THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT MUSOMA

MATRIMONIAL APPEAL CASE No. 7 OF 2021

(Arising from the District Court of Musoma at Musoma in Matrimonial Appeal Case No. 17 of 2020; originating from Musoma Urban Primary Court in Matrimonial Cause No. 78 of 2020)

BONIPHACE ABEL MWACHIPINDI ..... **APPELLANT**

Versus

WINNEY MARTINEY OBWOBWE ..... **RESPONDENT**

EX-PARTE JUDGMENT

01.12.2022 & 02.12.2022
Mtulya, J.:

Seventeen years ago, this court in the precedent of **John David Mayengo v. Catherina Malembeka**, (PC) Civil Appeal No. 32 of 2003 (the case), was invited on 13th September 2005, to interpret section 107 of the **Law of Marriage Act [Cap. 29 R.E. 2019]** (the Law of Marriage). After registration of prerequisite materials in the dispute, this court invited section 107 (1) of the Law of Marriage and observed that:

> *...marriage is a voluntary union of a man and a woman intended to last for their joint lives. It is the parties themselves who are the best judges on what is going on in their joint lives. A crucial ingredient in marriage*

is love. Once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him.

The facts gathered in the case show that: The parties in the case were teachers by profession. The appellant was a Secondary School teacher whereas the respondent was a Primary School Teacher. In the record it appears initially both were Primary School Teachers. The parties had celebrated a civil marriage [*Ndoa ya Serikali*] and cherished it for more than twenty (20) years blessed with four (4) children.

The facts of the case disclosed further that sometimes after their marriage, the appellant joined upgrading course which lasted for some years. It was during that period of schooling when life changed. According to the appellant in the case the cause of the fracas was the respondent who misappropriated family monies, mistreated the appellant's parents and practiced superstition.

To the respondent in the case, the cause of chaos in the family was the appellant who fell in love with another female teacher and lost interest with the respondent. The family took efforts to resolve and reconcile the parties at the family level and *Baraza la Kata Manyoni Mjini* unsuccessfully hence the

appellant had petitioned for divorce at the primary court. The primary court evaluated the evidence on the record and was satisfied that the marriage had broken down beyond all recall and dissolved the marriage. However, the respondent had no comfort with the order of the primary court and preferred an appeal to the district court alleging that their marriage had not broken down irreparably.

The district court was impressed with her submission hence reversed the decision of the primary court and declared the marriage to be subsisting. The appellant was aggrieved by the decision and registered an appeal before this court. This court then allowed the appeal and restored the decision of the primary court and held that:

> *It is upon the overall circumstances surrounding this case that I agree with the trial Primary Court that the marriage between the appellant and the respondent has broken down beyond all repairs. The order of the first appellate court declaring the marriage to be subsisting is hereby quashed and the order of the trial court dissolving the marriage is restored.*

This court in arriving at the decision, had provided five (5) reasons in favour of the holding, which in brief show that:

first, the respondent is better placed to know the true position of their marriage life; second, the appellant is ready to surrender to the respondent whatever matrimonial property they acquired through their joint effort during their marriage time; third, the appellant has sworn to **all gods** that he will never live with the respondent as his wife for whatever cost; fourth, marriage is a voluntary union of a man and a woman intended to last for their joint lives and that it is the parties themselves who are the best judges on what is going on in their joint lives; and fifth, provisions of section 107 of the Law of Marriage Act is not exhaustive.

The final reasoning of this court is related to section 107 (2) (a) – (i) of the Law of Marriage which provide matters of evidence to display proof which entitles a part to allege the marriage has broken down irreparably. In the case, the court had several quotes on record which depicted that the marriage between the parties had broken down irreparably. The record shows that: first, the appellant has sworn to **all gods** that he will never live with the respondent as his wife for whatever cost; second, the conciliation board failed to reconcile the

parties and finally, display of bitterness against each other, between the appellant and respondent.

The displays were not a good sign for a marriage worth the name. It may end up even killing each other, which is the last resort in humanity and life. There is a large bundle of precedents showing nexus of love affairs and killing of human person (see: **Shabani Rashid v. Republic** [1995] TLR 259; and **Benjamin Mwansi v. Republic** [1992] TLR 85; **Republic v. MT. 81337 Sgt. Batsin Philip Sanga**, Criminal Sessions Case No. 25 of 2020; **Republic v. Mokiri Wambura @ Makuru**, Criminal Sessions Case No. 7 of 2022; **Republic v. Godfrey Francis Mwesige**, Criminal Sessions Case No. 58 of 2017; and **Republic v. Masumbuko Fredrick,** Criminal Session Case No. 43 of 2017).

This court in one of its determinations of murder cases linked killing of persons and disappearance of love affairs. The court took its tight time off in the murder case schedule to explain on the effect of disappearance of love between lovers and its effect. This court stated that:

> *...love is an intense feeling of deep affection, something unexplainable...it is beautiful, adorable and everlasting no matter the situation ...However,*

love has become perishable good which can rot and stink...when sweets turn bitter to the extent of killing each other.

(See: **Republic v. MT. 81337 Sgt. Batsin Philip Sanga,** Criminal Sessions Case No. 25 of 2020).

The statement was considered in the precedent of **Republic v. Mokiri Wambura @ Makuru** (supra) when this court was invited to resolve murder case in criminal sessions' cases hearing. In its determination, this court noted there is a bundle of precedents in this court and Court of Appeal demonstrating the subject of love affairs and killing incidents and noted that it is a high time for the courts to situate their ddecisions on realistic premises regarding matters affecting our societies as a whole.

This court noted further that love may cause mental health problems that cannot be measured in laboratory or CT-Scan gadgets, but from unusual conducts of each individual persons according to its peculiar circumstances and tribe he belongs. When unusual conducts and hates take their course, intervention should also take its course to prevent the parties to reach their climax. The disappearance of love or existence

of serious hates between the married couples is one of the signs in reaching the climax of the conflict or provocation, which in turn may cause grave crimes. If such situations are left without interventions, or the parties are forced to stay together, tough decisions including killing of individual persons may take its course. That is the reality on ground. Life, cannot be reverted, like love or properties. It may be protected at earliest stages of matrimonial conflicts and fracas.

This court cannot cherish things which in themselves are not dangerous, but when acted upon are so risky. It will always learn from the reality on ground by use of the standard of reasonable person on streets and situate its decisions on realistic premises regarding matters affecting our societies (see: **Stephen Ngalambe v. Onesmo Ezekia Chaula & Another,** Misc. Civil Application No. 5 of 2022; **Republic v. Mokiri Wambura @ Makuru** (supra); **Republic v. Godfrey Francis Mwesige** (supra); and **Republic v. Masumbuko Fredrick** (supra).

There is a changing gear and course in common law courts in favour of the move of situating courts on real problem facing the African societies on ground (see: **Patrick Magit v. University of Agriculture Markud & Three Others** [2006]

All FWLR 1313) and **Republic v. Masumbuko Fredrick** (supra). Reading the enactment of section 107 of the Law of Marriage, it is obvious that the powers of courts in section 107 (3) and 110 (1) of the Law of Marriage Act were intended to resolve matrimonial disputes in accordance to the reality on ground. In that case, this court in its mandate has not been reluctant to dissolve a marriage when it is satisfied that the said marriage has broken down irreparably and if restored may cause more peril than cure.

In the present dispute, the appellant was dissatisfied with the decision of the **District Court of Musoma at Musoma** (the Musoma District Court) in **Matrimonial Appeal Case No. 17 of 2020** (the appeal) originating from **Musoma Urban Primary Court** (the Primary Court) in **Matrimonial Cause No. 78 of 2020** (the Cause) hence filed three (3) reasons of appeal in this court which shows that: first, the Musoma District court erred in law to hold that the marriage has not broken down irreparably; second, the Musoma District Court restored the marriage of the parties without their consent; and Musoma District Court erred in law in holding the appellant wronged the respondent.

The appeal was scheduled for hearing yesterday, 1st December 2022 at noon hours and the appellant decided to hire Mr. Christopher Waikama, learned counsel, to argue the cited three (3) points of the appeal, whereas the respondent declined appearance despite several efforts to invite her in normal and substituted service at page 20 of **Uhuru Newspaper** of 1st July 2022. This court interpreted the decline in service on the part of the respondent as a support to the reasons of appeal.

However, before the appeal hearing could take its course, Mr. Waikama prayed to join and argue all the three (3) reasons of appeal together. The prayer was granted and Mr. Waikama briefly submitted that the facts and evidences registered in the case show that the marriage was broken down irreparably. According to Mr. Waikama, the parties were happy couples, but later family quarrels started hence the parties could not live together as wife and husband.

In order to bolster his argument, Mr. Waikama submitted that due to ongoing fracas, the appellant had decided to have love affairs with another woman and Form No. 3 (the Form) from the Marriage Conciliation Board (the Board) shows that

the parties failed to resolve their differences before the Board. In his opinion, Mr. Waikama thinks the Musoma District Court declined to examine conduct and circumstances of the parties as per law in section 107 (1) of the Law of Marriage, and if had scrutinized well, it could have found the parties could no longer voluntarily live together as wife and husband. To Mr. Waikama, marriage is a voluntary union of a man and a woman and once it happens one of them is no longer interested with another, due to conducts and circumstances, the marriage is said to have been down irreparably.

In ending his submission in favour of the appeal, Mr. Waikama stated that the Musoma District Court heavily relied on the decision of the Musoma Primary Court to resolve the appeal instead of the record and precedent in **John David Mayengo v. Catherina Malembeka** (supra), which fits well in the present circumstances.

In the present appeal, the record shows that the appellant had approached Musoma Primary Court on 12th November 2020 carrying the Form from the Board duly signed by both the Chairperson and Secretary of the Board on 26th October 2020. The Musoma Primary Court had summoned the

parties to appear for hearing and register relevant materials on 18th November 2020. The materials show that:

SM1: *Mdaiwa ni mke wangu wa ndoa...tangu tufunge ndoa 2015, ndoa yetu imekuwa na migogoro...tumeshauriwa na watu bila mafanikio. Tumekuwa tukipigana na kupelekana polisi hadi kwa wachungaji. Mdaiwa amekuwa na tabia ya udokozi wa ndani akichukua pesa bila idhini yangu na kuondoka bila kuaga. Nilimpigia simu baba yake na alisema ataongea naye...nilimuuliza kwa nini ameiba pesa, alinijibu hajaiba ila amechukua...tumebahatika kupata watoto wawili katika ndoa yetu. Alitaka mtoto mmoja akasome private. Nikamwambia haiwezekani sababu mimi nasoma Open University. Mshtakiwa alinipeleka kwa Boss wetu kazini kunishtaki sitaki kusomesha...Boss akaniambia kuwa tukaelewane mambo madogo madogo na tukizidi kusumbua atatufukuza kambini. Mdaiwa akuelewa na tulipelekwa hadi kwa RPC ili kusuluhishwa na alitwambia ikishindikana tuachane...ugomvi ulizidi ndio tukafikishana mahakamani...tumewashirikisha sana wachungaji, viongozi kazini na Baraza...mdaiwa ana kiburi. Hanitii, na hata nikisema apike anakataa...migogoro ni ya muda*

mrefu. Tunaweza nuniana miezi miwili hadi mitatu...mimi tayari nina mwanamke.

SU1: *Mdai ni mme wangu wa ndoa. Migogoro yetu ni ya muda mrefu. Tunasuluhishwa, tunaelewana na tunarudi tunaishi tena...haniheshimu kabisa kama mke wake na hahudumii familia...nilienda ofisini kwao na kumueleza bosi wake...kuhusu pesa nilichukua ndani. Ni kweli nilichukua na nilimuomba kwanza. Sikutoroka, nilienda kwa ruhusa yake....Mdai ameshaoa toka mwaka jana mwezi wa saba na ana mwaka anaishi naye. Ana mwanamke na pia ni mlevi sana, ila najua atabadilika, ipo siku na nimemvumilia kwa muda mrefu sana...amekuwa akinipiga mara kwa mara, navumilia. Amekuwa sio mwaminifu kwenye ndoa...Mimi siko tayari kuvunja ndoa yangu maana nampenda mme wangu...*

During the hearing of the matter, the respondent had brought Martine Petro to testify in her favour at the Musoma Primary Court. The witness was a farmer from Rorya District and mother of the respondent (appellant's mother in law), who had brought in the court an interpretation of a reasonable persons in villages. She brief testified that:

...Mlalamikaji ni mkwelima wangu. Mdai hakuwahi kuvunja ndoa yake. ***Siwezi mlazimisha [the appellant] maana walioana wenyewe kwa kupendana***...

(Emphasis supplied).

Following the materials brought before the Musoma Primary Court, the court on 4th December 2020, found, at page 3 of the judgment, that: *mahakama imethibitisha kuwa hakuna tena ndoa baina ya wadaawa na kuwa imevunjika kiasi ambacho haiwezi kurekebishika tena*. Finally, the Musoma Primary Court pronounced various orders, including distribution of matrimonial properties and custody of children. The Musoma Primary Court reasoned at page 2 of the judgment that:

...mdai ameeleza wazi kuwa hayuko tayari kuendelea kuishi na mdaiwa kwa namna yeyote ile. Kiini muhimu katika ndoa ni upendo, upendo unapoisha basi ndoa inakuwa imeingia kwenye matatizo na hakuna dawa ya kurejesha upendo...upendo wake kwa mdaiwa umeisha kabisa na Mahakama hii haiwezi kuwalazimisha kuendelea kuishi pamoja...

The judgment aggrieved the appellant hence preferred the appeal in Musoma District Court attached with four (4) grounds of appeal, in brief: first, there was no proof the marriage has broken down irreparably; second, division of matrimonial properties excluded other properties; third, the respondent did not enjoy the right to be heard; and finally, failure to consider properties bought by respondent's loan. The Musoma District Court heard the parties and at page 5 of the judgment held that the decree of divorce was wrongly granted. Finally, the Musoma District Court allowed the appeal and set aside the decision of the Musoma Primary Court. Regarding the reasoning of the decision, the Musoma District Court, at page 4 of the judgment, stated that:

> *To me, it appears, it was the respondent who wronged the appellant by being drunk...the respondent did not deny this fact...**it was the respondent who had lost interest to cohabit with the appellant as his wife.** In the case of **Athanas Makungwa v. Darini Hassani** [1983] TLR 132 where it was held that where the petition is founded exclusively on the petitioner's own wrong doing, in*

absence of any special reason a divorce decree should not be granted.

The Musoma District Court totally declined to consider evidence of both sides registered in on the record and current circumstances in refusing to grant the decree of divorce. The evidence registered in the Cause show that the appellant has lost love and interest on the respondent. He briefly stated that:

...ndoa yetu imekuwa na migogoro...tumeshauriwa na watu bila mafanikio. Tumekuwa tukipigana na kupelekana polisi hadi kwa wachungaji. Mdaiwa amekuwa na tabia ya udokozi wa ndani akichukua pesa bila idhini yangu na kuondoka bila kuaga...Boss akaniambia kuwa tukaelewane mambo madogo madogo na tukizidi kusumbua atatufukuza kambini. Mdaiwa akuelewa na tulipelekwa hadi kwa RPC ili kusuluhishwa na alitwambia ikishindikana tuachane... tumewashirikisha sana wachungaji, viongozi kazini na Baraza...mdaiwa ana kiburi. Hanitii, na hata nikisema apike anakataa...Tunaweza

nuniana miezi miwili hadi mitatu...mimi tayari nina mwanamke.

On the other hand, the respondent replied the allegations against her in the following words, that:

Migogoro yetu ni ya muda mrefu. Tunasuluhishwa, tunaelewana na tunarudi tunaishi tena...nilienda ofisini kwao na kumueleza bosi wake...kuhusu pesa nilichukua ndani...Sikutoroka, nilienda kwa ruhusa yake....Mdai ameshaoa toka mwaka jana mwezi wa saba na ana mwaka anaishi naye...amekuwa akinipiga mara kwa mara, navumilia. Amekuwa sio mwaminifu kwenye ndoa...

The circumstances and conduct of the parties shows that forcing them to stay together, would cause more chaos than cure and may invite grave decisions from either party (see: **Republic v. MT. 81337 Sgt. Batsin Philip Sanga** (supra); **Republic v. Mokiri Wambura @ Makuru** (supra); and **Republic v. Godfrey Francis Mwesige** (supra). That is the thinking of any ordinary person in streets of Tanzania and has already received the support of ordinary villager, Martine Petro, who shares relations with both the respondent and appellant, as a

mother and mother in law respectively. Her words are quietly important with regard to restoration of the marriage. She is quoted to have said: ***siwezi mlazimisha [the appellant] maana walioana wenyewe kwa kupendana***. The last words **walioana wenyewe kwa kupendana** are very crucial in the present appeal and this court will situate in an ordinary villager Martine Petro.

That is why this court in the precedent of **John David Mayengo v. Catherina Malembeka** (supra) stated that: marriage is a voluntary union of a man and a woman intended to last for their joint lives and a crucial ingredient in marriage is love. According to the precedent, once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him. In the present case, the appellant has currently no any love with respondent.

I am aware of the provision in section 107 (1) (a) of the Law of Marriage with regard to wrongdoing of the petitioner and precedent in ***Athanas Makungwa v. Darini Hassani*** *[1983] TLR 132*. However, the circumstances in the present case is distinct with the circumstances in precedent. In the precedent

of **Athanas Makungwa v. Darini Hassani** (supra), the facts show that the petition was founded exclusively on the petitioner's own wrong-doing and there was no any special reason a divorce decree should to be granted. In any case, there were two serious allegations in the case, namely: first, there was no certificate from the Board indicating failure to reconcile the spouses within the meaning of section 101 of the Law of Marriage Act; and second, there was no proof that the respondent threatened to stab the appellant with a knife.

In the instant case, both parties are not contesting on adultery on part of the appellant, continuous fighting, the appellant has lost love towards the respondent and the parties went through all necessary steps in trying to resolve their differences by inviting all necessary institutions, including the Board before filing the petition at Musoma Primary Court.

In any case, the current trend in our courts is in favour of granting divorce when it appears one of the parties in the marriage union has lost interest in joint life and that love between the parties has disappeared to the extent that one of the parties is adulterous with a lover of his/her heart (see: **John David Mayengo v. Catherina Malembeka** (supra).

The material facts in the instant case demonstrate bitterness and family contests between the parties that cannot be resolved by their hearts. The allegations of adultery, money stealing, continuous fighting, and lose of interest and love from the appellant to the respondent to the extent of finding a lover of his heart are not good signs for a marriage worth the name. I am asking myself: can this specie of marriage be repaired? I think, to my considered opinion, it cannot. Even the family, employer and the Board failed to reconcile them. Of all, is the standard practice brought by the respondent's mother at the hearing of the Cause at Musoma Primary Court.

In the end, this appeal is allowed. The complaints of the appellant in this court have merit. The decision of the Musoma Primary Court in the Cause pronounced on 4th December 2020 in dissolving the marriage is hereby restored and any other orders delivered in the Cause are sustained without any alterations. I do so without any order to costs. I am aware this is a family dispute and the parties were wife and husband blessed with two (2) children. In any case, the respondent declined appearance, despite several efforts in normal and substituted service at page 20 of **Uhuru Newspaper** of 1st July

2022, to protest the appeal.

Ordered accordingly.

Right of appeal explained.

F. H. Mtulya

Judge

02.12.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant's learned counsel, **Mr. Christopher Waikama** and in the absence of the respondent, **Winey Martine Obwobwe.**

F. H. Mtulya

Judge

02.12.2022