



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**ATL v CPA (Civil Appeal E004 of 2024) [2024] KEHC 6969 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL E004 OF 2024**

**KW KIARIE, J**

**JUNE 12, 2024**

**BETWEEN**

**ATL ..... APPELLANT**

**AND**

**CPA ..... RESPONDENT**

*(Being an Appeal from the judgment and decree in Mbita Senior Principal Magistrate's SPMDC No. 49 of 2020 by Hon. Japhet Bii – Senior Resident Magistrate)*

**JUDGMENT**

1. ATL, the appellant, was the petitioner in the Senior Principal Magistrate's SPMCC No.xx of 2020. He sought a divorce because the marriage had irrevocably broken down. The learned trial magistrate dismissed the petition because it offended section 66 (1) of the *Marriage Act*. Dissatisfied with this decision, he filed this appeal through Achero Mufuaayia & Company Advocates. The grounds of appeal he raised are as follows:
  - a. The appellant argues that the learned magistrate erred both in law and in principle by failing to grant the divorce, relying solely on section 66(1) of the *Marriage Act* No. 4 of 2014 to dismiss the application for divorce dated 8<sup>th</sup> June 2020.
  - b. The trial magistrate failed to consider recent case law in Petition No. 6 of 2018, which declared section 66(1) of the *Marriage Act*, 2014 unconstitutional and null and void to the extent that it limits the presentation of a Petition for separation or divorce in a civil marriage to three years.
2. The respondent did not oppose the appeal but filed a cross-appeal through the Ngire Aduol & associates Advocates firm.
3. As the first appellate court, this court is tasked with evaluating all the evidence on record. It is important to note that the court did not have the advantage of seeing the witnesses testify and observing their demeanour. The court will be guided by the pronouncements in the case of *Selle v Associated Motor*



Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.

4. The respondent had also cross-filed a petition in the lower court. Both parties thought their marriage had broken down, but the learned trial magistrate found his hands tied by the law. Section 66 (1) of the *Marriage Act* provides:
  - (1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.
5. This section was declared unconstitutional in *Tukero ole Kina v Attorney General & another 2019* eKLR.
6. In this appeal, there was a cross-appeal. Both parties want to be divorced. This is four years since the decision by the trial magistrate. The glue to a marriage is love and passion to soldier on no matter what. When parties to a marriage have no love or passion left, no law can keep them together.
7. In the instant case, I will allow the appeal and the cross-appeal. Each party will bear its costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF JUNE 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

