IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 3 OF 2023

(C/F Monduli District Court in Civil Appeal No. 1 of 2022, Originating from Mto wa Mbu Primary Court in Matrimonial Cause No. 11 of 2020)

JENI MUSHI.....APPELLANT

VERSUS

HILLARY KIMARO.....RESPONDENT

JUDGMENT

14.08.2023 & 14.09.2023

MWASEBA, J.

Before the Primary Court of Mto wa Mbu at Monduli District in Arusha Region, the Respondent Hillary Kimaro petitioned for divorce against the appellant Jeni Mushi. The trial court in its decision dated 13/10/2020 issued a decree of divorce and granted the custody of a child Julieth, to the appellant herein as she was still young (2 1/2 years) and for Joan to continue living with her grandparent until she completes standard seven, and thereafter she would start living with the respondent herein. More to that, the respondent was ordered to pay maintenance costs of Tshs. 150,000/= per month. The respondent was further ordered to pay for

school fees, clothing, and treatment costs for his children. As for the matrimonial properties, the court ordered the appellant and respondent to receive 40% and 60 % respectively. Her appeal to the district court was unsuccessful.

Being aggrieved by the decision of the two lower courts, the appellant appealed to this court armed with five grounds of appeal as follows:

1. *That, the first appellate court erred in law for failure to hold that the whole proceedings in the trial court were nullity for the certificate from Marriage Conciliatory Board was not tendered and admitted as exhibit to form part and parcel of the court record.*
2. *That the first appellate court erred in law for failure to hold that it was mandatory to obtain an independent option of the elder daughter of the parties hereof issuing custody Order.*
3. *That the first Appellate Court erred in law for failure to hold that it was mandatory to inquire the income of the Respondent herein before issuing Maintenance Order to the tune of Tshs. 150,000/= per month.*
4. *That the first Appellate Court erred in law for failure to hold that an adverse inference had to be drawn against the Respondent herein for failing to call his material witnesses.*

5. *That the first Appellate Court erred in law for failure to hold that an Order for division of Matrimonial properties was issued contrary to the wishes of the parties.*
6. *That the first Appellate court erred in law for upholding the decision of the trial court that the marriage between the parties was broken down irrepealably.*

During the hearing of the appeal, the appellant was duly represented by Mr. Arnold A. Tarimo while the respondent was well represented by Mr. Nelson Massawe, both learned counsels. The counsels for the parties opted to argue the appeal by way of written submissions and they both complied with the submissions schedule.

Starting with the 1st ground of appeal, Mr. Tarimo submitted that the Certificate from the Conciliation Board was not tendered and admitted in the court as exhibit. So, the same was not part of the documents needed to be relied upon by the court. He supported his argument by citing **Section 101 of the Law of Marriage Act**, Cap 29 R.E 2019 and number of cases including the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited**, (2006) TLR 343.

Coming to the 2nd ground of appeal, Mr. Tarimo grieved that **Section 125 (2) of the Law of Marriage Act** was not complied with by the trial court as the child Joan Hillary Kimaro (12) was ordered to live with the respondent after completing her primary education without hearing her opinion as required by the law. He supported his argument with the case of **Mariam Tumbo v. Harold Tumbo** (1983) TLR 293.

Regarding the 3rd ground of appeal, Mr. Tarimo complained that it was wrong for the trial court to issue maintenance order at the tune of Tshs. 150,000/= without inquiring via social welfare officer to know the income of the respondent. He argued further that the said act was contrary to **Section 136 (1) of the law of Marriage Act**. He cited the case of **Jerome Chilumbo v. Amina Adamu** (1989) T.L.R 117 to support his argument.

On the 4th ground of appeal, Mr. Tarimo submitted that the trial court erred in law to draw adverse inference against the respondent for failure to call material witnesses. He argued further that the Headmaster of Rift Valley Secondary School and District Executive Officer of Monduli were supposed to be called to prove the allegation that the appellant was reporting to them that the respondent was disclosing the confidential issues to the outsider. Thus, he believes they were the material

witnesses needed to be called by the respondent. He cited the case of **Hemed Said v. Mohamed Mbilu** (1984) TLR 112 to bolster his arguments.

Coming to the 5th ground of Appeal, Mr. Tarimo challenged the division of matrimonial property that it was done contrary to the wishes of the parties. He clarified that at the trial court both parties agreed their matrimonial properties to be the properties of their two issues, thus, it was wrong for the trial court to divide them. He supported his argument by citing **Section 29 (2) of the Law of Marriage (Matrimonial proceedings Rules) Rules,** 1971 and the case of **Joseph Warioba Butiku v. Perucy Muganga Butiku** (1987) TLR 1.

On the last ground of Appeal, Mr. Tarimo Complained that there was no proof that a marriage was broken down irrepealably as required by **Section 107 (a)- (i) of the Law of Marriage Act.** He argued further that no proof was submitted regarding the mental cruelty as required by the law. Thus, he prayed for the appeal to be allowed based on the reasons submitted herein and the judgment and decree of the 1st appellate court and the trial court be quashed and set aside.

On his side, Mr. Massawe strongly opposed the appeal. Starting with the 1st ground of appeal he submitted that Mr. Tarimo did not dispute that

the matter was referred to Conciliatory Board and the certificate was awarded. He argued further that the law is very clear that a certificate from Conciliatory Board need to be accompanied with the petition of divorce as per **Section 106 (2) of the Law of Marriage Act**. Thus, the argument from the appellant's counsel is baseless as the law provides how the certificate needs to be attached. He distinguished the cited case of **Japan International Cooperation Agency (JICA)** (supra) because the procedure under **Section 106 (2) of the Marriage Act** differs with the normal procedure of tendering exhibits. His arguments were supported with the case of **Athanas Makungwa v. Darin Hassan** (1983) TLR 132.

Responding to the 2nd ground of appeal, Mr. Massawe submitted that it is true the trial court ordered the child Joan Hillary Kimaro to start living with the respondent after completion of her standard seven studies as she was living with her grandmother. The trial court did consider the interest of the child and taking into consideration **Section 125 (4) of the Law of Marriage Act**, that if there are more than one child, it is not mandatory both of them to be put under the same custody. However, until today the said child is still living with the appellant's parents at Moshi and no party moved the court to summon the child to

seek her opinion. Thus, this is a new fact introduced at this stage. So, this ground has no merit.

Replying to the 3rd ground of appeal, Mr. Massawe averred that **Section 136 (2) of the Law of Marriage Act** provides that no proceedings shall be held invalid for non-compliance of **Section 136 (1) of the Law of Marriage Act**. Yet, at the trial court, a social welfare officer proposed the amount of Tshs. 100,000/= which the appellant opposed to be insufficient, and the court ordered the amount of Tshs. 150,000/= but the appellant is still not satisfied. He submitted that the respondent will be paying the amount of Tshs. 150,000 and yet still ordered to maintain the children in respect of health, education, food, and shelter. Therefore, this ground too has no merit.

Responding to the 4th ground of appeal, Mr. Massawe submitted that as the appellant admitted that he went to the headmaster of Rift valley Secondary school and informed him that the respondent neglected his duties of maintaining his family there was no need to call them as witnesses. The trial court was correct to order that the Marriage was broken down irrepealably due to mental cruelty that drove the respondent away from the matrimonial home. He supported his argument by citing **Section 107 (2) (c) of the Law of Marriage Act**

and the case of **Max Hassan Omary v. Zainabu Kalenga**, Matrimonial Appeal No. 8 of 2020 (HC at Dodoma Unreported).

Replying on the 5th ground of appeal, Mr, Massawe submitted that it is true the parties wished that the properties would remain to their children however they are minors who cannot own properties on their own. The wishes of the parties were unmaintainable in law as it was not clear who will handle the matrimonial properties until the children reach the age of majority. Therefore, it was prudent for the court to divide the matrimonial properties between the parties herein. He supported his argument with several cases including the case of **Bi Hawa Mohamed v. Ally Seif** (1983) TLR 32.

On the last ground of appeal, Mr. Massawe submitted that the marriage between the parties herein was broken down irrepealably under **Section 107 (2) (c) of the Law of Marriage Act**. He averred that, the parties herein had already have a voluntary separation since 2019 which is enough ground to grant divorce. Therefore, he prayed for the appeal to be dismissed with costs as the records of the trial court speaks loudly as submitted herein.

In his rejoinder submission, Mr. Tarimo reiterated what had already been submitted in his submission in chief.

Having considered the parties' rival submission and the records before the court, it is certainly clear that the issue for determination is whether the appeal has merit or not.

Starting with the first ground of appeal, Mr. Tarimo submitted that the proceedings of the trial court were nullity since the Certificate from Marriage Conciliatory Board was not tendered and admitted as exhibit as required in Civil Cases. However, Mr. Massawe submitted that a Certificate from Marriage Conciliatory Board is attached to the petition for divorce therefore there was no need to tender it again in court as an exhibit.

I have gone through **Section 106 (2) of the Law of Marriage Act,** which provides that:

> "*Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104:*"

Thus, being guided by the cited section this court do agree with the submission of Mr. Massawe that as long as the Certificate were attached to the petition for divorce and the parties did not dispute that they went to Marriage Conciliation board then there is no need to tender it again in

order to be admitted as exhibit. Therefore, this ground is found with no merit.

Coming to the 4th and 6th grounds of appeal, Mr. Tarimo complained that a marriage was not broken down irrepealably as held by the trial court as there was no evidence to prove the same. Whilst Mr. Massawe submitted that the marriage was broken down irrepealably based on the evidence submitted as per **Section 107 (2) (c) of the law of Marriage Act**. The cited section provides that:

> "*Cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;*"

At the trial court the respondent submitted how he was mistreated by the appellant to the extent of leaving the matrimonial home and went to live somewhere else. Apart from that the parties were also separated since 2019 and no conjugal rights were exercised between them. Therefore, cruelty was not the only reasons the trial court decided to dissolve the marriage of the parties herein.

As for the issue of failure to call material witness, the same is baseless as the appellant when she was cross examined at the trial court, she admitted that "*Nilienda kwa Mkurugenzi kulalamika kwamba*

ulinitekeleza hutaki kurudi nyumbani na ulikuwa hutoi matunzo ya Watoto". So, there was no need to call him to testify if the appellant went to him or not.

Thus, this court is of the firm view that based on the evidence submitted at the trial court the Marriage between the parties herein was broken down irrepealably. Therefore these grounds lacks merit.

Coming to the 5th ground of appeal, Mr. Tarimo complained that division of matrimonial properties was issued contrary to the wishes of the parties. He submitted that the parties wish all the properties to remain to their children, but the court divided them between the parties. On his side, Mr. Massawe submitted that as the children were all minors their wish was impossible as there was no agreement on who will take care of the properties until they attain the age of majority.

Taking into consideration the age of the children, this court support the decision of the first appellate court which uphold the decision of the trial court for the properties to be divided between the appellant and the respondent. More to that, as it is provided under **Section 114 (1) of the law of Marriage Act**, that:

> *"The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order*

the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale."

See also the case of **Robert Aranjo v. Zena Mwijuma** [1984] TLR 7. Therefore, the trial court was correct to divide the matrimonial properties between the appellant and the respondent based on contribution of each other. See the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (Civil Appeal 102 of 2018) [2020] TZCA 31 (20 February 2020). Having so said, this ground lacks merit.

Regarding the 2nd ground of appeal, Mr. Tarimo complained that the trial court did not seek opinion of the child Johan Hillary Kimaro as required by **Section 125 of the Law of Marriage Act.** On his side, Mr. Masawe submitted that the said child is still living with the grand parents on her mother side and the appellant did not adhere to the court order which considered the welfare of the child.

I am aware of **Section 125 (1) (b) of the Law of Marriage Act** which provides that:

"1. *The court may, at any time, by order, place a child in the custody of* ***his or her father or his or her mother*** *or,* ***where there are exceptional circumstances***

making it undesirable that the child be entrusted to either parent, *of any other relative of the child or of any association the objects of which include child welfare."*

b) ***the wishes of the child****, where he or she is of an age to express an independent opinion;" (Emphasis added)*

At the trial court when Hon. Magistrate put the child under the care of her father stated that:

"Kuhusu Watoto wawili waliopatikana wakati wadaawa wakiwa wanandoa yaani Joan na Julieth, Joan ana umri wa miaka 12 anasioma shule ya msingi J.K Nyerere Moshi anaishi na bibi Mzaa mama, ili athiathirike katika masomo kwa kumhamisha shule, ***Mahakama imeona kuwa kwa maslahi mazuri ya mtoto****, aendelee kuishi na bibi yake mpaka atakapoaliza darasa la saba ndipo mdai atamchukua na kuishi nae."*(Emphasis is mine).

From the cited quotation it is clear that the trial court did not take into consideration the best interest of the child when it was deciding that the child should remain in the custody of his grandmother and later to be under the care of his father after the completion of standard seven. Further to that the court did not bother to receive opinion of the child as per **Section 125 (2) of the Law of Marriage Act** nor ordered the social welfare officer to make inquiry as to who will be able to remain with the children between the appellant and the respondent. Thus, this

court is of the firm view that there was no enough information submitted at the trial court which moved the court to place the child under the care of his father. The trial court ought to inquire enough information to enable it to consider the best interest of the child by inquiring more information from the parties or by involving a social welfare officer to prepare a social inquiry report to ascertain the best interest of the child as stipulated under **section 136 (1) of the Law of Marriage Act.** Thus, this ground has merit.

Coming to the 3rd ground of appeal, Mr. Tarimo complained that trial court ordered payment of Tshs. 150,000/= per month as maintenance without considering the opinion of the social welfare officer on the income of the respondent. On his side, Mr. Massawe stated that the opinion of the social welfare Officer was considered, and he suggested Tshs. 100,000/= per month depending on the income of the respondent and the court varied from Tshs. 100,000 to 150,000/=.

Upon perusal on the records of the trial court this court noted that at page 11 of the trial court proceedings SM4 (Swedi Ally) (Afisa Ustawi Wa Jamii) in part of his evidence he stated that:

> "*Watoto walikuwa hawajatelekezwa kwa sababu walikuwa wanapata mahitaji yao kama kawaida na Mdai hajawai*

kukaidi kutoa matunzo ya watoto. ***Mdai alikuwa anatoa matunzo ya Watoto Tshs. 100,000/= Kila mezi kupitia ustawi wa jamii'*** (Emphasis is mine).

Based on the quoted paragraph the amount of Tshs. 150,000 ordered by the court was given without any proof of income of the respondent. The Social welfare officer did not make any inquiry regarding the income of the respondent to help the court to determine the amount of maintenance need to be given to the appellant, taking into consideration that the respondent is Teacher. Thus, there is no proof as to why the court ordered the respondent to order the appellant to pay Tshs. 150,000/= as maintenance costs to the two children without proof of his income as per **Section 129 of the Law of Marriage Act**, Cap 29 R.E 2019. This ground has merit too.

All being said and done, the appeal is partly allowed to the extent explain herein. The matter is remitted back to the trial court for the court to determine the two issues of Custody and maintenance of the children after having enough information to ascertain the same.

Taking into consideration nature of the case and the existing parental relationship between the parties, each party to bear its own costs.

It is so ordered.

DATED at **ARUSHA** this 14th day of September, 2023.

N.R. MWASEBA

JUDGE