



**FOA v JA (Civil Appeal E407 of 2020)
[2024] KEHC 2069 (KLR) (Civ) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E407 OF 2020

SN RIECHI, J

FEBRUARY 28, 2024

BETWEEN

FOA APPELLANT

AND

JA RESPONDENT

*(Being appeal from the decision/judgement of Honourable S.G. Gitonga(MRS)
(RM) delivered on 11/09/2020 in Milimani Divorce No.838 of 2019)*

JUDGMENT

1. The appellant FOA filed a divorce case being divorce cause number 838 of 2018 against the Respondent JA seeking dissolution of marriage on grounds of cruelty. The particulars are set out in the petition.
2. The matter proceeded with appellant’s case who testified that the respondent is his wife having gotten married to her at Attorney General’s office on 14th September 2017. He testified that they cohabited in Nairobi as wife and husband and their marriage was blessed with 2 children. The appellant testified that since celebration of the marriage the respondent has treated the appellant with cruelty which has caused the said marriage to irretrievably break down despite attempts by appellant to reconcile the marriage. He testified that the respondent once locked him out of their matrimonial home since he came home with his sister. The appellant testified that the respondent has been cruel to all his members of his family and on one occasion threw out two of his sisters from their home. The appellant testified that he received an email from a name similar to that of respondent stating that she doesn’t love him or any member of his family. He testified that the email contained abusive contents calling him a monkey, that she cannot stay with him and does not love him and that she knows he cannot leave since he loves the kids. The appellant testified that he confronted the respondent and she denied sending the email



to him. He testified that afterwards he left their matrimonial home and according to him the marriage is irretrievable.

3. The respondent entered appearance and filed answer to petition on 17th December 2018. She testified that the marriage is not irretrievably broken down as alleged by the petitioner and denied being cruel to the petitioner. The respondent testified that she has never threatened to kill her husband. She testified that they have been living happily and they only had the normal disagreements. She stated that the email the appellant received was not hers and that the account used to send the email did not belong to her. The respondent stated that she informed the appellant to report the incident to the police but he failed to do so and she reported the incident to the police vide OB NO.xx/9/10/2018. The respondent stated further that she lives in their matrimonial home and the appellant moved out on 1st June 2018 at his own will. She prayed that the court dismiss the petition since she is loving wife and want her children to grow up in a complete family.
4. As per the Judgement, the court dismissed the case on ground that the appellant had failed to prove cruelty towards the petitioner. Being aggrieved the appellant filed an appeal alleging that the Honorable trial Magistrate erred in Law and fact in;
 1. Holding that the Petitioner did not prove to the satisfaction of the court that the respondent was cruel to him.
 2. Holding that the petitioner did not demonstrate to the court the efforts he has made to salvage the marriage despite the petitioner giving clear testimony on the same.
 3. Failing to consider the petitioner's evidence.
 4. Holding that the marriage has not irretrievably broken down and that the same can be salvaged thus forcing the petitioner to be in the said marriage.
 5. Failing to consider and apply the law appropriately.
5. The appellant prays that the appeal be allowed and judgement delivered on 11.09.2020 be set aside in entirety and be substituted with a judgement dissolving the marriage.
6. The appeal proceeded by way of written submissions. The appellant submitted that the trial magistrate erred in holding that marriage between the parties was still subsisting. The appellant submitted that the trial court did not consider the ground that the marriage had irretrievably broken down although it was pleaded to by the appellant.
7. It was appellant's submission that the parties are unlikely to cope up as a married couple and due to cruelty on the part of the respondent, the appellant has never gone back to the matrimonial home to date. The appellant further submitted that this is one of the compelling factors that the court should consider in finding that the marriage has irretrievably broken down. The appellant relied on the case law decision in DV V PB [2016]eKLR and HMN Vs JAN [2019]eKLR in support. The appellant submitted that they urge this court to consider the appellants and reconsider their evidence independently so as to come to the ultimate conclusion of dissolving the marriage.
8. The respondent on the other hand submitted that marriage can only be dissolved if the petitioner satisfies the court on the grounds listed under section 66 of the *marriage Act* 2014. The respondent submitted that the appellant did not provide any evidence to support his accusation of cruelty and that is why the court dismissed the petition. She submitted that the to prove grounds of cruelty on divorce is on balance of probability which the petitioner failed to satisfy.



9. The parties herein conducted civil marriage in 2017 therefore section 66 of the Marriage Act 2014 on dissolution of civil marriage is applicable.

10. Section 66 (1) of the Marriage Act provides;

A party to a marriage celebrated under Part V may petition the court for the dissolution of the marriage on the ground of;

- a) Adultery
- b) Cruelty
- c) Desertion
- d) Exceptional depravity
- e) Irretrievable breakdown of the marriage or;
- f) Any valid ground under the customary law of the Petitioner.

11. I have considered the submissions and the proceedings before the trial court. From the petition dated 15th October 2018 the petition is seeking a dissolution of marriage to the respondent on ground of cruelty. The petitioner has raised ground of cruelty in paragraph 6 of the petition and particulars are stated as follows;

- a. Threatening the petitioner that she would one day kill him thus causing him mental anguish.
- b. Constantly telling the petitioner that she does not love him and does not want anything from him.
- c. Constantly telling the Petitioner that she is only with him because of his money.
- d. Repeatedly looking the Petitioner out of the matrimonial home late at night.
- e. Being abusive and rude to the Petitioner whenever his mother and siblings visited him.
- f. Always sending the Petitioner hate text messages and speaking negatively about his personality.
- g. Being abusive to petitioner and his family members.
- h. Engaging in continuous acts of disrespect, neglect and spite towards the Petitioner.

12. The appellant pleaded that the marriage had irretrievably broken down.

13. The appellant herein submitted that the respondent constantly tells him that she does not love him and she is only with him because of his money. The appellant submitted that respondent constantly threatens him that she would one day kill him thus causing him mental anguish. That the respondent is always sending the petitioner hate text messages and speaking negatively about his personality among others. The appellant submitted that he left matrimonial home and he has never gone back. It is submitted by the appellant that it came out clearly from both sides that the marriage has irretrievably broken down.



14. The Court of Appeal considered at length what constitutes cruelty. JSM VS. ENB [2015] eKLR The Court of Appeal held;

There is consistent case law on what constitutes cruelty as a matrimonial offence. In MEME Vs. MEME [1976-80] KLR17, it was held that to establish cruelty, the Petitioner must show to the satisfaction of the court;

- i. Misconduct of a grave and weighty nature
 - ii. Real injury to the complainant's health or reasonable apprehension of such injury
 - iii. That the injury was caused by misconduct on the part of the respondent; and
 - iv. That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word...
15. Each petition found on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves.

16. In regard to irretrievable breakdown of the marriage, the Court of Appeal proceeded to state as follows;

“In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties. What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation, the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other, commitment of the parties to the marriage, chances of the parties resuming their spousal duties, chances of the marriage ever working again, among others. These considerations would be in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down”.

17. Having analyzed the evidence adduced by the appellant he admits that The he left matrimonial home on 1st June 2018 and he has never gone back. Section 69(1) of the *Marriage Act* sets several grounds of dissolution of the marriage. A party need not prove all the grounds. If one is proved to the satisfaction of the court, the marriage will be dissolved.

18. In this instant case the appellant testified that the respondent has been cruel to him and he set out grounds of cruelty as follows;

“That the respondent once locked him out of their matrimonial home since he came home with his sister; That the respondent has been cruel to all his members of his family and on one occasion threw out two of his sisters from their home; That the appellant received an email from a name similar to that of respondent stating that she doesn't love him or any member of his family; That the email contained abusive contents calling him a monkey, that she cannot stay with him and does not love him and that she knows he cannot leave since he loves the kids. That appellant confronted the respondent and she denied sending the email



to him. That appellant afterwards left their matrimonial home and according to him the marriage is irretrievable.”

19. The respondent in response to treating the appellant with cruelty stated as follows;

“That the marriage is not irretrievably broken down as alleged by the petitioner and denied being cruel to the petitioner. That she has never threatened to kill her husband. She testified that they have been living happily and they only had the normal disagreements.”

20. Where a spouse leaves matrimonial home for long time ,parties are not in speaking terms or when doing so are quarrelling, the companionship is absent this show that there is no harmony and marriage has irretrievably broken down. In the result, I issue the following orders;

1. The judgment of the trial Magistrate is set aside.
2. It is substituted with an order allowing the plaintiffs claim, that is to say the marriage between the appellant and Respondent is dissolved.
3. Each party to bear its own costs.

DATED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2024

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S.N. RIECHI

HIGH COURT JUDGE

