



3. 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;-

- 1) The appeal is allowed and the whole judgment and decree of the trial magistrate be set aside.
- 2) Judgment be entered for the appellant against the respondent granting her and the relief of judicial separation and the consequential remedies sought in her petition to share in the family property and be paid alimony.
- 3) The appellant be awarded costs here and the court below.

The role of the first appellate court is to evaluate the evidence on record afresh in order to come to its independent decision. In order to do justice to this matter, I had to read all the proceedings including the pleadings and judgment of the lower court.

In paragraph 5 of the petition, the appellant/petitioner stated that she was married to the respondent in 1975 traditionally and in 1984, he started cohabiting with one Susan Rwaga without any formal marriage. In paragraph 6, she stated that in 1992, the petitioner/appellant married lawfully to the respondent under Marriage Act through a Civil Marriage on April 27, 1992 and she even attached the Marriage Certificate. *(it is important to note at this point that the customary marriage which is potentially polygamous as per the customary Marriages Registration Decree 1975)* was transformed in a potentially polygamous marriage under the Marriage Act Cap 251 Laws of Uganda, though that civil marriage and the procedure for celebrating such marriage (Civil) is very well laid down starting from S.6 thereof.

She stated that after solemnization of the marriage, the petitioner/appellant and the respondent lived in their matrimonial home at plot 3 Ham Mukasa Road Entebbe Municipality. That they were blessed with 6 children who were delivered in 1976, 1980, 1981, 1977, 1983 and 1985. she stated in the petition that the respondent has totally abandoned payment of school fees and meeting the costs of other necessities of life for the child Doreen and Mercy who were still studying at the time of filing the petition and yet he was able to do so and he was building a house for his concubine Susan Kwaga at plot 94 Kitooro Road Entebbe at amazing speed using the revenue got from business stated by the respondent.

She stated further that in 2005, the respondent after flirting in adulterous companionship with menous way ward women and girls formerly brought one of them to the matrimonial home as his third wife, further aggravating the unbearable tension that already existed. That this was both adulterous and cruel given the health condition of the petitioner. She stated that the respondent and his new '*third wife*' caused quite unbearable scene on Christmas Day in 2005 in front of all the 6 children, their friends and a fiancée of one of them. That has cast in doubt the marriage of one of the children after the fiancée saw what type of father his fiancée had and the marriage that was scheduled for May 2006 has never been held to date.

That the marriage has been characterized by mistreatment, embarrassing the petitioner in the presence of relatives, visitors, friends and children. That the respondent has exhibited cruelty and selfishness and ungrateful attitudes towards the petitioner, despite the petitioner's loving and kind deeds, general disposition and words towards the respondent for example

- a) knowing that the petitioner has a heart problem the respondent has been physically assaulting and over quarrelsome aggravating the petitioner's problem
- b) the petitioner saved the respondent when he was very sick, despite resistance and strong opposition and abuses from his relatives who had preferred endangering his life when he was unconscious and were taking him to witch doctors
- c) the petitioner contributed money to buy a minibus, but the respondent mismanaged the money spending large sums on other women and excluded the petitioner from the business
- d) In 1998, the petitioner started a general trade import business and when the business prospered, the petitioner invited the respondent to join in the business booming. That the respondent started unnecessary conflict until the respondent kicked the petitioner out of the business and the respondent took away all the property acquired from the business.

That the petitioner worked for the East African Community and also Uganda Government in the Customs department for a long time and contributed more to the family assets than the respondent but the respondent registered most of the assets in his sole names and excluded the petitioner from them. She enlisted the business concerns of the family, see paragraph 15 of the petition. That the respondent withdrew from fulfilling his family obligations like paying school fees and buying food at home saying that he was no longer part of that family and that children and the petitioner could fend for themselves.

That he was not getting anything from the children and yet he paid school fees as an investment (paragraph (17) of the [petition] among others.

She prayed that her marriage be dissolved on the grounds of adultery, frequent desertion and cruelty or a decree for judicial separation be granted in the alternative. She also prayed that family property be shared between the petitioner and the respondent to enable the petitioner have a home and an income to cater for herself and the children who are still at the university. She prayed that the costs of the application be awarded.

The respondent made a reply to the petition and apart from general denials, he admitted that he traditionally married the petitioner. That he prefers the Christian faith and admits that the certificate of civil marriage was obtained though he stated that they only acquired it for purposes of securing a job as the job required someone married.

By that statement, the respondent admits that the Customary Registration Marriages' Decree did not constitute a marriage. It's only at the acquisition of the certificate of marriage through the civil marriage that he was married in a monogamous marriage. He alleged that the marriage certificate was *null and void*, but he never took any steps in the courts of law to declare that marriage *null and void* and so he had no capacity to state what he stated and it could not be sustained.

In paragraph 10 of his reply, he conceded to his not fulfilling his responsibilities and he added that the children were grownups (adults) capable of looking after themselves (paragraph 10 thereof). He also stated that he lost his job and that's why he could not pay their schools and he asked the children to supplement by paying fees. I find this contradictory after saying that the children were adults and capable of looking after themselves.

He stated in paragraph 14 that the petitioner accepted that the 3<sup>rd</sup> wife be brought home at Christmas on 25<sup>th</sup> December 2005 and he denies it being unbearable and called it a misrepresentation. He conceded having got another woman in the form of 3<sup>rd</sup> wife and that he did it with the knowledge of the petitioner. He denied having been cruel to the petitioner and

being harsh to her and that he has been giving a helping hand to her for her to have comfortable life.

This was a case which depended on whether there was a valid marriage between the petitioner and the respondent.

There is overwhelming evidence on record to prove that there was a valid binding marriage between the parties. There was the customary marriage which was concretised by the acquisition of the Civil Marriage Certificate in 1997. I find the denial of the respondent that the Civil Marriage was not conducted untenable.

The certificate is valid and it's not contested in substance or otherwise unless if it's declared *null and void* in the Courts of Law.

S.14 of the Divorce Act Cap 249 provides as follows:-

*'A husband or wife may apply by petition to the court of law for judicial or separation on the grounds of cruelty, adultery or desertion without reasonable excuse for two years or upwards and the court on being satisfied that the allegations of the petition are true and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.'*

Since the petitioner in her petition and during the hearing of the appeal she zeroed on judicial separation, I will also address the appeal in light of judicial separation requirement. In order for a decree for judicial separation to be granted, there have to be proof of cruelty, adultery or desertion. It's not all of them, but one of them, so it seems to me.

During the hearing, Counsel for the appellant/petitioner argued all the three grounds together as already mentioned and reproduced in this judgment.

Article the appellant was bound by law to prove on degree a little higher than the required in ordinary civil case but lower than that required in criminal cases.

The learned trial magistrate in her judgment said that the appellant had failed to prove cruelty. The evidence on record starting from page 54 of the record of proceedings, she testified that she has been living with the respondent since 1975 and they had business together with the respondent including the houses which they rent. That they at one time acquired a minibus, but it was later sold off to set up a business of soap for the respondent. By then she was working

with URA Entebbe Airport as a Customs Preventive Woman. That at the time of the petition she was not working and the respondent was not giving her any money from the rented houses and neither did he provide anything. That the respondent didn't live with her but lives with another woman in Kitoro and Arua.

That she last had conjugal rights with him in 2004 and their relationship is bad. That the respondent neglected them as a family since 2004 and in 2005, the respondent abandoned her and the children in a rented house. That the respondent has been quarrelsome, aggressive and threatened to beat her up and actually. When he comes once in a while, he just threatens them. That she has been with him for 32 years and he fights and beats her and that she is now scared of him as her heart condition deteriorates (gets complications).

She had the problem of the heart before and produced in the lower court evidence of her visit to the Heart Institute. She stated that the respondent brings women in the matrimonial home and sleeps with them in her bed. And that the respondent has never been explained to her why he no longer lived with her. She stated that he assaulted her in 2002. That he last bought food in 2005.

That at the time of purchasing plot 4 3 and the building, the money was from the business she was running. That the certificate of title was in the respondent's names and she knew that the respondent was the head of the family that's why she didn't object his name being inserted in the title.

It's important to note that what the appellant testified was not shaken at all in cross examination. She stated that the respondent lives with one Doris and he brought her to the appellant's house on December 25, 2005 and yet the respondent has built a house for her in the village and that she has never condoned that adultery of the respondent.

That when he brought that Doris at her home, the appellant had visitors including her son – in – law and he started showing off with this woman. He had even fought her (page 35 of the record of proceedings) moreover on Easter day. He even beat her up in 2002. She reported the issue to her parents and his parents. She went to state that they worked and obtained property together. That she has 2 houses in Entebbe and a building in Kampala, a house in the village and in Arua. That she is jobless and she had to pay fees for her two children who were still schooling. She stated that she was tired of the respondent and wanted a divorce as reconciliation is not possible. She requested court to help her to get property for the purpose above stated.

She specified the period in which their houses were completed.

That the woman by the name of Susan Rwaga was in the petitioner's house and she fought with her.

PW2 testified that they used to see their dad (respondent) daily but now they take a month and the relationship has changed. He testified that his mother, the appellant was a housewife and she gets financial support from her brothers and sisters. That they have had fights and quarrels (page 41 of the record of proceedings). She also narrates the event of December 25, 2005 when the respondent brought Doris at home (*woman friend*) when the appellant/petitioner had visitors. That the appellant refused to attend to Doris and her relatives and the respondent took them away. That when the appellant came back he started shouting in the bedroom.

That the petitioner has a heart problem. The witnesses stated that he even dropped out of school much as he says that his father was willing to pay fees.

I find this not consistent with his mother getting financial support from her brothers and sisters and he still stated that he dropped out of school to ease financial pressure. This inconsistency strengthens the appellant's case PW3 testified how the relationship between their parents is not good, i.e., the appellant/petitioner and the respondent. She also testified on the fact of the respondent bringing his girlfriend at home on Christmas day. That the respondent and the appellant quarreled in the bedroom. That she got frightened and called the respondent's friend. That the respondent said that they wanted to frustrate him. Will this be count splitting the family or the respondent's actions and or conduct?

The respondent in his defense conceded that he was married to the petitioner traditionally and the marriage was registered in the Municipal Council. He also testified that he had a number of properties and conceded further that he married Susan in 1983 and then Doris in 2002. He stated that in 1981, he acquired plot 43 Kiwafu Close and the petitioner wanted the title in her names. That in 2005 at Christmas day, he pushed her on the bed, but didn't carry out physical assault. (Whatever he meant –page 58). He stated that the petitioner changed her religion and he tolerates her because of her behaviour (he didn't elaborate on this). That he lost his job in 2006 and the petitioner had only 2 children at school. That he requested his three working children to help to pay the University fees but he was paying the petitioner's bills and was sending money for food.

He was actually conceding that he deserted her and the children by saying that he was sending money for food. When he stated that he was going to her house at page 59 of the record of proceedings, it emphasizes and strengthens the appellants' case. He actually further stated that since he got married to Susan, he stays with Susan. He becomes very untruthful and moreover on oath. When he stated that he goes to the appellant's house and that he lives with Susan.

He rested his case. There was desertion which he testified to himself and there was no merit in his other statements that he loved the appellant.

He actually split up his family by his own convictions to the two women, Susan and Doris. He actually broke up his family and the testimonies of his children in support of the appellants' case, so revealing. When he stated on page 59, the 3<sup>rd</sup> paragraph and I quote.

*“I love my wife and I think she loves me. She couldn’t be caring for me if she did not love me. There is no reason why court should grant a divorce. Separation means splitting the family. I pray that my marriage is saved.*

The question is does a mere statement that he loves his wife constitute love when the actions as testified by the appellant and her witnesses and the respondent himself say the contrary. Does someone who loves his wife dare deal with 3<sup>rd</sup> parties in the union to make the relationship so crowded and worse still disrupt the Christmas and bring misery to the whole family?

He is a man who wants to shift blame. He stated at that very page 59 that he lives with his 2<sup>nd</sup> wife Susan since they got married and that he lives with his 3<sup>rd</sup> wife in Arua who is a nurse.

All the actions do not only establish desertion and adultery, but they establish cruelty on his part knowing very well that the appellant has a legal wife who even has a heart problem. It’s cruel and insulting of him to state that out of everything, the appellant/petitioner had done with him in respect of raising the children and the business.

That he has no personal car, that he uses Susan’s car as if he found the appellant a pauper and she had made no contribution at all for the development of the family. For there is ample evidence to show that the appellant was not merely a housewife, but after she did a lot of business, the respondent found her not to be a fit and proper person to enjoy her sweat, hence getting these other women. This was cruel. He prayed that the divorce or judicial separation should not be granted but there was no gross competition, but even if it was to be there from his testimony, the respondent appears just wanting to enjoy to see the appellant suffering.

At the hearing of the appeal, counsels made oral submissions. All these grounds were argued together. Ground number two was very important and I agree with the submissions of counsel for the appellant that she did not only wrongly evaluate the evidence but she failed miserably to evaluate the evidence on record and came to a wrong conclusion that there was no proof of cruelty. Article 24 of the Constitution of Uganda provides, ‘

*“No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment”.*

From what I have summarized both from the testimonies of the appellant’s case and the respondent, it was apparent that the respondent was cruel to the appellant.



Definitely the health of the appellant was in danger as it was a well known fact that she had a heart problem. If she had a heart problem coupled with the ill treatment of the respondent which included fighting and pushing her, there is no doubt that was correct that he was subjecting her to torture, cruel and inhuman treatment. He neglected her and all her children. Even the respondent himself testified that he lived with Susan and Doris, what's more cruel than that.

He was assaulting her. He even mortgaged the house she was living in with her children, what Leeds to cruelty than this? The appellant was conceding to what the appellant stated. The respondent could just come once in a while only to quarrel with the appellant and the children, who at one time got scared and had to call a friend of their Dad (respondent, to come and intervene).

He was bringing other women in the matrimonial home when he had denied the appellant conjugal rights as he was not living with other. Isn't that cruel. I agree with the counsel for the appellant in regard to the authority cited of **Knot versus Knot [1955] 2 ALL ER. 305 – 311**. I find this case to be almost on all falls with the instant case. The facts among others were that the husband acted in an aggressive manner towards the wife and there were quarrels between them. Then later the wife became ill with tuberculosis. The husband withheld full sexual intercourse and practiced coitus interruptus against the wife's will. The court held that the husbands conduct as amounted to cruelty and further the refusal by the husband to allow his wife to have a child and the practice of coitus interruptus in disregard of whether it injured her health or not coupled with the appellant injury resulting there from amounted cruelty.

*“Forthe husband had adopted a course of conduct which preserved to himself sexual enjoyment measure”*

In the instant case, the respondent was no longer living with the appellant, but he was on and off, bringing his other women to her home, he had ceased to have conjugal rights with her, he was not maintaining her and the two children who were still at the university, and he mortgaged the house she was living in. There is evidence on record that the appellant was being supported by her brothers and sisters financially.

This is what I have already stated in this judgment amount to cruelty, desertion and adultery. It is a fact and actually the respondent stated, so that he had children with the other two women, three of them. Counsel for the respondent in his submissions referred to the evidence of PW2 and PW3, but when their testimony is analyzed, they were testifying negatively against the respondent and confirming what PW1 stated, who was consistent and what PW1 stated was strengthened by DW1's testimony (respondent). The respondent in his own words had said in his testimony that he was no longer part of the appellant's family and that the children were big to care for themselves. I find no substance therefore in counsel for the respondent's argument that the appellant didn't prove cruelty. Even if there was a contradiction, the contradiction was

so minor that it could not lead to the rejection of the appellant's testimony. The respondent by and large concedes to the allegations and strongly supported the appellant's case.

The appellant didn't say that it was the respondent who had caused the heart problem, but continuing to stay with the respondent with that conduct of his, was definitely aggravating her heart condition. She got married customarily in 1975, and then in 1992, the customary marriage was converted into a monogamous marriage by registering it, as a civil marriage.

It's therefore on record that she developed the heart problem when in marriage, but not necessarily that the respondent caused it. and that didn't license the respondent to conduct himself the way he did. Infact, he would be more sympathetic and caring since it's established that she didn't marry him with that ailment.

Counsel for the respondent tried to give evidence from the bar by stating that the petition was brought because of differences of ownership of property not because of desertion and cruelty. From perusal of the record, I find nothing to that effect so I find no merit in that submission.

The appellant had given a comprehensive testimony on the properties which they together developed with the respondent and she testified that she does not receive any money from there.

Actually from the evidence on record, she has been reduced into a pauper by the respondent's actions which he didn't deny. The properties listed are raising substantial money and therefore the respondent should be giving alimony of shs. 500,000/- to her every month for her necessities until she dies or remarries.

After a careful evaluation and scrutinisation of the evidence on record, I find that there was overwhelming evidence adduced by the appellant to warrant the grant and or award of the prayers sought for in her petition. Cruelty was definitely proved to the required standard and in accordance with Article 32, the tradition where 'man brings various women in a matrimonial home, behaves as the chief shepherd is against the dignity and welfare of a woman.' In this particular case, the evidence is overwhelming and it amounts to cruelty and torture.

The trial magistrate failed to evaluate the evidence on record and she misdirected herself on the standard of proof and therefore caused a miscarriage of justice when she failed to find for the appellant/petitioner.

I accordingly allow the appeal in the following terms;-

- i) The judgment and decree of the lower court is set aside.
  
- ii) Judgment is entered in favour of the appellant/petitioner
  
- iii) The appellant/petitioner is granted the relief of judicial separation and the consequential remedies sought in the petition. She should be left in the house where she is living now and be paid alimony of shs. 500,000/- per month for her necessities
  
- iv) Costs are hereby awarded of this court and the court below.

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**FAITH MWONDHA**

**J U D G E**

**25/02/10**

Right of appeal explained.

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**FAITH MWONDHA**

**J U D G E**

**25/02/10**