**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**AT MBEYA**

**MATRIMONIAL APPEAL NO. 10 OF 2019**

(Originating from Matrimonial Appeal No. 4 of 2018 Mbozi District Court at Vwawa from Matrimonial Cause No. 72 of 2017, Vwawa Urban Primary Court)

**JEREMIAH MWESONGO SENYAGWA ..... APPELLANT**

**VERSUS**

**BERNADETHA BATON MWALEWELA ..... RESPONDENT**

**JUDGEMENT**

***Date of last order:*** *18/12/2020*
***Date of Judgement:*** *08/03/2021*

**NDUNGURU, J**

This is a second appeal by Jeremiah Senyagwa (appellant) against Bernadetha Baton Mwalewale (respondent) arising from matrimonial dispute which ended into a decree of divorce before Vwawa Urban Primary Court, Mbozi District. The appellant is challenging all along the dissolution of the marriage contending that there were no sufficient reasons for the court to grant divorce, but has been a loser to the respondent before the Primary Court all the way to the District Court. He is now before this court.

Briefly the facts giving rise to this appeal are as follows. That the appellant Jeremiah Mwesongo Sinyagwa and Bernadetha Baton Mwalewale were husband and wife having celebrated that marriage Christian rites way back 1995. On 22/10/2018 Vwawa Urban Primary court dissolved their marriage following a successful petition for divorce filed by the respondent. Presumably the trial Primary Court did so upon being satisfied from the evidence adduced that the marriage of the couples had been broken beyond repair, and that the marriage Conciliation Board Vwawa ward had failed to reconcile the parties.

However, the appellant has all long contended that the decree of divorce was not lawfully because the conditions precedent for a proper divorce were not met. His appeal before the District Court was not successful. The grounds of appeal before the District Court are the same as those raised in this appeal, which will be shortly hereunder as I go along. In fact the appellant is questioning the competence of the proceedings of the Primary Court and the orders made thereto which had a bearing on the proceedings before the District Court on appeal and thus this second appeal.

In his memorandum of appeal, the appellant raised four grounds of complaints as reproduce herein below;

1. That the trial Magistrate erred in law and in fact to uphold the Primary Court decision as the same dissolved the marriage without ascertaining that the reasons grounded the petition of divorce are unproved hence insufficient to ground the grant of divorce.
2. That the trial Magistrate erred in law and in fact to uphold the Primary Court decision as the proceedings thereto contravened with the laws as ascertained the matrimonial cause before the disputes first referred to the conciliatory board for resolution.
3. That the trial Magistrate erred in law and in fact to uphold the decision of the Primary Court as the same failed to ascertain the failure of the respondent to prove that the marriage is irreparable broken down.

That the District Court in its judgement acknowledged its satisfaction with the evidence adduced by the respondent during trial before Vwawa Primary Court thus upheld the decision of the trial court on dissolution of the marriage. Further, although the District Court acknowledged the matter that was referred to the conciliatory Board and the certificate in the prescribed form was issued and treated it as sufficient to initiate a petition of appeal, it did not please the appellant thus filed this appeal. All the said above are contained at page 4 and 5

of the typed judgment of the first appellate court (the District Court of Mbozi at Vwawa).

On whether the marriage was broken beyond repair or not, the 1st appellant court concurred with the findings of the trial court, that the respondent was being beaten by the appellant. Further that if the marriage was not broken beyond repair the couples could have reconciled during 8 (eight) months given by the trial court before granting divorce.

When the appeal was called upon before me for hearing, Mr. Chingilile learned advocate appeared for the appellant while the respondent appeared in person. Submitting for the appeal, Mr. Chingilile was of the argument that, there is no proof whatsoever that the respondent was seriously beaten, abused or harassed. Thus the fact that the appellant exercised cruelty is a mere allegation, thus it was wrong to be the base of granting divorce. No witness was called to testify that the respondent was being beaten there is no police report tendered to that effect.

On the second ground of complaint Mr. Chingilile was of the argument that for the matrimonial cause to be filed in court, the dispute must be referred to the Conciliation Board, that is the requirement of

law – Section 101 of the Law of Marriage Act 1971. He submitted further that Section 104 of the Act, requires the Board to summon the parties and reconcile them. It is his contention that the respondent never referred the dispute to the Conciliation Board and the appellant was not summoned and still the certificate was not filed in court. He referred the case of **Hassan Ally Sandali v. Asha Ally, Civil Appeal No. 246 of 2019 CAT** (Unreported).

The counsel submitted that according to the evidence available (DW2) the respondent went to collect the letter of referring to the court by saying she did not want reconciliation. The Counsel further said that, what is referred as a certificate is not a certificate in the eyes of the law. On the 3rd ground the counsel did not have much to submit saying it resembles with the first ground.

Responding to the appellant's submission the respondent was of the contention that, she had been beaten several times, the fact that the appellant is the Civil Servant she did not like to report to the police as she did not like to spoil his image. That she referred the dispute to the Board but denied to be reconciliated because they have been reconciliated by their marriage matron and patron several times. Further that if there was a need or spirit of reconciliation between the two they

could have done during nine month when they were separated. She argued that during the nine month of separation the appellant never reformed it is when she went to the court for the order of divorce and division of matrimonial assets.

In his rejoinder Mr. Chingilile reiterated his submission in chief insisting that the respondent had jumped legal procedure. He prayed the appeal be allowed.

I have examined the record present before, and the submissions of the parties in the light of the grounds of appeal before. At this point I am called upon to determine whether the appeal has merit.

Turning to the merits of this appeal I will be guided by a well established principle that a court of second appeal will not routinely interfere with the concurrent findings of fact by the two courts below except where they completely misapprehended the substance, nature and quality of the evidence; where there are misdirection or non direction on evidence or when it is clearly be shown that there is a miscarriage of justice or a violation of some principle of law or practice. This was the position in **Mohamed Seleman v. The Republic, Criminal Appeal No. 105 of 2012 CAT** (Unreported, (See, **Director of Public Prosecutions vs. Jaffari Mfaume Kawawa (1981) TLR**

**149 at 153**; **Salum Mhando Stores V. Republic (1993) TLR 170** and **Amratlal D.M. t/a Zanzibar Silk Stores V. A.H. Jariwala t/a Zanzibar Hotel (1980) TLR 31)**.

In the instant appeal, the 1st and 2 grounds of complaints contained in the appellant's petition of appeal to my view are factual issues which are to be proved by evidence. But again in dealing with those factual issues the law has provided guidance on determination of that position. Section 99 of the Law of Marriage Act (Cap 29 R.E. 2002 now 2019) provides;

> *"99 Subject to the provision of section 77,100 and 101, any married person may petition to the court for a decree of separation or divorce on the ground that his on her marriage has broken down but no decree of divorce shall be granted unless the court is satisfied that the broken down is irreparable".*

From the wording of the above provision of law, the petitioner must produce evidence to satisfy the court that the marriage is broken down irreparable. The court also must be satisfied that the marriage is broken irreparable or beyond repair. As afore stated, thus section 99 of the Act provides for the right to petition for divorce, grounds for petition and reason upon which the court may grant divorce.

Further to that section 107 of the Act gives guideline to the court on evidence that marriage has broken down irreparably hence, it reads;

107;-(i) in deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and the circumstances of the parties and, in particular shall-

*"(a) N/A*

*(b) N/A*

*2(a) N/A*

*(b) N/A*

*(c) Cruelty, whether mental or physical inflected by the respondent on the petitioner or on the children, if any of the marriage; (emphasis added)".*

The trial court's record reveals that the respondent was several times being beaten by the appellant, abused in the presence of children, separate from sleeping room and that their marriage was tainted with a long existing misunderstanding, and zeal of reconciliation was several times attempted by their spiritual matron and patron but yield no fruit even after 9 months of separation. The existence of marriage misunderstanding and failure of reconciliation by spiritual matron and

patron is contained in the evidence of SM1, SM2, SM3 and SU1. All the above piece of evidence has been delt with by the trial court which arrived to the conclusion that the marriage is broken down. The same was the findings of the first appellate court.

The fact that the Act (Law of Marriage Act (Cap 29) has not set the standard of proof in the matrimonial dispute, taking into account that matrimonial cases fall under civil litigation, I am of the firm view that its standard of proof is that provided in Evidence Act Cap 6 R.E. 2019 which is the balance of probabilities.

In the instant case, the district Court being the first appellate court, concurred with the findings of facts of the trial Primary Court. So has this court also itself, having considered and reviewed the evidence before it and is satisfied that there was evidence upon which both lower courts could make concurrent findings of the above facts. Thus being guided by the wisdom **elucidated** in the case of **Neli Manase Foya v. Damian Mlinga, Civil Appeal No. 25 of 2002 CAT** (Unreported) and **Peter V. Sunday Post Limited (1958) E.A 424** on page 429, being the second appeal I am reluctant to interfere with the findings of facts by the trial court, more so where the first appellate court has concurred

with such findings of fact. Thus I am of the view that the 1st and 3rd grounds of petition are meritless, I accordingly dismiss.

The second ground of petition relates to the validity of certificate. From the trial court's record, it is quite clear that, the dispute was referred to the Conciliation Board as required by Section 104 of the Law of Marriage Act. But before the 1st appellate court the version changed. What was the issue according to the record is which Conciliation Board. According to the Counsel for the appellant, the parties contracted Christianity marriage in particular Roman Catholic thus it was proper for the dispute to be referred to the Church Conciliation Board stipulated under Section 104 of the Act read together with rule 9(2) of the GN No. 240 of 1971.

In the appellate's court judgement such an issue was acknowledged. The position of law is settled under section 104 which dictates that the marriage dispute must be referred to the reconciliation Board and in the instant case the law was complied with.

On the same ground, at this second appeal, the complaint is that the appellant was not summoned by the Board to reconcile their marriage just because the respondent did not need reconciliation

to be a certificate in the eyes of the law. The counsel fortified his ascertain by citing the case of **Hassan Ally Sandali v. Asha Ally, Civil Appeal No. 246 of 2019 CAT** (Unreported).

With due respect to the counsel for the appellant, the cited case is distinguishable to the case at hand. In the cited case the court was dealing with the form of the certificate. The court was of the position that the proper form is the one prescribed under scheduled as form No. 3 and the court reproduced it at page 12 of the judgment. At page 13 of the cited judgement the court said,

> *"It is plain from form 3 that the Board is enjoined to certify that has failed to reconcile the parties on the dispute referred to it by either the husband or wife. In addition, in terms of section 104(5) of the Act, the certificate has to reflect the Boards finding".*

In the instant case the certificate filed in court when filing the petition is in the prescribed form 3, the Board has certified to have failed to reconcile the parties, and it has reflected the Boards finding. In the finding, the Board did not state that it did not summon the appellant as submitted by the Counsel, thus what has is complained by the appellant at this stage is just like a kick of a dying horse.

Having so found, I again find myself reluctant to interfere with the findings of the two courts bellow on this ground of petition.

Being said and done I find the appeal is beleft of merit. I hereby dismiss the appeal in its entirety.

Being a matrimonial case and taking into account that parties have the joint role to up keep their issues blessed. I order no costs.

It is so ordered.

**D.B. Ndunguru**

**JUDGE**

**08/03/2021**