IN THE HIGH COURT OF TANZANIA
AT MTWARA

DC. MATR. APPEAL NO. 1/2011
ORIGINAL MTWARA RM'S COURT
MATR. CAUSE NO. 1/2010

MOSHI ABDALLAH KOVU ---------- APPELLANT

VERSUS

FADHILI NJENDE---------- RESPONDENT

30/10/2012 and 11/12/2012

JUDGMENT

S. A. Lila, J.

There is evidence, atleast, showing that the parties had a relationship which resulted in their being blessed with an issue in 2003. Such relationship lasted longer and it is not controverted that it lasted for about eight years. The appellant stated before the trial magistrate that they, under Islamic rites, married each other which fact was disputed by the respondent. On the basis of the above, the appellant clearly stated and this is not controverted that the matrimonial difficult was reported to the Marriage Conciliatory Board (Bakwata) before she petitioned for divorce.

A brief history of the matter will assist in determining this matter. The appellant petitioned for divorce, division of matrimonial properties and maintenance of the child before the Resident Magistrate's court of Mtwara. That was on 24/12/2010. She succeed and the trial court gave these orders.

1. The respondent to pay the compensation to the petitioner to the tune of Tshs. 2,500,000/= immediately after this judgment.
2. The marriage is broken down irreparably and so the parties are officially divorced now and the petitioner be given his divorce immediately.
3. The infant children remained under petitioner's custody and be maintained by the respondent
4. Each to bear his/her own costs.

The above orders aggrieved the appellant, hence this appeal and has raised seven (7) grounds of appeal.

With respect, I find myself unable to determined this appeal on merits. There are two points of law which make adjudication of this appeal on its merits unnecessary. **One**, the appellant and her witness contended and stressed during trial that she was officially married by the respondent according to Islamic rites. She went further into telling that she reported the matter to Bakwata (Marriage Conciliatory Board) before petitioning to court. She could not neither annex or show the copy of the certificate from the Conciliatory Board. Though the respondent did not dispute being summoned and appearing before Bakwata, but no certificate was issued by such Board for had there been one then the appellant would have annexed it with the petition. It can therefore legally be taken that the matrimonial difficulty was not first referred to a Marriage Conciliatory Board before the petition for divorce was filed in court. This lapse offended the provisions of **Section 101 of the Law of Marriage Act 1971, Cap 29 R.E. 2002** hereinafter referred to as the Act, which reads: .....

> " No person shall petition for divorce unless he or she has referred the matrimonial difficulty to a Board and the Board has certified that it has failed to reconcile the parties."

Section 106 (2) of the Act requires every petition for a decree for divorce to be accompanied by such certificate which must set out the finding and recommendations of the Board in terms of **Section 104 (5) of the Act**. There are six exceptions to the requirement for reference to a Board specified under section 101 as paragraphs (a) to (f). In the circumstances of this case, however, paragraph (a) to (e) were inapplicable and there were no extraordinary circumstances, let alone to the satisfaction of the trial court, which made reference to the Board impracticable in terms of paragraph (f). The Board is an impartial body which is expected to restore confidence in parties confronted with matrimonial stresses and strains. It assesses the circumstances and attempts to mediate and reconcile the parties. It is now settled and this court has held in a number of occasions such as in **Shilo Mzee V. Fatuma Ahmad [1984] T.L.R. 112,** that in the absence of a certificate from a conciliatory Board, and the case not

falling under any of the exceptions listed in **Section 101 (a) to (f) of the Act,** a petition for divorce becomes premature and incompetent. In the circumstances of this case it was improper for the trial magistrate to not only hold that there existed a presumed marriage while the appellant had stressed that they contracted an Islamic marriage but also preside over a petition for divorce which was improperly before her. The above irregularity vitiated the proceedings, judgment and orders of the trial court which are consequently declared null and void. I hereby quash and set them aside.

The second reason for not determining the appeal on merits is the fact that all the witnesses in this case were not sworn in or affirmed before they gave their testimonies. Only their names, age, tribe, works of life and religion were shown. There are no any indication that they took oath or affirmation before they testified. This is in contravention of **Section 4(a) of the Oaths and Statutory Declarations Act, Cap 34 R.E. 2002** which mandatorily requires any person who testifies in court to make oath or affirmations. As no one witness in this case made oath or affirmations before giving evidence, then their respective evidences

were worthless before the eyes of the law. Such evidence could therefore not be relied on in reaching a decision.

The appeal is, for the above reasons, accordingly allowed. The parties are to remain legally married and in the event that one of them wishes to divorce the other he or she must abide by, and act according to, the law. I make no orders as to costs considering that the parties are ordered to legally resume to their marital status.

S. A. Lila

Judge

11/12/2012

Order: Judgment is delivered today in chambers in the presence of both parties present in person.

S. A. Lila

Judge

11/12/2012