**IN THE HIGH COURT OF TANZANIA**
**AT DODOMA**

**(PC) CIVIL APPEAL NO. 32 OF 2003**

**(From the decision of the District Court of Manyoni at Manyoni in Civil Appeal No. 26 of 2002)**

**JOHN DAVID MAYENGO…… APPELLANT**

**VERSUS**

**CATHERINA MALEMBEKA…… RESPONDENT**

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**J U D G M E N T**

**KAJI, J.:**

The parties in this case are teachers by profession. The appellant, JOHN DAVID MAYENGO is a Secondary School teacher. The respondent, CATHERINE d/o MALEMBEKA, is a Primary School Teacher.

Over twenty years ago, the parties celebrated a civil marriage (Ndoa ya Serikali). It would appear by then both were Primary School Teachers. The respondent who is older than the appellant by five years, by then had four children by different fathers. The record is not clear whether the appellant by then had also some children from some other women.

The parties enjoyed a matrimonial life for about twenty years whereby they were blessed with four children of the marriage.

Later the appellant joined an upgrading course which

lasted for some years.

It was during that period that life changed. According to the appellant the cause was the respondent who misappropriated family money, mistreated the appellant's parents and practiced superstition. But according to the respondent the cause was the appellant who fell in love with another female teacher and lost interest with respondent. Efforts to reconcile them through Baraza la Kata Manyoni Mjini failed. The appellant petitioned for divorce. At the trial the respondent said she had no objection with the divorce provided the appellant would be ordered to build her a house. The trial court evaluated the evidence and was satisfied that the marriage had broken down beyond all recall. That marriage was dissolved. But the court refused to grant the respondent's request to order the appellant to build her a house on the ground that each of them was a teacher, and each had a building plot. But strangely, the respondent who had admitted that their marriage had broken down beyond all recall and

had no objection with the same being dissolved, turned around and appealed to the first appellate court against the order dissolving their marriage, alleging that their marriage had not broken down irreparably. The first appellate court was impressed. It reversed the trial court's decision and declared the marriage to be subsisting.

The appellant was aggrieved. Hence this appeal.

Before me both parties repeated more or less what they had stated before the two courts below, except that each of them was talking extremely bitterly, with the appellant swearing to all “gods” that he cannot live with the respondent as his wife for whatever costs. And the respondent responding bitterly that she would not mind living separately provided their marriage is existing thereby preventing the appellant from marrying his lover.

It is common knowledge that a court will only dissolve a marriage when satisfied that the said marriage has broken down irreparably. This is provided for under Section 110 (1) of the Law of Marriage Act, 1971. And this is the crucial issue in this case. The three grounds advanced by the appellant at the trial, together with the overall circumstances surrounding the marriage in issue, satisfied the trial court that the marriage has broken down beyond all recall. But the first appellate court held that, all those factors were not conclusive evidence that the marriage had broken down irreparably.

On my part, I agree with the finding of the trial Primary Court for the following reasons:-

One, the respondent, who is a party to the marriage, is better placed to know the true position of their marriage life. At the trial she considered deeply their sour relationship and terrible life and came up with a conclusion that their marriage had really broken down beyond all repairs. It was only later that she changed her mind and appealed against the very proposition she had accepted.

It would appear she is all out to see to it that the appellant remains in adulterous and concubinage life with whoever lover his heart falls on. This is terrible.

Two, in his 4th ground of appeal the appellant is ready to surrender to the respondent whatever matrimonial property they acquired through their joint effort during their marriage time. All these to show his bitterness against the respondent. This is not a good sign for a marriage worth the name.

Three, the appellant has sworn to “all gods” that he will never live with the respondent as his wife for whatever cost. I ask myself: can this marriage be repaired? I think it cannot. Even the conciliation board failed to reconcile them.

Four, marriage is a voluntary union of a man and a woman intended to last for their joint lives. It is the parties themselves who are the best judges on what is going on in their joint lives. A crucial ingredient in marriage is love. Once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him.

Five, I am aware of the provisions of Section 107 of the Law of Marriage Act, 1971. But it is my considered view that that provision of the law is not exhaustive.

It is upon the above reasons together with the over all circumstances surrounding this case that I agree with the trial Primary Court that the marriage between the appellant and the respondent has broken down beyond all repairs. The order of the first appellate court declaring the marriage to be subsisting is hereby quashed.

And the order of the trial court dissolving the marriage is restored. The record is not clear about the age of the children of the marriage. Whoever wishes to have an order for custody of the children and/or division of matrimonial properties (if any) can do so through the proper channel.

Appeal allowed. The parties who are ex-lovers, to bear

their own costs.

S.N. Kaji
Judge
13.9.2005.