IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MATRIMONIAL APPEAL NO. 08 OF 2020

(Arising from the judgment of the District Court of Tarime at Tarime (Hon. V.A. Balyaruhu), dated 18/05/2020 in Matrimonial Appeal No. 8 of 2019)

ASHA WAMBURA MARWA ..... APPELLANT

VERSUS

MARWA KERARYO MAGAHU ..... RESPONDENT

JUDGMENT

Date of Last Order: 06/08/2020
Date of Judgment: 28/09/2020

KISANYA, J.:

Asha Wambura Marwa (the appellant) and **Wambura Keraryo Magahu** (the respondent) celebrated their marriage under customary rites on 1/1/2005. Three children were born during the life time of their marriage. A sequence of matrimonial snags relating to both parties destabilized their marriage. Therefore, **Asha Wambura Marwa** decided to petition for divorce before the Nyamongo Primary Court, Tarime District on 6/11/2019. Upon hearing the parties, the trial court was satisfied the marriage had been broken down irreparably. It went on to grant her the divorce, dissolve the marriage and place the issues of marriage under the custody of **Asha Wambura Marwa.**

Wambura Keraryo Magahu successful appealed to the District Court of Tarime. The first appellate Court held that the dissolution of marriage was premature as the parties had been separated for two years. Consequently, the decision and

order of the trial court were quashed and set aside. The first appellate court went on to order the parties to live together. Also, the children were then placed under the custody of both parties.

Aggrieved, **Asha Wambura Marwa** has preferred the instant appeal. At first, she raised four grounds of appeal. But in the course of hearing, the following three grounds were advanced and argued:

1. *That the first appellate court erred in law to hold that the marriage has not been broken down irreparably while the parties have been in separation for thirteen years.*
2. *That the first appellate court erred in law to command the disputed parties to live together as husband and wife without their voluntary consent.*
3. *That the first appellate court erred in law and fact for granting custody to the parties in dispute without considering the fact that the parties are not living together, the appellant is living in Musoma while the Respondent is living in Nyamongo Tarime and two of the children were born during separation.*

At the hearing of this appeal, the appellant enjoyed the services of Mr. Wambura Kisika, learned advocate while the respondent appeared in person, legally unrepresented.

Mr. Kisika started his submission in support of the appeal by addressing the second ground of appeal. He faulted the first appellate court for forcing the parties to live together contrary to section 9 of the Law of Marriage Act, Cap. 29, R.E. 2019 (the LMA). Mr. Kisika argued that, there was no voluntary union between the parties. His argument was based on the fact that, the evidence adduced before the trial court shows that the parties were not ready to live together.

Returning to the first ground of appeal, Mr. Kisika argued that the marriage had been broken down irreparably. The learned counsel substantiated his argument by stating that the parties separated in 2007 when the respondent deserted the appellant. He argued further that, the appellant was put under control of the respondent's mother and that during the period of desertion, two children were born out of wedlock. Mr. Kisika was of the firm view that, the evidence deposed before the trial court proved cruelty, wilfully neglect and desertion on the part of the respondent and voluntary separation for more than three years. Therefore, he argued that, the grounds required under section 107(2) of the LMA to establish that the marriage had been broken irreparably were proved by the appellant.

On the third ground of appeal, Mr. Kisika submitted that the first appellate court erred in law and fact in granting the custody of children to both parties without considering the best interest of the child. He therefore urged the Court to allow the appeal by quashing and set aside the judgment of the first appellate court.

In reply, the respondent contended that he did not desert the appellant. He went on to state that, it is the appellant who moved from his house in 2016. Regarding the issue of custody of children, the appellant urged the Court to be satisfied on whether they were his or not. He claimed that, all issues of marriage are his and that, he had been maintaining them. The appellant went on to submit that, in the event the children belong to another man, he would be entitled to damages.

When Mr. Kisika rose to rejoin, he reiterated his position that, the marriage had been broken down beyond repair. He contended that, the respondent is concerned with the issues of marriage only. However, the learned counsel left for the Court to decide on the issue of custody of children.

I have carefully examined the submissions by both parties in line with the evidence on record. It is my considered opinion that, this appeal can be disposed of by addressing two issues namely; whether the marriage had been broken down irreparably; and who should be granted custody of children.

I will start with the first issue, whether or not the marriage had been broken down beyond repair. The common grounds to prove that the marriage has broken down irreparably are cruelty, adultery and desertion. These grounds are provided for under section 107(2) of the LMA which lines up other grounds for dissolution of marriage. The said section reads as follows:

> *"(2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree-*
>
> *(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when The Law of Marriage Act [CAP. 29 R.E. 2019] 62 adulterous association is continued despite protest;*
>
> *(b) sexual perversion on the part of the respondent;*
>
> *(c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;*
>
> *(d) wilful neglect on the part of the respondent;*
>
> *(e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;*
>
> *(f) voluntary separation or separation by decree of the court, where it has continued for at least three years;*
>
> *(g) imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;*

(h) mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; or

(i) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage.

Any of the above stated grounds may be considered as sufficient to grant the decree of divorce. Thus, it is not mandatory to prove more than one grounds. In the instant appeal, the trial court granted the decree of divorce basing on the ground of separation for more than three years and cruelty. This is reflected in the trial court's judgment where it was held that:

"Kuhusu hoja ya kwanza, Mahakama imeona kuwa wadaawa wametengana kwa miaka mitatu.

Kuhusu hoja ya pili mdai ameeleza alifanyiwa operation ya uzazi mume wake hakuwepo na alikuwa anapigwa na mama mkwe wake mpaka mshono ulifumuka. SM2 ameunga mkono na kueleza binti yake alikuwa anateswa alimrudisha kwa mume wake aliendelea kuteswa ameamua arudishe mahari asiendelee kuteswa.

Mdaiwa kwenye maelezo yake hapingi kuwa alikuwa anamtesa mke wake ila yeye ameelea mdai aliondoka ajitawale.

Mahakama baada ya kupitia ushahid imeona kuwa mdai alikuwa anateswa na kulingana na ushahidi hakai na mume wake."

However, the first appellate court quashed and set aside the above findings on one the basis that, the parties had been separated for two years in lieu of three

years required by the law. This is reflected in the following passage of the judgment of the first appellate court:

> *"However, having gone through the testimonies of both parties, the respondent left her husband on 12/05/2017 and till 06/11/2019 was when she sought for divorce in within a period of two years only and it was after leading her matrimonial home on her own in fine (sic), the court has gone through the grounds of appeal and found that they have merit. Being so I hereby quash the decision and order of the trial court."*

Now, was the first appellate court right in arriving at the above decision? I have gone through the evidence adduced by both parties. It is deduced from the appellant's evidence that, the respondent left her in 2007. This evidence was not challenged by the respondent during cross-examination. Although the appellant did state the date she left the respondent's home, the respondent testified that it was June 2016. On the other hand, it is on record that, the petition for divorce was filed on 6/11/2019. Therefore, in the light of the appellant and respondent's evidence, it is clear that the parties were not living together for more than three years. With that finding, I am of the considered opinion that, the first appellate court erred in holding that the separation was for two years only.

Furthermore, apart from the ground of separation, the trial court was convinced that there was cruelty on the part of the respondent. The fourth ground of appeal before the first appellate court was to the effect that, the trial court erred in deciding that there was cruelty on the part of the respondent. Although the first appellate court did not specifically decide on the said ground, it held that all grounds of appeal were meritorious. This implies that, the first appellate court did not find cruelty in the case at hand.

As rightly submitted by the Mr. Kisika, cruelty may be physical or mental. I have gone through the appellant's evidence. She advanced the ground of cruelty when she testified that:

> *"Alinitelekeza nikiwa na mimba ya miezi mitatu aliandoka nilivumilia nyumbani kwao, alirudi nimefanyiwa operation nina mtoto...Mume wangu alindoka aliolewa Nyangoto. Nilivumilia. Nilimwambia amenitelekeza kwa mara ya pili. Alisema mama yake ndiye amenioa. Nilipewa kiwanja na wazazi wake nilimwambia anijengee alikaa. Nilitafuta fundi Sanawe alinijengea nyumba kwanza. Nilihamia mme wangu alikuja anichomee ndani mama yake alikataa. Nilihangaika mwenyewe kutunza watoto..."*

Again, when asked by one of the assessors, the appellant deposed that:

> *"Sababu alinitekeleza amenipiga mara nyingi..."*

I am of the opinion that, the above evidence by the appellant reveals mental and physical cruelty inflicted to her by the respondent. The said evidence adduced was not challenged by respondent who opted not to cross-examine the appellant. It is trite law that, failure to cross-examine the adverse party on the important aspect is tantamount to acceptance or admission of the said fact. This position was stated in the case **Bakari Abdallah Masudi vs. R**, Criminal Appeal No. 126 of 2017 when the Court of Appeal held that:

> *"It is now settled law in this jurisdiction that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect."*

Since the evidence on cruelty was not challenged by the respondent on cross-examined, it was established by the appellant. In the end result, the stated evidence on desertion or separation and cruelty proved that, the marriage had

been broken down beyond repair as held by the trial court. It follows that the first appellate court erred in quashing the decision of the trial court.

Now that this Court is in agreement with the decision of the trial court on dissolution of marriage due to the foresaid reasons, the next issue is who was entitled to the custody of children. This issue is premised on section 125 of the LMA. The primary consideration in deciding in whose custody a child should be placed is the welfare of the child. In so doing, the court takes into account the wishes of the parents of the child; the wishes of the child, where he or she is of an age to express an independent opinion; and (c) the customs of the community. There is a rebuttable presumption that the best interest of the child requires the child below 7 years to be placed in the custody of his mother.

In the instant appeal, the issues born during the life time of marriage between the parties were aged 11, 8 and 6 years at the time of dissolution of marriage. The trial court granted custody of the children to the appellant on the ground that they were still minor. It is on record that, the appellant deposed that the respondent was biological father of the first born only. In the circumstances, and considering this is not a proper forum to determine the issue of parentage and paternity, I am of the opinion that, it is in the best of interest of the children to be placed under the custody of the appellant at this stage. Thereafter, the respondent may wish to petition for parentage or biological paternity and custody of children under the Law of the Child Act, Cap. 13, R.E. 2019 as held by the first appellate court.

That said and done, the Court finds the present appeal meritorious. Consequently, it is hereby ordered as follows:

1. The appeal is allowed.

2. The decision of the District Court of Tarime is quashed and set aside to the extent it is stated hereinabove.
3. The decision of the Nyamongo Primary Court is restored and upheld.
4. Due to the nature of this case, each party shall bear its costs relating to this appeal and the courts below.

Order accordingly.

Dated at MUSOMA this 28rd day of September, 2020.

E. S. Kisanya
JUDGE
28/09/2020

Court: Judgment delivered in Chambers this 28th September, 2020 in the presence of the appellant and the respondent. B/C Mariam present.

E. S. Kisanya
JUDGE
28/09/2020

Court: An aggrieved party may appeal to the Court of Appeal

E. S. Kisanya
JUDGE
28/09/2020