IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

(DC) CIVIL APPEAL NO. 15 OF 2018

(Originating from Matrimonial Cause No. 8 of 2017 at the RMs' Court of Arusha)

DORICA J. GOYAYI .....APPELLANT

VERSUS

JAMAL GOYAYI..... RESPONDENT

JUDGMENT

12/7/2021 & 27/8/2021

ROBERT, J:-

The appellant, **Dorica J. Goyayi** is challenging the decision of the Resident Magistrates' Court of Arusha in Matrimonial Cause No. 8 of 2017 which ordered separation of the appellant and respondent herein due to continuous irreconcilable differences in their marriage.

Briefly stated, parties herein contracted their lawful civil marriage on 29th June, 1991 at Arumeru District, Arusha region and are blessed with three children. They lived in harmony until 2000's when serious

misunderstandings started to arise in their marriage causing the respondent herein to file a suit at the Resident magistrates' Court of Arusha seeking an order for separation and other reliefs. At the end, the trial Court decided in favour of the respondent herein and ordered their separation for six months. Dissatisfied, the appellant filed the present appeal armed with seven grounds of appeal reproduced herein below:

1. *That, the trial magistrate failed to evaluate properly the evidence on record hence reaching at erroneous decision.*
2. *That the trial magistrate erred in law and fact by declaring the marriage between the applicant and respondent it was irreconcilable without any support of evidence given by the parties.*
3. *That the trial magistrate erred in law and in fact by granting a decree for separation for the period of six months the time limit which is below the requirement of the law.*
4. *That the trial magistrate erred in law and fact by granting a decree for separation through supporting the respondent herein own wrong doing.*
5. *That the trial magistrate erred in law and in fact by giving the judgment solely relied on the evidence given by the respondent herein only.*
6. *That, the trial magistrate erred in law and in fact by giving decisions solely relying on contradictory evidence given by the respondent hence reaching to an erroneous decision.*
7. *That, trial magistrate erred in law and in fact by giving judgment which does correlate the evidence which has been given.*

When this matter came up for hearing, the appellant was represented by Ms. Fatuma Amir, learned Counsel whereas Mr. Simon Mbwambo, learned counsel held brief for Mr. Philip Mushi, learned counsel who is representing the respondent. At the request of parties, the Court ordered parties to argue the appeal by filing written submissions.

Submitting in respect of the first and second grounds of appeal, Ms. Amir argued that, the trial court failed to analyze and evaluate the evidence on record hence, the decision reached is erroneous. She argued that, firstly, the respondent failed to prove allegations of fraud against the appellant as pleaded under paragraph 8 (a), (b), (c) and (d) of the petition for separation. She maintained that, since the said allegations were serious, they should have been specifically pleaded and proved to a standard higher than in the balance of probabilities. She referred the Court to the case of **Hidaya Ilanga vs Manyama Manyoka** [1961] EA 705) in support of his decision.

Secondly, she maintained that, the trial court failed to evaluate the evidence adduced by the appellant that the respondent had deserted her, failed to maintain her as required by the law and was committing adultery. She maintained that, failure of the respondent to cross examine her on crucial issues in dispute affirms the truth of the said issues.

Thirdly, she argued that, the trial court failed to evaluate and note that the evidence of the respondent was too weak to support the decree of separation. She argued that, the respondent also failed to prove the cruelty of the appellant since the mere act of borrowing TZS 55,000,000/= does not amount to cruelty. The respondent's allegation that he was maintaining his wife by giving her TZS 1,200,000/= every month was not proved.

Fourthly, she maintained that one of the issues framed at the trial court was "whether the marriage between the appellant and the Respondent has irreconcilable disputes". She argued that, this issue was misconceived since the law requires in the petition for separation to prove whether marriage between parties has broken down (See section 77,100 and 101 of Cap 29 R.E 2019). She argued further that, even if it is assumed that the issue was properly framed, the respondent failed to prove how he tried to resolve their matrimonial disputes. That evidence was material for the court to decide in his favour. The court erred in deciding that the marriage was irreconcilable without that evidence. To support his argument, he referred the Court to the case of **Azizi Abdalah vs Republic** [1991] TLR 71). Thus, she maintained that, the court did

not evaluate properly the evidence of the parties before it issued a decision.

Coming to the third ground of appeal, counsel for the appellant submitted that, the trial court erred in law and fact by granting an order for separation for the period of six months which is below the requirement of the law. She referred this court to section 107 (2) (f) of Cap 29 and to the case of **Robert Martin Thobia vs Rhoda Stephen Chacha**, Civil Appeal No. 7 of 2019.

On the fourth ground of appeal, Ms. Fatuma submitted that, the trial court granted the decree for separation based on the respondent's own wrong. The appellant's testimony that, the respondent had deserted her and failed to maintain her was not challenged by the respondent through cross-examination. She maintained that, the respondent had breached section 73(1) of Cap. 29. Therefore, the separation was wrongly granted by the court in favour of the Respondent.

Regarding the fifth and sixth grounds, Ms. Fatuma informed the court that, through her reply to the petition and testimony the appellant disputed the allegation that their marriage was irreconcilable and added that in 2015 and 2016 they were living in peace. However, the court relied on the respondent's testimony that on December, 2015, the appellant hid

his passport and released it after the matter was reported to the police station but he did not alter the bad words spoken by the appellant to him. Further to that, there is no proof of the allegation that the appellant was with a lorry driver who uttered bad words to the respondent.

On the other hand, counsel for the respondent submitted that this appeal lacks objectivity which renders the whole appeal unsuccessful. He argued that, this Court being the 1st appellate court has a role of re-evaluating the entire evidence on record and subjecting it to a critical scrutiny and if warranted arrive at its own conclusion, not to receive new evidence from either party at this stage (see **Idd Shaban @ Amasi vs Republic**, Criminal Appeal No. of 2006 (unreported)). He noted that submissions by counsel for the appellant raised new facts which were not raised at the trial level.

Responding to the 1st and 2nd grounds of appeal, Mr. Mushi responded to the four allegations raised by the appellant in seriatim. Firstly, in respect of the allegation that a claim of fraud raised in paragraph 8 of the petition for separation was not proved, he submitted that, when the respondent was giving his testimony regarding what is stated in paragraph 8 of his petition for separation, the appellant did not object. He referred the Court to page 10 paragraph 3 of the trial Court typed

proceedings. Further to that, in the appellant's petition for divorce No. 10 of 2011 (admitted as exhibit A "2"), the documents alleged at paragraph 8 of the petition for divorce were annexed to that petition. He maintained that the appellant opted not to disprove the appellant's testimony either by cross-examination or bringing counter-evidence.

He submitted further that, the testimony of the respondent joined hands with the appellant at page 17 paragraph 6 of the proceedings where she stated that she once petitioned for divorce before the court but after consultation with elders she withdrew her petition. Similarly, at page 11, paragraph 2 of the typed proceedings and page 16 paragraph 8 of the proceedings where the appellant admitted to have borrowed money from the bank without involving the respondent.

He submitted that, since the appellant didn't cross-examine the respondent nor challenge his testimony, he joined hands with the learned counsel for the appellant with regards to the cited decision of **George Meilikemboge vs Republic** (supra) which states:-

> "*It is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence*".

He maintained that, the rest of the cases cited by the appellant's counsel regarding proof of fraud in civil cases are distinguishable since

fraud was never an issue in this case and no contention was raised regarding those facts.

Secondly, he submitted that, the trial court did evaluate the evidence and the respondent never deserted the appellant. The appellant was aware of the circumstances of the respondent which did not allow him to leave with the family as he was on (war torn areas) yet she decided to visit him despite knowing it and as she failed to meet him, she alleged that he deserted her (see page 5 and 6 of the trial court typed proceedings). The act of the appellant not to see the respondent at Kinshasa (Congo) does not mean he deserted her as the respondent has been taking care of her and their three issues.

Thirdly, the appellant alleged that the respondent's evidence at the trial court was too weak to support the decree of separation. If you look at page 9 paragraph 9 to page 10 the respondent said that he is not living with his family since 2016 due to lack of peace at their home. The issue of loan paid by the respondent was not an issue at the trial court though counsel for the appellant has raised it, however, at page 16 to 17 of the typed proceedings the appellant agreed to borrow some money from saccos and when they wanted to sell the house the respondent interfered and agreed to pay the loan. The appellant did not challenge the

respondent when he testified that he used to give her TZS 1,200,000/= per month and secured her medical insurance together with the children. The appellant also required to be given Tzs 1, 500,000/= the fact which was never contested nor raised at this court.

Fourthly, he explained that, section 99 of the Law of Marriage Act of 1971 confers jurisdiction to the parties to file matrimonial cause, and the parties framed issues to assist the court to determine the disputed facts as it was held in a borrowed case of **Jones vs national Coal Bord [1957] Qb.5** where Lord Denning had the following to say:-

> *"In the system of trial which have evolved in this country, the judge seats to hear and determine the issues raised by the parties..."*

The issues which were decided at the trial court were framed by the parties and not the court. The appellant did not object and she was not prejudiced in any way. Thus, even if the issue could have been raised in a language preferred by the appellant the outcome could have been the same.

Further to that, he argued that, there is no law which requires the respondent to show how the matter was dealt with before the application for separation was filed. A person is not required to prove all the grounds

listed under section 107 of Cap. 29, proof of one ground is enough to prove the claim.

Coming to the third ground of appeal, counsel for the appellant faulted the trial Court for granting six months as separation period and maintained that according to section 107(2) (f) of the Law of Marriage Act the lowest period should have been three years. Responding to this, the respondent explained that, the appellant misunderstood the requirement of section 107(2)(f) of the Law of Marriage Act. He clarified that, the cited section deals with the evidence that can establish that marriage is presumed to have broken down. It provides that where parties either voluntarily or by decree of the Court have separated for three years then the marriage is presumed to have been broken down.

Responding on the fourth ground which faulted the trial court for granting the decree in support of the respondent's own wrong doing, he submitted that, this is a repetition of what is submitted on ground No. 1 and 2 above. He maintained that, records indicate that the respondent committed no wrong against the appellant and his testimony was not contested by the appellant.

Lastly, on ground No. 5 and 6 the appellant challenged the decision of the trial court on the ground that it is based on the evidence of the

respondent alone. Responding to this, Mr. Mushi submitted that, at page 18 paragraph 6 of the proceedings, the appellant admitted that their marriage had disputes since 2011 to date and their witnesses admitted that there is no peace in their marriage for a long time. Thus, he faulted the appellant for disputing at this stage that there is no dispute in her marriage.

In a brief rejoinder, counsel for the appellant disputed the argument that the law of Marriage Act, Cap. 29 R.E 2019 is not applicable at the matter at hand because the trial was conducted before 2019 and further that, issues in this case were framed by the parties. He clarified that, the provision of section 99 of the Law of Marriage Act which requires, in the petition for separation, to make a determination on whether the marriage between the parties has broken down is not a new provision, it existed since the enactment of the Act. Further to that, he maintained that, according to Order VIIID Rule 40 (1) of the Civil Procedure Code, Cap. 33 (R.E 2019) issues are framed by the Court assisted by the parties. Based on the reasons stated, he prayed for their appeal to be allowed with costs.

From the submissions and arguments made for and against this appeal, I will pose here and make a determination on the merit of this appeal in the manner adopted by parties in their submissions.

Starting with the 1st, 2nd and 7th grounds, the main issue is whether the trial court properly evaluated the evidence placed before it.

Having revisited the records of the trial court, it is noted that on 28/11/2017 the respondent informed the Court through his testimony why he petitioned for a decree of separation. When the respondent had finished to testify, the appellant prayed for adjournment in order to engage an advocate to cross-examine the witness. The case was adjourned and scheduled for cross-examination on 29/11/2017 but on that date the appellant and her advocate did not enter appearance thus, the matter was adjourned to 30/11/2017 for necessary orders. On 30/11/2017, again the appellant and her advocate did not enter appearance. The trial Court closed the applicant's case (respondent herein) and ordered defence case to take place on 4/12/2017.

Thus, the appellant having waived her right to cross examine the respondent at the trial court due to non-appearance on the date fixed for cross examination, the respondent's testimony regarding irreconcilable disputes in their marriage remained uncontroverted. The appellant cannot try to contradict the respondent's testimony at this stage.

This Court has also examined the evidence adduced by the appellant at the trial Court. It is evident that, when she was being cross examined

by the respondent's counsel, though she disputed that she never tried to kill her husband, she admitted that there is no peace in their marriage since 2011. She also admitted to petition for divorce and later withdrew the suit and to hide the respondent's passport until she was taken to Ngaramtoni police station. Based on the conduct and circumstances of the parties, the trial Court was satisfied, rightly so, that their marriage was irreparable. In the circumstances, this Court finds no reason to fault the trial Court's analysis of evidence. Hence, I find no merit on the first, second and seventh grounds of appeal.

Coming to the 3rd ground of appeal, the appellant faulted the trial court for granting a decree of separation for six months arguing that it is contrary to section 107(2)(f) of the **Civil Procedure Code.** The cited section provides that:-

> "(2) *Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree-*
>
> *(f) voluntary separation or separation by decree of the court, where it has continued for at least three years;*

As rightly argued by the counsel for the respondent, the cited provision establishes that where married couples separate for more than three years either voluntarily or by order of the court that separation may

be considered as evidence that marriage has broken down. It does not mean the court is required to allow separation for more than three years not below that as alleged by the appellant. For that I find no merit in this ground.

On the fourth ground of appeal, the appellant alleged that the trial court erred in granting separation based on the respondent's own wrong doing the act which was disputed by the counsel for the respondent.

Having gone through the trial court record, it is clear that there is nowhere in the proceedings where the respondent admitted to have another relationship or his failure to support the appellant and the children. The appellant did not provide evidence to prove the said allegations. Thus, this ground cannot stand.

With regards to the 5th and 6th grounds of appeal, having gone through the proceedings and the impugned judgment of the trial court, it is clear that there is no contradictory evidence of the respondent as alleged by the appellant. The appellant failed to point out the alleged contradictions on the part of the respondent's evidence.

Coming to the issue of the impugned judgment, the trial court at page 3 of the judgment held that and I will quote for ease of reference;

"Interestingly, there is nowhere the respondent disputed their irreconcilable differences instead she is revealing vividly the elements of misunderstandings with the petitioner who showed the same at the application and during the hearing of this application and since the respondent did not show dispute and her witness one Nelson Nghwahwa who is the pastor who was resolving them about continuous irreconcilable differences therefore the sought decree for separation is hereby granted and each party is advised to make a thorough meditation during this period of six months separation."

From the quotation above, it is clear that the trial court magistrate did consider the evidence of the appellant and her witnesses whose testimony was mainly that parties in this case had misunderstandings in their marriage for a long time.

On the basis of the foregoing analysis and findings, I find no merit in this appeal and I hereby dismiss it with costs.

It is so ordered.

K.N.ROBERT
JUDGE
27/8/2021