JKS v JGI (Civil Appeal E099 of 2023) [2025] KEHC 11961 (KLR) (8 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E099 OF 2023

RN NYAKUNDI, J

AUGUST 8, 2025

BETWEEN

JKS ..... APPELLANT

AND

JGI ..... RESPONDENT

(Being an Appeal from the entire Judgement of Hon. R. Odenyo SPM delivered on 11th May 2023 in Eldoret Divorce Cause No. 34 of 2020)

JUDGMENT

Representation:

M/s Chemwok & Co. Advocates

M/s Tororei & Co Advocates

1. The background of this Appeal is that the Appellant, JKS, instituted Divorce Cause No. 34 of 2020 against the Respondent, JGI, on the grounds of cruelty, desertion, and negligence, claiming that the marriage had irretrievably broken down. By an answer to the petition dated 17/8/2020 and filed on 25/8/2020, the Respondent denied the averments in the petition and prayed for dismissal of the petition with costs.

2. Upon being referred to Court-Annexed Mediation in Eldoret Mediation Cause No. 38 of 2021, the parties failed to resolve their differences, and the matter reverted to the Trial Court. The Petition was ultimately dismissed on 11th May 2023 via a judgment delivered by Hon. R. Odenyo SPM.

3. The Appellant being aggrieved by the said Judgement instituted this appeal vide a Memorandum of Appeal dated 7th June 2023. The memorandum of Appeal was premised on the following 6 grounds;

a. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's petition dated 29th June 2020 without considering wholesomely the pleadings of the parties, their evidence and the submissions and authorities cited by the Appellant which are on record.

b. That the Learned Trial Magistrate erred in law and fact in being biased by failing to be independent in his decision by believing the fabricated testimony of the Respondent on the Appellant's cruelty towards her without any proof at all and in totally disregarding and ignoring the evidence of cruelty on the part of the Respondent upon the Appellant and their children on record.

c. That the Learned Trial Magistrate erred in law and in fact by contradicting the principles established under Article 159(2)(c) of *the Constitution* by failing to appreciate that the Appellant and the Respondent attended several sessions of Court Annexed Mediation in Eldoret Mediation Cause No. 38 of 2021 since the matter was referred to mediation at the request of the Respondent on 19/03/2021 which provided an open avenue for discussions but still the parties did not agree to living together as a couple due to their irreconcilable differences.

d. That the Learned Trial Magistrate erred in law and fact by totally disregarding the mutual testimony of both parties where they both acknowledged that they no longer live together since the year 2019 hence no enjoyment of conjugal rights since then.

e. That the Learned Trial Magistrate erred in law and in fact in totally disregarding the decision of the Children's Court in Eldoret Divorce Case No. 164 of 2019 where the Court on 15th November, 2019 had granted the Appellant actual custody of their two issues of marriage and the other two issues to the Respondent which is enough proof that the two could no longer live together.

f. That the Learned Trial Magistrate erred in law and in fact in attempting to force the Appellant and the Respondent to live together whereas from the circumstances of this case, it can only be concluded that their marriage has irretrievably broken down.

4. The Appellant sought the following prayers from the Memorandum of Appeal;

a. The Appeal be allowed.

b. This Honourable Court be pleased to set aside the Judgement of the trial court in its entirety and to allow the Appellant's Petition dated 29th June 2020.

c. Costs of this Appeal be awarded to the Appellant.

5. The Respondent filed a Response to the Appellant's Memorandum of Appeal and stated as follows;

a. That indeed the Learned Trial Magistrate considered wholesomely the pleadings the parties evidence demeanor and made the best decision so far.

b. That the Learned Trial Magistrate did considered all the facts and evidence indeed the only cruelty was denial of conjugal rights by the Appellant sleeping in his mother's house which the court noted and particularly being a mother's child held captive thereto.

c. That the Trial court considered in details the principles enunciated Under Article 159 (2) (c) of *the Constitution* when the court gave the parties an opportunity to relate through mediation.

d. That the court appreciated the difficulty of the Mediator when the Appellant failed to leave his mother's unit to join his wife in holy matrimony.

e. That the Trial court too appreciated that the Appellant fulfilled all family obligations viz, purchase of food, payment of school fees, electricity, saloon for his wife and daughters and so forth. So really the greater impediment was the Appellant's mother who controlled the Appellant fully and the court found that, that was not a good reason to wit grant a divorce.

f. That the Trial court indeed could not comprehend how the Appellant could be held at ransom by his mother to the detriment of his family yet he showed the court that he loved his wife and children fully as he doesn't have any negative sentiment and bad feelings to his family. The court in a rare appreciation ordered that the divorce be dismissed in favour of unity of the Appellant's family and the Appellant was indeed happy.

g. That the Trial court distinguished the not so living together with the pulling apart by the Appellant's mother and step father to fulfil family secrets/taboos as against the Appellant's desire to reconcile with his wife and children a stone throw away from the mother's house.

h. That the Trial court was right to ignore the decision of the children's court as then children were toddlers and needed their mother's love and their fathers love not forgetting that all every shopping is done by the Appellant whether bread, maize meal and sundry fully provided for and the children relating with their father and mother though the father sleeps in his mother's house.

i. That the trial court appreciated that though the Appellant scalded the respondent with hot water scaring one of her breasts, the court noted the apology of the Appellant towards his wife and thus ignored the same in favour of family unity.

j. That truly speaking the Appellant desires to be with his family but thoroughly dressed down by his mother and step father in essence it's not forcing but appreciating family intricacies. The Trial court noted the Appellant's predicament thereto a fact it considered rightfully.

k. That the Appellant as pointed by his mother has married or intent to marry a 2nd wife which is not objected by the respondent who can be left in her matrimonial home with her children a decision insinuated to the court both at mediation and during the Trial. the court was alive and indeed considered the same in its decision.

6. The Respondent sought the following prayers from her response;

a. The Appeal be dismissed with costs.

b. That the Lower court judgement be upheld

c. That the petition dated 29th June 2020 be dismissed with costs

d. That the costs of the Appeal be awarded to the Respondent.

7. The Appeal was canvassed by way of written submissions.

Summary of the Appellant's submissions

8. The learned counsel for the Appellant submitted that the Appellant, JKS, instituted Divorce Cause No. 34 of 2020 against the Respondent, JGI, on the grounds of cruelty, desertion, and negligence, claiming that the marriage had irretrievably broken down. The parties contracted a customary marriage in 2012 under Nandi and Embu customary laws and had four children. However, the Appellant stated that during the subsistence of their marriage, the Respondent subjected him to cruel treatment,

neglect, and desertion, including locking their children in the house for three days, quarrelling, disrespect, and failure to perform family responsibilities.

9. Upon being referred to Court-Annexed Mediation in Eldoret Mediation Cause No. 38 of 2021, the parties failed to resolve their differences, and the matter reverted to the Trial Court. The Petition was ultimately dismissed on 11th May 2023 by Hon. R. Odenyo, SPM. Dissatisfied, the Appellant filed the present appeal supported by a Memorandum of Appeal dated 7th June 2023. The learned counsel listed 3 issues for determination as follows:

    a. Whether the Appellant proved his case on a balance of probabilities to warrant the grant of divorce orders.

    b. Whether the Appellant is entitled to the orders sought.

    c. Who should bear the cost of this Appeal.

10. Whether the Appellant Proved His Case on a Balance of Probabilities- counsel submitted that Section 69 of the *Marriage Act* provides for grounds of dissolution of customary marriages, including cruelty, desertion, and irretrievable breakdown. It was argued that the Appellant's evidence met the legal threshold for dissolution. The *Marriage Act*, 2014 and Article 45 of *the Constitution* both emphasize that marriage must be voluntary, and where a union ceases to be so, it no longer qualifies as a valid marriage. To reinforce this, reliance was placed on In Re Estate of Jecinter Njoki Okoth (Deceased) [2020], where Justice R. Nyakundi stated that a marriage is a voluntary union, and parties may choose to leave freely. The Appellant submitted that the marriage had become involuntary due to the Respondent's continued acts of cruelty and emotional abuse.

11. On cruelty, counsel cited Black's Law Dictionary (8th Ed.) and referred to the authority of Meme Vs Meme [1976–80] KLR 17, as affirmed in RMT v FCT (Civil Appeal E02 of 2020) [2023]. The test established includes:

    a. Misconduct of a grave and weighty nature;

    b. Real injury to health or reasonable apprehension of such injury;

    c. Intentional and unjustifiable conduct;

    d. A course of conduct amounting to cruelty in its ordinary meaning.

12. The Appellant detailed several instances including verbal abuse, threats of violence, desertion, lack of communication, and abandonment of the children, which, taken cumulatively, amounted to cruel treatment warranting dissolution. Counsel submitted that the Trial Court misdirected itself by overlooking these particulars of cruelty and speculating without evidence that the Respondent may have been the aggrieved party. The Appellant emphasized that Court-Annexed Mediation had failed, demonstrating irretrievable breakdown of the marriage. The decision in Kamweru v Kamweru [2000] eKLR was cited in regard to the standard of proof, where the court noted that matrimonial offences (cruelty, desertion, adultery) may be proved on a balance of probabilities, not beyond reasonable doubt.

13. On whether the Appellant Is Entitled to the Orders Sought, having satisfied the burden of proof, counsel submitted that the Appellant was entitled to the divorce orders. The learned counsel emphasized that where voluntariness ceases to exist in a marriage, it offends the legal character of marriage as defined under Section 3 of the *Marriage Act*. Once again, counsel referred to Article 45(2) of *the Constitution*, which guarantees every adult the right to marry based on free consent. Reiterating Justice Nyakundi's holding in In Re Estate of Jecinter Njoki Okoth (Deceased), counsel argued that the

Appellant voluntarily entered into marriage, but had a constitutional right to leave voluntarily upon facing irreconcilable challenges and mistreatment.

14. On the issue of costs, counsel submitted that pursuant to Section 27 of the *Civil Procedure Act* (Cap. 21), costs follow the event, and therefore, the Respondent should bear the costs of the appeal as the Appellant is the successful litigant.

15. In conclusion, the Appellant contends that he has met the legal threshold for the grant of a divorce, having proved cruelty, desertion, and irretrievable breakdown of the marriage on a balance of probabilities. The Respondent's conduct including emotional and physical abuse, abandonment of children, failure to perform spousal obligations, and lack of communication rendered the marriage intolerable. Counsel submitted that the continued denial of divorce orders by the Trial Court would amount to a violation of the Appellant's constitutional right to freedom of association under Article 36 of *the Constitution*. Accordingly, the Appellant prays that this Honourable Court: sets aside the judgment of the Hon. R. Odenyo (SPM) delivered on 11th May 2023 in Eldoret Divorce Cause No. 34 of 2020; allows the appeal in its entirety and substitutes the same with an order granting divorce as sought in the Memorandum of Appeal dated 7th June 2023 and awards costs of the appeal to the Appellant.

Summary of the Respondent's submissions

16. The learned counsel for the Respondent submitted that the appeal lacks merit and ought to be dismissed with costs, as it merely seeks to re-litigate issues that were thoroughly considered and justly determined by the trial court. Counsel emphasized that the trial magistrate applied the law correctly to the facts, exercised discretion judiciously, and reached a fair decision after engaging both parties directly, even excusing counsel at one point to better understand the parties' personal positions.

17. On the ground of cruelty, counsel submitted that the Appellant failed to prove any of the statutory elements required to support such a claim. On the contrary, credible evidence emerged at trial that it was the Appellant who subjected the Respondent to acts of domestic violence, including scalding her with hot water on her right breast while she was breastfeeding, resulting in serious physical injury. To support this, the Respondent cited DM v TM (2008) KLR 5 and AMA v GSB HCDC No. 134 of 2010, where the courts held that cruelty consists of "willful and unjustifiable conduct of such character as to cause danger to life." Additionally, reference was made to MN v CMN (2024) KEHC 1301 and Kamweru v Kamweru (2000) which clarify the standard of proof required - that misconduct must be of a grave and weighty nature, capable of causing real or apprehended injury to health. It was contended that the Appellant produced no evidence of cruelty by the Respondent and, conversely, the court found him culpable of both physical and emotional abuse.

18. On the issue of desertion, counsel noted that Section 65(c) and 66(d) of the *Marriage Act*, 2014 require proof of willful separation for at least three years, with intent not to return. The Respondent left only to seek medical attention after being injured, and later returned home, negating any claim of continuous and intentional desertion. Reference was again made to Kamweru v Kamweru (2000) and MN v CMN Civil Appeal No. 89 of 2019, which established that desertion must reflect an absence from the "state of the marriage," not a temporary absence. Further reliance was placed on Divorce Appeal No. E001 of 2023, which held that the three-year statutory period must have lapsed for desertion to be sustained as a ground.

19. Regarding the claim of neglect, counsel submitted that the Appellant failed in his duty to provide for the Respondent and their children. He abandoned his spousal responsibilities, forced the Respondent to seek medical and financial help from her family, and engaged in harmful beliefs, including

witchcraft, which created a hostile and emotionally distressing environment. These acts, according to the Respondent, amount to willful neglect under Section 66(c) of the *Marriage Act* and contributed to the breakdown of the marriage. Support for this was drawn from Divorce Cause No. 19 of 2015, where neglect during illness was held to amount to cruelty.

20. In response to the Appellant's claims of contempt and emotional abuse, the Respondent submitted that the trial court rightly found that it was the Appellant who treated the Respondent with contempt, subjected her to both emotional and physical abuse, and created an unstable family environment by living apart and failing to provide for the family.

21. On the welfare of the children, the trial court rightly found that allegations against the Respondent including claims of locking the children in the house were speculative and unsubstantiated. The Respondent, who has been the primary caregiver, continued to support the children responsibly during the Appellant's prolonged absence. Counsel reiterated that in matrimonial causes, the burden of proof lies with the party alleging the ground for divorce. Reference was made to Mbuthia v Jimba Credit Corporation Ltd (1988) KLR, which confirmed that although the standard of proof is not beyond reasonable doubt, it must be on a balance of probabilities, supported by credible and cogent evidence.

22. The Respondent contended that the Appellant had failed to meet this threshold and that the trial court properly evaluated both parties' testimonies, applied correct legal principles, and concluded that the marriage broke down due to the Appellant's conduct not the Respondent's. Notably, the Appellant had even expressed during mediation that he intended to marry another woman but wished to leave the Respondent in her matrimonial home with the children.

23. In conclusion, the Respondent submitted that the Appellant cannot be allowed to benefit from his own misconduct, especially where the grounds of divorce pleaded have not been proven. The trial court's findings were factually sound, legally grounded, and well-reasoned, and should therefore not be disturbed. The Respondent prayed that the appeal be dismissed with costs, and the lower court's decision be upheld in its entirety.

Analysis and determination

24. With this background I will now delve into the substantive Appeal. The question for this Appeal's Court is whether the impugned Judgement of the trial Court can be rationally supported and be affirmed or negated bearing in mind the entirety of the trial, the credibility of the witnesses as measured by the Learned Trial Magistrate which this Court did not have the advantage of, save for the record. The Court in Mbogo vs Shah (1968) EA 93 at 96 provided the following guidance on Appellate Jurisdiction;

> " A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice."

25. In Kenya, Civil Appeals are typically grounded on errors of law or facts made by the subordinate courts or tribunals or the discovery of new and important matter of evidence. An appeal can also be pursued by an aggrieved party before another or an inferior tribunal or court when the appellant can demonstrate that there has been a mistake or an error apparent on the face of the record, or when the impugned court has misdirected itself or failed to consider relevant factors, thereby leading to a wrong

conclusion. In the instant Appeal the Appellant has challenged the decision of a trial court on the following grounds justifying the need for this court to exercise jurisdiction and rule accordingly. The grounds have been decided elsewhere but being the substratum of this Appeal reiterating them causes no prejudice as follows;

a. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's petition dated 29th June 2020 without considering wholesomely the pleadings of the parties, their evidence and the submissions and authorities cited by the Appellant which are on record.

b. That the Learned Trial Magistrate erred in law and fact in being biased by failing to be independent in his decision by believing the fabricated testimony of the Respondent on the Appellant's cruelty towards her without any proof at all and in totally disregarding and ignoring the evidence of cruelty on the part of the Respondent upon the Appellant and their children on record.

c. That the Learned Trial Magistrate erred in law and in fact by contradicting the principles established under Article 159(2)(c) of *the Constitution* by failing to appreciate that the Appellant and the Respondent attended several sessions of Court Annexed Mediation in Eldoret Mediation Cause No. 38 of 2021 since the matter was referred to mediation at the request of the Respondent on 19/03/2021 which provided an open avenue for discussions but still the parties did not agree to living together as a couple due to their irreconcilable differences.

d. That the Learned Trial Magistrate erred in law and fact by totally disregarding the mutual testimony of both parties where they both acknowledged that they no longer live together since the year 2019 hence no enjoyment of conjugal rights since then.

e. That the Learned Trial Magistrate erred in law and in fact in totally disregarding the decision of the Children's Court in Eldoret Divorce Case No. 164 of 2019 where the Court on 15th November, 2019 had granted the Appellant actual custody of their two issues of marriage and the other two issues to the Respondent which is enough proof that the two could no longer live together.

f. That the Learned Trial Magistrate erred in law and in fact in attempting to force the Appellant and the Respondent to live together whereas from the circumstances of this case, it can only be concluded that their marriage has irretrievably broken down.

26. The background of this Appeal is traceable back to the Divorce Petition dated 29th June 2020 in which the factual litigation history is laid bare as follows;

> " 3. That sometime in August 2012, the Petitioner and the Respondent contracted a marriage under Nandi and Embu Customary Laws.
>
> 4. That prior to the said marriage, both parties were a spinster and bachelor respectively.
>
> 5. That immediately after celebrating their marriage the Petitioner together with the Respondent resided at Kapsoya and later moved to Kapseret village in Uasin Gishu County where they cohabited together as husband and wife.
>
> 6. That your humble Petitioner and the Respondent have been blessed with four (4) issues namely;
>
> a) CCS born in 26/09/2008.

b) EKK born in 07/02/2010.

c) JKB born in 06/04/2015.

d) JJS born in 13/04/2019.

7. That both the Petitioner and the Respondent are Kenyan citizens, resident and domiciled in Kenya and it is over three years since they celebrated their marriage.

8. That during the subsistence of the marriage, the Respondent has treated the Petitioner with cruelty, desertion and negligence the principle particulars of which are as follows;

Particulars of cruelty, desertion and negligence

a) The Respondent has formed the habit of frequently using abusive language to the Petitioner, and baselessly quarrelling with the Petitioner.

b) The Respondent has frequently threatened the petitioner with physical violence.

c) The Respondent deserted her matrimonial home in August 2015 and came back in January 2016 without any plausible explanation.

d) The Respondent on the second time deserted her matrimonial home on 5th September 2019 to date without any plausible explanation.

e) The respondent locked the children in the house on 5/9/2019 to 8/9/2019 when with the assistance of the police from Langas police station the children were saved as per OB 22/8/9/2019.

f) Respondent is a person of quarrelsome disposition and has on many occasions been disrespectful and arrogant to the Petitioner.

g) The Respondent is rude and abusive to the petitioner and his relatives.

h) The Respondent has generally failed to perform her family responsibilities.

i) The Respondent has shown utter contempt towards their marriage and total lack of matrimonial commitment.

j) The Respondent has failed to dialogue and communicate with the Petitioner during subsistence of their marriage.

k) Exposing the Petitioner to emotional torture and public ridicule and causing the Petitioner to have issues with trust, self-esteem, confidence etc.

9. That there is a pending children's case number 164 of 2019 now on Appeal at the Eldoret high court.

10. That this Petition is not brought in collusion with the Respondent.

11. That the Petitioners prayer is for marriage to be dissolved.

12. That the marriage has broken down irretrievably.

13. That there have been no previous proceedings and there are no proceedings pending between the parties touching on the marriage herein.

14. That this Honorable Court has jurisdiction to hear and determine this matter.

Reasons Wherefore the Petitioner prays for orders.

(a) That the marriage between the Petitioner and the Respondent be dissolved.

(b) That a mandatory injunction to restrain the Respondent from interfering with the Petitioner.

(c) That the Respondent be condemned to bear the costs of this cause.

(d) Any further or other relief that this Honorable Court may deem just and fit to grant to the Petitioner in the circumstances."

27. This Appeal would be incomplete without a brief commentary on the mythology of creation of the first man and woman in the Garden of Eden which is the foundational story for those who trace their being from the creation of Adam from dust and subsequently of creation of Eve from Adam's rib as a companion. If one has got to speak about the first marriage; Genesis 1: 26-28 expressly state as follows; "And God said, "Let us make man in our image, after our own likeness .... And God (Elohim) created man in His image, in the image of God He created him, male and female He created them. And God blessed them and said to them, "Be fertile and increase..." In God's eyes it is not good for man to be alone hence a man leaves his father and mother and clings to his wife so that they can become one flesh.

28. There is an irrefutable presumption both in common and customary law that the partnership in a marital union is founded on love. And I think this is what is clearly articulated by Oloka Onyango in treatise by Oloka Onyango

> "debating love, human rights and identity politics in East Africa; the case of Uganda and Kenya (2015) 15 African Human Rights Law Journal 29. "Love is a beautiful thing. In its purest form, it brings out the best in us and smoothens our rougher edges. Its importance in human relations is self-evident. If this needed any demonstration, it would be found in the sheer volume of artistic and other work dedicated to the exploration of love's various forms and expressions." Yet it seems that this powerful emotion finds scant emotion in legal imagination. I agree with Mr. Oloko Onyango that *the Constitution* 2010 strategically foundationally does not even mention the canon of love in any of its Article which is at the core of the provisions of family in Article 45 which expressly states as follows;

" 45.

(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

(4) Parliament shall enact legislation that recognizes-

(a) marriages concluded under any tradition, or system of religious, personal or family law; and

(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion,

to the extent that any such marriages or systems of law are consistent with this Constitution."

29. As he rightly notes; "While the 'right' to love appears in no known legal document-national, regional or global-there is no doubt that it is a universal human sentiment. If one was to perform a dissection of the right to love, it would be found implicit in several human rights principles -freedom of association and expression, the right to health, the right to privacy and especially in the right to human dignity. Despite the absence of the right in a normative form, it is a central feature of human existence, especially within the context of sexual expression. To deny its existence is to deny the very essence of our humanity."

30. To the building blocks of the right to love identified by the learned author Oloka, one would add another: the right to marry and form a family. Where love cannot culminate in marriage and where several great loves have historically chosen not to commit formally in that regard for many, marriage is indeed an expression of love and affection. At the same time, one might suggest that just as the right to love is inextricably linked to the fact of being human, the right to "unlove" is similarly tightly woven into the tapestry of the human experience. This Petition as it originated in the Subordinate Court unravels ideals of marriage and the aftermath issues within reality. The traditional love notion in Kenya which culminates in marital union, either celebrated under customary law, civil law, Islamic law or the more commonly preferred solemnization and vows taken in a church setting where the minister of that congregation administers the vows to be kept by the new spouses or husband and wife duly recognized in our *Marriage Act* 2014. The mythic union between two devoted individuals is presumably founded on love which conquers all. The search for self-identity through choosing a life partner and the outcome of the marital union becomes a life-long commitment to another.

31. It is this mythology of love in marriage between the appellant and the respondent initially fueled by affection that can now be contrasted with the reality of divorce. What was once considered a blissful and permanent union has, through the filing of the divorce, revealed elements of disillusionment. The lifelong covenant of faithfulness and mutual respect is now described in the petition as a mirage.

32. The legal framework on family and marriage is rooted in Article 45 of *the Constitution* as corroborated by International Law as entrenched in Article 2 (5 and (6) of the same Constitution. International instruments emphasize the right to marry freely and without coercion, including the right to make

a voluntary choice to solemnize a marriage. These instruments include the Universal Declaration of Human Rights, which states that men and women of full age have the right to marry and found a family, with equal rights during marriage and at its dissolution. Further, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) also address the right to marry, particularly focusing on the need for free and full consent and a minimum age for marriage. One of the most progressive Regional Instrument in the Maputo Protocol to the African Charter to the Human and People's Rights on the Rights of Women in Africa, includes provisions related to the right to marry, specifically ensuring free and full consent of both parties for marriage and setting the minimum age of marriage at 18. It also promotes monogamy as the preferred form of marriage and protects women's rights within all marital relationships, including polygamous ones. Additionally, the protocol emphasizes the equal rights of men and women in marriage, including the right to choose a matrimonial regime, retain nationality, and jointly contribute to the family's interests.

33. The Petition as litigated before the trail court was based on the *Marriage Act* 2014 which outlines several grounds for divorce including adultery, cruelty, desertion, and irretrievable breakdown of the marriage. Additionally, exceptional depravity and any valid ground under the customary law of the petitioner can also be considered. These grounds apply to both civil and customary marriages, though customary marriages may also have grounds specific to the community's customs. Some of the key legal battle grounds presented by various Petitioners in our Courts to dissolve their marriage can be summarized briefly as follows;

    a. Adultery: One spouse engaging in sexual relations with someone outside the marriage.

    b. Cruelty: Physical or emotional abuse inflicted by one spouse on the other or on the children of the marriage, making it unbearable to continue living together.

    c. Desertion: One spouse abandoning the other for a continuous period of at least three years without reasonable cause.

    d. Irretrievable Breakdown: This is a general term indicating that the marriage has completely broken down and cannot be reconciled. This can be evidenced by factors like adultery, cruelty, neglect, long separation, or a spouse's imprisonment or mental illness.

    e. Exceptional Depravity: This covers extreme cases of misconduct or moral failings.

34. It is instructive to note that this appeal is based on a customary marriage as provided for under Section 69 of the *Marriage Act*. In a customary marriage where the husband and wife once loved and romanticized each other but a season of "unlove" has crept in, either party may petition for the dissolution of the marriage on grounds of adultery, cruelty, desertion, irretrievable breakdown of the union, or any other fact recognized under the community's customs.

35. The concept of divorce in the traditional African communities in Kenya, particularly in the earlier decades such as the 1960s and 1970s, was rarely adjudicated within the formal legal system. This was largely due to the fact that, among many communities, there existed an inherent bias toward the permanence of the marital union once celebrated in favor of the ordained couple. Today, however, it is more the rule than the exception that divorce is universal, existing across different cultures and communities with only minimal variation. This country does not have a Customary Law Act but the same as a source of law is expressly entranced in our Constitution under the Preamble as follows; "that we the People of Kenya are proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation. That we are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. That recognizing

aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law". *The Constitution* went further to state that customary law is part of our sources of law in settling disputes so long as it's not inconsistence with this Constitution. Customary law as fashioned in Kenya specifically on family life and marriage union was and is tailored towards sustenance of marriages and dissolution of it is a recourse of las resort.

36. In the case before the Trial Court, the Appellant who was also the Petitioner was under duty to discharge the standard and the burden of proof as stipulated under Section 107 (1), 108 and 109 of the *Evidence Act* on the alleged grounds of Divorce as against the Respondent. The Court in Kamweru -vs- Kamweru (2000) eKLR 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."

37. A statutory standard of proof is introduced that the Court must be "satisfied" but this word must be read as if the word were qualified by the words "beyond reasonable doubt". It is inconceivable that a Judge could be "satisfied" so long as he entertained a reasonable doubt and it is equally inconceivable that after the burden of proof is discharged the standard of proof has not been attained. Satisfaction is a formula determining the state of mind to be achieved by the judge before he can statutorily order a decree. But this merely expresses in terms of state of mind what the petitioner has to discharge as: burden of proof and once he has discharged that burden of proof it follows that the Judge is "satisfied" that a decree should be ordered.

38. In the instant appeal, a recap of the trial court divorce proceedings shows that the following grounds were in contestation between the appellant and the respondent. The learned trial magistrate was seized of jurisdiction to rule on each of them, based on the evidence applying the standard of a balance of probabilities, or, if of a criminal nature, the higher standard and burden of proof required in criminal cases. The grounds included inter alia;

    a) The Respondent has formed the habit of frequently using abusive language to the Petitioner, and baselessly quarrelling with the Petitioner.

    b) The Respondent has frequently threatened the petitioner with physical violence.

    c) The Respondent deserted her matrimonial home in August 2015 and came back in January 2016 without any plausible explanation.

    d) The Respondent on the second time deserted her matrimonial home on 5th September 2019 to date without any plausible explanation.

    e) The Respondent locked the children in the house on 5/9/2019 to 8/9/2019 when with the assistance of the police from Langas police station the children were saved as per OB 22/8/9/2019.

    f) Respondent is a person of quarrelsome disposition and has on many occasions been disrespectful and arrogant to the Petitioner.

    g) The Respondent is rude and abusive to the petitioner and his relatives.

h) The Respondent has generally failed to perform her family responsibilities.

i) The Respondent has shown utter contempt towards their marriage and total lack of matrimonial commitment.

j) The Respondent has failed to dialogue and communicate with the Petitioner during subsistence of their marriage.

k) Exposing the Petitioner to emotional torture and public ridicule and causing the Petitioner to have issues with trust, self-esteem, confidence etc.

39. In the Memorandum of Appeal, the grievances by the Appellant can be clustered into two predominant grounds that;

a. The learned trial magistrate erred in law and fact when she wrongly evaluated the evidence on record and erroneously found that the petitioner did not prove the ground of cruelty. The learned trial magistrate erred in law when she misdirected herself on the standard of proof required in this matter. She therefore prayed for orders that;

b. The appeal is allowed and the whole judgment and decree of the trial magistrate be set aside."

40. The role of this Court is to evaluate the evidence on the Record afresh in order to come to its independent decision. In order to do justice in this matter, I have read all the Proceedings including the pleadings and Judgement of the Lower Court.

41. First and foremost, it would be appropriate to discuss the dimensional elements of the stated grounds of divorce before superimposing them on the impugned judgment of the trial court, with a view to either affirming or setting aside the entire judgment as a whole. The issue of cruelty featured prominently as the appellant sought leave of the court to dissolve the marriage. From the comparative perspective the Court in Jayachandra -Vs- Aneel Kaur 2005 SCC 22 it was held that;

> " The Honorable Supreme Court held that, to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life. The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty."

42. In similar circumstances the Court in MKM -vs- GM 1975 eKLR made the following on what constitutes cruelty in Divorce Petition;

> " 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 v Russell [1895] P 315, 322 and Horton v Horton [1940] P 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 facts 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. These are the tests laid down in Gollins v Gollins [1964] AC 644 and Williams v Williams [1964] AC 698. Lord Evershed said at page 670 in Gollins v Gollins."

43. In the area of matrimonial causes, particularly those touching on the dissolution of marriage, a court must individualize the grounds for decreeing a marriage as dissolved as no single definition of cruelty can apply mutatis mutandis to another family consisting of a husband and wife. The family court, duly constituted to investigate the allegations for divorce, as briefly legislated by Parliament, must enter into an inquiry stage so that justice can be done to the dispute. On this issue, the following case law is instructive. Sir Charles Newbold in Colarossi v Colarossi [1965] EA 129 observed:

> " No comprehensive definition of cruelty has ever been accepted as satisfactory much depends on the habits and circumstances of the matrimonial life of husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however that the party seeking relief must prove actual or probable injury to life, lives or health."

44. In Naveen Kohli vs Neelu Kohli (AIR 2004 All 1) the Court made a commentary on what constitutes elements of cruelty thus: "Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in a D-day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life." The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions."

45. The question that requires to be answered first in this Appeal is whether the averments, accusations and allegations made by the Appellant before the trial court and as alleged on oath constitutes the ground of cruelty capable of dissolving a marriage. What was the evidence placed before the trial court that the Respondent at one time locked the children in the house and particulars of OB 22/8/9/2019 was placed before the trial court? There was also evidence on the Respondent being quarrelsome and abusive and failing to perform her family duties. At this juncture it becomes imperative to understand and comprehend this broad conceptual doctrine of cruelty in addition to what jurisprudential decisions have been able to guide this court in examining whether the Learned Trial Magistrate sufficiently applied the evidence to this ground to establish that the Appellant's burden of proof fail short of what the law required of him to discharge.

46. The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'. The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

> " Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

47. The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

> " The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty, but it is an important element where it exits."

48. In the instant case, I have had the advantage of examining the impugned judgment and drawing from the evidential material presented by the appellant in that court. It can be summarized as follows: the petitioner attempted to prove cruelty but failed to pinpoint any specific acts of cruelty. In fact, it was the respondent who claimed that she had been assaulted by the petitioner which in my view would have constituted proof of cruelty. Allegations made in the written statement of the appellant/petitioner, and tested through cross-examination, in my view satisfied the legal requirements and were firmly laid before the trial court. The shifting of the burden of proof by the learned trial magistrate was unnecessary. The magistrate failed to appreciate that this matter had even been subjected to mediation under Article 159(2)(c) of *the Constitution*, which the parties were unable to resolve. The collapse of court-annexed mediation was a clear red flag that the allegations, when viewed in the context of a marital union, were sufficient in law to constitute cruelty. A marital relationship that has become increasingly bitter and acrimonious since 2020 inflicts cruelty on both parties. For the learned trial magistrate to maintain the façade of this broken marriage is in my view an injustice to both sides. The rationale behind this is that, since marriage is a matter of free choice, individuals should equally have the freedom to end it willingly. I am aware that from an ecclesiastical perspective, this may be considered controversial, as it might be seen to encourage hasty divorces or dissolutions of marriage over minor differences or incompatibilities, potentially promoting immorality. However, that critique is far from the truth. There should be no coercion by the court to force two individuals who once loved each other like Romeo and Juliet to sustain a marriage that exists only on paper or, in the case of many customary marriages, remains unregistered and lives only in the shadow of the community. In love marriages two people from different backgrounds lineages consanguinity and affinity, ethnicities, and racial roots become intentional in their belief that the marriage they have solemnized will last for eternity. However,

they often forget that they are two different individuals with distinct life experiences. Over time, they may change from being boyfriend and girlfriend to husband and wife sometimes overlooking the fact that such a shift can bring about new and unexpected traits, calling for new ways of getting along to sustain the marriage. In our humanity, marriage is a matter of give and take, which is not always easy, as it requires a paradigm shift of sorts.

48. What the learned trial magistrate failed to conceive and appreciate was the need to analyze cruelty as encompassing both physical and mental aspects. On a physical level, it may be possible to interrogate the injuries suffered with the corroboration of a medical report if any. However, when cruelty is mental such as through allegations of insult, abuse, or lack of companionship it can have a significant impact, particularly on a man, given our society's patriarchal orientation. The learned magistrate was required to draw an inference by considering the nature of the respondent's conduct and its effect on the complaining spouse. I find no such analysis in the impugned judgment of the trial court.

49. From the record in this appeal, one of the grievances raised by the appellant is the denial of conjugal rights by the respondent, which falls within the broader framework of sexual and reproductive health, recognized as a fundamental human right. For the appellant, this relates to the unavailability of essential conjugal rights and the difficulty in accessing them due to the conduct of the respondent. This ground is also linked to the grievance of desertion. For the Appellant to succeed in this Appeal that the Respondent is guilty of desertion, this case must be measured within the dicta in the cases of Lang -vs-Lang [1954] 3 ALL ER 571 where the Court stated;

> " To establish desertion, two things must be proved; first certain outward once visible conduct – the factum of desertion and secondly the animus deserendi, the intention underlying this conduct to bring the matrimonial union to an end in ordinary desertion the factum is simple; it is the act of the absconding party in leaving the matrimonial home. The context in such a case will be almost entirely as to animus deserendi was the intention of the party leaving the home to break it up for good, or something short of or different from that."

50. This was also the principle in the case of P C Patel -vs L P Patel [1965] EA 560 in which the Court stated as follows;

> " That it is generally accepted test of what conduct amounts to constructive desertion in this: Has the defendant been guilty of such grave and weight misconduct that the only sensible inference is that he knew that the complainant would in all probability withdraw permanently from cohabitation with him if she acted like any reasonable person in her position."

51. The law governing desertion as a ground for divorce was also discussed by "Rayden on Divorce" in which the Learned author stated as follows; "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse, but the physical act of departure by one spouse does not necessarily make that spouse the deserting party." The legal position taken in Halsbury's Law of England 3rd Edition Vol 12 stated in the following words; "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discharged attempts at defining the desertions, there being no general principle applicable to all cases."

52. The appellant in this case alleged that the respondent deserted their home in August 2015 and returned in January 2016 without any plausible explanation. Furthermore, the appellant claimed that the

respondent once again deserted their matrimonial home and to date has not returned, still without providing any plausible explanation. In the language of the learned trial magistrate he addressed the issue as follows in the impugned Judgement; That on desertion a close review of the evidence does not show any desertion. The Respondent was able to satisfactorily explain that in 2019 she went back home with view of seeking treatment for alleged burns. The element of desertion thus fails."

53. It is clear from the Judgement that the learned trial magistrate did not address the elements of desertion which allegedly took place in August 2015 to January 2016 and the one of 2019. Briefly stated, there is no compelling or substantial circumstantial evidence explaining why treatment had to be sought through the respondent's parental lineage rather than within the matrimonial domicile. The act of leaving her matrimonial home for her place of birth speaks volumes about the nature of the relationship between the parties. There is no doubt that the appellant did not consent to the respondent leaving their matrimonial home to seek treatment elsewhere during the subsistence of their marriage. This desertion constituted a continuous period of separation from the appellant without reasonable cause and is indicative of an intention to end their cohabitation. It also forms a pattern of cruelty, causing prolonged mental anguish to the appellant. In my considered view, the act of desertion also amounted to a denial of conjugal rights, which was persistent and without reasonable cause. In fact, the learned trial magistrate mentioned the issue of conjugal rights only in passing, without much legal analysis. In the judgment of the trial court, the context is captured as follows: the petitioner stated that the last time he had conjugal relations with the respondent was in the year 2020. There is no rebuttal evidence from the respondent regarding the deprivation of conjugal rights without sufficient cause. It is trite law that the expression "desertion" has been explained by the courts to mean the intentional abandonment of one spouse by the other without the consent of the other and without reasonable cause. The persuasive dicta in Bipnchandra Jisinghbai Shah -vs- Prabhavati AIR 1957 SC 176 says it all as follows;

> " 10. ... If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion; so far as the deserting spouse is concerned, two essential conditions must be there,
>
> (1) the factum of separation, and
>
> (2) the intention to bring cohabitation permanently to an end (animus desorendi). Similarly, two elements are essential so far as the deserted spouse is concerned:
>
> (1) the absence of consent, and
>
> (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.... Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act

> could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commended without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time..."

54. The canonical doctrine holds that to be together is to make a marriage, and to be apart is to end a marriage. For the appellant and the respondent, these two distinct periods of separation can also fall within the definition of desertion. It is well-settled law that desertion is the intentional and unwarranted abandonment of the other party to the marriage against their will or without their consent. Upon examining the record and pleadings in this appeal, I find no evidence that the desertions from August 2015 to January 2016 and during the 2019 period, when the respondent went to her parents' home to seek medical attention, were with the consent of the appellant or were based on reasonable cause. This court must make it clear that desertion within a marital union is not merely a withdrawal from a place, but a withdrawal from a state of things in which there is a legitimate expectation to meet both the written and unwritten obligations necessary for the survival of the marriage. The essence of desertion lies in the rejection of all marital obligations. Let us assume, for a moment, that the respondent went to her parents' home with the knowledge and consent of her husband, the appellant but then deliberately remained away for an extended period; such prolonged absence would still amount to desertion.

55. In my considered view, the facts of this appeal also satisfy the criteria for constructive desertion where a spouse intentionally brings cohabitation to an end through misconduct, thereby rendering the continuation of marital relations unbearable. This appears to be precisely what happened to the appellant in this case. Therefore, the context of desertion, which the trial court dealt with only sketchily, in itself met the threshold for granting a divorce. In line with the principle that "what God has put together," a judge of a court in Kenya, acting under Article 50(1) of *the Constitution*, is empowered to dissolve a union where satisfied that the standard and burden of proof have been met on a balance of probabilities for civil matters, and beyond reasonable doubt for any criminal element of cruelty.

56. This Appeal would be incomplete without emphasizing that the occasional quarrels or outbursts of anger and a systematic pattern of abusive behavior can constitute mental cruelty. This marital union, having had its share of successes and failures, can clearly be described as one in which there has been a complete and irretrievable breakdown of the marriage, notwithstanding the respondent's opposition to its dissolution. The differences between the appellant and the respondent are traceable to the years 2015, 2016, and 2019. Keeping in mind the several factors discussed, and drawing from the record of the trial court, it is evident that this court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead, and beyond salvation. Therefore, the dissolution of the marriage is the right solution, and the only way forward is for the appellant and the respondent to go their separate ways, open a new chapter, and run their respective races in life without the support of the other partner. In arriving at this finding on appeal, one must apply the legal lens to several factors: the period of cohabitation between the appellant and the respondent following the solemnization of the customary marriage; the length of time the conflict and disputes have persisted without resolution through mediation; the continued litigation before a court of law; the nature of the allegations made before the trial court against each other; and the cumulative impact of these factors on the quality of their personal relationship. Sometimes, multiple court battles between spouses and their failure to commit to mediation and reconciliation are clear testimony to the fact that no bond of love can

survive between them. In light of these observations, this is indeed a marriage that has broken down irretrievably.

54. In conclusion, I am satisfied that the learned magistrate was wrong in coercing and forcing the Appellant and the Respondent to go back to their home of domicile and continue sustaining a marriage that is in life support. There are also constitutional imperatives under Article 25 (a), 26 (1), 28, 29 (c) (e) and (f), 32 (1) and 45 (2) of *the Constitution* 2010 which needed to receive purposive interpretation in construing the provisions of the *Marriage Act* 2014 on divorce. As a consequence of all this, the Appeal is allowed and the marriage is decreed as dissolved with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH AUGUST 2025 AND DISPATCHED VIA EMAIL ON 10TH AUGUST, 2025

.....

R. NYAKUNDI

JUDGE

In the Presence of:

M/s Chemwok for the Respondent

M/s Akinyi for the Appellant

JKS, the Appellant

JGI, the Respondent

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