

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 324 OF 2021

**(Appeal from the decision of the District Court of Mkuranga at Mkuranga
in Matrimonial Cause No 5 of 2019, delivered on 9th July, 2021 before Hon.**

K. P. Mrosso Esq – Resident Magistrate)

BETWEEN

SAMWEL MUHOJA LUMALA.....APPELLANT

VERSUS

MARYLINE AMINIEL MINJARESPONDENT

JUDGMENT

MRUMA, J

This is an appeal against the decision of the District Court of Mkuranga at Mkuranga in Matrimonial Cause No.5 of 2019 delivered on 9th July 2021 delivered on 9th July 2021. In that cause the Respondent herein Maryline Aminiel Minja had filed a petition for divorce against the

Appellant Samwel Mohoja Lumala and also for the following consequential orders;

(i) That the matrimonial property be equally divided;

(ii) That the Appellant maintain issue of marriage till they obtain proper economic settlement.

(iii) That the Appellant be ordered to maintain the Respondent from the date when the decree of divorce will be granted until she gets economic settlement.

(iv) Costs of the petition and;

(v) Any other reliefs and orders which court may deem fit and just to grant.

The Respondent's petition was premised on the ground that the marriage between the parties had irretrievably broken down following the Appellant's conducts and the Appellant's accusing Respondent of being a witch and his behaviour of staying in separate rooms without any communication with her. The Respondent alleges that the acts of

the Appellant amounted to cruelty and adultery on the part of the Appellant.

In reply to the petition the Appellant contested the allegation that his marriage with the Respondent had irretrievably broken down. He said that the allegation had not been proved and he added that he was still interested in the marriage as he loved his wife. He said that upon his retirement from employment he simply chose to live/ stay in one of his houses and that he lives in the same room with the Respondent and he has always ensured that his family live happy life and he pays school fees and give other provisions to his family. That since he had never subjected the Respondent to harassment, violence and any abuse there was no reason for dissolution of their marriage.

Briefly the background of the matter is that the Appellant and Respondent solemnized Christian marriage at African Inland Church on 9th December 2000. Their marriage was blessed with three issues namely

1. Clara Samwel Mhoja
2. Betrice Samwel Mhoja
3. Elimsori Samwel Mhoja.

It was the petitioner's statement that the problem in their marriage started following Appellant's habitual neglect of his obligations to maintain his family. At the final pre-trial conference and scheduling order court framed eight issues for determination namely;

- (i) Whether the Petitioner has to be granted decree of divorce.
- (ii) Whether custody of the issues of marriage should be granted to the petitioner (ie the present Respondent)
- (iii) Whether the Respondent (the present Appellant), should be ordered to maintain the petitioner.
- (iv) Whether the matrimonial properties should be divided equally.
- (v) Whether allegations of atrocities, domestic violence, beating and other harassment to the petitioner had been proved;
- (vi) Whether the Respondent neglected his key responsibilities to his family.

(vii) Whether the Respondent misused his pension with other women and neglected his family

(viii) Whether the parties jointly acquired four houses at Mwandege Magengeni, a car and motor cycle.

These issues, in my view could be fused into two major issues namely;

1. Whether or not there were grounds for divorce and;
2. What remedies are available to the parties'.

In its judgment the District Court found that the Appellant had committed cruelty against the Respondent and proceeded to grant the decree of divorce sought. The court also confirmed existence of three issue of marriage and acquisition of properties by parties' joint efforts. The properties were held liable for distribution. On whose custody of the issues of marriage should be placed the District Court found, and I think correctly so, that the three issues who were above 18 years of age and who were living with their father (ie Appellant), should remain in the custody of the Appellant and one issue Beatrice Samwel Lumala who was fifteen (15) years of age and who was staying with her mother (ie Respondent) should continue to stay with her mother. The Appellant was ordered to provide basic needs such as food, clothing and medical

services to his children who were still in school and who were dependants.

On the division of matrimonial properties the trial District Court ordered that;

1. The petitioner (the present Respondent) be given one residential house situated at Mwandege Magegeni area.
2. The present Appellant was given a house situated at Kilungwe area in Mkuranga District. The court went on to order that other houses including business frames be evaluated, sold and the proceeds thereof be divided in the ratio of 40:60 to the Respondent and the Appellant respectively.

The Appellant Samweli Mhoja Lumal was aggrieved and he has appealed to this Court on the following grounds:

1. That the trial court erred in law and fact to grant divorce while the reasons(s) for granting divorce were baseless and unfounded.

2. That the trial court erred in law and fact to grant divorce relying on the certificate of conciliation which was defective.
3. That the trial Court erred in law and fact to grant divorce on the ground of desertion while there was no evidence of desertion which not pleaded in the first place.
4. That the learned trial Magistrate erred in law and in fact in not weighing the evidence of the Appellant and his witnesses as against that of the Respondent and her witnesses as a result of which he arrived into erroneous judgment.
5. That the trial court erred in law and in fact to grant divorce distribution of properties and maintenance of issues of marriage while the case was not proved on the balance of probabilities.
6. That the trial court erred in law and fact for failure to address or give reasons as to why court left some issues among the mine issues

proposed by the parties and dealt with issues proposed by the court only.

7. That the learned trial Magistrate erred in law and in fact for failure to ascertain and determine properly the main issue for determination in particular division of matrimonial properties and hence reached it reached a non- conclusive decision.

At the hearing of this appeal, parties were represented. The Appellant was represented by Mr. Omega Myeya learned Counsel, while the Respondent was represented by Mr Frank Micheal also learned counsel. The appeal was argued by way of written submissions.

I am grateful to the parties' counsel for their brilliant submissions for and against the appeal. As stated earlier two issues can resolve this matter conclusively. The first issue is whether there were grounds for granting a decree of divorce. On this issue counsel for the Appellant submitted that the trial court erred in law and in fact in granting divorce on the ground of desertion which was neither pleaded nor proved contrary to the principle of pleadings.

Starting with this ground, the record shows that Petitioner pleaded under paragraph 6 of the petition to the effect that she suffered atrocious domestic violence harassment, abuse and embarrassment. In her evidence she testified at page 15 of the typed proceeding inter alia thus;

".....During night he refused to share bed with me saying that I am a witch".

Elsewhere in the same page the petitioner is on record telling the court that;

" in 2017, the Respondent rented a house of one Seif Kishongo located near Rosh Bar and was living with his new lover who is Mama Lishe."

The fact that in her pleadings the petitioner pleaded atrocities, embarrassment and abuse and gave evidence to support those allegations, bars the Appellant from being heard saying that desertion was neither pleaded nor proved. The term desertion is defined in **Black's Law Dictionary 10th Edition by Bryan A. Garner at page 540** to mean a wilful and unjustified abandonment of a person's duty or obligation. A cessation of cohabitation is one of the five elements of

spousal desertion. It is neglect of marital obligation of a spouse to share bed with her partner in order to discharge his/her "*night duties*" whenever so required. On the pleadings and evidence on record I find that desertion was both pleaded and proved. On the standard of proof of these issues my view is that the standard of proof required to establish that a marriage has irretrievably broken down is less than the balance of probability which is required in ordinary civil cases. To me it is sufficient for the petitioner to establish a mere prima facie case. I say so because I view marriage as, apart from being a legally or formally recognized union of a man and a woman, a moral contract which holds a spouse to a certain moral and behavioural standard so as not to bring disrepute contempt or scandal to other spouse to that marriage. It is a bond which cannot be enforced by provisions of any law. Once there is no more love between spouse, court cannot make orders to restore it. Marriage is love, trust and affection, once it is over it is over. The underlying condition of a contract of marriage is mutual love. Unlike in other civil contracts where courts can enforce the terms and conditions agreed by the parties, love which is an intense feeling of deep affection which a spouse has towards his/her partner against cannot be enforced or imposed by any law enforcer being it a police force or a court broker. Forcing a spouse to stay with his/ her partner without his or her consent

will change the status of that marriage into a forced marriage even if both parties had initially entered in that marriage with full consent. Section 16(7) of the Law of Marriage Act [cap 29 RE2019] provides that:

"No marriage shall be contracted except with the consent, freely and voluntarily given by each of the parties thereto."

From the above quoted provisions of law consent freely and voluntarily given by each party forms the basis of marriage. Like in ordinary contract, marriage starts with one person signifying to another his/ her willingness to do or to abstain from doing anything with the view to obtaining the assent of that other to such act or abstinence which act amounts to a proposal. When the proposal is accepted it becomes a promise. When the promise agrees to do or to abstain from doing something the promise forms consideration and every promise which forms consideration is an agreement. In some religion faiths marriage is a holy matrimonial divinely blessed lifelong monogamous union between a man and a woman. It is a solemn and public covenant between a man and a woman in the presence of God, intended by God for their natural joy, for the help and comfort given to one another and adversity and when it is the God's will for the procreation of children. Thus, where the

consent is withdrawn by one of the parties, and there is no more love, no mutual joy and comfort then the marriage should be legally terminated. Refusing to legally terminate such a marriage will automatically convert it into a forced marriage with its all common psychological effects such a feeling of depressed mood, irritability, low self-esteem, rage and frustration, sleep problems difficult in forming relationship and difficulty in trusting others. The net effect of all these psychological problems is failure to consummate the marriage itself. Accordingly once one of a spouse withdraws his/her consent, and efforts to have him/her restore it through reconciliation processes by reconciliatory bodies have proved futile, courts have no option but to grant divorce in order to avoid drastic consequences like wife or even husband killing etc. I thus dismiss the first ground of appeal and agree with the trial court that there was evidence of desertion by the Appellant and even if there was no such evidence the fact the Respondent had withdrawn her consent, she no longer loves him and there is no more mutual enjoyment of the marriage, to me those are sufficient grounds for granting divorce.

On the reliefs and starting with division of matrimonial assets. The trial court found that because the Respondent prior to her retrenchment was

working with J.J. company, prior to becoming a house wife she had contributed to the acquisition of matrimonial assets. Accordingly the court ordered her to be given a residential house situated at Mwandege Magegeni area where she will live/stay with the children. That house was the matrimonial home of the parties. The Appellant was given a house situated at Kilungule area in Mkuranga. Other houses including business frames were ordered to be divided in the 60:40 ratio for Appellant/Respondent respectively.

I have no problem with the principle laid down **in Bi. Hawa Mohamed Vs Seif Ally's in reported in [1983]** TLR page 3 in sharing what is considered to be matrimonial properties in which domestic duties amount to contribution towards acquisition of matrimonial assets. My worry is whether a mere fact that a spouse is or was working prior to becoming a house wife/husband (i.e. uxorious) is also a proof her/his contribution towards acquisition of matrimonial assets. I am so worried because it appears that in allotting Mwandege/Magengeni house to the Respondent the underlying consideration was the prior to her becoming a house wife, she was working with J.J. Company. That was wrong. A person or spouse may be working and spend his or her entire earning for other expenditures different from constructing a matrimonial house or

buying matrimonial assets. The fact that he/she was in marriage at the time the properties were acquired does not on its own give him/her shares in those properties but her physical, monetary and domestic services which will count. Section 60 of the Law of Marriage Act provides that;

"Where during the subsistence of a marriage any property is acquired

(a) In the name of a husband or of the wife, there shall be rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse or....."

A rebuttable presumption tends to shift a burden of proof to the Defendant. What the plaintiff is required to do is to assert, and the burden shifts to the Defendant to rebut the assertions. In the case at hand the Respondent asserted

Under section 114(1) of the same law court has power to order division of matrimonial assets. The spirit behind the provision of that law is to

protect spouses and children from being rendered destitute upon collapse of marriage or by unilateral acts of one of the spouse hence the Respondent and children are entitled to a home.

In view of the evidence of the parties that their matrimonial home was the house situated at Mwandege and taking into consideration the principle laid down in the case of **Bi. Hawa Mohamed** (supra) and the evidence on record which is to the effect that after her retrenchment, the Respondent became a house wife therefore performed domestic duties shed is entitled to share in the matrimonial house. On how that house shares should be shared as stated hereinbefore, the learned trial Magistrate ordered the whole of it to go to the wife (i.e. the present Respondent). The Appellant was given another house which is situated at Kilungule area in the same District of Mkuranga. Apparently according to the evidence on record and in view of the provisions of section 2 of the Law of Marriage Act which defines a matrimonial home as a building in which a husband and wife reside, the house at Kilungule area was not a matrimonial and therefore it was wrong to divide it under that head of matrimonial property. Under the provision of section 114(1) of the law, court has power subsequent to the grant of decree of divorce, order the division between the parties of any

assets acquired by the parties during the marriage by their joint efforts or order the sale of any of such assets and the division between the parties of the proceed of sale. In law propertied acquired by parties by their joint efforts are distinct from matrimonial home or matrimonial properties in that while matrimonial home is a building or a house where the couple live, jointly acquired properties comprises all other properties which were acquired by the parties during their marriage. It comprises properties acquired by joint efforts of the parties. They are shareable properties. For a spouse to be entitled for a share he/she must prove that he/she contributed to the extent of his/her claim.

In the present case the Respondent didn't give any evidence to prove her contribution towards what she considered to be jointly acquired properties. PW3, Benadeta Lazaro didn't witness when the plots were being purchased. She simply saw them looking for a plot to buy. Similarly PW2 didn't witness when the plots and houses were being procured. On the other hand there was undisputed evidence that some properties were acquired before marriage. DW2 was a mason engaged by the Appellant. He didn't see the Respondent's contribution during construction of the houses. The two houses which were constructed before marriage one was converted to a matrimonial home (and it has

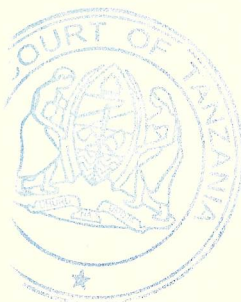
been given to the Respondent). The other one should be excluded from division as it is not a jointly acquired properties. The two other houses which were acquired during the subsistence of their marriage – they were acquired in the names of the Appellant, as there is no evidence of material contribution to their construction the 40% share allotted to the Respondent is unfounded unrealistic and unfair. I think in the circumstances where there is no evidence of physical, monetary or material contribution towards acquisition of a property during subsistence of marriage, the share of a party so fails to so produce evidence of contribution must be pegged on the usual matrimony comfort he/she gave his/her companion and this cannot be anywhere at around 40%. In my view 20% will be fair share in the circumstances if this case. I thus allow this ground of appeal and reduce the Respondent's share to 20% of the value of the two house which were constructed after celebration of their Christian marriage and during its subsistence.

As regards maintenance, it is on record that Lumala, was 23years in 2020, Clara was 21 years old and Clara Samuel and Elimson were 19 years old. All these are now of age of majority. The Appellant as a parent has no legal obligation to maintain them. Granting an order for

their maintenance may be tantamount to ordering the Appellant to maintain his children and their wives(s) and /or husbands together with his grandchildren. That was not the intention of the law. Once a child becomes a mother/father she is a parent like his parents. He/she has her/his own family which he/she must be responsible for its maintenance.

Regarding Beatrice, she was 15 years old in 2019 today 2022 she is 18 years old which is also the age of Majority. The Appellant has no legal obligation to maintain her except for school fees and support as a parent.

In view of the foregoing, save for variations ordered in the division of the two houses, the Appellant's appeal is dismissed. As this is a matrimonial matter I make no orders as to the costs.




A.R.MRUMA

JUDGE

15/8/2022

15/8/2022

Coram: **Hon. A. R.MRUMA,J.**

For the Appellant: Present and represented by Mr. Omega Myeya for
advocate

For the Respondent: Present in person.

Cc: Delphina.

Court: Judgment delivered this 15th day of August 2022 in presence of
the Appellant and his advocate and in presence of the Respondent in
person.




A.R.MRUMA

JUDGE

15/8/2022