



REPUBLIC OF KENYA



KENYA LAW
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EAS v LKO (Family Appeal E015 of 2022) [2024] KEHC 6409 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6409 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
FAMILY APPEAL E015 OF 2022
SC CHIRCHIR, J
MAY 30, 2024

BETWEEN

EAS APPELLANT

AND

LKO RESPONDENT

*(Being an Appeal from the judgement of Hon. J.R Nderuri
(SPM) delivered on 13/10/2022 in Divorce case no. E008 of 2021)*

JUDGMENT

1. The Appellant filed for the dissolution of his marriage to the Respondent at the chief magistrate's court at Kakamega. At the conclusion of the hearing, the trial court found that the Appellant has not proved his case and dismissed the petition.

Memorandum of Appeal

2. Dissatisfied with the outcome the Appellant filed this Appeal setting out the following grounds:
 - a. That the learned magistrate erred in law and fact by dismissing the divorce petition
 - b. That the learned magistrate erred in law and fact by failing to find that the petitioner had proved the particulars of Adultery to the required standard
 - c. That the learned magistrate erred in both law and fact by holding the petitioner to a higher standard than that required in civil cases.
3. The Appeal proceeded by way of written submissions.



Appellant's submissions

4. It is the Appellant's submissions that the trial court erred in holding that the adultery had not been proved on a balance of probabilities. He argues that , all that was needed of him was to demonstrate that it was more probable than not that the respondent was involved in extra-marital affairs, and no more. In this regard the Appellant has relied on the case of *J.K.M v C.O.O* (2015)eKLR where the court held that circumstantial evidence suffices.
5. The Appellant further submits that the Respondent did not sufficiently disapprove that he would always be home early that is, between 6-9pm.
6. The further submits that it was the Appellant's evidence that he saw the Respondent with an unknown man
7. It is further submitted that the trial court failed to appreciate the respondent's testimony during cross examination to the effect that she was not opposed to the petition for divorce. The Appellant then went on to cite the provisions of S.66 (6) of the marriage act on what constitutes irretrievably broken marriage while pointing out that he had stated as much in his testimony; that the Appellant has proven that he no longer wants to live with the Respondent and hence demonstrating that the marriage has irretrievably broken down.
8. The Respondent did not file any submissions

Analysis and Determination

9. This is a first appeal and the role of this court is to relook at the evidence, re-evaluate and arrive at its own findings. (Ref: *Gitobu Imanyara & 2 others v A.G* (2016)eKLR)
10. I have perused the pleadings in the trial court. The Appellant's only ground of seeking for the dissolution of the marriage was adultery on the part of the Respondent.
11. The Respondent filed an Answer to petition in which she sought for dismissal of the petition, custody of the children and their maintenance, and division of the matrimonial property.
12. Each of them relied on their written statements as their evidence- in- chief and were extensively cross-examined by the respective advocates.
13. The main contention of the Appellant is that the trial court set the standard of proof higher than is required of civil cases.
14. This like all civil matters the standard of proof is on a balance of probabilities. In *Blyth v Blyth*(1996) the Judge held "Divorce like any other civil allegation is proved by ordinary standard of balance of probability". In *DM v J.M* (2008) 1 KLR 5 justice Chesoni when considering the standard of proof in Adultery stated: "..... evidence required to establish adultery must be more than mere suspicion and opportunity; evidence of guilty inclination or passion were undisclosed". Finally in *N v N* (2008) 1KLR 17 , cited by the Appellant the court stated : "to prove Adultery it is not necessary to have evidence of the same . Association coupled with opportunity, illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstance are relevant, cogent and compelling"
15. In support of his plea of adultery on the part of the Respondent the Appellant stated in his statement: "On the 14/03/2021, I had taken the children out for a walk leaving the Respondent at home. That



briefly thereafter, the Respondent left the confines of our matrimonial home and proceeded to visit her lover.” He did not bother to explain how he came to that conclusion

16. The other incident allegedly took place on 25/03/2021. He stated : “That on 25/03/2021 the Respondent, reported to her work place in Malava where she parked her vehicle at the chief’s office and proceeded to meet with her lover friend. That I then followed the Respondent’s movements via the vehicle’s tracker to the house the Respondent was with in with the lover. That I then confirmed the presence of both the respondent and her lover and proceeded back to the matrimonial home and picked my belongings.”
17. Like the trial court, I have difficulties accepting that the above two cited incidences constitutes proof of adultery. There is no name of the respondent’s alleged lover; there is no evidence of having been seen together. He said he confirmed the presence of both the Respondent and lover in the house. My question is, under what circumstances did he find them . He did not say he entered the house. How did he know that was the house in question belonged to respondent’s alleged lover’s house? If he had taken the trouble to follow her upto the alleged lover’s house, why was it difficult to investigate and find out the name? Did he talked to them to seek clarity on the nature of their relationship if any at all? He did not bother to explain. From his own admission he had put a tracking device in the car. While the legality of the action is in question, shouldn’t this tracking have availed him more evidence of interaction of the Respondent and her lover.
18. I agree with the Appellant’s submission that acts of adultery are seldom apparent. However, I hasten to add that as stated in of N.N case(*supra*) there ought to be circumstantial evidence that are compelling.
19. The Appellant made no attempt to demonstrate any compelling circumstances that would assist the court to make an inference of an adulterous relationship. As was held in the case of *Alfred Ndogi v Hellen Adede* (2005) eKLR “ legal disputes are determined on the basis of facts proved by evidence and law applied to the facts” (Emphasis Added)
20. The cardinal principle of law “He who alleges must prove” is not an idle statement. It is the principle that the Appellant ignored or took for granted. It is not for the court to make assumption or read more than what a litigant tells the court. The litigant must prove his case. I entirely agree with the trial court that the Appellant failed to prove on a balance of probabilities. I disagree that the trial court set a higher standard than that of civil cases. The foregoing shows that the evidence tendered fell short set for civil cases.
21. The submission that the marriage has broken down irretrievably do not appear in the pleadings of Appellant’s evidence. It only came up in the submissions. Nevertheless in the case of *JSM v E.N.B* (2015) eKLR the court of appeal stated “it is worth noting that although adultery, cruelty and dissertation are distinct and separate grounds for divorce, these matrimonial offences often constitute evidence of irretrievable breakdown of a marriage”.
22. Thus, even though there was no plea that the marriage had irretrievably broken down, had the Appellant been able to prove acts of adultery, the petition would have succeeded.
23. What constitutes irretrievable marriage is set out in Section 66(6) of the *Marriage Act* .It includes :Adultery; cruelty to a spouse or children of the marriage; willful neglect of the spouse for at least two years preceding the date of presentation of the petition;, separation for 2 years whether voluntarily or by decree of the court, desertion for at least 3 years immediately preceding the date of the presentation of the petition.
24. Unfortunately for the Appellant, he has not proved any of those grounds. Even on separation ,they had only separated for 14 days before the Appellant moved to court to petition for divorce.



25. Perhaps the Appellant had other reasons for wanting out of the marriage. It was his duty however, to present those reasons to the court, and prove it/them.
26. I have considered the Appellant's submission to the effect that the Respondent accepted the dissolution of the marriage in her testimony in court. However this is at variance with her pleadings, where she prayed for dismissal of the petition. Parties are bound by their pleadings.
27. On the issue of custody and maintenance of the children, this matter ought to have been placed before the children's court as the court of first instance.
28. On the issue of matrimonial property, ordinarily this claim can be heard together with the divorce proceedings . In this case however, there were no particulars provided in respect to the alleged properties. However nothing bars any of the parties from seeking appropriate declarations on the matrimonial property even during the subsistence of marriage, but for the above reasons, and the fact that the dissolution of the marriage is disallowed, the matrimonial property cannot be distributed even if particulars had been supplied.
29. In conclusion, this Appeal has no merit. It is hereby dismissed. Each party to bear their own costs

DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024

S. CHIRCHIR

JUDGE

In the presence of:

Godwin- Court Assistant.

