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

AT SHINYANGA

PC.MATRIMONIAL APPEAL NO. 11 OF 2018

(Arising from matrimonial Appeal No. 01 of 2018 from Kishapu District Court. Originating from Mwadui Primary Court as case No. 02 of 2018.)

LAZARO S/O PETER.....APPELLANT

VERSUS

LEAH D/O JACOB MAYARA.....RESPONDENT

JUDGMENT

Date:17/3/2020-30/4/2020

MKWIZU, J.:

This is an appeal by Lazaro Peter against the judgment of Kishapu District Court, dated 14/11/2018 dismissing his appeal from the decision of Mwadui Primary Court which was for dissolution of the marriage and custody ofchildren.

The facts leading to the present appeal aresimple. TheAppellant and the respondent celebrated their Christian marriage on 8/8/2015.Their marriage was blessed with one issue, Emmanuel Lazaro.Their few years of happy marriage ended with a serious misunderstanding between the couple which led to the petition of the dissolution of the marriage and custody of the

child by the respondent at Mwadui Primary Court. The appellant resisted the petition.He said, they solemnized an eternal Christian marriage which cannot be dissolved.Attackingthe respondent's prayer forcustody of their sole child,appellantsaid, respondent has a brain disorder called Bipolar disorder and therefore is not safe to be allowed to stay with the child.After a full hearing, trial magistrate on 7th June, 2018, dissolved the marriage, issued divorce and granted custody ofthe child to the respondent.

Aggrieved, appellantappealed to the District court.The District court dismissed the appeal.He filed a present appeal before this court raisingeight (8) grounds which essentially faults thetrial court presided over a matrimonial proceeding without and before referring the same to the marriage conciliation board, and that the case was not proved.

At the hearing, parties were all in person, unrepresented. Arguing in support of the appeal, Appellant submitted that the dispute was filed without first being referred to the marriage conciliatory board.The purported certificate of the marriage conciliatoryboard filed was signed by a social welfare officer- Mwajuma who is not mandated to chair a marriage conciliatory board. He added that, He was never summoned to attend the

board's meeting. At the social welfare,appellant argued, they went to discuss issues pertainingto the child's welfare and not about their marriage affairs. After all, what was signed by the said social welfare officer was a letter on Non settlement of issues and not a certificate, concluded appellant. He complained of the decision of the 1st appellate court for not answering his grounds of appeal conclusively.

On her party, respondent attacked the appeal.She stated that the theirdispute wasreferredto the marriage conciliation board which had issued a certificate presented to the trial court before the filing of the case. She added that, they first presented their dispute to the Roman Catholic Church who failed to resolve the matter, later they went to the social welfare office. She finally prayed for the dismissal of the appeal.

After considering the arguments of the parties and going through the evidence on record, I findno good ground to entertain any doubt as to the correctness ofthe findings of the trial Court regarding the dissolution of themarriage and on custody of the sole issue of the marriagebetween the parties.

With regards to the issue of the reference of a matrimonial dispute to a marriage conciliation board, first and foremost it should be understood that this is a mandatory requirement of the law. It is not optional.Section 101 of the Law of Marriage Act, Cap 29 provides categorically that:-

> *"No person **shall petition** for divorce unless he or she **has first referred** the matrimonial dispute or matter **to a Board** and **the Board has certified that it has failed to reconcile the parties**." (emphasis added).*

The above section of emphasizes in the case of **Athanas Makungwa v. Darini Hassani** [1983] TLR 132 where the court stressed that:-

> *"Where there is no certificate within the meaning of section 101 of the Law of Marriage Act, 1971 from the Conciliation Board indicating its failure to reconcile the spouses a petition for divorce becomes incomplete."*

The debate in the case at hand is whether or not the certificate filed before trial court and which initiated these proceedings was issued by a conciliatory board envisaged by the above section. Parties are in agreement that there was issued a document on non-settlement of the dispute between the parties but are disputing on its legal value. While the

appellant isalleging that the document was issued by a Social welfare officer who is not a marriage conciliatory board and therefore do not constitute a certificate under the parameters of the Law of Marriage Act, respondent is on the opposite.

I have deliberately visited the document in issue.It is titled Form No.3 from Kishapu District Marriage Conciliatory Board.The Board certified its failure to resolve the dispute between the parties in this case. And therefore, they refered the dispute to the court. Unfortunately, this issue was not raised before the trial court, it was raised for the first time at the 1st appellate court which found that the certificate was properly issued and was filed before the matter was admitted and determined by the trial court. Iam of the same stance. The records are clear that parties' dispute was referred to the marriage conciliatory board and certificate was thereafter issued. This claim is therefore baseless.

I now move to the second issue raised in the appellant's grounds of appeal that the matter was not proved . As alluded to above in this judgement, appellant's dispute before the trial court hinged on divorce and custody of the child.On the issue of divorce, it was sufficiently proved and well

analyzed by the trial magistrate on why he found for the petitioner. Trial magistrate went on looking at the evidence on records regarding the irreparability of the parties' marriage. He took into account evidence in respect of cruelty by the appellant against the respondent, separation caused by the said cruelty,refusal to have sexual inter course his inaction towards resolving their differences. Having discussed in lengthy, the trial magistrate was satisfied, correctly so in my view that, the marriage between the parties has broken down irreparably and went ahead to issuing a divorce. This court finds nothing to disturb.It was properly proved that the marriage between the appellant and the respondent was beyond repair.

The issue of custody of the child was also established to warrant the trial court to grant the respondent custody of the child. The law on this aspect is very clear that in deciding on the custody of a child, the courts' paramount consideration is the welfare child (see the case of **Celestine Kilala and Halima Yusufu V Restituta Celestine Kilala** [1980] TLR 76).

In arriving at its decision on this point, the trial magistrate correctly, took into account evidence on the records, and the provisions of section **125 of the Law of Marriage Act**. The appellant has failed to convince this court to hold otherwise. The child being of atender age, shall continue to be under the custody of appellant.

The appellant was ordered to maintain the child. Section **129(1)of the Law of Marriage Act provides**as to who should maintain the child.The section reads**:-**

> "*(1) Save where an agreement or order of court otherwise provides,* ***it shall bethe duty of a man to maintain his infantchildren, whether they are in his custody or the custody of any other person,*** *either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.*(Emphasis added)

As can be gleaned from the provision above the issue of maintenance is directed to the father of the child.Maintenance refereed to is for the provision of necessities like accommodation, food, clothing education and

health care.The paramount consideration being the welfare of the child. Though no basis under which the trial magistrate expressly relied in issuing an order for maintenance.The evidence on record is to the effect that appellant, the child's father is an experienced doctor who works at Mwadui in Kishapu District. To this end, I find nothing wrong again with this order. Appellant is required by law to provide all necessities to his child regardless on whose hand the child is and he has that capacity as indicatedabove. For the above reasons I find the order of maintenance merited and therefore it remain undisturbed.

In the circumstances and for the foregoing reasons I have endeavoured to provide, the appealis hereby dismissed. Considering the nature of thiscase, I make no order as to costs, each party to shoulder his or her owncosts

DATED at **SHINYANGA** this 30th Day of **APRIL**, 2020

E.Y.MKWIZU
JUDGE
30/4/2020

Court: Right of appeal explained.

E.Y.MKWIZU
JUDGE
30/4/2020