IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

D.C CIVIL APPEAL NO. 14 OF 2023

(C/F Matrimonial Cause No. 05 of 2021 in the Resident Magistrates' Court of Moshi at Moshi)

RECHINOLD RAYMOS KINYUNGA…………………..………APPELLANT

VERSUS

FURAHA SADOCK SIMWANZA…………………...………...RESPONDENT

JUDGEMENT

Date of Last Order: 17.04.2024
Date of Judgment: 23.05.2024

MONGELLA, J.

The parties herein were once husband and wife. They contracted their marriage at Moshi Lutheran Church on 12.04.2008. The respondent was the petitioner in Matrimonial Cause No. 05 of 2021 in the Resident Magistrates' Court of Moshi at Moshi (herein after trial court). She sought for divorce, division of jointly acquired properties, maintenance including health care, non-molestation clause, costs of the petition and any relief the trial court deemed fit. The appellant contested the petition save for the relief for divorce.

The trial court heard both parties who stood as sole witnesses for their case. The trial court found and declared the marriage

between the parties broken beyond repair and issued a decree for divorce. The trial court further issued a non-molestation order, and sale of a matrimonial home at Shiri Matunda and proceeds thereof to be equally divided between them. It further ordered the appellant to maintain the respondent only on health care by providing her with reliable health insurance or directly pay for her medical expenses if need arises.

Aggrieved by the order for maintenance, the appellant preferred this appeal on 6 grounds, to wit:

1. *The Resident Magistrates Court erred in law and in fact in ordering the appellant to maintain the respondent on health matters after granting an order for divorce without assigning special reasons for doing the same.*

2. *The Resident Magistrates Court erred in law and in fact in ordering the appellant to maintain the respondent on health matters after granting an order for divorce while the said respondent was able to work and maintain herself.*

3. *The Resident Magistrates Court erred in law and in fact in ordering the appellant to maintain the respondent on health matters after granting an order for divorce without proof that she was still sick and needed health care.*

4. *The Resident Magistrates Court erred in law and in fact in ordering the appellant to maintain the respondent on health*

matters after granting an order for divorce while at the same time ordering equal division of the matrimonial house.

5. *The Resident Magistrates Court erred in law and in fact in ordering the appellant to maintain the respondent on health matters after granting an order for divorce without proving that the appellant had the means for doing the same.*

6. *The Resident Magistrates Court erred in law and in fact in ordering the appellant to maintain the respondent on health matters after granting an order for divorce while it was on record that the appellant had never neglected her during the whole time of their separation.*

The appeal was argued by written submissions whereby the appellant was unrepresented while the respondent was represented by Ms. Elizabeth Maro Minde, learned advocate.

The appellant argued all grounds generally. He alleged that the legal position in Tanzania is that where a marriage is dissolved, the parties' responsibilities towards each other also dissolve, unless the court, for special reasons, sees a party is entitled to maintenance. That, such special reasons ought to be property evaluated and assessed by the court. Explaining about the reasons to be assessed by the court, he contended that the same would include extreme poverty of the party, incapacity to work wholly or partially due to ill health, mental retardation and others. He added that the court

also has a duty to ensure that the spouse liable to maintain another has the means to do so.

He made reference to proviso in **Section 115 (e) of Law Marriage Act** [Cap 29 R.E 2019 which provides for maintenance of a wife when granting or subsequent to granting of divorce. He further made reference to **Section 116 of the Law of Marriage Act** which provides for factors the court can observe in determining the amount of maintenance to award a wife on divorce. In consideration of those provisions, he contended that the court ought to base its assessment primarily on means and needs of the parties but must also have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage and the customs of the community to which the parties belong.

Referring to the trial court record, he argued that the trial magistrate also found that both parties were cruel to each other. That being the case, he had the stance that their marriage had been broken irreparably, and the degree of responsibility toward the disintegration of the marriage was shared between the parties.

He further argued that the respondent proved that she has the capacity to work as she also contributed to construction of their matrimonial home owing to her former employment at Theophilo Kisanji University in Mbeya. He challenged that the is no evidence that the respondent is now incapable of working or earning her

livelihood. In that regard, he said, the court should not have awarded her maintenance.

The appellant further faulted the trial court for failure to assess his means and needs of both parties. He argued that there was no proof of the appellant's means of paying for the respondent's health care example, whether he was working or had financial means of maintaining the respondent. He added that there was also no proof that the respondent could not maintain herself after divorce.

With regard to medical expenses, he argued that any reliable health insurance is very expensive and requires a party paying for the same to have stable income. That, despite the fact that medical expenses are very expensive, the court order did not categorize as to what expenses should be covered. He maintained his stance that he lacks the means to maintain the respondent rendering the order impracticable.

The appellant further pointed out that apart from the failure by the trial court to prove the means and needs of parties, it ordered equal division of the matrimonial home. He alleged the said order put a heavy burden on him as he has no means of maintaining the respondent while he still has children to care for. He believed that the proceeds from sale of the matrimonial home should have sufficed to maintain the respondent. Finalising his submissions he prayed for the appeal to be allowed, but the divorce order and order for division of matrimonial home be maintained.

The appeal was opposed. In her reply submission, Ms. Minde had the view that the appellant's grounds of appeal reflect his misconception on the issue of maintenance. In an attempt to lay the legal position on maintenance she cited **Sections 63(a), 115(1), 116(a) and 120 of the Law of Marriage Act**. She further contended that provision of maintenance is mandatory during subsistence of marriage and after divorce.

replying to the 1st ground, Ms. Minde argued that according to **Section 63(a) of the Law of marriage Act**, the requirement to grant maintenance is mandatory. That, the respondent sought the same among other reliefs and it ought to subsist until her remarriage. She alleged that there are no special reasons required for maintenance to be awarded. Referring to the proceedings, she submitted that the appellant admitted to have been supporting the respondent the entire time, which means the respondent fully depended on him.

Further that, in Misc. Application No. 08 of 2021 between the parties, the trial court granted maintenance, but after issuing divorce the court only awarded maintenance for health care. She averred that there was no proof of changed circumstances and thus, after divorce, the respondent was rendered helpless.

Addressing the 2nd ground, Ms. Minde stated that the appellant had himself indicated that the respondent had been sick for a long time and had undergone several operations, but still felt pains and that, due to such circumstances she is not able to work. Commenting on

the effect of dissolution of marriage on maintenance, she contended that dissolution of marriage only affects the right to live as spouses but responsibilities such as maintenance continue.

With regard to the 3rd ground, Ms. Minde again maintained that the respondent had long time illness and no evidence was tendered to contradict such position and this court cannot act on speculations.

As to the 4th ground, the learned counsel alleged that maintenance orders and division of matrimonial properties are separate and distinct orders. In her view, no error was occasioned in treating them separately.

Replying to the 5th ground, Ms. Minde maintained that the respondent was and is still sick and due to the said illness, she is unable to work and earn a living. She added that there was no evidence tendered to confirm her other sources of income. She considered the appellant's allegations as to the respondent's capacity to work being historical facts. She argued so saying that after the marriage the parties lived in Moshi and the respondent is unemployed, sick and fully dependent on the appellant.

Ms. Minde further pointed out that the quoted proviso to **Section 115 (e) of the Law of Marriage Act** is apparently found under **Section 115 (g)** which is not applicable to the present case. In her view, as far as the order for the respondent's maintenance was only for health care, the complaint on ability or assessment of means is

irrelevant. She contended that health care is paid per annum and since the appellant is a tour operator, he can meet the obligation.

Ms. Minde found the complaint in the 6th ground misconceived as the duty to continue covering healthcare is mandatory during the subsistence of marriage and thereafter. On that ground, she supported the trial court orders for healthcare after divorce. In conclusion, she prayed for the appeal to be dismissed with costs as it is devoid of merit.

I have considered the submissions of both parties. As I have indicated earlier, the appellant filed 6 grounds of appeal challenging the maintenance order issued by the trial court. The order required him to provide the respondent with a reliable health insurance and or directly pay for her medical expenses, if need arise. A simple interpretation of this order, is for the appellant to provide a reliable insurance for the respondent or commit to pay for her medical expenses. However, together with the insurance he would pay other medical expenses uncovered by the insurance. The underlying question at this point is whether the trial court justly awarded such relief.

Section 63 (1) of the Law of Marriage Act referred to by Ms. Minde imposes a duty on a husband to maintain his wife except in separation by agreement or decree of the court. With due respect, this provision is unrelated to the matter at hand. The power of the court to order maintenance for a spouse is set under **Section 115** and it covers circumstances, to wit, when the marriage subsists,

during matrimonial proceedings and after the court issues decree of divorce or separation. The provision provides:

> **115.** (1) The court may order a man to pay maintenance to his wife or former wife—
>
> (a) if he has refused or neglected to provide for her as required by section 63;
>
> (b) if he has deserted her, for so long as the desertion continues;
>
> (c) during the course of any matrimonial proceedings;
>
> (d) when granting or subsequent to the grant of a decree of separation;
>
> (e) when granting or subsequent to the grant of a decree of divorce;
>
> (f) where the parties were married in Islamic form, for the customary period of iddat following the date on which the divorce takes, or is deemed to have taken, effect;
>
> (g) if, after a decree declaring her presumed to be dead, she is found to be alive:
>
> Provided that, where the marriage has been dissolved, the wife shall not, unless the court for special reason so directs, be entitled to maintenance for herself for any period following the date when the dissolution takes effect."

It appears that contrary to the arguments by Ms. Minde, the proviso to the cited provision is not limited to item **(g)** of **Section 115 (1)** of the Act. This means as pointed out by the appellant that the grant

of maintenance order depends on special reasons. It is not an entitlement as argued by Ms. Minde.

Assessment of maintenance is regulated under **Section 116 of the Law of Marriage Act**. The provision provides that assessment of maintenance would require the court to observe the means and needs of the parties and should pay regard to the degree of responsibility of each spouse on the breakdown as well as customs of the parties. In its exact words, the provision states:

> "**116.** In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties but shall have regard also—
>
> (a) to the degree of responsibility which the court apportions to each party for the breakdown of the marriage; and
>
> (b) to the customs of the community to which the parties belong."

The question therefore is whether the trial court took into consideration such factors when granting the order for maintenance. Having observed the Judgement of the trial court, it is evident that the trial Magistrate found the marriage between the parties broken down irreparably. The reasons were adultery on the part of the appellant, sexual perversion on part of the appellant, cruelty on both parties and separation of the parties for more than

3 years. However, in granting maintenance to the respondent, I find that the trial Magistrate did not observe any of the requirements set under Section 116 as quoted above. The Hon. Magistrate did not assign any reason for the award in relation to the provision of the law. This can be seen in her reasoning for the order for maintenance at Page 8 of the Judgement whereby she stated:

> *"It was also the claim by the Petitioner that an order be issued for her maintenance by the Respondent. Much as the Respondent conceded to the fact that during the subsistence of their marriage, he was at all times assisting and taking care of the petitioners medical expenses and considering the fact that the petitioner's health is involved; this court in accordance with section 115(e) of the Law of Marriage Act (supra) order that the Respondent to maintain the Petitioner only on health care by providing her with a reliable health insurance and or to directly pay for her medical expenses if the need arise."*

Nevertheless, this being the 1st appellate court, I shall take up the duty to evaluate the evidence on record to determine whether the maintenance order was justly awarded. First, I will observe the means and needs of the parties as found in evidence then address the other factors.

No doubt that the respondent pleaded for maintenance, including health care. In her testimony, she stated that she had been treated for fibroids, endometriosis and had her uterus removed. She as well said to have received medical treatment both, in Tanzania and Namibia. Still, after her treatment in Namibia she attended the

KCMC hospital for pains. That, all medical expenses were covered by the appellant. The record also indicates that the respondent also received some medical aid from other people. Her statement to that effect was not cross examined by the respondent. It is trite law that failure to cross examine a witness translates to admission of his/her statement as true. See, **Shomari Mohamed Mkwama vs. Republic** (Criminal Appeal 606 of 2021) [2022] TZCA 644; I**ssa Hassani Uki vs. Republi**c (Criminal Appeal 129 of 2017) [2018] TZCA 361 and; **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103, all reported at TANZLII.

However, despite all the medical issues that the respondent suffered as also admitted by the appellant, there was no evidence produced to show that the respondent still needed the health care. Apart from her details on having multiple operations due to the medical conditions she encountered, there were no further details on record in regard to her requiring further medical help. In the premises, I find the needs of the respondent not been demonstrated.

With regard to the means of the appellant, I have observed the trial court record and found nowhere indicated that the appellant has the means to still support the respondent. There is also no proof on record to show that the respondent also lacked the means to support herself. In my considered view, the mere fact that the respondent had not been working during most of subsistence of their marriage and was previously supported by the appellant due to her medical condition is not conclusive proof that she lacks the

means to support herself. The trial court ought to have considered all these factors before entering its order, but unfortunately it did not.

It is well settled under **Section 110 and 111 of the Evidence Act** [Cap 6 R.E 2022] that he who alleges must prove. The burden of proving a fact only shifts to the other party when discharged by the former. This fact was well expounded in the case of **Crescent Impex (T) Limited vs. Mtibwa Sugar Estates Limited** (Civil Appeal No.455 of 2020) [2023] TZCA 17501 TANZLII whereby the Court of Appeal stated:

> "It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the said burden is not discharged or diluted on account of the weakness of the opposite party's case."

See also; **Maria Amandus Kavishe vs. Norah Waziri Mzeru & Another** (Civil Appeal No. 365 of 2019) [2023] TZCA 31 TANZLII; **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 TANZLII and; **Agatha Mshote vs. Edson Emmanuel and Others** (Civil Appeal No. 121 of 2019) [2021] TZCA 323 TANZLII.

The respondent had the burden to prove that she was in need of health care and to what extent such care ought to be given. She also ought to prove that she lacked the means to provide for herself the said health care. Proportionately, she also had to prove that the appellant was well with means to afford such healthcare. Having failed to prove such facts, she clearly failed to discharge her burden and the burden to prove otherwise never shifted to the appellant.

In regard to the degree of contribution each party had to the breakdown of the marriage; I have considered the testimony of both parties. The respondent testified on the appellant's adultery while working and residing in Arusha and the fact that he had a child and a girlfriend. The appellant admitted to having a child during the subsistence of his marriage with the respondent. This renders the claim of adultery to have been proved.

Concerning the claim of cruelty, the respondent testified on how the appellant beat her up and assaulted her with a bush knife causing her harm. The appellant denied such allegations. However, the respondent also admitted to an altercation that involved a bush knife. The record also shows that she too used a razor blade to injure the appellant. The fact that there were other quarrels, misunderstandings over the years and related incidents between parties, as well as, refusing to have sexual intercourse with each other, undoubtedly, as observed by the trial Magistrate, cruelty had been occasioned by both parties. There were also allegations of

sexual perversion and evidence on parties being separated for 3 years.

From the foregoing, I am of the view that the appellant is mostly to blame for the irreparable breakdown of their marriage. However, bearing in mind the trials suffered by the parties especially due to the medical conditions of the respondent, I am of the view that that too took a toll on the relationship. I say so because the record shows allegations of the respondent being aware of her medical condition and the fact that she could not have children, but hid such fact from the appellant. I am inclined to believe such allegation being true since the respondent did not cross examine the appellant on such details although in her evidence, she stated that following a series of medical conditions, the appellant persuaded her to have the operation that took her ability to have children.

Before winding up, I also wish to note that even if such order was tenable, it was still too general and hard to implement. Example; what amounts to a reliable insurance? which medical expenses would the appellant be required to pay for? and what needs would be covered as requiring the appellant to pay for? I am of view that a maintenance order should be as direct and plain as needed to avoid issues with its interpretation.

In conclusion, having found that neither the needs nor the means of the parties were considered by the trial court; that while the appellant was more responsible, the respondent too had a fair share of blame in the breakdown of their marriage, I find that the

trial court erred in awarding maintenance of health care to the respondent. I therefore allow this appeal. The order for maintenance of the respondent issued by the trial court against the appellant is hereby quashed. Considering the relationship between the parties, I make no orders as to costs.

Dated and delivered at Moshi on this 23rd day of May, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA