IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 31 OF 2000

A K.....APPELLANT

AND

A W K….....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Bosire, J) dated 9th May, 1995

in

H.C.DIVORCE CAUSE NO. 75 OF 1992)

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JUDGMENT OF THE COURT

A K, the appellant, appeals from the judgment of the superior court (Bosire, J, as he then was) whereby the learned Judge declined to dissolve the marriage between the appellant and A W K, the respondent, which marriage was solemnized on 29th November, 1986 at St. Peters and Paul Catholic Church, Kiambu in accordance with The African Christian Marriage & Divorce Act, Cap.151, Laws of Kenya.

The petition for dissolution of the said marriage was based on the ground that the respondent had committed acts of adultery with three named persons. They are (1) J K alias "Wa T" (2) R M also known as H and (3) G K K also known as G. Only the second of the named co-respondents entered an appearance to the petition. The other two did not. The respondent entered an appearance to the petition but did not file an Answer thereto. The second co-respondent also, did not file an answer to the petition within the time allowed by rule 16 of the Matrimonial Causes Rules, or at all.

Although the petition was based on other two grounds, namely; (1) that the respondent was extravagant and had dissipated funds entrusted to her by the appellant for constructing a house and (2) that she had neglected the children of the marriage by being drunk and moving out of the matrimonial home on 12th July, 1992, these grounds (which presumably fall under the ground of cruelty) were not seriously gone into and could be deemed as abandoned. The learned Judge assumed that the ground regarding lavishness in money spending was abandoned, and in our view, he quite properly did so.

The only ground which the learned Judge had to deal with was that of adulterous acts of the respondent with the three named co-respondents. The evidence as adduced by the appellant to prove adultery, according to the learned Judge fell short of proving a matrimonial offence which would entitle the appellant to have his decree nisi of divorce.

The evidence which the appellant adduced to try and prove the alleged adulteries was four-fold. He

attempted to convince the court that adulterous association between the respondent and some other person could be or ought to be inferred from the fact that she was suffering from a sexually transmitted disease with which she infected the appellant who never had such a disease previously. The appellant was asking the court to infer that as he was infected by the respondent and as he had never slept with any other woman the respondent must have had extra-marital affairs with someone else. Although he was told by a doctor in Kenya that his wife was treated for sexually transmitted disease he did not call the doctor who so informed him. Nor did he produce documents showing that the respondent was so treated. That version of the appellant, if considered solo, does not have any probative value, as in fact the learned Judge found.

Secondly, the appellant asked the court to infer that the respondent must be committing adultery as she was never at home in the middle of the night when he often used to call her from abroad. By itself such evidence does not establish adultery on the part of the respondent and the learned Judge was not satisfied that that fact proved any adultery. The learned Judge cannot be faulted on that.

Thirdly, the appellant relied on some of the contents of a letter, undated, written to him by the respondent, to show that the respondent must have committed adultery. The learned Judge in his judgment pointed out that the passages in that letter relied upon by the appellant if read in conjunction with the contents of the whole of the said letter, did not amount to confession of adultery. To that extent the learned Judge was right. The letter does not amount to a confession or confessions of adultery by the respondent. The passage more strongly relied upon by the appellant to prove adultery on the part of the respondent reads:

"Start thinking of fresh and new life for your two kids plus the other two of your hug at Kajiado. And myself with my son and never again tell me to take him to his (father?) since the father has got his own family and I'm not a cripple that I can't be able to take care of my lovely son".

Whilst the above-quoted passage by itself does not amount to a full-bodied confession of adultery it does suggest that the respondent may have had a child by another man who has his own other family to look after. But the learned Judge thought that the letter was written in anger - "in a huff" - and fell short of amounting to confession of adulterous association.

Fourthly the appellant attempted to prove adultery by reason of opportunity and inclination, that is to say, that the respondent was minded to have nothing to do with the appellant and that she had other men around her and that as she was living separate from the appellant, there was necessary atmosphere conducive to committing adultery. He asked the court to draw the inference that as she was seen in compromising circumstances with the first co-respondent by P N N (PW2) adultery must have taken place. The compromising circumstance that PW2 talked of was that he found the respondent seated on the 'laps' of Wa T inside the shop and that he severally saw the two of them together in Wa T's car at night.

The learned Judge applied the test of proof beyond reasonable doubt to arrive at the conclusion that no adultery was proved. The learned Judge relied on the authority of Wangari Mathai vs. Mwangi Mathai (1980) K.L.R. 154 to say that proof of adultery must be beyond reasonable doubt. What the learned Judge did not consider was the holding in the Wangari Mathai case which equates, for the purposes of proof of matrimonial offences, beyond reasonable doubt burden of proof to that of being satisfied as to be sure. The Court in Wangari Mathai case stayed away from the analogy of Criminal Law standard of proof beyond reasonable doubt. That is correct as it would be wrong to say that adultery must be proved with the same strictness as is required in a Criminal Case. The learned editors of Rayden's Practice and Law of Divorce, 10th Edition, say in paragraph 109 at page 176:

"The burden of proof is throughout on the person alleging adultery there being a presumption of innocence. Reference to the statute shows that the standard of proof is that the court must be "satisfied on the evidence." The Act makes no distinction between the standards of proof of adultery and that of any other ground of divorce but this has not in the past been reflected in the cases, which have required the same strict proof in respect of adultery as is required in a criminal case before an

accused person is found guilty, that is, that the tribunal must be satisfied beyond all reasonable doubt. But it has been held that a suit for divorce is a civil and not a criminal proceeding and that the analogies and precedents of criminal law have no authority in the Divorce Court, which is a civil tribunal. It is wrong therefore to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other ground for divorce, may be proved by preponderance of probability."

Applying the yard-stick 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.

Section 10 of The Matrimonial Causes Act Cap.152, Laws of Kenya, where pertinent, sets out the standard of proof required to prove a matrimonial offence. The section says:

"10(1)On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged, and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any counter-charge which is against the petitioner.

(2)If the court is satisfied on the evidence that:

(a)The case for the petitioner has been proved; and

(b)Where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or where the ground of petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) The petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition"

The requirement is that the court must be satisfied that a matrimonial offence has been proved. The Act (Cap 152) does not refer to proof beyond reasonable doubt and it would therefore be proper to put or place the burden of proof at the level of feeling certain or sure that a matrimonial offence has been committed.

Having discussed the burden and standard of proof in matrimonial disputes we revert to the evidence which was adduced by or on behalf of the appellant. As already pointed out there was no acceptable evidence on a preponderance of probability to the effect that the respondent was suffering from a venereal disease transmitted to her by a person other than the appellant. Unanswered telephone calls in the middle of the night do not call for an inference of adultery. Absence from home during the middle of the night on repeated basis may create, at the most, some suspicion of extra-marital affairs.

The contents of the afore-mentioned letter do raise a suspicion that the respondent may have had a child by another person and in the absence of any evidence to contradict that factor inference of adultery may be drawn. It must be remembered that the respondent did not defend the petition. We think the learned Judge, with respect, misdirected himself when he concluded that the letter was written in a huff. That would have been for the respondent to say and she did not say so either under oath or by way of an Answer confirmed under oath. Of course an Answer, save in respect of mere denials, needs confirmation under oath.

The compromising circumstances in which the respondent was often found by PW2 do suggest that adultery could have taken place. As argued by Mr. Gathenji for the appellant there was opportunity and

inclination. Inclination as the marriage had irretrievably broken down and opportunity as the appellant was abroad. The evidence of PW2 was unchallenged and raises a presumption of an adulterous association. In the absence of a challenge to such evidence we can presume that adulterous association did exist between Wa Teresa and the respondent.

In all the circumstances and facts narrated before the superior court and having re-evaluated the evidence of the appellant and PW2 we feel sure that the respondent was guilty of an adulterous association with Wa Teresa. We must make it clear that we are not departing from the standard and burden of proof of adultery as set out in the Wangari Mathai case (supra), in which case the Court said at page 156 I:

"The learned Judge is here explaining and amplifying what he meant in Ouko's case [(Ouko v. Ouko, Divorce Case No. 71 of 1975) (unreported)] when he said that the standard of proof required to establish a charge of adultery was by preponderance of probability. He meant more than a mere balance of probabilities. To be satisfied that a charge of adultery has been made out, he said, the court must feel sure of the guilt of the respondent."

If the learned Judge had adopted the course followed by Chesoni, J (as he then was) in the Wangari Mathai case in the High Court and by this Court in the appeal from that decision we believe he would have found adulterous association proved.

We therefore allow this appeal, set aside the dismissal of the petition in the superior court, and order issuance of a decree nisi for dissolution of the marriage celebrated between the appellant and the respondent on 29th November, 1986 at St. Peters and Paul Catholic Church in Kiambu. The period of making decree nisi so issued, absolute, is reduced to one month. We make no order as to costs.

Dated and delivered at Nairobi this 1st day of December, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.