which the respondent categorically denied and in response to which she stated that whereas she was ready and willing to have sexual intercourse with the appellant, the appellant was never there for her as he was most of the time

away from their matrimonial house and only returned in the wee-hours of the morning. On 11th December 1997, the appellant left a note to the respondent stating as follows:-

> ***"I have moved out of this house to give you the peace you have requested and also to get time to check out your accusation that I stink (which you have done twice) among many other reasons.***
>
> ***As I have done for the last 26 years I will continue with all my responsibilities.***
>
> ***I have made an appointment with your lawyer Mrs. P. M. Ndungu for both of us to see her at 3.00 p.m. on Monday 15.12.97. 'E C NG."***

The appellant left the matrimonial house in Nairobi on that date. The respondent, in a letter dated 26th December 1997, addressed to the appellant, apologized to the appellant for remarks she made to him about his bodily odour and explained that she made the remarks out of love and concern for the appellant's health and in an attempt to seek a medical solution to what she thought was a health problem. In that letter she also pleaded with the appellant to return to his matrimonial house. In a letter dated 9th April 1998, addressed to the appellant, the respondent in an Easter message full of references to the Bible pleaded with the appellant to forgive, return home and build a united family, and in another letter dated 10th May 1998, the respondent again regretted the circumstances that resulted into the appellant being separated from her but ended in asking the appellant to give her a share, most likely, of the family properties. The record does not reveal any response to these letters but on 17th November 1999, close to two years after the appellant left their Nairobi matrimonial house, he filed a petition for divorce in the superior court – Matrimonial Cause No. 143 of 1999. The only ground raised in that petition and relied upon for seeking divorce was cruelty. Particulars of the allegation of cruelty were in total fifteen. These were, in a nutshell that in February 1994, the respondent refused to give her consent to the appellant to sell their plot in Thindigua in Kiambu; that on 22nd May 1994, the respondent refused to talk to the appellant and on 7th June 1994 she took appellant's company car and using it, deserted matrimonial house causing the appellant and another man to search for her in police stations and mortuaries to no avail; that on 8th June 1994, when the two met near their house, the respondent refused to stop and talk to the appellant but instead *"zoomed"* away in the same company car; that the respondent did not apologise for that action of running away in the appellant's company car but rather accused the appellant of making out a case for the police to shoot her dead for stealing a car; that on 22nd May 1994, the respondent refused the appellant to have sexual intercourse with her; that on 25th August 1996, the respondent informed the appellant that she would never open the gate to their matrimonial house for him; that earlier on 23rd May 1996 the respondent arranged a reconciliatory meeting at Fairview Hotel without the appellant's notice; that on 4th October 1996, the respondent dared the appellant to file divorce proceedings but the appellant declined as their last daughter was still in the college; that on 17th February 1997, the respondent challenged the appellant to remarry and start another family as she was not interested in him as a husband; that the respondent removed window curtains, utensils, furniture and the appellants clothes from their matrimonial house at Nyeri and when asked where the clothes were, the respondent said she had burnt them all; that on 28th March 1997 after some arguments between the two in the morning, the respondent followed the appellant in the office later and insulted the appellant there for over two hours using unprintable words and threatened to beat up the appellant; that on 31st March 1997, the respondent took away all the titles to their properties and only returned them on 30th September 1997 after lodging a series of cautions on the said properties, and after challenging the appellant to move out of their matrimonial home; that on 7th October 1997, the respondent told the appellant he was stinking terribly and that on 26th December 1997 after the appellant had moved out of the matrimonial house on 11th December 1997, the respondent wrote a letter of apology to the appellant but alleged satanic forces were behind her unpredictable behavior.

In response to those allegations in the appellant's petition, the respondent in her answer to the petition dated 29th December 1999 and filed on 30th December 1999, denied treating the appellant with cruelty

and denied the particulars of cruelty cited in the petition. She averred that the problems in their house including that of bad odour started after the appellant had started extra marital affair with one R.K and while admitting that she made remarks to the appellant on the bad odour, she maintained that that remark was made in good faith and out of concern for the appellant's health which she felt needed medical attention. She admitted removing curtains, utensils and other items from their matrimonial house in Nyeri, but said she did so to discourage the appellant from taking R to that house as she had heard he was doing. She admitted declining the request to have their property at Thindigwua sold as she felt that the property was not the appropriate property to be sold at that time since there were other properties available for sale and there was no pressing financial need to necessitate the sale of that property. She specifically denied that she deserted the matrimonial house on 7th June 1994; that she burnt appellant's clothes; that she suggested to the appellant to file divorce proceedings; that she took titles to their properties away; that she remarked that the appellant wanted police to shoot her; that she challenged the appellant to start another family; that she refused sexual intercourse with the appellant and all the allegations against her. She stated further that she placed Cautions on the property titles to prevent transfer to R. She ended that answer to the petition by stating that she loved her husband and had forgiven him for his cruelty to her but sought dismissal of his petition as she felt the marriage had not broken down irretrievably.

The appellant gave evidence and called no witness. Likewise, the respondent also gave evidence and did not call any witness. Letters and a note we have referred to here inabove, were produced and admitted in evidence. The learned Judge of the superior court, Aganyanya J. (as he then was), after hearing the entire case and the submissions by the learned counsel representing the parties in a detailed and well considered judgment dismissed the petition saying in conclusion:-

"I am sorry I am not convinced all the incidences of cruelty cited in paragraph 6 of this petition have been proved to the satisfaction of this Court to amount to cruelty in the ordinary sense of the word and the petitioner was set on a mission since 1994 to divorce his lawful wife to concentrate on R and has only come to this Court for an order to enhance that mission.

However, this Court cannot be used to satisfy the whims of such a litigant."

That is what has prompted this appeal before us which is a first and last appeal. It is premised on seven grounds which are namely that:-

> ***"1. The learned Judge misdirected himself as to the application of the principles in the case of <u>Meme vs. Meme</u> (1976) KLR 13***
>
> ***2. The learned Judge erred in law and fact in refusing to appreciate the cause and effect on the marriage vis-à-vis respondent filing for the division of matrimonial property in H.C.C.C. (OS) No. 399 of 2000.***
>
> ***3. The learned Judge erred in law in failing to accept the fact that due to the effect of cruelty caused by the respondent the appellant has been in dissertion since 11.12.1997.***
>
> ***4. The learned Judge misdirected himself when he rejected all the Judicial Precedents cited by the petitioners as being irrelevant and bad law.***
>
> ***5. The learned Judge erred in holding that the petitioner's marriage had not broken down irretrievably.***
>
> ***6. The learned Judge misdirected himself by exhibiting bias and partiality against the appellant in trivializing his entire evidence inter alia that the appellant is a person of arrogant attitude, immoral, dishonest and disrespectful of court orders.***
>
> ***7. The learned Judge erred in law and fact in failing to appreciate the fact that all***

the three (3) issues of marriage are all grown ups and working for gain in United Kingdom and in United States."

In his submissions before us, Mr. Guantai, the learned counsel for the appellant referred the Court to the petition, to the evidence and to the judgment and contended that the allegations of use of derogatory language by the respondent, against the appellant; refusal of sexual intercourse; taking the appellant's company car; insulting the appellant in his office and refusal to open the gate for the appellant were all clear incidences in proof of cruelty and should have been viewed by the learned Judge as such. Further he argued that it was not proper for the learned Judge to conclude that the appellant had set up his mind to divorce the respondent and in order to realize that goal, he picked up bits and pieces of occurrences as incidences of cruelty. In his view the cited particulars of cruelty were grave and of weighty nature as there was reasonable apprehension of injury as the respondent had even asked the appellant to see a psychiatrist. He concluded his submission by maintaining that the ground of cruelty on which the appellant relied was proved to the required standards and the learned Judge of the superior court erred in refusing to grant divorce to the appellant.

The respondent addressed us in person. She urged us, to consider that the marriage had been a happy one from 1971 when they wedded upto 1994 when the appellant, because of extra-marital affairs with R started going home late. As to taking the company car, she said she did what she had been doing previously and no complaint had been raised by the appellant. On the main, she explained the various incidences that were raised in the petition before the superior court and when asked by us as to whether she was still interested in the marriage as she had taken her share of the family property, she was categorical that she did not want divorce on two grounds, which are that as Christians, the two took their vows before God and would not break the vows, and secondly that the appellant in any case was seeking divorce for the wrong reasons.

As this isfirst appeal, we are bound to look at the evidence that was adduced before a the superior court a fresh, analyse it, re-evaluate it and reach our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and giving allowance for that.

As we have stated above, the entire petition was based on the allegation of one matrimonial offence only and that was cruelty. On the whole, fifteen incidences of what the appellant felt were incidences of cruelty to him, were relied on. However, during the hearing of the petition, the appellant added another item which stemmed from the allegation that he was stinking and that was the respondent's refusal to kiss him. We have set out above all the particulars of cruelty as stated out in the petition, and we do not find it necessary to repeat them here. We however, think the most important ones are given in a summary in the appellant's evidence in re-examination. He stated there as follows:-

"Lack of sexual intercourse, burning my clothes, saying I stink all culminated in my moving out.

I also feared physical violence."

That list leaves out the allegations on the respondent going away with company car; refusing to kiss him, taking title deeds; refusing to open the gate for him; deserting home on 7th or 8th June 1994, refusing to give consent to sell their plot at Thindigua, Kiambu, insulting him in the office and refusing to talk to him when she met him in his company's car at the matrimonial house's gate the day she returned from wherever she went when she allegedly deserted house. We think these particulars were properly left out by the appellant in the summary he gave in his evidence in re-examination, because in our view, they do indeed amount to bits and pieces put together to make a case. They cannot be seriously relied on as acts of cruelty in the normal tear and wear of marriage life between a husband and wife and particularly when it is considered that the two had lived happily for about 23 years.

In our view, it is natural, that when one of the party to a marriage feels for one reason or the other that a property acquired during coverture should be sold, consent of the other couple be sought and obtained. In seeking that consent one must accept that the other partner may object as happened here. We cannot see

how such dissent can amount to cruelty in law and how it can be relied on to secure divorce. One seeking consent must be prepared for dissent. Secondly, the respondent agreed that she used the appellant's company car to go to their matrimonial home in Nyeri. Her explanation for that is that she used to do so on several occasions previously and no offence was registered against her. She returned after one day i.e. On 8th June 1994, and when they met at the Nairobi house gate, she could not talk to the appellant as she was rushing to go and buy gas at a petrol station with the intention of talking to the appellant on arrival back home. Those facts were not disputed and when one considers that these incidences happened in 1994, five years before the petition was filed and three years before the appellant left home, and noting that though the appellant alleged the respondent deserted house for over a week yet in the same petition he stated that she left on 7th June 1994 and by 8th June 1994 they met at the gate, one cannot fault the superior court Judge when he concluded that he was not satisfied with those allegations of cruelty. Further, on temporary retention of title documents, the respondent again agreed she retained them and used them during that period to lodge caution against them because she feared the appellant would transfer some of their matrimonial properties to R. She however, returned them intact. That fear was real as the appellant had admitted having extra-marital relationship with R and had adamantly said he would not stop it. When one considers that the relationship between the appellant and the respondent was already sour, one can understand that action as that of a mother protecting her interests and those of her children and the appellant was aware of this for he too said in evidence that he would not transfer to R the properties acquired by him and the respondent, meaning that such possibility loomed large. The removal of window curtains, utensils, furniture and appellant's clothes from their matrimonial house was admitted by the respondent and explained as her attempt to contain the appellant's extra-marital activities in their matrimonial house at Nyeri and an act to ensure the house was not defiled. That act was reasonable in the circumstances obtaining. She also explained that the appellant's clothes were not burnt but we will discuss that aspect later in this judgment. On the allegation that the respondent insulted the appellant in his office on 31st March 1997, there was no evidence of the words used which amounted to insults, neither was there any allegations of the insults being uttered in the presence of any other person so as to cause any embarrassment to the appellant. Mere allegations of insults will not be enough to sustain a plea for divorce. The allegation that the respondent refused to open the gate to their matrimonial house for the appellant was also admitted but the respondent explained that because the appellant formed the habit of coming home late since 1994 when he got into extra-marital relationship with R, she prepared a bunch of duplicate keys, gave them to him to enable him open the gate any time he returned home. This was not disputed and cannot be said to have been an inappropriate arrangement in the circumstances. The claims that the respondent on several occasions called upon the appellant to commence divorce proceedings against her and to remarry another woman and start another family were denied by the respondent who also alleged that it was the appellant who wanted divorce whereas the respondent and other family members pleaded with him to hold on till their last child completed her examinations. The appellant said these requests were made on 24th May, 4th October 1996 and 17th February 1997. There is evidence part of which has been reproduced above, that the appellant left the house leaving behind a note written by himself stating that he was leaving the house. In his evidence in cross-examination he said:-

> ***"Even if I had no other woman I would not move (sic) back to the matrimonial house, that it is not true, thus it is not true. (sic) I am out of this matrimonial house because of another woman."***

That is not the conduct of a person who was unwilling to move out of the house or who was forced to file divorce proceedings against his will.

The above allegations of cruelty were, in our view matters that needed not be cited as particulars of cruelty in seeking divorce.

As we have stated and as the learned Judge also rightly pointed out, perhaps the main thrust of appellant's complaint was that he was referred to as *"stinking"* by the respondent. He added in his summary above that refusal of conjugal rights and burning of his clothes were also some of the reasons why he moved out of the matrimonial home and eventually filed the petition. We now turn to consider those three allegations. We do agree with the learned Judge, and it is the law, that he who alleges is required to prove his allegations. In the petition, the appellant alleged that the respondent had burnt his clothes. He had the

onus of proving that allegation. The respondent denied that allegation and stated the clothes were in their matrimonial house in Nairobi. In his evidence on that allegation the appellant stated that the respondent told him she burnt the clothes but that as in her answer to the petition she said she did not burn them, she should return them to him if indeed she did not burn them. The respondent's evidence on that is as follows:-

> ***"I took clothes and curtains from the rural home to our house in Nairobi – not an undisclosed destination…..***
>
> ***This was done in order to discourage petitioner going with his mistress there to defile my bed as well as children's bed……***
>
> ***When petitioner asked me about his clothes I never told him I had burnt them. In any case he saw his clothes at the house in Nairobi. I should (sic) them to him."***

In cross-examination she was emphatic that she did not burn his suit as he moved away with it. Against the allegation of the appellant that since his clothes were not there, they must have been burnt, and considering that the appellant was allegedly going home late after 1994, it is possible that he never had time to see his clothes in the matrimonial home. We see no reason to think the respondent burnt the appellant's clothes as there is no proof of that contention. On refusal of conjugal rights, the respondent's position is that she never refused to have sexual intercourse with the appellant at anytime. In cross-examination, she said that she still had intercourse with the appellant even if he had been out with R and in her answer to the petition, the respondent stated that the appellant was never there to have sexual intercourse with her as he either went home late or not at all. Against all these, the appellant's evidence was merely that the respondent refused him sex from 1994 when they started these problems otherwise he was always available, except on those days he went to their rural home. He accepted that at times he would come home late and that was also one of the reasons why one incidence of cruelty was cited namely that the respondent refused to open the gate for him. In those circumstances, the allegations of the respondent that her husband was not there for her even though she was available for him cannot be anything but honest. As will be seen later in this judgment, the cruelty upon which a party to a divorce cause relies on must be proved to the satisfaction of the court. Hence the trial court was not satisfied with the allegation of denial of conjugal rights to the appellant, and we, on our own, having considered the evidence on record, are also not satisfied that it was proved within the standards required.

That leaves one main allegation for cruelty to be considered, and that is the allegation that the respondent told the appellant he was stinking. The respondent admitted having told the appellant so but said she did so out of love for her husband and concern for his health. She apologized for the remark in a letter she addressed to the respondent soon after the respondent left the house. In that letter dated 26th December 1997 she stated inter alia as follows:-

"I got your note of 11.12.97. I just want to make an apology to you. I sincerely apologise to you for telling you that you had an odour. I did it sincerely from the bottom of my heart for someone I care about. It took me a long time and a lot of courage because my aim was for you to seek help but not to embarrass you. I was just trying to help. May be I said it foolishly but that was not my intention. I meant well."

In the petition, the appellant stated that pursuant to the above:-

"The respondent once went to the petitioner's office to ask one of his colleagues whether indeed he smells,"

an allegation which the respondent refuted at paragraph 4 (c) of her answer to the petition. In his evidence in chief, the appellant did not confirm that allegation which in our view would have been viewed as serious as in that case the respondent would have not only told him he was stinking but would have gone too far in informing his colleagues as well, thus deliberately embarrassing the appellant. However, in his evidence he gave a totally different version. He said:-

"I was very annoyed and told her I was going to check with other people who work closely with me to confirm if I stink. I did exactly this. I checked with my deputy and personnel and Human Resources Manager – Mr. Ritho and Miss Mbaka."

It emerges from the above that the appellant, instead of checking with the doctor as the respondent suggested, did check this remark with his own colleagues. Apart from saying he was annoyed when that remark was made, the appellant did not state what injury to his health or otherwise that remark caused. Although in his petition he stated that the remark was made on 7th October 1997, in his evidence he said it was made in July 1997. Since the respondent admitted making the remark and apologized for it, that discrepancy is neither here nor there, but is only important in that if it was made in July 1997, the appellant took another five months till December 1997 when he moved out of the house because of it, among other allegations of cruelty. As matters stand, and as the appellant apparently never saw a doctor to confirm to him whether the remark was true or not and as the appellant did not tell the trial court what Ritho and Miss Mbaka told him when he checked with them and further as there was no injury alleged by the appellant to his health and no evidence of his having been embarrassed in any way by the respondent telling anybody about his alleged stinking, and noting that he had the burden of proving these and did not do so or even make any attempt to do so, we find it difficult to fault the learned Judge in his refusing to rely on this alleged offence to grant divorce. The law as regards the principles that guide the court when considering a petition for divorce based on the allegation of cruelty is well settled. We agree with Chesoni J. (as he then was) in his observations in the case of ***Meme vs. Meme (1976) KLR 13*** where he referred to several decided cases and thereafter stated:-

"Cruelty as a matrimonial offence upon which a petition for dissolution of a marriage may be grounded is defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger (see Russell vs. Russell (1895) pg 315, 322 and Horton vs. Horton [1940] pg 187. This is by no means a comprehensive judicial definition of cruelty. It is so difficult to attach a comprehensive judicial definition to that term that it is dangerous to use factors of previously decided cases as precedents. Each case of cruelty has to be decided on its own facts.

For cruelty to be established two tests must be satisfied. These are first whether the conduct complained of is sufficiently grave and weighty to warrant the description of being cruel; and secondly whether the conduct has caused injury to health or reasonable apprehension of such injury."

We have also perused and considered the decision of Jocelyn Simon P in the case of ***Mulhouse vs. Mulhouse (1964) 2 All ER 50*** where the learned Judge stated:-

"Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt; Bater vs. Bater (1951) pg 35. That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct 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. Secondly, it must be proved that there is a real injury to the health of the complainant or a 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 this should be proved a real impairment of health or a reasonable apprehension of it. Thirdly, it must be proved that it is the misconduct of the respondent which has caused injury to (the) health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought the trouble on himself or herself, the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of the term."

Although Chesoni J.'s decision in ***Meme vs. Meme's*** case was a decision of the superior court, we are of

the view that that decision was sound in law and we adopt it. We also agree with his comment on Simon P.'s decision above, that the standard of proof should not be beyond reasonable doubt for that is mainly a preserve of the requirements in criminal cases, and that in civil cases such as divorce, the proof should be to the satisfaction of the trial court.

In the first ground of appeal before us, the appellant states that the learned trial Judge misdirected himself as to the application of the principles in ***Meme's*** case (supra). During his submissions, however, Mr. Guantai did not address us on that ground. On our own, we have anxiously considered that allegation, but with respect, we are unable to make that conclusion. Indeed the learned trial Judge considered the principles in ***Meme's*** case in detail, referring to other cases, and in our view made proper application of the same and arrived at the only conceivable conclusion.

We have set out the facts of this matter as they were before the superior court. We have analysed the evidence and evaluated the same as a first appellate court and we have considered all the grounds of appeal before us. On the available evidence and the law as set out above, we are, like the trial court, not satisfied that the appellant, who had the burden of proving cruelty against the respondent, did prove his case within the standards required. Further, and even more importantly, he has not stated how the alleged cruelty affected his health or how it affected him psychologically. If anything, he is the one who admitted a matrimonial offence of adultery but as there was no cross-petition and the respondent said she had forgiven him for that offence, we leave it at that. There were allegations, admitted by the respondent that the two had shared out matrimonial properties. Relying on that the appellant's counsel suggested the marriage had broken down irretrievably. The respondent however, is adamant that the marriage is still alive and there is no legal basis for dissolving it. There is no provision in our laws that entitles a court of law to order divorce on grounds that the marriage has broken down irretrievably, and we are not about to do that. Neither is it a ground for divorce that the children of the marriage are adults and working for gain. Marriage is indeed between two people and the children of the marriage are God's blessings and no more. None of the couples to any marriage is entitled to divorce because these issues are adults. We find it difficult to appreciate this ground of appeal.

In conclusion, having considered all aspects of this appeal, we are unable to disagree with the learned Judge of the superior court. The appeal cannot succeed. It is dismissed with costs to the respondent. Orders accordingly.

Dated and delivered at Nairobi this 28th day of January, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR