



**SKN v SSS (Civil Appeal E015 of 2022) [2024] KEHC 443 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 443 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E015 OF 2022  
PN GICHOHI, J  
JANUARY 25, 2024**

**BETWEEN**

**SKN ..... APPELLANT**

**AND**

**SSS ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. Caroline A. Ocharo Senior Principal Magistrate dated and delivered on the 2nd February, 2022 in Kisii Chief Magistrate’s Court Divorce Cause Number E69 of 2021 Samuel Kerecha Nyarango vs Sheila Shibuse Shikami)*

**JUDGMENT**

1. The background of this Appeal is that SKN ( the Appellant) and SSS (the Respondent) solemnised their marriage on 17<sup>th</sup> April 2016 at N New Life Satellite {SDA Church, Umoja Nairobi-Official | Nairobi

Home | Newlife SDA Church Nairobi

More images

Seventh-day Adventist Church} SDA}} Church in Dagoretti North Sub- County in Nairobi. Thereafter, they were blessed with one issue of marriage being S.N.S on 5<sup>th</sup> September, 2017. They lived together in Kawangware Estate in Nairobi before moving to Kisii Town in June 2020.

2. Apparently, the marriage did not work well for by a Petition dated 2<sup>nd</sup> September 2021, the Appellant sought that the marriage between him and the Respondent be dissolved on two main grounds that is, cruelty by the Respondent and that the marriage him and the Respondent had irretrievably broken down.

3. He accused the Respondent of failing to show him love and affection, mistreating, insulting, nagging, ridiculing him and threatening him that she was ready to break up from the marriage if he failed to render monthly financial support to her parents.



4. Further, he accused her of moving from their bedroom to another room without consulting him, denying him conjugal rights and finally moving out and going to live with her parents in Nairobi thus causing him loneliness and desperation. He pleaded that the Respondent's conduct exposed him to emotional torture, public ridicule and humiliation.

5. The Petition proceeded as undefended with the Petitioner as the only witness. In its judgment, the trial court held:-

“I have considered the evidence of the Petitioner which is unchallenged.

However, I note that the Petitioner has not shown their attempt to salvage this marriage which happens to have had challenges during this Corona period when it was a very trying time for most people.

His testimony is that the Respondent went to live with her parents in Nairobi in 2020. What action has the Petitioner taken to resolve the issues between them as a couple? None has been exhibited. The period which parties have been apart before the petition was instituted is 9 months. Not a period for a reasonable party to presume that marriage has irretrievably broken down. It is for these reasons that this court declines to dissolve the union between the Petitioner and he Respondent. Costs of the petition shall be in the cause.”

6. Being aggrieved by this decision, the Appellant who was represented by the firm of S.O.Omwenga Advocates filed 9 grounds of appeal a which are condensed into four (4) grounds as follows:-

- a. The trial magistrate erred in law and fact in dismissing the Appellant's case when despite being served, the Respondent never filed answer to Petition or tender any evidence to challenge the Appellants evidence presented before court.
- b. The trial magistrate erred in law and fact in fact when she decided the case against the weight of evidence.
- c. The trial magistrate erred in law and in fact when it embarked on presumptions instead of evidence on record.
- d. The trial magistrate erred in law and in fact in failing to properly evaluate the entire evidence on record thus reaching a wrong, unfair and unjust and occasioned him a miscarriage of justice.

7. The Appellant therefore prayed that:-

1. The Appeal herein be allowed and judgment and decree of the trial magistrate dated 2/2/2022 be set aside in its entirety.
2. The Court be pleased to substitute and give an order thereof allowing the marriage between the Appellant and the Respondent be dissolved in Kisii Chief Magistrate's Court Divorce Cause Number XXXX of 2021.
3. Costs of this Appeal and the costs in the subordinate court be borne by the Respondent.

8. In further support of his Appeal, the Appellant filed written submissions dated 26/8/2022 and while rehearsing the evidence before the trial court, the Appellant cited the case of *E.A. Ov S.A.A* [218]eKLR and urged the Court to allow the Appeal as prayed.



## Analysis And Determination

9. The role of this Court as the first appellate court, is spelt the Court of Appeal decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123 , that is, to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
10. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law.
11. The evidence before the trial court shows that the Appellant was the sole witness in the case. He told the court that he was a nurse by profession. He adopted his witness statement and maintained the contents of the Petition. He told the court that the Respondent was very disrespectful and abusive. She was furious whenever he made decisions, she felt she was against and accused him of not providing enough for her and her parents. She threatened to leave and that immediately after they had their child, the Respondent moved to another bedroom and denied him his conjugal rights.
12. That during the Corona period, she moved to his parent's home but there was no peace. She finally decided to leave his parent's home in Kakamega and went with the child back to Nairobi without his consent. These issues caused him a lot of stress which affected his work. He produced the Marriage Certificate as Pexh. 1 as evidence of said marriage.

## Determination

13. Having considered the evidence on record and the submissions therein, it is a fact that the Petition was undefended. The main issue for determination is whether the trial court applied the correct principles in dismissing the Appellant's petition.
14. Having confirmed that the Petitioner and the Respondent were duly married under the [Marriage Act](#), 2014 at SDA Church as shown by the Marriage Certificate exhibited and having been satisfied that the petition was unchallenged, then the trial court had to establish whether the Appellant had had proved his case to warrant dissolution of the marriage.
15. The Petitioner was a party to the marriage in question and therefore he had a right to seek dissolution of the marriage on the grounds provided for under Section 65 of the [Act](#) being: -
  - a. One or more acts of adultery committed by one party;
  - b. Cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage;
  - c. Desertion by either party for at least three years immediately preceding the date of presentation of the petition;
  - d. Exceptional depravity by either party; or
  - e. The irretrievable breakdown of the marriage.



16. The law does not require that a party who files for a divorce petition must satisfy all the above grounds. Further, Section 64 of the Marriage Act which allows Mediation of disputes in Christian marriages provides that:-

“The parties to a marriage celebrated under Part III may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated.”

17. The operative word in the Section is “may.” It is therefore not mandatory that the parties must seek to reconcile before filing of a divorce petition. Further, this Court does not understand the above provision to include the courts as one of the reconciliatory bodies intended to offer reconciliatory services to the couple. In the circumstances, the intentions of the trial magistrate, however noble and commendable, were not justified. It was not upon the trial court to satisfy itself that parties had tried to reconcile and salvage their union, Covid -19 Pandemic notwithstanding.

18. When the Respondent decided soon after birth of their child to move out of the matrimonial bed, completely deny the Appellant his conjugal rights and lastly leave him for no logical explanation amounts to cruelty. That is made worse by insults and nagging on the part of the Respondent.

19. Her demand of monthly financial support of her parents by the Appellant and her threats that she would move out of the marriage if the Appellant does not offer such upkeep to her parents sounds ridiculous. It is an indicator that this is a marriage based on quick sand.

20. The circumstances herein show that the parties cannot cope with each other. From the evidence on record, there is no love between the Appellant and the Respondent herein. There is no companionship either, as reflected by their living apart. They cannot be compelled to remain in such a marriage. This Court is persuaded by Mrima J where he held in E.A. O (supra), that “compelling the parties herein to remain in a marriage may a recipe for more harm than intended good.”

21. This Court is satisfied that the trial magistrate erred in law and principle thus calling for interference. The marriage between the Appellant and the Respondent herein cannot be salvaged. The two should be released to look for love, companionship, happiness and respect elsewhere other than in this union. From the foregoing, this Court finds the Appeal merited and thus makes the following orders: -

1. The Appeal is hereby allowed and the order of the trial court dismissing the Petition is hereby set aside.
2. The marriage between the Appellant and the Respondent is hereby dissolved and a decree nisi is issued which shall be made absolute after three months.
3. There will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 25TH DAY OF JANUARY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of;**

**N/A for the Appellant**



**N/A for the Respondent.**

**Laureen Njiru/ Aphline , Court Assistant**

