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

MATRIMONIAL APPEAL NO. 01 OF 2022

(Arising from the judgment of the District Court of Muleba in Matrimonial Case No. 2/2020 and originating from Matrimonial Cause No. 02 of 2020 of Muleba Primary Court)

SWITBERT THOMAS BARUMUZI.....APPELLANT

VERSUS

JULIANA SWITBERT.....RESPONDENT

JUDGMENT

15th August & 15th August 2022

Kilekamajenga, J.

The appellant married the respondent under Christian rites on 20th April 2001. Their marriage was blessed with five children and they acquired several properties within Muleba District. They enjoyed a happy marriage until in 2019 when their relationship was characterised with perennial squabbles. The conflict between the couple intensified necessitating the respondent to seek a decree of divorce at the Primary Court of Muleba at Muleba. The trial court considered the evidence from the parties and finally dissolved the marriage and ordered division of matrimonial assets. The trial court further ordered the appellant to continue paying school fees for the children. The decision of the trial court aggrieved the appellant who filed an appeal in the District Court of Muleba which also decided in favour of the respondent by upholding the decision of the trial court.

The appellant approached this Honourable Court for the second appeal. He moved this court with a memorandum of appeal containing eight grounds of appeal as follows:

1. *That, the appellate District Court erred in law to entertain, determine and confirm the case for dissolution of marriage in the absence of a valid certificate from the reconciliation Board.*
2. *That, the trial court grossly erred in law for failure to close of the case of the petitioner and respondent when receiving witnesses' evidence.*
3. *That, the appellate District Court erred in law to decide the case and confirm the decision for divorce and it consequential orders based solely on uncorroborated evidence of the children of the parties herein, some of whom were of tender age.*
4. *That, the impugned judgment of the appellate court is illegal for having been pronounced and endorsed/signed by the magistrate who had already disqualified herself from the proceedings of the case at the instance of the appellant.*
5. *That, the appellate District Court erred in law and fact to issue order of divorce without proof that the marriage between the parties had irreparably broken down.*
6. *That, the appellate District Court erred in law and fact to issue the order for division of (some) asserts without proof whether the same were acquired during the subsisting of the marriage between the parties.*
7. *That, the appellate District Court erred in law and fact to issue and order for the division (some) asserts which did not form part of the matrimonial assets.*
8. *That, the appellate District Court erred in law for dismissing Matrimonial Civil Appeal which was meritorious.*

The hearing of this appeal brought the presence of the parties and their counsel. The appellant hired the legal services of the learned advocate, Mr. Mathias Rweyemamu. The respondent enjoyed the legal services of the learned advocate, Mr. Remidius Mbekomize assisted by the learned advocate, Miss Salome Kagoa. The counsel for the appellant abandoned all the grounds of appeal save the first and fifth grounds. On the first ground, he argued that, the proceedings of the Primary Court do not show whether the dispute was referred to the reconciliation board before petitioning for divorce. Also, the witnesses did not state whether an attempt to reconcile the parties was done before the petition for divorce. He argued further that, under **section 101 of the Law of Marriage Act, Cap. 29 RE 2019**, in absence of the certificate from the reconciliation board, the Primary Court had no jurisdiction to determine the case.

On the fifth ground, the counsel averred that, there was no proof whether the marriage broke down beyond repair as the appellant was not willing to divorce the respondent. Also, there was no witness from outside the parties' family to prove that the marriage had broken down beyond repair. He urged the court to set aside the decision of the District Court and that of the Primary Court.

In response, the counsel for the respondent objected the allegation that the petition was filed before referring the dispute to the reconciliation board. He insisted that the dispute was referred to Kashasha Ward Tribunal for reconciliation and form No. 3 was issued stating that the tribunal failed to reconcile the parties. He invited the court to peruse the court records to satisfy itself on whether the matrimonial dispute was referred to the reconciliation board.

In this case, as stated earlier, the counsel for the appellant argued the first and fifth grounds and abandoned the rest. I will also address the two grounds argued by the counsel and other pertinent issues. In his oral submission, the counsel attacked the proceedings of the trial Primary Court for not showing whether the matrimonial dispute was referred to the reconciliation board before petitioning for divorce. I should appreciate, in our law, any matrimonial dispute cannot be taken to court without first undergoing through the reconciliation process under the recognized reconciliation board. The **Law of Marriage Act, Cap. 29, RE 2019**, stresses on this requirement under section 101 thus:

> *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.

I have already stated in other decisions that, there are several reasons for referring the matrimonial dispute to the reconciliation board before petitioning for divorce. **First**, when the dispute is referred to the reconciliation board, the community also gets an opportunity to participate in resolving the dispute. **Second**, reference to the reconciliation board gives the parties an opportunity for hearing before the dispute is taken to court. **Third**, reference to the reconciliation board allows the parties cool their tempers instead of rushing straight to court for adjudication. **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.

Sixth, when the reconciliation fails, it gives another piece of evidence proving that the marriage has broken down.

Under our law, every matrimonial dispute is always initiated with the filing of the certificate from the reconciliation board. The certificate is always in the prescribed form well known as form No. 3. For those who might not be aware, this prescribed form is an annexture in the subsidiary legislation under Cap. 29. The courts have insisted in a number of cases that, a mere letter from the reconciliation board may not suffice to amount to a certificate required under section 101 of the Law of Marriage Act. It must be a form which is always issued after the reconciliation board has attempted to reconcile the parties but failed. The certificate, therefore, gives jurisdiction to the trial court to deal with the matrimonial dispute by way of adjudication after the failed reconciliation.

In the case at hand, the perusal of the trial court file does not leave any shred of doubt that the respondent referred the dispute to Kashasha Ward Tribunal. The Ward Tribunal summoned the appellant for reconciliation. The proceedings from Kashasha Ward Tribunal noted the failure to reconcile the parties. In the said proceedings, the Ward Tribunal recorded that:

> *"Kwa kuwa Baraza ni chombo cha upatanishi kabla ya hatua nyingine hakilazimishi mtu kufanya asivyotaka, kimeshauri imeshindikana. Ipo haja dhidi ya wanandoa hawa kufika mbele ya chombo chenye uwezo wa kutoa*

*maamuzi kipi kifanyike **ili kuokoa** hapo mbeleni kusiweze kuwepo hatari kwa wanandoa ambao inaonekana **wanaelekea pasipo usalama wa maisha yao.**"* (Emphasis added).

The Ward Tribunal went further filling-in the certificate which contains the following words:

*"Kuwa wadaawa hawa suruhu imeshindikana ili kuokoa maisha yao **ili waendelee kuwa salama sheria dhidi ya wanandoa hawa itumike.**"* (Emphasis added).

So long as the certificate is available in the court file, which in fact initiated the proceedings of the trial court, I find no rationale of requiring the same to be part of the proceedings while the trial court could not have commenced the trial without the presence of this certificate. Furthermore, it may be gross injustice to return the parties back to the reconciliation board for the process that they have already gone through. It may also be awkward to return the parties back for retrial for the mere reason that the certificate from the reconciliation board does not feature in the proceedings of the trial court. In my view, doing so would be squarely bowing to legal technicalities instead of dispensing justice to the parties.

On the fifth ground of appeal, the counsel for the appellant argued that, there is no evidence to prove that the marriage had broken down beyond repair. In addressing this ground, I wish to put it clear that, in matrimonial cases, the

evidence is not intended to prove that the marriage has broken down beyond repair. The evidence is only given to prove that the marriage has broken down. The obligation of deciding whether the marriage has broken down beyond repair or not is on the trial court. Arguing that the marriage had not broken down beyond repair would be going contrary to what the law provides. For academic purposes, I wish to reiterate again that, a decree may only be granted where the court is satisfied that the breakdown is irreparable. **Section 99 of the Law of Marriage Act, Cap. 29 RE 2019** clearly provides thus:

> *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.*** (Emphasis added).

Therefore, in this case, the petitioner had no legal obligation to prove that the marriage had broken down beyond repair. The petitioner is just required to adduce evidence to prove the breakdown of the marriage and such evidence are already stated under **section 107 of the Law of Marriage Act.** The section provides that:

> *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;

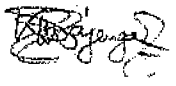
(e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;

(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)

The pieces of evidence proving breakdown of the marriage must fit within the list of evidence of breakdown stated in the above provisions of the law. Furthermore, the petitioner may have proved that the marriage has broken down but proof of any of the evidences above may not entitle a party to the decree of divorce. As stated above, whether a decree of divorce should be granted or not, the court must consider several factors surrounding the matrimonial dispute. The court must be careful enough not to dissolve a marriage where there is no evidence of the break down or where the break down is not beyond repair.

In the case at hand, the respondent testified that she was under frequent cruelty by the appellant. The appellant had even attempted to kill her but was rescued

by her children. The appellant went further promising to take respondent's life. She has been frequently abused by the appellant in the presence of her own children, something which, in my view, amounts to both physical and mental cruelty. Furthermore, to prove further that the marriage had broken down, though they married under Christian rites which does not allow either of the party to marry another person, the appellant married another woman and they have three children in that illegal union. The appellant has committed mental cruelty by taking some of the matrimonial properties to the concubine. PW2 and PW3 supported the testimony of the respondent proving that, the respondent has been living under both physical and mental cruelty. In fact, when the cruelty intensified, the respondent, together with the children of the marriage, left the matrimonial house. When the parties appeared before the reconciliation board, this fact was revealed. The reconciliation board did not reserve to recommend further steps to be taken for security of the parties. During the trial, the court had the privilege to observe the extent to which the marriage had broken down and finally granted the decree of divorce.

Generally, on the reasons advanced by the appellant, I find that the dispute was referred to the reconciliation board before the respondent petitioned for divorce. The parties appeared before the reconciliation board, and an attempt was made to reconcile them but ended in vain. The certificate from the reconciliation board

which initiated the proceedings of the trial court is the first document in the trial court's file. Therefore, the requirement of section 101 of the Law of Marriage Act was complied. Furthermore, the respondent advanced strong evidence proving that the marriage had broken down. She proved that cruelty, both mental and physical done by the appellant, has been an order of her life since 2019 until the circumstances forced her to abandon the matrimonial house and take refuge in another safe place. Despite being physically abused in the presence of her children, her life has been in danger. The reconciliation board has recommended necessary steps to be taken before the respondent's life is put to expiry. Therefore, I find no merit in the grounds advanced by the appellant. I hereby dismiss the appeal and uphold the decision of the District Court. No order as to costs.

Dated at Bukoba this 16th Day of August 2022.

Ntemi N. Kilekamajenga
JUDGE
16/08/2020

Court:

Judgement delivered this 16th of August 2022 in the presence of the respondent and her counsel, Miss Salome Kagoa but in absence of the appellant. Right of appeal explained.

Ntemi N. Kilekamajenga
JUDGE
16/08/2020