

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**PC MATRIMONIAL APPEAL NO. 09 OF 2021**

(Arising from the Judgment in Matrimonial Appeal No. 1 of 2020 of the District court at Ngudu,  
Original Matrimonial Cause No. 32 of 2019 at Buyogo Primary Court)

**MINDI KWIYUKWA ..... APPELLANT**

**VERSUS**

**LUCHOLONGA LUFASINZA..... RESPONDENT**

**JUDGMENT**

**28<sup>th</sup> & 30<sup>th</sup> April, 2021**

**RUMANYIKA, J.:**

The 2<sup>nd</sup> appeal is with respect to judgment and decree dated 12/02/2021 of Kwimba district court at Ngudu with respect to petition for divorce and division of matrimonial property unsuccessfully instituted by Mindi Kwiukwa (the appellant) at Buyogo primary court (the trial court), on the basis of no proof of the marriage having had not been found broken concurrently the two courts refusing her the intended judgment and decree. Mr. Madukwa learned counsel appeared for Lucholonga Lufasinza (the respondent).

The appellant had four (4) grounds which essentially they revolved around evaluation of evidence thus boiled to one point only: **That with regard to the appellant for seven years consecutively having had**

**been constructively deserted by the respondent consecutively, the 1<sup>st</sup> appeal court improperly evaluated the evidence.**

It is equally important at this stage also to state that when, by way of audio teleconferencing the appeal was called on 28/04/2021 for hearing, I heard them through mobile numbers 0756803629 and 0748610542 respectively.

Unusually briefly, the appellant submitted that she had nothing additional to the petition of appeal. Only that for 7 good years, in all aspects of life the respondent had deserted her and children just in a rented room then the latter only enjoyed life with other women.

In reply, and just as he had chosen to, and he argued the 4 grounds generally, Mr. Madukwa learned counsel submitted that the 1<sup>st</sup> appeal court was correct because there was no proof that the marriage had irreparably broken leave alone breaking. That if anything, only the appellant was to blame because for reasons known to her she had just fled the matrimonial home, therefore Contrary to provisions of Section 107(2) (e) of the Law of Marriage Act Cap 29 R.E. 2019 deserted the respondent husband much as it was also evident on record that all the time the respondent continued



providing food for the children who stayed away with the mother but they spent day times at the respondent's home.

Briefly, the evidence on record reads as follows;

SM1 Mindi Kwiukwa stated that having had stayed for twenty nine (29) years and the couple was blessed with (5) children, and due to seven years constructive desertion their marriage became sour and un tolerable, from a single rented room for that reason the single mother now she petitioned for divorce and division of matrimonial property. That the property, subject to division they included some heads of cattle jointly acquired through agricultural produces and proceeds. That is all.

SU1 Lucholonga Lufasinza stated that as long as still he needed the wife, the petition was both premature and uncalled for because in fact for no apparent reasons he had been deserted by the 6<sup>th</sup> wife appellant as the latter had just like that fled the matrimonial home. That still he provided food for the children who stayed away with the mother but they spent day times at his home. That all the heads of cattle were dowry only paid in relation with the other five wives' daughters and the couple only cultivated the clan land or land self-acquired by him.

Sm2 Barnaba Jilama Jota stated that the wife and husband were blessed with four (4) issues only that in June, 2019 she fled the matrimonial home and rented a room at Shirima centre in the locality (sm2 testified almost a replica of Sm1's ) essentially.

Sm3 Gwesu Mayala also testified materially almost the same as Sm1 and Sm2 did. Only that besides the six (6) wives the respondent had some others out of wedlock. That is all.

The issue is whether the 29 years old marriage was broken. This one in his evidence the respondent cut the long story short. One having had not disputed the alleged seven (7) years involuntary separation whether or not against the respondent's will the appellant had fled the matrimonial, it was immaterial in my considered opinion leave alone the respondent having had been providing food for the children. I think it is common knowledge that "marriage" is more than mere food for the issues of marriage and even the mother. Moreover, with respect to the respondent seven years involuntary separation went far beyond the 3 years threshold set by the law, practice and I think logic and common sense. If only on expiry of a minimum of two years marriage was presumed, equally so the logic would inevitably have had it that far beyond it sufficed seven years



for the marriage presumed as having had been irreparably broken. Although the issue wasn't raised before, whether or not there was a certificate of failure issued by Marriage Conciliation Board it was immaterial under the circumstances much as the certificate was a requisite only, unlike in the present case where there was no any kind of alleged constructive desertion.

As for division of matrimonial assets, I would only hold that unless the respondent sufficiently proved that the appellant mistook it, it defeated both logic and common sense that for a quarter and plus century the spouses had earned nothing except the alleged helpless children and now the sour marriage. It follows therefore that in determining division of matrimonial property, in terms of what the parting company spouses were entitled courts should not allow polygamists to take advantage of their wide range wives as a sword if anything, they should use it as a shield.

In the upshot, the appeal is allowed with costs. Now that actually the marriage was irreparably broken, and, essentially the respondent did not dispute existence of 24 heads of cattle, the house, a hut, about 15 acres of shamba, one-acre plot with three rooms at Shirima centre, a motor bike

with even Registration Number, and assortment of property (as per appellant's evidence), the appellant shall take 8% thereof. It is so ordered.

Right of explained.

  
**S. M. RUMANYIKA**

**JUDGE**

**30/04/2021**

Judgment delivered under my hand and seal of the court in chambers  
this 30/04/2021 in the absence of the parties.



  
**S. M. RUMANYIKA**

**JUDGE**

**30/04/2021**