

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

MATRIMONIAL APPEAL NO 04 OF 2021

*(ARISING FROM CIVIL APPEAL NO 13 OF 2021 OF THE DISTRICT COURT OF TANGA, ORIGINATING FROM
MATRIMONIAL CAUSE NO 02 OF 2021 OF MWANGÓMBE PRIMARY COURT)*

JENNY MHANDO.....APPELLANT

VERSUS

ALOYCE KISENGO.....RESPONDENT

JUDGEMENT

Mansoor J

Date of Judgement: 13 May 2022

This matter centres on the concept of presumption of marriage. After his wife died in 2010, Aloyce Kisengo, the respondent, engaged in love affairs with the appellant, Ms Jenny Mhando. That was in the year 2015.

Record shows that their relationship was unpleasant all along. The respondent decided to seek liberation at Mwangómbe Primary Court. He filed Matrimonial Cause No 02 of 2021. He pleaded with the court to give orders so as to free him from the relationship.



The appellant and the respondent during their cohabitation begot no children together and had no jointly acquired properties. This much is undisputed. The case was heard at the primary court between the two parties who brought no witnesses and, in the end, the court declared that since the two had lived together for more than two years then there was a presumption of marriage. Also, since the presumed marriage was no longer tolerable, then the respondent, Aloyce Kisengo was ordered to give the appellant, Jenny Mhando one million Tshs. for her to get back home with her luggage.

This decision displeased the appellant and she filed an appeal at the District Court of Tanga with the grounds that

- 1. The hon trial magistrate erred in law and fact and failed to consider the appellant's contribution to the respondent's life socially during the period they lived together*
- 2. The Hon trial magistrate failed to grant a compensation to the appellant to enable her to start a new life*
- 3. The granted amount of tshs one million for transport of the appellant and her personal effects is unreasonable as was not based to (sic) any factor*



Basing on the afore-listed grounds of appeal, the appellant prayed for the court to grant her a compensation and reasonable amount for transportation.

The matter was argued at the District Court by way of written submissions. In her written submissions the appellant submitted on her dissatisfaction with the compensation of One million ordered by the primary court. She insisted that she deserved twenty million Shillings. The respondent refuted this amount as it was not part of any jointly acquired property.

In its decision, the district court found that there was no presumption of marriage between these parties and reversed the order for payment of one million as compensation to the appellant as it had no legs to stand in the eyes of law.

This decision further displeased the appellant and she approached this court with this second appeal. In her petition of appeal, she attacked the district court for holding that one million shillings awarded by the primary court was enough for her. Secondly, she expressed her dissatisfaction on the finding that there was no presumption of marriage. Thirdly, she stated that the court erred in holding that the parties had no intention of



living together and lastly that the magistrate erred in finding that the parties were not legally married. Just like in the first appellate court, she prayed that this court "condemns" the respondent to pay her 20,000,000/= Tshs. and other costs.

In arguing this appeal by way of written submissions, the appellant got Legal Aid from Tanzania Women Lawyers' Association (TAWLA) while the respondent was assisted by Advocate Aniceth Gaitan Boyi. In finalising her submission, the appellant prayed that the decisions of both lower courts be quashed and set aside and that the appellant be availed liberty to file a fresh suit before the court of competent jurisdiction. On his side, the respondent maintained that the district court decision was rightly arrived at and should be upheld. These submissions by both parties will be referred to in due course.

As intimated earlier, the primary court found that the relationship of these parties had gained the status of marriage. This presumption was rebutted by the respondent from the beginning of the proceedings. The District Court held that there was no presumption of marriage between the appellant and the respondent. I find it pertinent first to determine the second

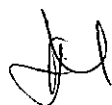


ground of appeal which centers on whether there is enough evidence to show that there is presumption of marriage in this case.

Presumption of Marriage is covered by Section 160 (1) of the Law of Marriage Act. The section provides; -

160 (1) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.

For the presumption of marriage to exist, within the clear and plain meaning of the subsection to Section 160 quoted above, there must be, first, proof that the man and woman have lived together for two years or more and secondly, that living together must be in such circumstances as to have acquired the reputation of being husband and wife. In the case of **John Kirakwe vs Idd Siko (1989) TLR 215, Mwalusanya J** (as he then was) did set elements to constitute a presumption of marriage, elements which I find to be relevant even in the present time. They are;-



- a) *That parties cohabited for over two years*
- b) *That the parties have acquired a reputation of being husband and wife*
- c) *That there was no formal marriage between the said couple*

In this particular case, there is no doubt and the parties are in agreement that they lived together from 2015 to 2021, that is six years. Also, that there has never been a formal marriage between them. What is in contention is whether in their course of cohabitation, the two acquired the reputation of being a husband and a wife. While the appellant suggests that they required such a reputation, the respondent rebuts.

This being a matter of fact, this court will look into the evidence given in the primary court to find which was heavier. In **Raphael Dibogo vs. Frabianus Wambura 1975 LRT No 42**, the High Court speaking through Lugakingira, J. stated that; -

"Where a man and a woman have lived together in circumstances that lead the outside world to believe they are husband and wife, the party denying that status has to tilt the balance with weightier evidence."



In the present case, the respondent, being the one who rebuts the presumption of marriage stated, and for clarity status I will quote;-

*"Mnamo mwaka 2015 nilianza mahusiano na mdaiwa na ikiwa ni baada ya kufiwa na mke wangu mwaka 2010 na kuniachia Watoto wadogo wawili. Hata hivyo mdaiwa kutokea na uhusiano, alifikia kwangu na akahamia kwangu na **nikamuuliza kwa nini ahamie akajibu sasa nifanyaje. Hivyo nilimuuliza anaondoka lini akamjibu kuna mambo yake anasubiria ataondoka. Hata hivyo tuliishi bila makubaliano kwani mdaiwa alikuwa hataki kuondoka na tukawa hatuelewani na kutafuta ushauri kwa watu wengine ili aondoke ndipo mdaiwa alisema bila kupewa milioni ishirini hawezi kuondoka ndio madai yake."***

(See page 4 of primary court proceedings)

In that matter, it can be gathered that at first the two once lived apart like any other lovers but according to the respondent, the appellant forced herself in the matrimony life with him.

The respondent is also recorded to have testified that



"Miaka mitatu iliyopita sina uhusiano wa kimapenzi tena naye lakini yupo chumba kingine kwenye nyumba tunayoishi".

Also, during further examination by the court assessor, the respondent stated: -

"Tatizo la kufanya tutengane sasa ni kwa kuwa sina lengo la kumuoa na nilimweleza mapema alipokuja kwangu. Uhusiano ni wa kimapenzi tu sio wanandoa na mdaiwa alihamia bila ridhaa yoyote na wakati huo sikuwepo alimkuta msichana wa kazi na tulikuwa hatuongeti. Hakuna maelewano baina yetu."

Taking this testimony as a whole, it is without doubt that the respondent totally disputes having any intentions of living or marrying the appellant.

Now moving to the evidence by the appellant at the primary court, she displayed a number of maltreating deeds from the respondent. Some of them being telling her to stop working and not enabling her financially, abusing her both verbally and physically, denying her food, threatening her, committing adultery openly, shifting the appellant's stuff from their room etc.



When asked why he was doing all that, the respondent always reiterated that he wanted the appellant to leave him alone. All this evidence verifies the evidence of the respondent that the relationship was far from peaceful.

Acquiring a reputation of being husband and wife being a matter of fact should have been reflected in the evidence given at the primary court. The reputation was to be easily noticed by the family members and or neighbours who are familiar with the lifestyle of parties. It is trite law that the one who alleges, must prove existence of the facts alleged. The appellant alleges that they had acquired the reputation of being a husband and wife and that she took care of the respondent's children. However, she brought no witness to give credible evidence on the same. Measuring this evidence, presumption of marriage cannot be said to have existed between parties.

Not every sexual affair is designed to lead or to be in a form marriage. What is observed from record here is that the appellant at all costs, even forcefully, decided to cohabit with the respondent, notwithstanding his willingness. Courts will not encourage people to manipulate a person into an intolerable

relationship in the name of presumption of marriage. This concept cannot be used as a sword but a shield to those whose rights are really being violated. The pandora box will not be opened through this court in this case.

The district court observed, and I think correctly so, that there was no voluntariness in this relationship hence there cannot be said to be a presumption of marriage. Marriage means the voluntary union of a man and a woman, intended to last for their joint lives. If marriage is a voluntary union, then its presumption should reflect similar elements. There is plenty of evidence that this cohabitation started and sustained involuntarily.

The respondent exhibited failure to condone with the relationship by initiating the cause at Mwang'ombe Primary Court. No relatives or neighbours were brought to evidence that the two had attained the status of husband and wife. It is the family and the surrounding neighbours who could credibly testify that the two attained the status of a husband and wife.

In civil cases, the burden of proof lies on a party who alleges anything in his/her favour. This proof is on balance of probabilities. Further, parties cannot tie. The one whose evidence



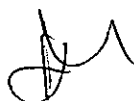
is heavier wins over the other. Measuring the evidence on record, the heavier evidence rebuts the existence of presumption of marriage.

I have gone further to ask myself whether the reliefs prayed by the appellant in this case are legally maintainable. Assuming there was a presumption of marriage, record shows that the appellant herein does not dispute that she owned nothing jointly with the respondent.

At page 9 of the proceedings she states, "*Mali za Pamoja hatukuchuma nilimkuta nazo*".

Division of matrimonial properties finds its roots from the jointly acquired properties. There must be joint efforts in the acquisition of properties for there to be a division. About taking care of children, record shows that there were house helps in the house and the record doesn't suggest that the appellant was the sole care taker of the children whose age is not even reflected.

I am more surprised to dismay at the appellant's insistence that so as to leave the respondent's home, she has to be given twenty million shillings. In her own words at page 9 of the



proceedings as well as in the petition of appeal, the appellant states; -

Naomba mdai anipatie milioni ishirini ili nikaanzishe maisha yangu mdai ana uwezo wa kunipa kwa sababu anafanya kazi serikalini na akakope ili arudishe biashara na kazi yangu imekwisha ili niweze kuondoka.

The primary court awarded the amount of One million shillings as compensation. The District Court found that there was no basis for awarding any compensation to the appellant. I too wonder what the compensation was for. Can a lover be repatriated at the end of a relationship? Indeed, this will be a new practice.

Facts speak for themselves. This appeal is too far from having merits. It is hereby dismissed. No costs

DATED AND DELIVERED AT TANGA THIS 13TH DAY OF MAY, 2022



Latifa Mansoor
LATIFA MANSOOR

13TH MAY 2022