IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

PC. CIVIL APPEAL NO. 18 OF 2023

OWEN VENANCE KALYEMBE ..... APPELLANT

VERSUS

JANETH LEONCE UPUNDA ..... RESPONDENT

(Appeal from the Judgment and decree of the District Court of Mkurunga at Mkuranga)
(R. E. Mwaisaka, SRM)
Dated 8th day of March 2023
In
(Matrimonial Appeal No. 12 of 2022)

JUDGMENT

Date: 04/09/2023 & 08/03/2024

NKWABI, J.:

While the respondent insists that the dalliance between her and the appellant has fallen into decay, the appellant thinks that their infatuation is still at its hottest or intense and vibrant level. It is from that basis and other grounds that he is ferociously faulting the concurrent findings of the trial court and the 1st appellate court.

It is a fact, as seen in the court record, that the trial court found that the marriage had irreparably broken down on the grounds of voluntary separation for over a year period, cruelty (cutting her with a panga), adultery

by the appellant who had love affairs with their house girl and fruitless reconciliation efforts. It issued a divorce decree and proceeded to distribute the matrimonial properties jointly acquired. Hurt, by the decision of the trial court, the appellant appealed to the district court which confirmed the decision of the trial court. Unhappy with the decision of the 1st appellate Court, the appellant is in this Court challenging the concurrent decisions of the lower courts as I have already indicated above. He has the following rationales of appeal:

1. The first appellate court erred in law and fact by referring, relying and acting on the annexture, against the trite law that, annexures are not evidence.
2. The first appellate court erred both in law and fact by failure to find that, the primary court had no jurisdiction to entertain the dispute, as the certificate from the marriage conciliation board was not tendered and admitted into evidence at the trail of the suit.
3. The first appellate District Court wrongly interpreted and misapplied the Court of Appeal of Tanzania in the case of **Patric William Magambo v. Lilian Peter Kitali,** Civil Appeal No. 41 of 2019 (unreported).

4. The appellate district court erred in law for failure to find that, the trial court's proceedings are fatal, for being tainted with serious irregularity, impropriety and illegality on the ground of failure to adhere to the mandatory requirement of the law, that the court must frame issues before hearing of a suit.
5. The district court erred in law and fact by deciding that, there is sufficient evidence which exhibit the marriage has broken down irreparably.

On account of the above justifications of the appeal, the appellant is asking this Court to grant him the following orders:

a. That all proceedings, judgment and decree of both district and primary courts be quashed and set aside.
b. Any other relief this honourable court may deem fit, proper, fair and just to grant.
c. Costs of this appeal.

The advocates of the parties to this appeal requested this Court that they dispose of the appeal by way of written submission. I unhesitatingly granted the prayer. Mr. Mganga Paul, learned counsel for the appellant drew and lodged the submissions in support of the appeal. The submission in

opposition to the appeal was drawn and filed by Majid Matitu, also learned counsel.

Over the first, second and third grounds of appeal Mr. Mganga asserted that the trial court based its decision on annexures which is wrong and should not be upheld. He cited **Leonard Dominic Rubuye t/a Rubuye Agrochemical Supplies v. Yara Tanzania Ltd,** Civil Appeal No. 219 of 2018, CAT among others. He insisted that the document (certificate) ought to have been tendered and admitted in evidence. The counsel for the respondent did not purchase the views of Mr. Mganga.

Despite a length submission by the counsel for the appellant, I am of a firm view that the counsel for the appellant missed the point. The certificate of the conciliation board is well in the Court record. In evidence, the appellant confirmed to have attended the conciliation attempt but it was futile. As I understand it to be the law, proof of a fact is needed when that fact is disputed. The facts which are disputed give raise to issues. In this appeal, parties were not at issue in respect of whether they submitted themselves to the reconciliation board and that the board certified that they have failed reconcile the parties to the marriage. I confess, I do not know any law that

requires proof of a matter which is admitted, but I know that where a fact is admitted, for instance during preliminary hearing in criminal cases, that admitted fact does not need to be proved. In any case, I know the position of the law that the defence may advance the (prosecution) plaintiff's case where there is, during defence like in this case, admission of a material fact. That is the position of the law in our jurisdiction as stated in **Republic v. Sebastiano s/o Mkwe,** [1972] H.C.D. No. 217 (E.A.C.A.), SPRY, AG. P.

> *"... There is also another serious misdirection in the judgment appealed from. The learned judge criticized the trial magistrate, saying that he "should look only to evidence of prosecution witnesses to see that the case is proved beyond all reasonable doubts and not try to fish for something from defence." Once an accused person has been called on to make his defence, any evidence he gives or calls is evidence in the trial and it is the duty of the court to consider the evidence as a whole."*

One may wish also to make reference to the case of **Ali s/o Mpaiko Kailu v. Republic** [1980] T.L.R. 170 Kisanga, J., as he then was underscored that:

".... and it is the appellant himself who in his defence made a disclosure of the broken engine mount. But this did not amount to saying that the trial magistrate relied on the weakness of the defence. What really happened was that the appellant in his own defence gave evidence which substantively supported an affirmative prosecution case. I am of the view that where the prosecution has made out an affirmative case against the accused person and the accused in the course of his defence gives evidence which carries or advances the prosecution further, the court would be entitled to take into account such evidence of the accused in deciding on the question of his guilt."

See also **Emmanuel Lyabonga v Republic,** Criminal Appeal No. 257 of 2019 CAT (unreported). In the premises I hold that the parties complied with the requirement of section 101 of the Law of marriage Act. That compliance was admitted in evidence by the appellant thus there is no need of proof by tendering it in evidence. The ground of appeal is lame and I dismiss it. It is however, worthy to note here that Mr. Mganga had earlier on urged this Court to interfere with two concurrent decisions of the lower courts citing

among other cases **Amratlal Damodar Maltaser & Another t/s Zanzibar Silk Stores v. A.H. Jariwalla t/a Zanzibar Hotel** [1980 T.L.R. 31. The above discussion, disposes the 1st, 2nd and 3rd grounds of appeal which were discussed together.

On the 4th ground of appeal, the counsel for the appellant faults the 1st appellate court for failure to declare that the proceedings in the trial court were fatal for failure of the trial court to frame the issues prior to commencement of the hearing of the evidence. He cited the violated provisions of the law to be Rules 44 up to 50 of the Magistrates Courts (Civil Procedure in Primary Courts) Rules GN. No. 310 of 1964. To buttress his stand view, Mr. Mganga referred this Court to the case of **Haj Ibrahim Mohamed Saeed v. Al Haj Othman Kaid Sallam** [1962] E.A. 149 where it was stated that:

> *"The need to frame issues has been repeatedly stressed by the court. Here the failure to do so ... appears to have misled the learned judge in consideration of the case."*

Mr. Mganga pointed out that the case relied upon by the 1st appellate court, was misled by the case of **Janmohamed Umerdin v. Hussein Amarshi**

& 3 Others [1953] E.A.C.A. 41 which has already been overtaken by events on the coming into force of the Interpretation of Laws, Act, Chapter 1 on 1st September 2004. It is added that where the word shall is used, it connotes the function has to be performed. He relied on that position of the law to **Goodluck Kyando v. Republic** [2006] T.L.R. 363 at page 368 and 369. He also maintained that it is a legendary law that statute law takes precedence over case law as held in **National Bank of Commerce v. Jackson Nahimawa Sinzobakwila** (1978) L.R.T. 39. He then implored me to find merit in the 4th ground of appeal and hold that failure to frame the issues is fatal and vitiates the proceedings and the judgment.

It was replied by the counsel for the respondent that the issues were framed by the trial court in the judgment and duly determined. He urged me to dismiss this ground of appeal.

In the comments of the Mr. Mganga in rejoinder submission, pointed out that the issues ought to have been framed during the proceedings and not in the composing the judgment. Failure to do so the trial started in a fog, explained Mr. Mganga.

In a close examination of the submissions of the counsel for the appellant, I have come to note that the counsel for the appellant is absolutely acquainted with decisions of this Court in **Joseph Kimera v. Idd Hemedi** [1968] H.C.D. No., 355 Seaton J., as he then was held inter alia that:

> *"(4) The failure to frame the issues at the outset was not in itself fatal. ..."*

I am also utterly sure that the counsel for the appellant is no stranger to the decision of his Lordship, Cross, J., as he then was in **Ibrahim Ahmed v. Halima Guleti,** [1968] H.C.D. No. 76 (PC) where he held that:

> *"The District Court erred. The question for a court on appeal is whether the decision below is reasonable and can be rationally supported: if so, the lower court decision should be affirmed. ..."*

The above stated, I am of the firm view that the requirement of the law was observed and the case of **Janmohamed** (supra) is good law. It is trite law that sometimes where the word "shall" is used in a statute merely connotes the function is merely directory as opposed to mandatory. I am of the settled mind that framing of the issues is not an exception. Thus, I find that the 4th ground of appeal is lame and crumbles to the ground.

Finally, in regard to the 5th ground of appeal, the counsel for the appellant avowed that there is no evidence adduced that depicts the marriage has broken down irreparably. He explained that the constant squabbles based on adverse suspicions are normal tear and wears of a marriage institution which cannot warrant dissolution of marriage. He cited **R. v. R.** [2004] T.L.R. 121 where it was stated that:

> *"So, court of law should not be a place for rubber stamping, rather they are required to handle matrimonial dispute with judicial care."*

The counsel for the appellant prayed the grounds of appeal be allowed.

In a short reply, the counsel of the respondent said that the trial court found that the marriage had irreparably broken down and urged this court to dismiss the ground of appeal. In the reaction to the reply submission Mr. Mganga merely reiterated his submission in chief without more.

I have given due consideration to the submissions of both parties. I am of the considered view that in this case, there is more than sufficient evidence that the marriage had irreparably broken down. There is proof of adultery committed by the respondent. When the appellant was inquired about it in

respect of the short messages the appellant was sending to their house girl, the appellant turned cruel to her and cut her with a panga. In addition, the parties to this appeal were in a voluntary separation for more than one year. All things considered; the marriage has definitely broken down irreparably. The concurrent findings of the lower court cannot be overturned by this Court, more so when this court is mindful of the decision of the Court of Appeal of Tanzania in **Jafari Musa v. DPP,** Criminal Appeal No. 234 of 2019, CAT (unreported) it was stated that:

> *"From the above excerpt it is clear that the trial magistrate sufficiently considered the defence evidence to which we subscribe. To that end, while we agree with the learned State Attorney that the first appellate court did not consider the defence evidence, we do not find it necessary to invoke section 4(2) of the AJA and re-evaluate the defence since we are of the considered view that the trial magistrate sufficiently evaluated the said evidence for the defence."*

In the upshot, I dismiss the appeal for being patently devoid of merits. The concurrent finding of both lower courts is upheld. Each party shall bear their own costs because the respondent did not ask for. It is so ordered.

DATED at **KIGOMA** this 8th day of March, 2024.

J. F. NKWABI
JUDGE