IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE-STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 25 OF 2022

(Arising out of Matrimonial Cause No.41 of 2021 of District Court of Temeke at Temeke One Stop Judicial Centre)

JAMES ZACHARIA MASSAMAKERI..... APPELLANT

VERSUS

YUSTA ISAYA GONGO..... RESPONDENT

JUDGMENT

Date of last order: - 15/12/2022
Date of judgment: - 28/02/2023

OPIYO, J.

The appellant herein is aggrieved by the decision of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 41 of 2022, appeals to this court on the following grounds;

1. That, the trial magistrate erred in law and facts by deciding the matter without evaluating evidence.

2. That, the trial magistrate erred in law and fact by failing to dissolve the marriage while both parties are no longer living together and both testified that they have no interest in their marriage and they can never be together.

3. That, the trial magistrate erred in law and fact by failing to consider the law and evidence adduced after being controlled by emotions.

4. That, the trial magistrate erred in law and fact by failing to exercise judicial discretion judiciously in awarding costs of the suit without considering the circumstances of the case.

5. That, the trial magistrate erred in law and fact by not ascertaining all important issues laid before him.

Both parties were represented and through their counsels, they agreed to dispose of the matter through a written submission. I thank both counsels for their exhaustive research and for filing the submissions timely.

Counsel Dedi Isaka Mabondo for the appellant submitted on the first ground that, the court failed to evaluate evidence as the trial magistrate focused on proof of adultery and abandoned other grounds stated in the pleadings and testimony. That, that the respondent herein did not cross-examine the issue of psychological torture, there was unimpeached evidence that the respondent took personal belongings of the appellants like academic certificates, and a business license, and demanded 10 million so that she can return the same as it was indicated in page 6 and 7 of the court's trial proceedings. Also there was unimpeached evidence that there was chaos at home due to the conducts of the respondent.

The counsel for the appellant further stated that as a matter of principle, the party who failed to cross-examine the witness is deemed to have

accepted the facts and will be estopped from asking the trial court to disbelieve the same facts and cited the case of **Goodluck Kyado v Republic (2006) TLR 263**

On the second ground, it was submitted that the trial court confined itself to the listed grounds in the law of Marriage Act in dissolving the marriage while there are a number of binding decisions that direct the subordinate courts to consider the circumstances and conducts of the parties and cited the case of **Mariam Tumbo v Harlod Tumbo (1983) TLR 293** to fortify her argument. On page 3, last paragraph of the judgment the court denied dissolving the marriage because the appellant herein did not prove the listed ground in section 107 of the Law of Marriage Act, the trial court ought to consider the circumstances and conducts of the parties, the respondent made a cross prayer that marriage be dissolved. That is a proof that the marriage was broken down beyond repair and marriage conciliation board has failed to resolve the matter (exhibit P-4) and there was a testimony of both parties that they cannot live together. The case of **Valence Paul Shayo v Jackline Wilson Kimaro, Matrimonial Cause No. 21 of 2020, HC Moshi Registry, Mutungi, J** (as she then was) the rest of the evidence painted a clear picture that the two could no longer live together as without love the marriage had irreparably broken down, was cited to support the argument.

On the third ground, the appellant's counsel submitted that by looking at the judgment it is vivid that the trial magistrate was controlled by emotions, he concentrated on the parties' vows before the Catholic Church that only death can do them apart (first page, first paragraph of

the judgment) and further stated that, the vow was witnessed by friends, relatives, buddies which it is not found anywhere in the records. No issue was framed by the parties regarding vows, the trial magistrate could have focused on the legal issues since the law permits for spouses to file petition for divorce despite their vows or religious beliefs, the decision should not be influenced by emotions and irrelevant considerations (**Godfrey Buberwa v Pelagia Buberwa, Land Appeal No. 238 of 2020 at page 10**

On the fourth ground, the counsel appellant stated that in exercising the courts' discretion the court must consider rules, principles, and laws, the trial magistrate has demonstrated nothing as to why he awarded the cost of the suit to the respondent, the parties separated and the respondent took all house utilities (exhibit P-3). Not only that but, also the trial magistrate disregard the fact that the court had dismissed the suit, the marriage still subsists, thus it was unwise to award costs and disregarding everything.

Lastly, the counsel for the appellant submitted on ground 5 that, the trial magistrate failed to address the issue of properties on separation taken by the respondent as per exhibit P-3. The trial magistrate would have revised the same since he dismissed the suit. Thus, the appellants pray for this court to set aside the trial court judgment, to make a declaration that the marriage has broken down, to issue a divorce decree, the listed utilities continue to be taken by the respondent and any other relief this honourabe court deems fit to grant.

In reply, counsel Paulo Patience Hyera, for the respondent submitted that the respondent never cross-examined on the issue of physiological torture as the real gist before the trial court was that the respondent was involved in adulterous behaviour. The counsel further submitted that failure to evaluate those matters cannot preclude justice from smiling in its temple. Cross-examination may be tantamount to acceptance of fact but it did not occasion a failure of justice in this case.

On the second ground, the respondent's counsel agreed to the extent that, the respondent has no more love for the appellant and it is true that they are not living together and the appellant agreed on the fact that he is living with another woman who is pregnant and already had one child with. The counsel further submitted that the appellant himself was a wrongdoer by his adulterous habits and he is the one who sued his wife for the acts done by himself and it should be borne in mind that what necessitated the trial Magistrate to hesitate to grant the decree of divorce was the fact that the appellant petitioned for the decree of divorce for his own wrong doing. He also remarked that, if the respondent was the one who was fed up with the adulterous acts of the appellant she would approach the court and ask for the divorce at her wishes.

On the third ground, the counsel for the respondent replied that no emotions clouded the trial Magistrate, the remarks were normal and they can be considered *obiter dictum*. It is the law that permits seeking divorce as to oppose the vows. The Law of Marriage Act agrees with people's beliefs and religious marriages, thus, we can afford an element of religion in the judicial articulations.

On the fourth ground, it was submitted that the justification to award cost for the magistrate is not hard to find. The appellant sued the respondent for adultery while he was the one involved in adulterous behaviour. Considering that, it was reasonable for the trial magistrate to award costs because it was tantamount to abuse the court process as the petition was frivolous and vexatious (he referred section 90(1) of the Law of Marriage Act (supra))

Lastly, the counsel for the respondent submitted. On this ground, their appellant complained about exhibit P-3. There was a distribution of the properties the question is why only respondent things reflect on the exhibit? And if there was the true intention of distributing things it could be done through settlement deeds. And thus, prayed for the appeal to be dismissed entirely.

In rejoinder, it was replied on the first ground that, failure to consider unimpeached evidence did occasion failure of justice as the evidence was within the factual matrix of the petition for divorce. That, psychological torture or mistreatments falls under the grounds of divorce as per section 107 of the Law Marriage Act (supra).

On ground two, the counsel for the appellant stated that there is an admission of both parties that there is no love between the parties, and if it is the appellant wrongdoing by the virtue of cross prayer on page 13 of the proceedings and evidence adduce the magistrate was supposed to dissolve the marriage and referred the case of **Edna Gombanila v Andrew Gombanila, 1974) LRT No. 65.**

Also, on the issue of emotions, the appellant's counsel stated that the law recognizes religious marriages but this does not mean that their vows should be considered in a divorce proceedings

After going through all grounds raised and submissions adduced by the parties, my observation is that there are grounds that can conveniently be disposed together as they raise the same issue. Ground one, two and three leads to the issue of evaluation of evidence, that is as to whether the trial magistrate failed to analyse evidence laid before him in order to dissolve the marriage And whether the trial magistrate failed to consider the law and evidence adduced after being controlled by emotions. Grounds four and five is on whether the trial magistrate failed to analyse issues laid before him and to exercise judicial discretion judiciously in awarding costs.

On the set of first and second ground, my observation is as below. From the facts of the parties which can be observed at pages 5 to 15 of the typed proceedings, it is shown that what triggered chaos in the marriage is the message found in the respondent's phone which was however not tendered as evidence at the trial court. The saga never ended there, as there was a series of endless accusations of adultery until 5th March 2021 when the respondent was returned home to her parents (*see exhibit P-2*).

The respondent in reply insisted that it was the appellant's fault and he is the one who committed adultery by having a child with another woman as there is no evidence to implicate her. After all, she was not the one who was fed up with appellant's behaviour, because if she was

she would be the one to file for divorce not the appellant. Conclusion of the trial magistrate was that in all that tale, factors in section 107 (1) (a) Law of Marriage Act, Cap 29, R.E 2019 was not proved and appellants' faults should not be blessed by the court.

In order to grant divorce order, marriage has to have been broken irreparably. In the case of **R v R (2004) T.L.R 121, i**n deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and the party must prove that there are some factors necessary to warrant divorce as stipulated in section 107(1) and (2) of the Law of Marriage Act, Cap 29, R.E 2019. See also the case of **Mariam Tumbo** (supra) cited by Mabondo. It is trite law that one who alleges must prove (**Mwanahawa Iddy Mtili v Omary Rajabu Muambo, PC. Civil Appeal No. 59 of 2019, HC, DSM (unreported),** *Kulita, J* . In divorce proceedings this principle is emphasized to preserve the sanctity of marriage. It follows that, divorce is not an automatic right upon filing a petition; petitioner has to prove that their marriage is in beyond repair state. In the case **R v R** (*supra*) it was also held that;

> *"...legislature has imposed a duty upon Courts of law to see to it that marriages should not be easily dissolved. The rationale is not far to seek families are foundation of a nation and it is truism that strong families breed strong..."*

What the court is to determine now is whether there was such evidence that was not considered by the trial court and instead he used emotions

to reach decision. The main allegation was adultery on the part of the respondent. It turned out that indeed there was no concrete proof to ascertain these facts as found by the trial court. And in turn of events, it is the appellant who admitted adultery by having a child with another woman and making her pregnant for the second time. However, this was not the only allegation. There was also allegation of the psychological torture on part of appellant, long standing disharmony in the family. It is also on record that, the parties are no longer living together for lack of love between them. Moreover, these same parties had previously approached the court for the same thing, grant of divorce, which was dismissed for being premature. It is unfortunate that the trial court concentrated only on failure to prove adultery on part of the respondent by the appellant to conclude that the marriage has not broken down irreparably, hence, declined issuing divorce decree. The above two cases, **R v R (supra and Mariam Tumbo (**supra) give court wider discretion to consider other circumstances in each particular case to prove that marriage has broken down irreparably. In the case of Mariam Tumbo it was held that:-

> *"In this country, proof of what is called matrimonial offence (adultery, cruelty, desertion etc) would not by itself entitle a spouse to a decree of divorce, afortiori failure to prove such offences would not by itself disentitle a spouse to the decree. What is relevant is whether the marriage has been broken down irreparable and in considering this aspect the Court is enjoined to have regards, not merely to specific offence, if any, but all relevant evidence regarding the conduct and circumstances of the parties"*

Drawing inspiration from the above quotation, it is my observation that, although the adultery was not proved, but I still find enough evidence adduced before the court to back up the claims that the marriage was broken down beyond repair. Other factors like psychological torture, long time separation and decline of love between them were not denied by the other side. And actually there was cross prayer from the respondent for the decree of divorce to be issued. In addition to the fact that these parties have been on hold awaiting expiration of the two years of their marriage to get divorced after their first attempt failed for being prematurely filed, I am convinced that this marriage has broken down irreparably. The trial court ignored all these glaring factors for issuing decree, had it given them a closer look, his decision would have been different, I believe. In the circumstances, finding refuge in the holding in the case of **Ahmed Said Kidevu v Sharifa Shamte (1989) T.L.R referring to p**rovision of section 140 Of the Law of Marriage Act (*supra),* I find no reason to compel the two into forced cohabitation which is not even there any more as they are in long separation. In **Shamte's case** it was held:-

> *"No proceeding may be brought to compel a wife to live with her husband or a husband with his wife, but it shall be competent for a spouse who had been deserted to refer the matter to a Board. Marriage is a voluntary union of a man and a woman, and it is contracted with the consent of the parties. It is intended that the marriage will last for their joint lives of the parties.* ***However, when difficulties arise in a marriage, and one spouse decides to live separately from the other, the court cannot***

compel them to live together. *Parliament, in its wisdom, enacted section 140 of the Law of Marriage Act, which clearly provides that a court cannot compel one spouse to live with the other.* The only remedy to a spouse who has been deserted is to commence divorce or separation proceedings." *(Emphasis added)*

For that reason, this ground is allowed. Judgment and decree of the trial court refusing divorce decree is quashed and set aside.

The issue whether the trial magistrate failed to consider the law and evidence adduced after being controlled by emotions should not detain me. I say so because, what has been depicted by the appellant in arguing this issue is some words and religious reflections that did not lay the foundation of determination of the case by the trial court. What the trial magistrate did is just using what is commonly referred to as Biblical style in writing his judgment. The Biblical verses articulations did not affect his decision as argued by the appellant.

On the issue as to whether the trial magistrate failed to analyse issues laid before him and to exercise judicial discretion judiciously in awarding costs (ground 4 and 5), my take is that, it may have been suitable in the circumstances that the marriage was not dissolved and the petition was seen as frivolous, but now that the marriage has been dissolved, its relevance has diminished given the relationship between the parties. This order is therefore quashed and set aside.

Having said so, this appeal is allowed. The judgment and decree of the trial court is quashed set aside. Marriage between the two is hereby dissolved and divorce decree. No order as to costs.

It is so ordered

M. P. OPIYO,

JUDGE

28/2/2023