IN THE HIGH COURT OF TANZANIA

AT GEITA

(PC) MATRIMONIAL CIVIL APPEAL NO.7/81

(From the decision of the District Court of Sengerema at Sengerema in Matrimonial Civil Cause No.146/1980

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MWAMBEGE FELIX J. M. ..... APPELLANT

Versus

SANGWE MWAMBEGELE..... RESPONDENT

## J U D G M E N T

CHUA, J.

In the Primary Court Sengerema the appellant petitioned for divorce giving his reason as being cruelty on the part of his wife the respondent in this appeal. The Primary Court found that the appellant had failed to prove cruelty of the type that would entitle it to conclude that the marriage had broken down irretrievably. Nevertheless a separation of two years was ordered. The appellant is disatisfied with the findings and orders of the lower court.

In his memorandum of appeal the appellant alleges that the trial magistrate and the assessors were biased against him. He maintains that he he in fact told the lower court that he would like his case to be heard by another magistrate but he was overruled. I have perused the record of the lower court and noted the following facts. On 22/2/1980 the petitioner adduced his evidence. As soon as he had finished to do so the trial magistrate of his own motion made the following order:-

> "Mdai kuleta wazazi wake 29/1/1981. Mume ahame nyumba ile kwa sababu hawezi kuishi pamoja na hali wanaugomvi kama huu. Mke ndiyo akae kwenye nyumba mpaka hapo itakavyotokea vingine."

It is this order which prompted the appellant on 10/1/1981 to apply for a retrial before another magistrate. He gave as his reason, the biased order above and the fact that his wife was bragging that the magistrate was going to decide the case in her favour. The trial magistrate sought the views of the assessors. It is interesting to note what the assessors said. The assessor by the name of Dinah said as follows:-

> "Mimi naona kwamba nyumba hiyo imejengwa nao wakiishi pamoja kindoa. Wote wana haki na nyumba hiyo yaani ni yao wote wawili. Ndiyo kusema wote wawili wamejenga nyumba hiyo na vitu vilivyomo ndani humo ni vyao wote. Nitashangaa kama mke ataviiba. Amri iliyotolewa 22/12/80 kwamba mwanaume atoke nyumba hiyo ibaki ilivyo mpaka mwisho wa shauri hili. Hii ni njama ya mdai kutoka mdaiwa mke aitoke nyumba hiyo kusudi aishi humo yeye asijali shauri lake la kuomba talaka. Ombi la pili vile vile ni njama ya mdai kutoka hakimu mwingine kusikiliza daawa hili ili aweze kufaulu."

The views of assessor Dinah prevailed and the court went on to hear the evidence of the respondent on 29/1/1981 and fixed the case for

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judgment on 7/2/1981.

On 30/1/1981, however, the court record shows that evidence of two witnesses, namely Nyambelega Kubakigwe and Eva Mwambegele was taken. These witnesses were mother and sister of the petitioner respectively. Their evidence ought to have been taken before the case for the respondent commenced as they were witnesses for petitioner. The record gives no clue as to why this breach of elementary procedure was committed.

It is a basic rule of natural justice that no one should be judge in his own cause. This rule covers not only a situation where the presiding magistrate has a direct interest but also where there is evidence of bias through close association with any of the parties. sometimes there may be no actual evidence of bias but if there are proved incidents giving rise to a reasonable apprehansion in the mind of the aggrieved party that he will not have a fair trial than the magistrate ought not proceed with the matter. This legal principle was expounded clearly in case of Herman Milde reported in 1 TLR,129 which involved an application for change of venue. In that case the High Court held:

"It is not every apprehension which could be taken into consideration but that the apprehension must be of a reasonable character and must be founded upon distinct incidents which would really give rise to a reasonable apprehension that there would not be a fair trial."

The same principle is restated in the case of Mbuji V. R. (1971) HCD. 220: In that case it was established that the principal prosecution witness was not only of the same tribe as the trial magistrate but also an intimate friend. Mr. Justice Mwakasendo, as he then was, ordered a retrial giving his reason that;

> "it would be lame indeed to assert that right minded people watching these judicial proceedings would think other than that the magistrate was biased.....
> .....
> It does not matter in the least in my opinion, that they might be completely mistaken in holding this view."

In this case the order of the trial magistrate that the appellant should vacate the matrimonial house was made of his own motion. He did not want to hear the views of the parties or the assessors on this aspect of the case which leads to a reasonable presumption that he already knew the case before handling it. This in my view was a manifestation of bias. Subsequent failure to complete the petitioner's case before hearing the respondent is another incidence which gives rise to apprehension that the trial magistrate was not handling the case fairly. Finally the comments of assessor Dinah which I have quoted above strongly reflected the state of a biased mind. Justice must not only be done but must manifestly be seen to have been done. This cannot be said of the present case.

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In view of what I have said above it will be otiose for me to go into details about the merits of the other points raised in the memorandum of appeal. Had the case been conducted more properly the final results may have been different. It is not however the function of this court to work on conjecture. Suffice it to say that in the interest of justice I quash the proceedings of the lower court and a trial de novo is ordered before a new bench. In the spirit of S. 90 of the Law of Marriage Act. 1971 each party will bear his or her own costs.

L. J. R. CHUA
JUDGE

GEITA:
23rd March, 1982: