IN THE HIGH COURT OF TANZANIA

[DODOMA DISTRICT REGISTRY]

AT DODOMA

PC MATRIMONIAL APPEAL NO. 9 OF 2018

[Arising from a decision of the District Court of Dodoma in Matrimonial Appeal No. 3 of 2018 original Matrimonial Cause No. 57 of 2017 of Urban Primary Court Dodoma]

JOSHUA NDAHANI ..... APPELLANT

VERSUS

HAPPINESS NDAHANI ..... RESPONDENT

JUDGMENT

08th June, 2020 & 11th August, 2020

M.M.SIYANI J.

Parties to this appeal have lived together for 15 years as husband and wife having married under customary rights sometimes in 2001. Their union was blessed with three issues. It would appear that a series of matrimonial difficulties involving the two weakened their marriage and so on 2nd November, 2017 Happiness Ndahani, the respondent herein petitioned at Dodoma Urban Primary Court Dodoma for divorce, division of matrimonial asserts and custody of children. Having heard the matter, the trial court

declined to dissolve the marriage on a reason that evidence tendered did not prove that the marriage was broken down beyond repair.

On appeal to the District Court, it was found that there was conclusive evidence on record that the marriage has broken down irreparably and as such the first appellate court went on to issue orders as division of matrimonial assets and custody of the children. Dissatisfied, Joshua Ndahani, preferred the instant appeal. Initially, the petition of appeal presented had four grounds but in the course of hearing, two grounds of appeal were abandoned. The following two grounds were therefore argued by the parties:

1. *That the first appellate court erred in law in respect of the division of matrimonial assets while the marriage was or/is not dissolved by neither the trial court nor the appellate court.*

2. *That the first appellate court erred in law and in fact by awarding one house, one bed with its mattress, a half of the value of the car and cupboard by relying on the weakest evidence adduced by the respondent towards acquisition of the same.*

Both the appellant and the respondent had legal representation at the hearing of the appeal in this court. While the appellant had the services of counsel Issaya Edward Nchimbi, the respondent enjoyed the services of counsel Maria Ntui. Both counsels were brief in their respective submissions. In support of the appeal counsel Nchimbi argued that it was wrong for the first appellate court to divide matrimonial assets while neither of the two courts below, dissolved the marriage. He contended by relying on section 110 (1) (a) of the Law of Marriage Act [Cap 29 RE 2019] that it is only after dissolving the marriage that matrimonial asserts can be legally divided. The learned counsel went on to even fault the first appellate court for dividing matrimonial assets in absence of strong evidence on the respondent's contributions towards its acquisition.

In reply, it was submitted by counsel Maria Ntui that, the respondent moved the court to dissolve their marriage and the first appellate court issued reasons for granting divorce decree. Ms Ntui therefore believed that the first appellate court dissolved the marriage when it disagreed with the trial court's findings. As to division of matrimonial assets, it was argued that the court correctly divided the same by relying on the principles laid in **Anna Kanuga**

Vs Andrea Kanuga (1995) TLR 194 and **Gabriel Nimrod Kurwijila Vs Theresia Hassan Malongo,** Civil Appeal No. 102 of 2018

Having revisited the record and what was submitted by the learned counsels, I will also be brief in my reasoning. Apparently the first appellate court found that the marriage between parties herein has broken down beyond repair. The two grounds of appeal presented, were basically on division of matrimonial assets and so none of it was intended to challenge the said finding. Since the first appellate court found that the marriage has been irreparably broken down and since no ground of appeal was presented and argued against that conclusion, then the question whether or not the marriage between parties herein has been broken down beyond repair, is not a subject of contention at this stage.

The above said, it is a correct position of law that marriage are dissolved by a court's declaration that the same has been broken down irreparably. That declaration must be followed by issuance of a divorce decree. In the instant appeal, the first appellate court overturned the trial court decision that

declined to dissolve the marriage. In reaching his decision the learned first appellate magistrate observed the following:

> *It is common knowledge that a court will only dissolve a marriage when satisfied that the said marriage has broken down irreparably...The three grounds advance by the appellant at the trial together with the overall circumstances surrounding the marriage in issue, did not satisfy the trial court that the marriage has broken down beyond all recall. The trial court was convinced that all those factors were not conclusive that the marriage had broken down irreparably. On my part, I differ with the findings of the trial primary court..... I ask myself can this marriage be repaired? I think it cannot. Even the conciliation board failed to reconcile them*

As it can be glanced from the extract above, although the first appellate court found that the marriage has broken down beyond repair, there was no declaration that the marriage has been dissolved. As such no divorce decree was granted. In my considered opinion, that was wrong. Marriage duly contracted is not dissolved by a mere finding that they have broken down irreparably but having so found, by granting a decree of divorce as required

under section 110 (1) (a) of the Law of Marriage Act (supra) which for easy of reference I have reproduced its contents hereunder:

> *110: (1) At the conclusion of the hearing of a petition for separation or divorce, the court may:*
> *(a) if satisfied that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce, as the case may be, together with any ancillary relief;*

Therefore having found that evidence on record was sufficient to dissolve the marriage, the first appellate court ought to have completed the task by granting a divorce decree which as correctly noted by Ms Ntui was sought by the respondent at the appellate stage. By not granting a divorce decree, the marriage which otherwise has been broken down remains undissolved.

Since as noted above the fact that the marriage between parties herein has broken down irreparably is not an issue, then a question whether or not this court step into the shoes of the first appellate court and do what ought to have done by it by granting a divorce decree becomes necessary because

this being a second appellate court, should normally be enjoined only to deal with issues of law and not facts. That notwithstanding, a second appellate court can only step into the shoes of the lower court on issues of facts where there is a poof of misapprehension of evidence leading to miscarriage of justice.

In my view failure of a court to grant a divorce decree after concluding that the marriage has broken down beyond repair, is a question of law because section 110 (1) (a) of the Law of Marriage Act cited earlier requires so. Therefore this is a fit case for the second appellate court to intervene by stepping into the shoes of the lower court. Without much ado, issuing a divorce decree being a legal requirement after finding by a court that a marriage has broken down irreparably and since that finding has not been challenged in this court, an order for decree of divorce sought by the respondent, is now granted accordingly.

The above said and done, I will now turn to the second ground of appeal where the appellant faulted the first appellate court for dividing matrimonial assets basing on weak evidence by the respondent the extent of her

contribution towards its acquisition. I have gone through the trial court records. The same are clear that the respondent's contribution towards acquisition of the assets was not financially but basically by providing domestic services. According to her evidence, the respondent used to perform domestic services such preparing meals and doing laundry activities. An established principle of law is that domestic services forms party of the joint efforts and so amounts to contribution in acquiring matrimonial assets. [See **Bi Hawa Mohamedi Vs Ally Seifu** [1983] TLR. 32]. Rendering of these services was not contested by the appellant at either stage of the trial.

For the foregoing reasons, the appellant's complaint that there was weak evidence on the respondent's contribution towards acquisition of matrimonial assets, is of no basis because the rendered domestic services was a sufficient contribution in acquisition of the matrimonial assets and a prudent court, cannot let such efforts go unnoticed.

In the fine, the decision of the first appellate court cannot be faulted save for granting of divorce decree. The appeal is therefore partly allowed and partly dismissed to the extent explained above. Considering that this matter

arises from matrimonial cause, I order each side to bear its own costs. It is so ordered.

DATED at **DODOMA** this 11th day of August, 2020

M.M. SIYANI

JUDGE