

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**MATRIMONIAL APPEAL NO. 04 OF 2019**

(Appel from the Judgment of the District Court of Ukerewe District, L. A.  
Nyahega RM, in Matrimonial Cause No. 01/2019)

**JENIFER DAMIAN..... APPELLANT**

**VERSUS**

**SHERIA BUKENE.....RESPONDENT**

**JUDGEMENT**

**Date of last order: 13/11/2020  
Date of Ruling: 14/12/2020**

**F. K. MANYANDA, J**

In this appeal the Appellant is challenging the decision of the District Court of Ukerewe, hereafter referred to as the "trial Court". It was a decision given by Honourable L. A. Nyahega, Resident Magistrate, dated 11/11/2019 in Matrimonial Cause No. 01 of 2019 that dismissed the Appellant's petition for divorce and matrimonial division, a decision which aggrieved the Appellant.

The brief background of this matter is that the Appellant was married to the Respondent since 09/03/2008 under the rituals of Association of Yehova's witness. They are blessed with two issues namely Jesca Sheria



and Hudson Sheria. The Appellant is a teacher at Bukongo Primary School in Ukerewe District while the Respondent is a jobless.

The Appellant and the Respondent lived peacefully. As the Respondent had no job, she took credits from banks and financed him to start business. She purchased a motorcycle which later on was sold by the Respondent. Then she took another loan and opened a hardware shop but the Respondent failed to maintain it. She later on sent the Respondent to qualifying tuition, commonly referred to as QT, in order for him to get secondary education in anticipation that if he becomes educated, he might get a paid employment. She paid all the fees, but he failed.

Seen all these steps fertile, she chose to go to Bunda Teachers College herself for studies in 2017. By then she had already constructed a house from loan she took from banks, a house in which they were living.

The sour their marriage life started when she went to the collage, the Respondent chased the Appellant's young brother, who was taking care of her young children, for no reason. He sold one of the two plots the Appellant had purchased on loan. When she completed her studied and



returned in 2019, the Respondent chased her from the house on reason that she was pregnant and he did not know the owner of the pregnancy.

The Appellant referred the conflict to the Church leaders who failed the to reconcile the same. She then reported the same at the Ward Tribunal in vain. Hence, she petitioned in the trial court for divorce which also dismissed her petition on reason that their marriage had not irreparably broken down. Hence this appeal.

The appellant has come to this Court with four (4) grounds of appeal namely: -

- 1. That the trial Court erred in law and facts when failed to hold that the Appellant has failed to prove that the marriage has been broken down irreparably.*
- 2. The trial Court erred in law and fact when it failed to hold that there was a constructive desertion, or the appellant departure from matrimonial home was necessitated by the respondent's misconduct which amounted to dismissal from the consortium.*



*3. That the trial magistrate grossly erred in law and facts when he failed to properly consider and correctly evaluate and analyze the evidence adduced at the trial.*

*4. That the trial court grossly erred at law and facts for failure to hold that chase from the matrimonial home accompanied by putting the appellant properties/articles (clothes) outside the house amounted to cruelty.*

Hearing of the appeal was ordered to be argued by way of written submissions. The written submissions by the petitioner were drawn and filed by Mr. Dutu Fausitine Chebwa, learned Advocate while the Respondent wrote the submission and filed the same personally as a layman.

Mr. Chebwa chose to argue grounds 1 and 3 together whereas after summarizing the evidence he was of the opinion that basically the evidence of the Appellant was not controverted by the Respondent. He failed to see why the trial court failed to hold that their marriage had been broken down irreparably. He cited the case of **Mariam Tumbo vs Harold Tumbo** [1983] TLR 293 where it was held that: -



*"In this Country, proof of what is called matrimonial offence (adultery, cruelty, desertion etc) would not by itself entitle a spouse to a decree of divorce, afortiori failure to prove such offences would not by itself disentitle a spouse to the decree. What is relevant is whether the marriage has been broken down irreparable and in considering this aspect the Court is enjoined to have regards, not merely to specific offences, if any, but all relevant evidence regarding the conduct and circumstances of the parties."*

The Respondent been a layman had nothing to say on this contention.

I have gone through the evidence on record, it is the evidence by the Appellant that right now she is hibernating with her issues in a small room she has rented after been chased out of a house she actively participated in its construction. She took a loan with which she used to purchase two plots of land and built the house on one of the plots. As she was going for studies at Bunda Teachers College she and the Respondent invited her brother to live in their house for purposes of taking care their children who were very young; thereby enabling the Respondent to struggle finding the means of survival.

The evidence of the Appellant which is not controverted shows her high commitment of maintaining the Respondent. She borrowed money from banks and purchased a motorcycle which she gave the Respondent for him to self-employ but the Respondent failed, instead of using it for business he sold the same and ended up jobless again.

The Appellant borrowed money again and paid for QT Examinations so that the Respondent would go on in academics but he failed. Seen this, the Appellant changed idea and borrowed money again. This time she opened a hardware shop for the Respondent, but he failed to run the same again. Undaunted, she borrowed money again and purchased two plots of land and built a house on one them, the Respondent sold the remaining plot without consent or notice to the Appellant and swindled all the money. When she came back from the college, the Respondent expelled her from the house she actively participated to build for her family. More, he accused her of adultery after she had become pregnant. On the allegations that he did not have sexual intercourse since 2019.

Despite of all these love and passion demonstrations by the Appellant to the Respondent, her wages from the Respondent was donkey's kicks. The Respondent also chased her brother who was taking care of the

children, he did this in her absence while she was at Bunda Teachers College. There are no reasons given by the Respondent for all these conducts, except denial.

The Appellant referred their marriage disputes to their religion leaders at their Church and later on at the Ward Tribunal, but in vain.

The trial Court when dismissing the petition stated at page 8 that: -

*"In this present case it is of my strong view that the petitioner was not able to prove any one of the grounds for divorce as provided under section 107(2)(a)(i) of the Law of Marriage Act, [Cap. 29 R. E. 2002] against the Respondent."*

After this finding the Court went on making reference on paragraphs 12 and 13(1) of the Petition and held that such grievances were minor.

I have gone through the petition. In ground number 12 the grievance was that she registered a dishonest behaviour by the Respondent who conceded. In her testimony she stated that the Respondent wants to marry another woman she stated that: -

*"My husband has the purpose of marrying another wife and bring her in my house."*

This fact was not cross examined by the Respondent which means he admitted the same a true fact.

The trial Court dismissed the grievance in ground 12 of the petition in the following words:-

*"The Petitioner did not elaborate more on this fact in the petition to show if the respondent had confirmed with this dishonest behaviour later on and also in her testimony she was silent on this fact." The Court therefore did not see if this fact was strong enough to grant decree of divorce."*

With due respect, the Appellant testimony was sound enough to be heard; that the dishonest grievance is still in existence to date, that is why the Appellant is not living in their house after been chased by the Respondent.

Regarding grievance in ground 9 of the petition is that the Appellant complained of the Respondent selling the plot to one Scolastika Dickson not only without her consent but also without notifying her. The trial Court dismissed this grievance on reasons that she still has chance to challenge the sale agreement in Courts of law.



This Court agrees with the Counsel for the Appellant that the trial Court dealt with the matrimonial offence in isolation. This is contrary to the Court's direction in the case of **Mariam Tumbo (supra)**.

Cumulation of the matrimonial offences gathered from the evidence, as a whole, in this case establishes to the required standard of proof in civil cases that the marriage between the Appellant Jenifer Damian and the Respondent Sheria Bukene is broken down irreparably grounds 1 and 3 has merit.

Regarding ground 2 Mr. Chabwe elaborated constructive desertion that when the Appellant returned from her studies she was chased by the Respondent. That the Respondent has not indicated any invitation for her to return. He was of the view that even if the period of desertion has not exceeded the period of three years, still the same can be considered. Relying in **Mariam Tumbo's case (supra)** where it was stated: -

*"While, therefore, desertion which has not persisted for three years may not be a ground for divorce, that only operates to exclude it as an actionable ground per se, it does not operate as a bar to considering the circumstances of the parties as a result of it."*

I agree with the Counsel, on the record, the evidence is clear that the Respondent chased both the Appellant and her brother Benson Damian from their family house. There is no scintilla of evidence that the Respondent took initiative of inviting her to consortium since 2019 when she came back from her studies.

Instead, the Respondent condemned her of a pregnancy from a man he doesn't know. This fact, being among the pieces of evidence that the Respondent has deserted her, the same, in the light of **Mariam Tumbo's case (supra)**, entitles this Court to take it as one of the factors for establishing that the marriage between the Appellant and the Respondent has broken down irreparably. Ground 2 also has merit.

The Appellant's complaint in ground 4 is about mistreatment and cruelty. Mr. Chabwe lists the conducts which in his view amount to cruelty including chasing of the Appellant from their matrimonial home, putting or throwing of her clothes outside, denial of conjugal rights etc.

I have already dealt with these acts in ground 1 and 3 when I was analyzing the evidence. This piece of evidence is not controverted by the

Respondent. The conducts of the Respondent depict that the Appellant was being mistreated. There is merit in this ground.

In the upshot and for reasons stated above, this Court finds that the marriage between the Appellant and the Respondent cannot be maintained. It has been irreparably broken.

As regard to division of matrimonial properties, it is prayed by the Appellant in her petition of appeal that the payers in her petition for divorce be granted.

The petition for divorce in the trial court contained the following prayers that is to say: -

- i. Dissolution of marriage
- ii. Decree of divorce
- iii. The matrimonial house at Kasuhi 'A', within Bukongo Ward in Ukerewe, be given to the Petitioner to live with the children.
- iv. Payment of arrears of maintenance for the rate of TSh. 500,000/= per month and reimbursement of education expenses paid by the petitioner for the issues of marriage from 2016 to date of judgment.
- v. Any other relief(s) as the Court may deem fit."

The trial Court denied all prayers save for that of maintenance on both parties. Mr. Chabwe also in his submission prayed for the orders in the petition save for maintenance.

As found by this Court, the marriage between the Appellant and the Respondent is evidently, from the record, irreparably broken down. This Court orders thus: -

- i. The marriage between the Appellant Jenifer Damian and the Respondent Sheria Bukene is hereby declared dissolved.
- ii. A decree of divorce is hereby issued.
- iii. The Appellant Jenifer Damian is hereby given the matrimonial house at Kasuhi "A" within Bukongo Ward in Ukerewe to live with her children.
- iv. The Respondent to have vacant possession of the matrimonial house at Kasuhi "A", within Bukongo Ward in Ukerewe District.
- v. Costs of this Appeal to be provided for by the Respondent.

Order accordingly.



  
**F. K. MANYANDA**  
**JUDGE**  
**14/12/2020**