

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**(APPELLATE JURISDICTION)**

**CIVIL APPEAL NO.154 OF 2019**

*(Original Matrimonial Cause No.12/2018 of the District Court of Temeke before Hon.  
M. Mfanga - RM)*

**DAVID YORAM MWAIHABI..... APPELLANT**

**VERSUS**

**JESTINA KIBONA.....RESPONDENT**

**JUDGMENT**

06/09/2021 & 8/10/2021

**I.C MUGETA, J**

Parties to this appeal started cohabiting in 1990 until they decided to celebrate their union in Christian rites (Christian marriage) in 2008. They were blessed with five issues. It was stated in the petition for divorce that they lived happily and in harmony until when, allegedly, the appellant started having extra marital affairs with other women denied the respondent conjugal rights and deserted her. These claims were disputed by the appellant who said respondent refused to go to Kilosa with him when he was transferred to work at Ifakara. However, is saying the truth no longer matter to their marriage as, finally, the respondent instituted a matrimonial cause at Temeke District court seeking for divorce,

distribution of matrimonial properties, custody of the children, maintenance of herself and children at the tune of 1,000,000/= monthly and costs of the suit. After a full trial, the trial court dissolved their marriage by granting a decree of divorce, distributed the matrimonial properties, ordered for the appellant to maintain the children and to compensate the respondent at the tune of 3,000,000/=. Appellant was aggrieved by the decision of the trial court. He has appealed to this court on eleven grounds of appeal which I won't reproduce because I intend to consider just one of them which is sufficient to dispose of the appeal.

The appeal was argued by way of written submission. Flora Jacob learned advocate and Mwang'enza Mapembe learned advocates filed the documents for the appellant and the respondent respectively. In between the period of filing the submissions the respondent appeared to ask for extension of time to file the submissions and reported that the appellant had passed on and the burial ceremony caused her delay to file the reply submission. Since the appellant had filed his submissions and there is no sufficient evidence to prove the appellant's death apart from what has been reported by the respondent. I shall proceed to pass this judgment.

As I stated before, appellant advanced eleven grounds of appeal but I shall deal with only one of them which is: -

*The trial magistrate grossly erred in law and fact by determining the dispute while the court was not properly clothed with jurisdiction.*

Counsel for the appellant submitted that the trial court entertained and determined the case involving prayers for divorce without a certificate from the marriage conciliation board which is a mandatory requirement under section 101 of the Law of Marriage Act, **[Cap R.E 2019]** (the Act). She further argued that the evidence on record does not disclose any exceptional circumstances that prevented reference of the dispute to the board.

Counsel for the respondent replied that the ground of appeal on jurisdiction lacks merit since the trial court ruled that there was no need for the parties to refer their dispute to the board. He argued further that respondent was not duty bound to refer the matter to the board since she was deserted for 4 years. He cited section 101 (a) of the Act to buttress his argument.

Section 101 of the Act provides: -

*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*

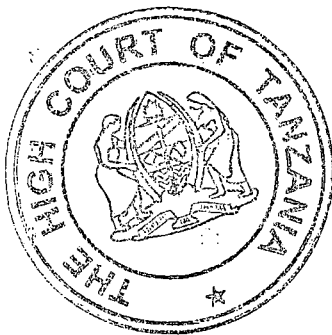
The exceptions to this rule are provided from paragraph (a) – (f) of the said section. The record of the trial court shows that objection on jurisdiction for want of the certificate was raised but the learned magistrate overruled it for the reason that the parties had admitted in their pleadings that their marriage has broken down irreparably, therefore, no need for them to refer their dispute to the board. With respect to the learned magistrate her finding is not one of the exceptions under section 101(a) – (f) of the Act. The same apply to the argument by counsel for the respondent that since appellant deserted the respondent for 4 years, she was not bound to refer the dispute to the conciliation board. He interpreted the use of the word 'and' separating the condition of desertion and the fact of not knowing the whereabouts of the spouse in para (a) of the proviso to section 101 of the Act as meaning that desertion is independent ground for not referring the dispute to the board. With respect this is a misconstruction of the meaning of the sentence. The said part of the law reads: -


*Provided that, this requirement shall not apply in  
any case-*

*(a) where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse;*

It is my view that a deserted spouse who knows the whereabouts of his/her partner must refer the dispute to the board. The comma (,) after the word 'by' was intended to set two conditions. Firstly, that the petitioner must be deserted and secondly, he/she should not know the whereabouts of the other spouse. In this case the respondent claimed that she was deserted but there is no claim or evidence that the whereabouts of her husband (the appellant) was unknown. In her evidence she testified that she even used to visit the appellant at Ifakara.

From the foregoing, I hold that the proceedings of the trial court in Matrimonial cause No.12/2019 was a nullity for want of a certificate from the marriage conciliation board. Consequently, <sup>the</sup> its judgement is quashed and the decree is set aside. This appeal is allowed with no orders as to costs.



  
**I.C MUGETA**  
**JUDGE**  
**8/10/2021**

**COURT** – Judgment delivered in chambers in the presence of Nazaria Michael for appellant and Mwang'eza Mapembe for respondent who appeared in person.

**Sgd: I. C MUGETA**

**JUDGE**