IN THE HIGH COURT OF TANZANIA
AT TABORA.

MATRIMONIAL CIVIL APPEAL NO. 22 OF 1978

(From the decision of the Urban Primary Court of Tabora at Tabora in Civil Cause No.23 of 1978)

ELIZABETH SAIDI ..... APPELLANT

VERSUS

KASOLA SAIDI ..... RESPONDENT

J U D G M E N T

MACKANJA, EXTENDED JURISDICTION:

In 1973, according to the undisputed evidence which was laid before the lower court, the litigants contracted a civil marriage before the Area Commissioner against the will ofthe appellant's father. And although both of them are resident here, they went to wed at Kigoma. That marriage was soon riddled with matrimonial strife; and, as a result of the protracted quarrelling, of which the appellant appears to be largely responsible, she left the matrimonial home sometime on March 9, 1978, and went to live with her parents. No sound explanation was given by the appellant of her decision except that there had been a series of quarrels, accusing her husband of lack of respect to her parents. In particular, she claimed that whenever there was a quarrel which led her, from time to time, flee from the matrimonial home to her parents, the respondent would follow her in a violent disposition against his in-laws. That whenever there was a quarrel between them, and it would appear that the quarrels were many, the respondent would not contain himself in oral outbursts - he had to fight his wife. There was however, no particualr instance which the appellant singled out during which the respondent so misbehaved during their cohabitation. At most, the only occasion he found himself up against his father-in-law was after the appellant had left the matrimonial home immediately before these proceedings were instituted. As regards this incident there is evidence that the respondent went to see his wife on one night but he could not find her there. I think he had a right to be told where his wife was, but in so doing he exceeded limits of fair inquiry and prevailed upon his mother-in-law to go to the Police Station with him. I still doubt if the respondent had any colour of right to behave the way he did, but he was charged criminally as a result of that scuffle. I however do not propose to dwell

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much on these criminal prosecutions because they have entirely no bearing on the outcome of this appeal, although I am almost certain that the occasion flared up tempers. Be that as it may, it nonetheless appears that shortly after this confrontation the proceedings which are a parent to this appeal were instituted before the Isevya Primary Court. The petitioner lost to the respondent.

It is also on record that the respondent's estranged wife did not nurture his suggestion that she determine her services with her employers. This is quite a matter which, if the litigants were living well, could have been settled without raising eye-brows, particularly at a time when every able-bodied person is required to engage in productive activities. The further accusations she makes against the respondent are wild and are clearly not born out by the record. She claimed that the respondent burnt her clothes in one ofthe quarrels. I consider these allegations wild because she even could not evaluate the clothes so burnt nor could she say why she just kept quite when she was capable of seeking the help of the respondent's niece. I think the lower court rightly rejected this allegation.

If the appellant was honest to herself, according as I propose to put forth quite presently, she should have held herself responsible for much of the blame. She does not appear to have had any respect for the man she had had three children with. There are certain things a married woman may not do for her husband, but there are certain others which she is bound to do: these include conjugal right and her duty to diligently serve him. Quite unexpectedly she denied the respondent such wifely services as cooking for him and the as if that was an act of bravado, she went around boasting in writing that she had rudely refused to cook for him. Exh. No.I, of which she admitted to be the author, states:

> "Mimi leo 9/3/78 huyu bwana aliniambia kumpikia chakula nikakataa kwa jeuri yangu mwenyewe kwa hiyo sikumpikia kapika mwenyewe na hakunikosea lolote.
>
> Mke wake mama Saidi."

The tone of the message contained in that document is a shameful insult to the very sactify of the matrimony the appellant herself willingly and knowingly had entered into.

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As if that was not enough, she openly went about in such loose way that she was once found committing adultery in "flagrante delicto." As regards this infedility she made this answer during cross-examination:

> "Ndiyo mwaka 1975 ulinifumania siyo tabia nzuri. Dai Na.56/75."

It was on the strength of these misdeeds that the appellant was petitioning the trial court to grant a decree for the dessolution of her marriage. The lower court dismissed the petition in a unanimous decision, holding that there was no ground upon which to pronnounce the marriage dissolved. I total agree in principle, basically on the statutory condition, that, before dissolving a marriage, the court must satisfy itself that the said marriage has irrepearably broken down. The trial court was not so satisfied; and there is no provision in the law of Marriage Act which may be thrown in aid of the appellant to entitle her as of right to the relief she seeks. For the only provision which may be invokced in favour of the appellant much depends on the discretion of the court in deciding whether the marriage has bfoken down as a result of the petitioner's own wrong-doing. That provision is S.107 (1) (a) of the Law of Marriage Act which provides:-

> "S.107 - (1) in deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular:-
>
> (a) shall, unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing;"

It may now be seen according to what I have endeavoured to setforth, that the petition that was filed before the lower court is exclusively based on the petiter's, now the appellant's, own wrongdoing. Is there reason, under the circumstances of this case and the conduct of the parties, in the light of the evidence on record, which justifies a decision other than that which was reached by the trial court? An answer to this question shall depend much on why marriages should be sustained at all, in the light of the law and its fair interpretation. The law I have in mind is s.107 (1) (a) of the Law of Marriage Act,

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In exercising its discretion under s.107 (1) (a) of the Law of Marriage Act the court has the unfailing duty to look at every aspect and circumstance of the case, including the consequences which would ensue from refusal of a decree. Of paramount importance it should have regard to the position of the children of the marriage who, finding themselves living with an undivorced adulterous parent may be spoilt; the court has to have regard too, of the unoffending spouse whose chances to remarry and live respectably shall hang in the balance if the decree for divorce is refused. It is also important to have regard to whether, if the marriage is not dissolved, there is a prospect of reconcilliation between the spouses. Finally, but most importantly, the court should have regard to the interest of the community at large, judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintainance of a union which has wholly broken down. Thus even though the courts usually refuse to grant divorce if petitioned by the offending spouse, they sometimes grant decrees under such circumstances such as to avoid injustice to the unoffending parties. These sound propositions were made in a leading decision of the House of Lords in BLUNT vs. BLUNT, (1943) 2 All E.R. 76 at P.78 where Viscount Simon, L.C., while delivering judgment of the court said, iter alia, that:-

> "That utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases as helping to arrive at a just conclusion. In WILSON V. WILSON (9) Sir Henry Duke, P., in dealing with the particular case before him, mentioned four circumstances which, in his view, warranted the exercise of the judicial discretion in the petitioner's favour, and these considerations were referred to with approval by Lord Birkenhead, L.C., when he was sitting in the Divorce Court and deciding WILKINSON V. WILKINSON AND SAYMOUR, THE KING'S PROCTOR SHOWING CAUSE, (10). These four points are (a) the position and interest of any children of the marriage; (b) ....., (c) the question of whether, if the marriage is not dissolved there is a prospect of reconcilliation between husband and wife; and

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(d) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably.

To these four considerations I should add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between the respect of the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down....."

I have deliberately skipped point (b) because I consider it unconsionable to favour the appellant who, by all means, is the one who wrecked this marriage. Instead, it is my considered opinion that the law should operate in favour of the respondent who has unsoiled hands in this matter, to the extent that he is the one who should be given an opportunity to re-marry and live a respectable life.

Now, these considerations were propounded in relation to an enactment in England viz., s.4 of the Matrimonial causes Act, 1937, whose proviso states, according as the same is relevant to the instant case, that

"..... the court shall not be bound to pronnounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery."

It may at once be noticed that the operative part of this English legislation is largely in "pari materia" with out s.107 (1) (a) of the Law of Marriage Act. To that extent the construction of our said section of the law of Marriage Act could safely be based on the decision of BLUNT V. BLUNT (infra). And although its authority is purely persuasive in this matter, nonetheless the principles enunciated there are sound and are worth applying to situations in Tanzania which are similar to those obtaining in England. Accordingly, I propose to apply those principles in deciding this appeal.

There are, however, pre-conditions which have to be fulfilled before the court is justified to use its discretion inthese matters. Of paramount importance the wronged spouse should not have condoned the adultery, nor should he have connived at the same. He also is bound not to collude with the adulterous wife in order to secure a divorce. Are these conditions fulfilled? I would think so, because immediately the appellant was found committing adultery her adulterous partner was successfully sued before the same trial Primary Court. And in our country, the municipal law does not make adultery "per se" necessarily a full ground for divorce, it is only evidence for a breaking union. By replacing the appellant in her role as wife after the adultery, in the peculiar circumstances of this case, does not constitute the condition I have referred to earlier in this judgment.

To what extent, then, are the principles I have proposed to apply relevant to the peculiar circumstances of this case? The first principle relevant to this case is that relating to the possibility of reconciliiation. I can say, almost with certainty that events have overtaken the possibility of reconcilliation. For those who should have been able to reconcile the petitioning wife, are now complainant's in a matter which, if the respondent is convicted, may well lend in prison. That is not the right atmosphere for a reconcilliation. Of course one may wonder why the appellant should ally with her parents against the respondent when she went to marry him against the will of her parents. That might have been so, but considering that the appellant has long since been creating conditions which make a happy marriage impossible, she cannot now be expected to side with her respondent husband. In my considered opinion, conditions are now such that a reconcillian is hardly more than a fool's vision.

If, as I have held, there is no possibility of a reconcilliation, are sucial considerations in favour of maintaining the union which is sought to be dissolved? I would not think so.

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Upon these reasons it is my considered view that this marriage has so broken down that seeking to maintain it is to justify an injustice to the parties. I would accordingly allow this appeal. The first ground of appeal is according determined.

Finally, there is the issue of the presents and cash worth shs.5,000/= which the respondent contended to have given to the appellant allegedly as dowry she demanded instead of giving the same to her parents. The transaction, if at all it was bridewealth, is strange and quite foreign in a marriage under customary law or under Islamic Law or under any rite whatever. The only person who is entitled to be paid bride wealth is the parent or the gurdian of a marrying girl. Anything given to the girl is a present to her and such presents can only be claimed back if she breaches the promise to marry (s.69 of the Law of Marriage Act). There is no such breach. Accordingly the respondent is not entitled to the refund of shs.5,000/= or to goods worth that amount.

In the result I allow this appeal as prayed. The marriage is dissolved. But because the appellant was the guilty party there shall be no order as to costs.

J. J. M. MACKANJA,
RESIDENT MAGISTRATE
ON EXTENDED JURISDICTION
12/5/79

12/5/79
Coram: J. Machanja, R.M.
Appellant: In person
Respondent: In person

Judgment delivered in open court this 12th day of May, 1979.

J. J. M. MACKANJA,
RESIDENT MAGISTRATE,
ON EXTENDED JURISDICTION - 12/5/79