

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

AT DODOMA

MATRIMONIAL APPEAL NO 9 OF 2021

**(Arising from the decision of the District Court of Manyoni at Manyoni,
Matrimonial Cause No. 01/2021)**

SCOLA AUGUSTINO MREMA.....APPELLANT

VERSUS

HENRY BENITUS ERONDOLA..... RESPONDENT

JUDGMENT

18/8/2022 & 03/10/2022

KAGOMBA, J

The appellant, Scola Augustino Mrema, being aggrieved by the judgment of the District Court of Manyoni at Manyoni (henceforth “the trial court”) in Matrimonial Cause No. 01/2021, delivered on 30th April, 2021, has appealed to this Court to challenge the said decision based on the following grounds:

1. That, the trial court erred in law and fact to hold that the appellant had failed to adduce evidence that the respondent was cruel to her and did maintain her.
2. That, the trial court erred in law and fact by deciding that the marriage was not broken down irreparably despite claims of

anguishes experienced by the appellant and threats to be killed by the respondent herein.

3. That, the trial court erred in law and in fact to hold that the respondent maintained the appellant herein during her illness basing solely on the fact that her treatment bills were paid through health insurance given to her by the respondent.

Briefly, the appellant petitioned the trial court for; declaration that her marriage with the respondent had broken down irreparably, order to dissolve the marriage and decree of divorce. She alleged that the respondent was not providing maintenance to her despite knowing that she was suffering from spinal ache. She also alleged that the respondent was frequently chasing her out of the house and was threatening to kill her by using his pistol.

On his side, the respondent denied all the appellant's allegations, stressing that the appellant was his legal wife as per certificate of marriage (exhibit "D1") which he tendered before the trial court. He prayed for dismissal of the petition.

In determining whether the marriage had broken down irreparably, the trial court was of the view that the appellant had failed to establish her claim by preponderance of probabilities. The trial court found no merit in all the appellant's allegations stated above, for not being supported by sufficient evidence. Neither of the parties had called any witness. Hence, the trial court

found that corroboration was wanting to prove the allegations raised by the appellant. Accordingly, the appellant's petition was dismissed, a decision which has aggrieved her and prompted this appeal.

During hearing of the appeal, Ms. Neema Ahmed, learned advocate appeared for the appellant while the respondent was represented by Mr. Godwill Benda and Mr. Kidumage, both learned advocates.

On the first and second grounds of appeal, Ms. Ahmed submitted to the effect that the learned trial Magistrate should have considered the fact that the respondent didn't controvert the claims of cruelty and death threats leveled against him by the appellant, which was tantamount to his acceptance of the same as truth.

On the claims of cruelty, Ms. Ahmed cited the case of **Mariam Tumbo v Harold Tumbo** (1983) T.L.R 293. She added that the claims were made by the appellant under oath, having been previously reported the same to Police and Social Welfare Office. She was of the view that such claims should have been taken to prove that the marriage had irreparably broken down.

The learned appellant's advocate prayed this court to use the words of Lord Pearce quoted in the above cited case to find that the marriage between the parties has broken down irreparably.

Arguing as an alternative, Ms. Ahmed invited this court to order the trial court to take additional evidence regarding the claims of cruelty and

death threats, if needed, since the trial court was of the view that independent witnesses were required to corroborate the appellant's claims.

To further bolster her argument on breaking down of the marriage, Ms. Ahmed cited the provision of section 140 of the Law of Marriage Act, [Cap 29 R.E 2019] to the effect that there cannot be proceedings to compel either a wife or a husband to continue with the marriage. She added that, since the parties testified during trial that they were sleeping in two different rooms as far back as 2016, it was not correct for the trial court to find that the marriage had not broken down irreparably.

On the third ground of appeal, Ms. Ahmed submitted that the trial court erred to hold that the respondent was maintaining the appellant by mere evidence that he was paying her medical bill through a health insurance. She added that the appellant also needed food and care, which the insurance could not provide. To further demonstrate that the respondent was not maintaining the appellant, Ms. Ahmed submitted that evidence adduced during trial revealed that the respondent was buying food for himself while the appellant had to get food from his relatives.

Ms. Ahmed also clarified the reason for the appellant to go Police to report. She said, the respondent had closed the door to her and was telling her to go, so that she could not enjoy the respondent's terminal benefits. She said, this happened while the appellant was sick. The learned advocate argued that, under such circumstances, paying medical bill was not enough

evidence for the trial court to hold that the respondent was taking care of the appellant.

For the above reasons, Ms. Ahmed prayed the court to find merit in the appeal, proceed to quash the decision of the trial court and pronounce that the marriage between the parties had broken down irreparably.

Mr. Godwill Benda, for the respondent, supported the decision of the trial court that the marriage had not broken down irreparably. Addressing the claims made by the appellant as her reasons to prove the marriage had irreparably broken down, Mr. Benda while referring to the typed proceedings of the trial court, submitted that there is nowhere she adduced evidence that she was threatened by the respondent or the respondent did any cruel act to her. He added that what is on record is a dispute between the parties caused by health problem of the appellant. He added that, the appellant's further testimony was on how the dispute arose leading to each of them sleeping in separate rooms.

Mr. Benda conceded that the appellant reported to Police and Social Welfare Office, but found it to be a normal occurrence when one tries to find solution in marriage disputes.

On the argument that the respondent did not object the appellant's claims, Mr. Benda submitted that the respondent did in fact refute all the allegations as recorded on page 9 of the trial court proceedings.

Regarding the cited case of **Mariam Tumbo v. Harold Tumbo** (supra), Mr. Benda submitted that the case might be distinguishable as he had noted that the same was about conjugal right. It was Mr. Benda's view that, in general, the evidence adduced during trial did not prove the allegation of cruelty or failure to maintain the appellant to the extent of the court to find that the marriage had irreparably broken down.

On the prayer that the court be minded to order additional evidence taken, Mr. Benda opposed the prayer. He had his reasons. Firstly, he said that since the appellant was the one who filed the petition, she had a duty to call such witnesses to prove her case. Secondly; he said, the trial court did not solely rely upon lack of corroboration to dismiss the petition but there were other grounds as stated in judgment of the trial court. For these reasons, Mr. Benda called upon the court to find no merit in that prayer.

Regarding the provision of section 140 of the Law of Marriage Act, Mr. Benda submitted that the cited provision is not applicable in this case. He said, its spirit is to prohibit a party to file a case to compel his spouse to continue with their marriage. He added that there is no such compulsion in this matter. It was his argument that when the court finds the evidence is insufficient it shall not pronounce a marriage irreparably broken down, adding that that is what happened during trial. For these reasons, he prayed the court to find no merit in the first and second grounds of appeal and to hold that the marriage is reparable.

Replying to the submissions on the third ground of appeal, Mr. Benda submitted that the respondent did take care of the appellant when she was sick, including escorting her to Hospital as per the appellant's own testimony. That, the appellant herself testified that she was getting food. On the same vein, Mr. Benda submitted that even the respondent testified that he was keeping his family which contravened this appellant's allegation. Mr. Benda then pointed out that the appellant didn't cross-examine the respondent on his assertion that he was maintaining the family.

Replying on the allegation that the respondent was chasing the appellant so as to deny sharing with her his terminal benefits, Mr. Benda submitted that the benefits for an employee is his own benefits when he retires and is not part of matrimonial assets. He added that, since the respondent was maintaining the family, he would continue doing so even after receiving the said terminal benefits. He prayed the court to find no merit in the third ground of appeal too.

Having replied as above, Mr. Benda prayed the court to find the grounds of appeal are unmeritorious and uphold the decision of the trial court accordingly.

In her rejoinder, Ms. Ahmed disagreed that it was normal for the appellant to report to Police and Social Welfare Office. She said, the appellant went there because there was a serious problem as she endured cruelty and

death threats. She again referred to the cited case of **Mariam Tumbo v. Harold Tumbo** (supra) particularly where it was said that even an apprehension is enough to prove cruelty.

Ms. Ahmed emphasized that unlike what Mr. Benda had said, the trial court relied upon lack of corroboration by independent witnesses as a crucial ground for dismissing the Petition. She also underscored that, even now, there is no harmony between the parties as they are continuing to sleep separately. She said, by not granting divorce it would amount to putting them in a relationship neither of them requires. She prayed the court to allow the appeal and find that the marriage has irreparably broken down.

Having read the judgment and proceedings of the trial court and after considering the pleadings and submissions made by the parties, I find only one main issue for determination. It is whether, according to the evidence on record, the marriage between the parties has irreparably broken down. In determining this issue, this court will rely on evidence on record and shall not be tempted to receive new evidence since this is an appeal.

Also, this court, being the first appellate court, is alive to its duty to examine afresh the evidence on record to find out if the claims made by the appellant on the status of their marriage were duly proved, during trial. As it can clearly be garnered from the battle by the learned advocates in this matter, there were three claims raised by the appellant in her bid to convince the trial court that their marriage had irreparably broken down. These are;

that, the respondent failed to provide maintenance to the appellant, he threatened kill and was chasing the appellant out of the house. Since the evidence of the appellant is the only testimony which could be relied upon to prove the case, I re-examine the same at length, as hereunder.

The appellant testified as PW1 and her testimony is recorded from page 3 to page 8 of the typed proceedings. She testified to the effect that when she had a problem with her womb in 2016 the respondent demanded conjugal right which she could not provide owing to her illness. As the respondent continued to demand sex, she decided to move to a different room, and they continued sleeping in different rooms. Probably, this separation left the respondent feeling he was denied of his conjugal right.

PW1 testified further that after one month of medication, her swollen womb reduced to a large extent and she escaped a surgery earlier suggested by doctors. It appears to me that the respondent believed that conjugation could possibly be done under the circumstances and he continued to inquire about it. PW1 said, as she continued to refute that holly act most of the times, the respondent started telling her to move out of the matrimonial bedroom, lamenting that she was no longer useful to her. At this juncture one can see how the dispute probably begun.

PW1 continued to testify to the effect that their life continued like that, and that the respondent was threatening and telling her to move out of the house, which she defiantly objected.

It is on record that in 2019 when the appellant visited her daughter in Dodoma, the respondent advised her to visit Benjamin Mkapa Hospital for check up on her spine as she had also a spine ache. The appellant followed her husband's advice and went for checkup where she was found with dislocated bones. She was given medicine and was required to report back to hospital for monthly check up. She testified however that the respondent refused to give her transport. She also testified on her other ailments for which she was hospitalized for treatment.

In her testimony, the appellant conceded that the respondent was giving her food, but the respondent did so to avoid being perceived badly by the society, as said himself.

PW1 also testified that she was once beaten by fist on her forehead by the respondent who was telling her to move out of the house, a call the respondent made repeatedly culminating into a weapon threat on 17/12/2020. According to PW1, it was during this incident the respondent told her to leave the house so as not to enjoy his benefits and that he shall not give her maintenance. She testified further that she went to her sister on 13/01/2021 who gave her some food items. Upon her return home she found the door locked and she had to use a backdoor to find a place to sleep. That, on the next day, the respondent closed the door again.

The evidence adduced by PW1 thereafter was about her efforts to seek intervention of elders and eventually reported the matter to Police Gender

Desk and Social Welfare Office. It is her further testimony that on 26/01/2021 when the duo appeared before a Social Welfare Officer, the respondent resisted the allegation, and on her side, she resolutely demanded divorce.

When cross-examined by the respondent, the appellant conceded that she was being treated in hospitals by using the Health Insurance obtained for her by the respondent. She also conceded that the respondent escorted her to Hospital. This is what made up the Petitioner's case before the trial court. As it takes two to tangle, the trial court had to balance the story by hearing the respondent too. I re-examine his evidence as hereunder.

The respondent testified as DW1. His evidence is recorded from page 9 to 11 of the typed proceedings of the trial court. In his testimony, he disputed the allegations raised by the appellant. He testified that he is the one who advised the appellant to see a specialist and did accompany her wherever she went for medical check-up, the respondent himself being a Medical Officer working at Manyoni Government Hospital. He testified further that the result showed that the appellant had no health problem. With this knowledge of his wife's result, it is not surprising that the respondent probably thought that her wife could serve him the dish.

DW1 also testified that in 2019 he advised the appellant to see a specialist who visited the Manyoni Government Hospital, an advice which the appellant followed. It was the respondent's further testimony that he sent

his wife to attend their daughter who was to attain labour, in Dodoma. As PW1 herself testified, the respondent again advised her to see a specialist at Benjamin Mkapa Hospital while she was in Dodoma.

DW1 also testified that he was responsible for buying food for the family as usual. He said, one day the appellant slapped her, and he decided to sleep on the floor. He reiterated that the allegations by the appellant were untrue. As such, while the appellant alleged cruelty, deaths threat and lack of care from her husband, the latter did deny those allegations. Unfortunately, the appellant didn't take her right to cross-examine her husband. She didn't ask DW1 any question. Such was the state of the evidence before the trial court.

Having re-examined the entire testimony as above, the question is: Did the appellant prove before the trial court that their marriage had irreparably broken down? The answer would appear to me, as it did to the trial court, to be in the negative. I have reasons to demonstrate this finding.

Firstly, in this case the burden of proof lied squarely with the appellant. She is the one who petitioned for divorce alleging that their marriage had irreparably broken down. Section 111 of the Evidence Act, [Cap 6 R.E 2022] provides:

"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".

In this case, that person who had a duty to prove the said allegation was none other than the appellant, who petitioned for divorce.

While it is true that the appellant adduced evidence under oath, as Ms. Ahmed argued to advance a point that the evidence of the appellant was enough without corroboration, the same is equally true of the respondent in whose testimony he denied what was alleged by the appellant.

Secondly, it is the position of the law that every witness deserves credence, unless proved otherwise. This principal was stated in the case of **Goodluck Kyando V. Republic [2006] TLR 363**. Guarded by this principle, I think it was necessary for the appellant to adduce evidence which would disprove the credence of the respondent for her to win the case. There was no such evidence.

Given that the appellant had a duty to prove her allegation but didn't call any witness to corroborate her story, neither did she cross examine the respondent at all, her appeal against the decision of the trial court is rather surprising. This is because, courts are required to decide cases according to evidence made available to them by parties, and in observance of the law. Her evidence was opposed by almost equal weight of the respondent's evidence.

In the circumstances of this case, it is the trial court that was in trial. It either had to believe the testimony of the appellant or the respondent, but

not both. It is for this reason, even the decision in the cited case of **Mariam Tumbo v. Harold Tumbo** (supra) on what amounts to cruelty does not apply. In the case at hand no cruelty could be said to have been proved, as it was the appellant's word versus the respondent's word. I therefore agree with the trial Magistrate that the evidence of independent witnesses, especially those who attempted to settle the dispute such as from the Police Gender Desk, the Social Welfare Office and Manyoni Ward Tribunal, was very crucial to support the appellant's allegation in the circumstances of this dispute.

Thirdly; while the appellant enjoined the trial court to find that her marriage with the respondent had broken down irreparably for, among other reasons, lack of maintenance and death threats, it is the appellant who also testified that her husband did escort her to hospital, was providing her foods while at hospital and did advise her to see a specialist doctor at Benjamin Mkapa Hospital, an advice which she graciously accepted.

The above testimonies, measured on preponderance of probability as per section 3(2) (b) of the Evidence Act [Cap 6 R.E 2022], lead to a conclusion. That, despite the heated moments which might have occurred between the parties, mainly as a result of perceived denial of conjugal right as earlier stated, there was still love and care between them. In other words, not all was lost.

With deliberate efforts by both parties to rehabilitate their marriage for their own good and in pursuit of a better legacy to their issues, the love in the parties could blossom to unimaginable heights. Such a decision however is for the parties themselves to deliberately make. As for this appeal, the marriage between the parties was not proved to have broken down irreparably, during trial. This is the bottom line. For this reason, the sole issue set for determination in this appeal is answered in the negative.

Accordingly, the appeal is dismissed for lack of merit. The decision of the trial court is therefore upheld. As the parties are spouses, I refrain from ordering costs. Order accordingly.

Dated at Dodoma this 03rd day of October, 2022.



A handwritten signature in blue ink, appearing to read "ABDI S. KAGOMBA".

ABDI S. KAGOMBA

JUDGE