

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(PC) MATRIMONIAL CIVIL APPEAL NO. 12 OF 1980

(From the decision of the Primary Court of Miono
Bagamoyo District)

AWESO ALLY.....Appellant
Versus (Original Respondent)

MATUMU SAIDI.....Respondent
(Original Petitioner)

JUDGEMENT

MAPIGANO, J. - The appellant AWESO ALLY is the husband of the respondent MATUMU SAIDI. They contracted their marriage under customary law rites about 24 years ago. Six children have been born out of the union. On 9/1/80 the respondent came to the Primary Court at Miono, Bagamoyo to petition for a decree of dissolution of the marriage. She succeeded and the **court** pronounced the divorce on 4/2/80. She had based the petition on cruelty and wilful neglect. This is an appeal from that decision.

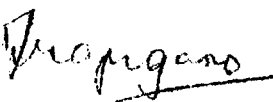
I think there was sufficient evidence which justified the judgement of the lower court. There was evidence from three witnesses which lent support to the respondent's assertions. It was established that on two occasions the appellant had been **convicted** by court for assaulting the respondent physically. It was also established that she has been living separately, for the last four years, largely in order to avoid the ill-treatment he had been subjecting her to. The appellant's answer to her petition was a general denial and a plea of res judicata. His memorandum of appeal repeats the same. But I am satisfied that the lower court was entitled to accept and act upon the evidence adduced by the respondent and her three witnesses. And while I fully subscribe to the view that divorce is not a matter which should be treated lightly, I am quite satisfied that there is no hope in this case that the parties can possibly pick up the pieces and live together again.

Res judicata does not avail the appellant. It is true that there has been a previous action between the parties before the same court in 1977. The appellant had brought proceedings to compel the respondent to return to the matrimonial home. After hearing the parties the court came to the decision that the marriage between them should be dissolved

after an elapse of ninty days, notwithstanding the fact that the respondent had neither cross-prayed for divorce nor specifically asked for it in her testimony. On appeal to the District Court of Bagamoyo by the appellant, that decision was upset. On a further appeal to this court by the respondent, it was held that the District Court was right in setting aside the decree of divorce. Most importantly, it was also held that the action filed by the appellant in the Primary Court was misconceived and not maintainable, by virtue of section 140 of the Law of Marriage Act, and, accordingly, the proceedings were found and declared to be a nullity: DSM. (PC) Civ.App. No. 31/78.

In consequence, this appeal is dismissed with costs..

DAR ES SALAAM
15th December, 1980.


(D. P. MAPIGANO)
JUDGE.