

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

**AT BUKOBA**

**MATRIMONIAL CAUSE APPEAL NO. 5 OF 2022**

*(Arising from Karagwe District Court at Karagwe in Matrimonial Case No. 1 of 2021)*

**ADELINDA @ ADERIDA BESINGIZA.....APPELLANT**

**VERSUS**

**BERENADO RUMUELEILE.....RESPONDENT**

**JUDGMENT**

***Date of Judgment: 09.09.2022***

***A.Y. Mwenda, J.***

Before the District Court of Karagwe at Kayanga, the appellant petitioned for divorce against the respondent (her husband). In her petition she prayed for a number of reliefs to wit;

- a) A declaration that the marriage between the petitioner and respondent is broken beyond repair;
- b) That the decree for divorce be granted;
- c) An order for division of matrimonial assets acquired by the petitioner and the respondent by their joint effort;

- d) That custody of the last issue of marriage (Menrad Berenad) be placed under the petitioner;
- e) That the respondent be ordered to maintain and continue to pay school and college fees for those issues who are still schooling (Benjamin Berenado and Menrad Berenado);
- f) That, the respondent be ordered to maintain the petitioner;
- g) Any other relief(s) as the honorable court would deem just to grant.

Having filed the said petition, the respondent was served and in response thereto he filed a reply where he denied all the claim as levelled by the petitioner (the appellant). The parties were thus called to prove their case before the trial court by calling witnesses to testify. At the end of the judicial day, the trial court found the appellant have failed to prove her case. In other words, the court found, in the circumstances surrounding the matter, that the marriage between the petitioner and the respondent not broken beyond repair.

Aggrieved by the trial court's findings, the appellant preferred the present appeal. She advanced four grounds of appeal to wit;

1. That, the trial court erred in law and fact by deciding that the marriage between the appellant and the respondent had not broken beyond repair though the respondent's acts within the marriage; (sic)

2. That, the trial court erred in law by failure to grant decree of divorce after it had realized that the court cannot force the married couple to leave together; (sic)
3. That, the trial court erred in law by failure to analyze the appellant's evidences which proved the marriage to have been broken beyond repair;
4. That, the trial court erred in law by non-recording of appellant's material evidence in judgment as the result the same was not clearly analyzed hence erroneous decision.

She then prayed this court for the following relief(s) i.e;

- a) The trail evidence be re-evaluated and analyzed accordingly;
- b) The marriage between the appellant and respondent be declared to have been broken beyond repair;
- c) The matrimonial assets acquired during the subsistence of marriage be accordingly distributed;
- d) The younger issue of the marriage be placed under the custody of the appellant;
- e) Costs of this appeal and any other relief(s) be granted by this court

On his part, the respondent contested this appeal. He filed a reply with four points and prayed for the following reliefs that is for;

- a) An order for this court to dismiss instant appeal;
- b) An order to uphold findings of trial court;
- c) Any other relief.

When this matter was set for hearing the appellant appeared in person whilst the respondent hired the legal services from Mr. Samwel Angelo, learned counsel. Submitting in support of grounds of appeal the appellant stated that she and her husband (the respondent) are separated since 2015 although they live in the same house but each in separate rooms. She said that during all that time they have never consummated their marriage as the respondent alleged that he was unable to do so due to his old age. She said, despite the appellant's allegation that he cannot consummate, he failed to tender any hospital card and strangely, she said, he (the respondent) is now married to another woman. She said, they contracted a traditional marriage in 1990 and ten (10) years later they upgraded it into a Christian marriage. She added that their last born is now 19 years old but the respondent has been refusing to provide maintenance. She then concluded her submission with a prayer that this appeal be allowed.

Responding to the submissions by the appellant, Mr. Samwel Angelo, learned counsel for the respondent submitted that before granting a decree for divorce, the court is required to satisfy itself on the sufficiency of the reasons. He said the said reasons are covered under section 99 of the Law of Marriage Act, [Cap 29 RE

2019]. He said, the circumstances under which a divorce can be granted depend on the circumstances and facts beforehand. The learned counsel stated that section 107(2) of the Law of Marriage Act, [Cap 29 RE 2019] provides for circumstances under which the court may consider in granting divorce.

He said, during the hearing before the trial court, nothing under S.107 (2) of the Law of Marriage Act was levelled against the respondent. Before the trial court, he said, the appellant alleged the respondent re married to another woman and impregnated her but there was no proof whatsoever as she failed to mention the child's name or bring the witnesses to support her claim.

The learned counsel submitted further that the appellant alleged she was being beaten but she failed to support her allegation by evidence. He said, the appellant alleged that at one time she filed a criminal case against her husband for beating her but she failed to support her claim by producing a copy of judgment.

With regard to failure by the respondent to provide her with conjugal rights, the learned counsel for the respondent submitted that it is true that the respondent testified before the trial court that due to his old age i.e 72 years, he is no longer sexually active but that alone is not sufficient reason to warrant grant for a divorce. The learned counsel concluded his submission with a prayer that this court be pleased to dismiss this appeal.

In rejoinder, the appellant stated that in respect to the argument by learned counsel for the respondent that she failed to prove her allegation regarding her husband's affair with another woman, she said she mentioned her name before the trial court but could not mention the name of the baby as it was newly born.

With regard to argument by the learned counsel for the respondent that due to his old age i.e 72 years, the respondent is no longer sexually active, the appellant responded in that the said allegation is not true as to date, the appellant is still re-married to another woman. She then repeated to her previous prayer beseeching this court to allow this appeal.

Having keenly analyzed the oral submissions by both parties, the issue is whether or not the present marriage is broken irreparably.

To provide answers to the said issue, this court found it pertinent to go through S.107 (2) of the Law of Marriage Act, under which circumstances for consideration as evidence that marriage has been broken down are stated. This section reads as follows and I quote;

*"S.107(2) without prejudices to the generality of subsection (1), the court may accept any one or more of following matters as evidence that a marriage has broken down, but a proof of any such matter shall not entitle a party as of right to the 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.*

In the present case, the appellant advanced the following reasons as the basis for her application for grant of divorce. Firstly, that the respondent was committing adultery with another woman. She mentioned the name of the woman as Ester Zawadi Tibinika. I have revisited the trial courts records and came across the appellant's testimony that the said woman (Ester Zawadi Tibika) had at one point in time brought a child at their residence alleging the said child as being co-parented by her with the respondent. In her testimony she went further to state that the respondent did not accept the said child as being his. With this kind of evidence, it cannot be stated with certainty that the respondent had an affair with that woman and that they are co-parenting a child. In other words the respondent refused having such affair, and the appellant failed to bring other sufficient evidence to support that allegation.

Secondly, the appellant alleged that the appellant was beating her up. She alleged that at one time she was beaten to the extent that she decided to report the matter before the police and a criminal case was filed against her husband (the respondent). As it was rightly submitted by Mr. Samwel Angelo, the appellant was expected to bring in evidence by either producing a copy of judgment or even mentioning the case's particulars for this court to take judicial notice. Such failure leave her allegation with no supporting evidence. On top of that the appellant did not call any witness to testify in support to this claim.



Thirdly, the appellant strongly stressed that the respondent is refusing to consummate their marriage. She testified before the trial court that her husband (the respondent) is refusing to consummate leading her to suffer sexual starvation. On his part the respondent agreed that he is unable to consummate their marriage due to his old age as by then he was 72 years old. The respondent further stressed that despite his failure to consummate their marriage, he still loves his wife and beseeched her to tolerate the mishap. This court have considered this issue and is of the view that with his age, the respondent might not be able to consummate although this is not scientifically proven. With his problem (respondent's) this court is of the view that the appellant should be tolerant as was requested by the respondent because such problems are not self-induced. That being the case, I find sexual saturation not a ground for granting divorce.

With regard to maintenance of the family, the respondent testified how he allocated a 2.5 acres of coffee and banana farm to the appellant for harvest and use the proceeds to carter for their last born's school fees. On top of that the appellant said he has been paying school fees for the said child. This court have considered this point and is of the view that the same is not one of the grounds for consideration in grant for decree for divorce. The issue of maintenance of a child and school fees can be dealt with by lodging complainant before the social welfare office.

From the foregoing, this court is of the view that the appellant failed to substantiate her claims and in that basis, the parties marriage is not broken irreparably. This appeal therefore is dismissed and the trial court's decision is hereby upheld.

Each party shall bear its own costs.

It is so ordered.



  
A.Y. Mwenda

**Judge**

09.09.2022

Judgment delivered in chamber under the seal of this court in the presence of Ms. Adelinda @ Aderida Besingiza the Appellant and in the absence of the Respondent.



  
A.Y. Mwenda

**Judge**

09.09.2022