

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

MATRIMONIAL CAUSE NO. 1 OF 2020

MODESTA KAGAMBO.....PETITIONER

VERSUS

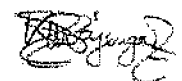
YAHAYA KAGAMBO.....RESPONDENT

JUDGMENT

10th June & 13th June 2022

Kilekamajenga, J.

The petitioner and respondent contracted their Christian marriage on 14th December 1967. In their marriage, they were blessed with seven children though only three of them are alive today. They also jointly acquired two plots of land namely, Plot No. 186 Block MDA and Plot No. 187 Block MDA located at Rwamishenye within Bukoba Municipality. It is alleged that, in 2004, the petitioner accused the respondent for aggressive behaviour, cruelty and wilful neglect. In 2020, the petitioner finally petitioned for a divorce on the ground that the marriage had broken down. In response, the respondent filed a written statement of defence resisting the petition. During the hearing of the case, the petitioner was represented by the learned advocate, Mr. Anesius Stewart whereas the respondent was represented by the learned advocate, Mr. Eliphaz Bengesi.



During the trial, the petitioner (PW1) testified that, she married the respondent in 1967. Her husband was a Muslim who later converted to Christianity before the marriage. She tendered the certificate of marriage which was admitted as exhibit P1. The petitioner further confirmed that, their marriage was blessed with seven children but only three of them are alive today. She informed the court that, in 2004 when she went to Dar es salaam to attend to her sick child, she received a letter informing her that the respondent wanted to marry another woman because the petitioner became a born again Christian. Soon after that letter, there was no harmony in the marriage though the two continued to stay under the same roof. The petitioner told the court that, currently, she is living in the back yard of the house. When things became worse, she took the dispute to the reconciliation board which referred the matter to the court for determination. She tendered form No. 3 from the reconciliation board which was admitted as exhibit P2.


PW1 further informed the court that, the house has shops in the front which she does not benefit from and that they have been in separation for almost 18. She insisted that, she cannot live with respondent because her life is at risk. She blamed the respondent for intending to sell their matrimonial home without her consent. She further confirmed that, they jointly own two plots, namely plot No.



186 and 187 which are all located at Rwamishenye. They gave the other house at Rwamishasha to their son in 1998. The house at Mwanza belongs to their daughter who lives in America. She urged the court to grant the divorce decree and order the division of the matrimonial assets.

During cross examination, PW1 revealed that, in 2011, she went to nurse her two children in Dar es salaam. When the children died, the respondent did not attend their funeral. She further stated that she deserted the respondent and that is the reason she is seeking divorce and that the respondent has been causing mental cruelty to her.

The evidence of PW1 was supported with PW2 (Imani Kagambo) who testified that, he currently lives in the house of his parents at Rwamishenye. He takes care of his mother in the rooms located at the back yard of the main house. He insisted that the main house is rented by the respondent. He further informed the court that, in 1998 his parents gave him a plot of land at Machinjoni at Rwamishasha where he constructed a house for his family and he was in the process of getting a title deed of the plot. The community around recognise him as the owner of the land. To fortify his testimony on the ownership of the land, he tendered a letter from the local authority proving his ownership on the land; the letter was admitted as exhibit P3.



On his side, the respondent testified that, his marriage with the petitioner was contracted in the names of Johanness Kagambo and Modesta Kagambo. He confirmed that, he was a Muslim before marrying the petitioner; he changed his religion and he was baptised as Johanness Kagambo. They got married in 1967 and the marriage was registered on 13th December 1968. The marriage was officiated by the priest called Father Stevin Ndyamukama. He disputed his name of Yahaya Kagambo as the same does not appear on the marriage certificate. Hence, he objected the grant of a divorce decree because the petitioner was not married to Yahaya Kagambo but to Johanness Kagambo. He further informed the court that, the Ward tribunal did not find reason to dissolve the marriage. DW1 complained that, though he was solicited to join the Roman Catholic Church, the petitioner become a member of the Full-Gospel Bible Fellowship Church something which he did not consent.

DW1 averred that, he worked as a teacher for more than ten years before venturing into construction industry. He narrated her testimony on how he got the petitioner; they both studied at Mpwapwa Teachers' College in 1964/65. The petitioner was posted to Singida as a teacher before shifting to Bukoba where they finally got married. Throughout his testimony, he objected the allegation that he is inflicting cruelty to the petitioner but the dispute arose after one of



their daughters who currently lives in New York was married to an American Jew. Their daughter got married in Dar es salaam and he organised a reception party in Bukoba in 2000. During the reception, they prepared a special room which was later occupied by the petitioner. He also blamed the petitioner for receiving dowry for her daughter. Also, his two children died in 2011 and were buried in Dar es salaam as he had a conflict with the petitioner on the place of burial. After the funeral, the petitioner never returned to Bukoba as he went to Mwanza where their daughter bought a house at Mkuyuni. The petitioner came to Bukoba in 2018.

In their marriage, they acquired Plot No. 186 and 187 at Rwamishenye within Bukoba Municipality. He tendered the two title deeds which were admitted as exhibit P4 and P5 respectively. He further alleged that, they also acquired a plot at Rwamishasha and a house at Mkuyuni in Mwanza. DW1 urged the court to allow him occupy the house on plot Number 187 and sell the undeveloped plot Number 186. He insisted that, there is no reason to dissolve their marriage as the petitioner was the one who deserted him (respondent) for more than seven years.

After the evidence from the parties, I now come back to the issues raised before the hearing. The court framed three issues thus:

1. *Whether the marriage has broken down;*
2. *Whether the parties acquired properties through their joint efforts;*
3. *What reliefs are the parties entitled.*

In addressing the first issue, I should make it clear that, the court may only grant a decree of divorce where it is satisfied that the marriage has broken down beyond repair. I should also put it clear that, there is only one ground for separation or divorce; that the marriage has broken down. Therefore, the court has the duty to gauge whether the breakdown is beyond repair and consequently issue a decree of divorce. Where the court finds that the marriage has broken down but not to the extent of beyond repair, it may dismiss the petition or depending on the circumstances of the case, a decree of separation may be granted. Therefore, in assessing whether the marriage has broken down, the court must be guided with **section 99 of the Law of Marriage Act, Cap. 29 RE 2019** which states that:

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

In assessing whether the marriage has broken down, the court must be availed with evidence. The evidences of the breakdown of the marriage are listed under section 107 of the Law of Marriage Act thus:

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

(a) unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and

(b) have regard to the custom of the community to which the parties belong.

*(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-***

(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest;

(b) sexual perversion on the part of the respondent;

(c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;

(d) wilful neglect on the part of the respondent;

(e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;

(f) voluntary separation or separation by decree of the court, where it has continued for at least three years;

(g) imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;

(h) mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; or

(i) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage.

(3) Where it is proved to the satisfaction of the court that-

(a) the parties were married in Islamic form;

(b) a Board has certified that it has failed to reconcile the parties; and

(c) subsequent to the granting by the Board of a certificate that it has failed to reconcile the parties, either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law, the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce.

(4) When hearing a petition for a decree of divorce, the court may admit and found its decisions, wholly or partly, on evidence which is substantially the same as that on which a decree of separation has previously been granted. (Emphasis added)

I wish to emphasize that, marriage being the most important institution in our society, its dissolution cannot be taken lightly hence proof of the evidence above does not necessarily warrant the court to issue a decree of divorce. Before granting a decree of divorce, the court must assess all the evidence, circumstances of the case and other factors to ensure that the parties can no longer be considered as husband and wife. Where one of the above evidences is proved, but the court finds that the breakdown is reparable, the court may order separation instead of divorce. See, **section 99 of the Law of Marriage Act.**

While divorce dissolves the marital status of the parties, separation keeps the marriage alive though the couple may be living apart. Where separation exists for at least three years and there is no possibility of repair, such separation becomes an evidence proving the breakdown of the marriage. There are two categories of separation; consensual separation which may be reached by the parties without an order of the court and separation by the court. See, **section 107(2)(f) of the Law of Marriage Act.**

However, under **section 114(1) of the Law of Marriage Act**, the court may still order division of matrimonial assets after the decree of separation is granted. For clarity and understanding, I take the discretion to reproduce the section thus:

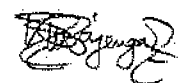
*114.-(1) The court shall have power, when granting or subsequent to the grant of a **decree of separation or divorce**, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*

In the case at hand, the petitioner prayed for the decree of divorce and division of the matrimonial properties. The evidence adduced by the petitioner intended to prove the marriage has broken down on the evidence of mental cruelty. In her evidence, she stated that, she lost her two children in Dar es salaam within an interval of three months, but the respondent did not attend the funeral nor



render any support. Furthermore, while the petitioner was still in Dar es salaam nursing her children, the respondent wrote a letter to her indicating that he (respondent) was not happy with his marriage and he intended to marry another wife. After the burial of the two children in Dar es salaam, the petitioner relocated to Mwanza where she stayed for almost seven years. Under this circumstance, the petitioner cannot be liable for desertion because the parties may be living under desertion even though they are still under one roof. Desertion does not necessarily mean vacating from the matrimonial home; the petitioner may leave the matrimonial home but still be considered deserted. The behaviour of the respondent may be a driving force for desertion. Not every petitioner who leaves the house may be considered to have deserted the respondent. Depending on the circumstances and behaviour demonstrated by the respondent, even the party who remains in the house may be construed to have deserted the other. Where such desertion exists for at least three years, it may be evidence that the marriage has broken down. See, **section 107(2)(e) of the Law of Marriage Act.**

When the conflict between the petitioner and respondent persisted, the petitioner took the dispute to the reconciliation board which found no breakdown of the marriage. Still, the petitioner took the matter to the court. Of course, the law requires every matrimonial dispute to go through the reconciliation board

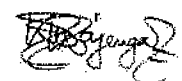


before the petitioner brings the dispute to the court. Taking the dispute to the reconciliation board is a mandatory requirement which the petitioner cannot avoid unless there are exceptions as provided under **section 101 of the Law of Marriage Act**. The section provides:

101. 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: 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;*
- (b) where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition;*
- (c) where the respondent has been required to appear before the Board and has wilfully failed to attend;*
- (d) where the respondent is imprisoned for life or for a term of at least five years or is detained under the Preventive Detention Act and has been so detained for a period exceeding six months;*
- (e) where the petitioner alleges that the respondent is suffering from an incurable mental illness;*
- (f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.*

The reasons for referring the dispute to the reconciliation board are legion: **first**, to allow the community participation in the dispute of their member(s); **second**, to give the parties an opportunity and another avenue of hearing before going to the court. **Third**, to allow the parties cool their tempers before instead of rushing



straight to the court; **fourth**, it is an opportunity for the board to deal with tear and wear of the marriage before the dispute reaches the court; **fifth**, to see the possibility of reconciliation before the dispute is adjudicated.

Before this court, the parties clearly demonstrated that the marriage has broken down. For instance, the couple do not share any marital relationship; their two children died in Dar es salaam but the respondent did not attend their funeral; every party lives in his/her own room; the petitioner lost his father but the respondent did not attend the funeral; the respondent lost his brother but the petitioner did not attend the funeral; every party cooks his own food; the respondent has never received a greeting from the petitioner for a couple of years. In my presence, the couple frequently engaged in intense arguments. I am confident and satisfied that the marriage has broken down though not to the extent of beyond repair. During the hearing of the case, I carefully observed the couple's demeanour in order to discern the genesis of the dispute. There is no doubt, their marriage has broken but the cause of the conflict may be on unfair division of the proceeds from the rents of their house at Rwamishenye. The dispute may also be fuelled by the son who lives with his family in the matrimonial home. The respondent also keeps on complaining that he does not benefit from the support from her daughter from the United States. Also, the



petitioner is suspecting that the respondent is about to dispose of their matrimonial house.

However, during the trial, the respondent urged the court not to dissolve the marriage nor divide the matrimonial asset because he will be left with no place to stay. I fairly considered his prayer and also took into consideration that the couple are now 78 years old. Indeed, a decree of divorce may not benefit either of them. At their age, they just need a place; ordering sale and division of the only matrimonial house will completely desolate their life.

On the second issue on whether the parties acquired properties through their joint effort, the evidence from both the petitioner and respondent has proved that they acquired two plots, namely plot No. 186 and 187 at Rwamishenye. One of those plots is where their matrimonial house is constructed. I am full convinced that the house at Rwamishasha belongs to their son (PW2) and the house in Mwanza belongs to their daughter who lives in the United States of America. I am satisfied that, the two plots were jointly acquired and their contributions are almost equal. The petitioner worked as teacher until her retirement while the respondent also worked as a teacher before turning to business.

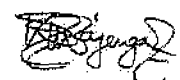
On the third issue on what reliefs are the parties entitled, I have already found that the marriage has broken down but there is a possibility of repair. For the interest of justice and the affair of the each party, I partly allow the petition by ordering a decree of separation instead of divorce. However, to create harmony among the couple, I hereby order the parties to stay in the matrimonial house under the following conditions/orders:

First:

1. The respondent shall immediately occupy or manage the following rooms:
 - a. The room used for the saloon and one kiosk in front of it;
 - b. The room used as a shop which is next to the saloon on the side of the pharmacy;
 - c. The room rented for pharmacy;
 - d. The room or space hired for timber business.
2. The respondent shall occupy the sitting room in the middle of the house.
3. The respondent shall occupy the two rooms which are located on the right and left of the middle sitting room.
4. The respondent shall collect rents from all entrepreneurs who parade their petty businesses in front of their house during the evening.

Second:

1. The petitioner shall occupy or manage **one room which was used as a hotel;**



2. The petitioner shall occupy or manage the **two rooms** used as shops which are next to the hotel room;
3. The petitioner shall manage the **three kiosks** (including the container) which are outside the house but in front of the hotel room;
4. The petitioner shall occupy or manage all the rooms located at the backyard of the house namely, the kitchen, store, sitting room and three bed rooms.

Third:

1. The petition shall keep the title deeds of plot No. 186 and 187 located at Rwamishenye.

To maintain harmony in the family of the couple, their son (Amani Kagambo) who is aged 47 years old but currently lives in the matrimonial together with his wife and children should vacate from the parties' matrimonial house because he has become part of the dispute. He (Amani Kagambo) together with his family should vacate from the parties' matrimonial home **on or before 13th August 2022**. I order no costs to this case. It is so ordered.

Dated at Bukoba this 13th Day of June 2022.




Ntemi N. Kilekamajenga.

JUDGE

13/06/2022

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Court:

Judgment delivered this 13th June 2022 in the presence of the petitioner and her counsel, Mr. Anesius Stewart and the respondent and his counsel, Mr. Eliphazi Bengesi (Adv). Right of appeal explained.



Ntemi N. Kilekamajenga.

JUDGE

13/06/2022