IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

PC MATRIMONIAL APPEAL NO.05 OF 2017

(Arising from Ukerewe District Court in Matrimonial Appeal No. 6 of 2017, Original from Nansio Ukerewe Primary Court Case No. 2 of 2016)

SELINA NGEREJA.....APPELLANT

VERSUS

KADONGE PAUL.....RESPONDENT

Last Order: 27/09/2017

Judgment: 17/11/2017

JUDGMENT

MAKARAMBA, J.:

This appeal is from the decision of the District Court of Ukerewe District at Nansio in Matrimonial Appeal No. 02 of 2016 dated 27/10/2016 before **Hon. Kishenyi, F.M *Esq* RM.**

Briefly, in 1978 the Appellant and Respondent met and started living together as wife and husband respectively. They have blessed with five children and managed to acquire various properties including houses, plots, farms, motor vehicle and motorcycles. Their life was tainted with conflicts and un-ending misunderstand. Once upon time, the Appellant rushed before Ukerewe Primary Court seeking for divorce. They were reconciled and went back home continued living together. However, within a short

period of time misunderstanding re-ensued. In 1992 they separated and their dispute had never been resolved until in 2016 when the Appellant decided to lodge a suit for divorce and division of the Matrimonial Properties in **Matrimonial Cause No. 2 of 2016**. The Appellant sought an order for divorce on grounds of cruelty, long separation, dissertation, lack of maintenance, lack of conjugal rights, insults, threatened to be killed, being forced to sex against nature and that she was not ready to continue living with the Respondent. Upon considering grounds for divorce raised by the Appellant, the Ukerewe Primary Court issued an order for divorce between the parties and the matrimonial properties were also divided between the spouses. The Appellant was given a house which located nearby TANESCO area at Nakatunguru-Kona.

Being dissatisfied with such a decision, the Respondent appealed **before the District Court of Ukerewe District at Nansio in Matrimonial Appeal No. 02 of 2016**. The appeal was upheld. The District Court found the marriage to have not irreparably broken down. Consequently, the decision by the Primary Court of Ukerewe was quashed.

Aggrieved by the decision of the District Court of Ukerewe at Nansio, the Appellant apealed before this Court on the following grounds, namely;

1. *That, the Honourable Magistrate erred in law and in setting aside the Judgment of the Primary Magistrate's Court on divorce and distribution of matrimonial home which is well founded on the evidence adduced in the Court of the first instant.*

2. *That, the Honourable Magistrate erred in law without considering the evidence adduced by appellant in the Court of first instant on matters of cruelty, sodomy and desertion that rendered the marriage between them to be irreparably broken down.*

3. *That, the Honourable Magistrate erred in law in considering the age of both the Appellant and Respondent that the marriage cannot be broken down irreparably.*

The Appellant prays this Court for orders that;

(a) *The Appellant pray that the Judgment of the District Court be quashed and consequently; the Judgment of the Primary Court be confirmed.*

(b) *Matrimonial assets be distributed by considering the extent of contributions made by each party towards the acquisition of the same, debt owing to each party that was contracted for the joint benefit as well as the benefit of issues of marriage.*

(c) *This Honourable Court be pleased to condemn the Respondent herein to bear costs of this appeal and that of the Court below.*

(d) *Any other order (s) or/and relief(s) as this Court may deem fit to grant.*

In prosecuting the appeal, **M/s Rehema Sawaka**, learned Advocate from Tanzania Women Lawyers Association (TAWLA) on a pro bono represented the Appellant. The Respondent, **Kadonge Paul,** appeared in

person and fended for himself unrepresented in this appeal. The Appeal by consent was disposed of by way of written submissions and hence this Judgment.

I propose to determine all the three grounds of appeal seriatim. I should point out here from the outset that this was a rather simple and straight forward case but it seems that the learned Appellate Magistrate elected to make it look complicated.

It is without that on the evidence on record, the marriage between the two spouses who are before this Court had irreparably broken down irreparably in terms of the provisions of section 107(2)(c) of the ***Law of Marriage Act [Cap.29 R.E 2002]*** which stipulates as follows:

On the evidence by **SM1, SM2 and SM3** on record, it is abundantly clear that their mother had been severely beaten and insulted by the Respondent. Even **SU2** testified before the trial Court that, their parents have not been living in a peace and that their parents had been separated since 1992. The Respondent himself while testifying before the trial Court as **SU1** confirmed that, their marriage had been tainted with un-ending conflicts and a lot of misunderstandings. **SM2** testified further that, her father was so cruel to their mother to the extent that, their father threw a stone at their mother in one of their conflicts. Cruelty which is among the grounds for seeking for divorce has been judicially defined in the case of ***Saidi Mohamed v. Zena Ally [1985] TLR 13 (HC)*** thus;

"Cruelty means willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, so as to give rise to a reasonable apprehension of such danger."

In my considered view, the behavior of the Respondent of continuously beating up and insulting the Appellant was unjustifiable. Clearly that behavior caused danger to the life of the Appellant, her health and caused her mental anguish. It is without any flicker of doubt that on the evidence on record, cruelty had been proved as a matrimonial offence as provided for in the law to the required standard.

In her evidence at the trial Court, the Appellant testifying as SM1 stated that, she was not ready to continue living with the Respondent - ***"Siko radhi kuendelea na Mdaiwa."*** This statement coming from the victim of matrimonial abuse was so clear and strong to have made the learned Appellate Magistrate to consider whether it was proper in the circumstances to order the conflicting spouses to continue living together and whether the marriage had irreparably broken down and each party to go own way. In any event, in the eyes of the law, a court of law cannot compel cohabitation between disputing spouses. This legal principle has succinctly been restated in the case of ***MWENDWA MTINANGI v. JUMA MAHUMBI [1984] TLR 47 (HC)***. Furthermore, in the case of ***SAIDI MOHAMED v. ZENA ALLY [1985] TLR 13 (HC),*** the High Court found that;

"...the Respondent strongly objected to live together with the Appellant and cannot be compelled to do so by court proceedings;

the Appellate Judge was satisfied that the learned District Magistrate decision was justified to make an order for divorce."

With due respect, it was wrong and potentially risky for the Appellate Magistrate, in view of the strong evidence on record on the discord between the spouses, to compel them to continue cohabiting together. The Appellant having so strongly objected to continuing living together with her co-spouse and given the evidence of continued cruelty, the Appellate Magistrate ought not to have compelled the spouse but should have made an order for divorce.

The evidence by the issues of the marriage between the disputing spouses, SM2, SM3 and SU2 was that, considering the way their parents were living, it was better if an order for divorce be issued against them. The Appellant and the Respondent confirmed that, for a long period of time, they had never enjoyed their marriage. That in the circumstances, in order to settle their un-ending conflicts and particularly considering their elder stage in their life, it was better if an order for divorce could be issued against them.

Rather unfortunately, the learned Appellate Magistrate made his decision without considering the grounds of appeal which were before to him. In the appeal before the first instance Appellate Court the Respondent had raised four (4) grounds of appeal, namely;

1. *That, the trial Court erred in law by entertaining Petition to 2 of 2016 (sic) before first getting a Certificate from a Conciliation Board indicating its failure to reconcile the parties.*

2. *That, the trial Magistrate erred in law by treating the Matrimonial Case just like a normal civil case.*

3. *That, the trial Magistrate erred in law for not sticking on the requirements of the law of marriage while dealing and determining the matrimonial properties instead based his decision on emotion which interfered and distorted the salience of the particular evidence of the Defendant now Appellant.*

4. *That, the failure and refusal on the part of the trial Magistrate to comply with the requirements of the provisions of section 108 of the Law of Marriage Act, Cap. 29 R.E 2002 was reached on a basic of caprice and was arbitrary one.*

On the record of the first instance Appellate Court, neither of the above grounds of appeal feature or were dealt with by the Appellate Magistrate. There are reasons assigned for this failure. Some of the grounds of appeal were so serious particularly those which touched on the jurisdiction of both lower courts to determine the suit on its merits. The Appellate Magistrate determined the appeal basing on grounds which were never raised by the Respondent. The reason of age is nowhere to be found in law and it was not among the grounds of appeal presented before the Appellate

Magistrate. Consequently, the appeal before the District Court has never been determined on its merits.

In the premise and for the above reasons, the decision by the District Court of Ukerewe District at Nansio is wanting.

In the whole and for the above reasons, the appeal succeeds. It is hereby allowed.

The decision by the District Court of Ukerewe District at Nansio in **Matrimonial Appeal No. 02 of 2016** is hereby quashed.

It is hereby ordered that the Court record be immediately remitted to the District Court of Ukerewe District at Nansio for it to properly consider and determine the appeal.

It is hereby ordered that another Magistrate be assigned the appeal to determine it on the basis of the grounds of appeal and the pleadings as filed by the parties before the District Court.

Considering the financial position and the situation of the parties, I shall not make any order as to costs. Each party shall therefore bear its own costs in this appeal. It is so ordered.

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R.V.MAKARAMBA

JUDGE

17/11/2017