

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

MATRIMONIAL APPEAL No. 07 OF 2020
(Originating from Matrimonial Cause 02/2017 of Ngara District Court)

MAGORI MBANDA KIHIRI.....APPELLANT
VERSUS
STIVIDANA KEGOYO WEBIRORESPONDENT

JUDGMENT

16th July & 13th August 2021

Kilekamajenga, J.

In this case, the appellant and respondent were husband and wife who married on 10th October 1994 according to civil rites. The parties lived happily in their marriage until things turned sour prompting the appellant to petition for divorce at the District Court of Ngara. After the trial, the court was of the view that the marriage did not break beyond repair. As a result, the petition for divorce was dismissed. Aggrieved with the decision of the trial Court, the appellant preferred this appeal with two grounds of appeal thus:

- 1. That the trial Court erred in law and facts by refusing to issue divorce without considering the evidence adduced by the parties.*
- 2. That, the trial Court failed to evaluate the evidence adduced by the respondent's witnesses which could led (sic) to issuance of divorce and division of matrimonial properties.*

When the parties appeared to argue the appeal, the appellant was present and enjoyed the legal services of the learned advocate, Mr. Edwin Aaron whereas the

respondent was also present and represented by the learned advocate, Mr. Samweli Angelo.

The counsel for the appellant submitted that the trial Court erred in law by deciding that the marriage had not broken down beyond repair. The trial Court failed to consider the evidence of parties which shows that the marriage broke down beyond repair. The appellant is not willing to live with the respondent and the law cannot compel her to live with the respondent. The major reason for divorce is because the respondent alleged that the appellant committed adultery. On this allegation, there is a case pending before the High Court at Mwanza where the respondent sued Mihayo John for having an affair with the appellant. The counsel further argued that the appellant and respondents acquired several properties during their marriage. He mentioned the properties of the parties as:

- 1) A house located at Bunda Town
- 2) A house located at Siriti village at Bunga
- 3) A house located at Sanzate at Bunda town
- 4) A shamba located at Sanzate
- 5) A plot of land located at Bunda Town
- 6) A plot of land located at Kiloleli at Bunda
- 7) Eighty (80) herds of cattle which are at Siriti at Bunda
- 8) A shamba at Kumnazi area at Ngara which is about 5 – 6 acres.
- 9) A big estate located at Siriti village which is about 7 acres.

- 10) Six herds of cattle which are at Ngara at the house of Dario.
- 11) Toyota Dahatsu which is at Kigoma
- 12) House hold items

Also, the parties have three children namely:

- a) Bunuri Stividana Webiro who is 25 years old.
- b) Webiro Stividana Webiro who is 23 years old.
- c) Mwange Stivana who is 19 years old.

The counsel for the appellant further submitted that the two children namely Webiro Stividana and Mwange Stividana are still schooling and need assistance. He finally urged the Court to grant a divorce decree in this matter.

On the other hand, the counsel for the respondent objected the prayer for divorce because the marriage had not broken down. He argued further that the issue of adultery as an evidence of the breakdown of the marriage was not proved. All allegations of unfaithfulness in the marriage were not proved. Under the law, a person who alleges must prove. In this case, the respondent had no obligation to prove the allegations. Concerning the matrimonial properties, Mr. Angelo mentioned the following properties as matrimonial properties:

1. A house located at Kibondo Kigoma
2. A house located at Kawekamo Msumbiji in Mwanza
3. A plot of land located at Mahina Mwanza.
4. A house located at Nyamuswa village

5. A house located at Salama A at Bunda
6. A house located at Ngara which is under construction.
7. 48 herds of cattle located at Salama A at Bunda

The counsel further submitted that the parties have three children as mentioned by the appellant. The respondent is a police officer working at Karagwe while the appellant works as a primary school teacher. He further insisted that the marriage had not broken down and urged the Court to dismiss the appeal.

When rejoining, the counsel for the appellant did not raise any substantial argument than reiterating the submission in chief.

Having considered the arguments advanced from both sides, the most pertinent issue for determination in this appeal is whether or not the marriage has broken down beyond repair. Before venturing into this technical issue, it is apposite to set-up the relevant law in this matter. Under Section 99 of the Law of Marriage Act, Cap. 29 RE 2019, a decree of divorce shall be granted only when the Court is satisfied that the breakdown is irreparable. For clarity, I take the discretion to reproduce the Section Thus:

"99. Subject to the provisions of Section 77, 100 and 101 any married person may petition the Court for a decree of separation or divorce on the ground that his or her marriage has broken down but no decree of divorce shall be granted unless the Court is satisfied that the breakdown is irreparable"

Based on the above provisions of the law, where it may seem, in the eyes of the law that the marriage has broken down, the court may go further considering whether the marriage has broken and whether such breakdown does not attract any hope of reconciliation. The doctrine of break down beyond repair is left for the court to interpret depending on the surrounding circumstances and whether the petition has advanced reasons for the break down as provided under **Section 107 (2) of the Law of Marriage Act**. The section provides that:

(2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree—

- (a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest;*
- (b) sexual perversion on the part of the respondent;*
- (c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;*
- (d) wilful neglect on the part of the respondent;*
- (e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;*
- (f) voluntary separation or separation by decree of the court, where it has continued for at least three years;*
- (g) imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;*

(h) mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery;

(i) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage.

In this case, though the appellant is pushing for the decree of divorce, the respondent is not willing to let her wife go. It is therefore pertinent to evaluate the evidence and see whether the breakdown of the marriage had gone beyond the repair point. My close evaluation of the evidence shows that, the appellant alleged cruelty on her and the children of the marriage. She insisted that, she was assaulted and abused by her husband (respondent). She further alleged that the respondent wanted to conduct traditional rituals to his female children by genital mutilation. She further assailed the respondent by failing to provide maintenance to the children and the family at large. At some point, she hinted on how the house rent at Bunda has caused strife in their family.

Moreover, the appellants summoned her own children (PW2 and PW3) to support her evidence. Despite the close perusal and scrutiny of the evidence, the witnesses did not raise any serious evidence to suggest the marriage has broken down. They acknowledged the misunderstanding between the appellant and respondent which was manifested by mere exchange of words. Both PW2 and PW3 pointed towards the house at Bunda being a misfortune in the family.

In other words, the allegations raised by the appellant have no proof. For instance, the appellant cited the case of adultery filed by the respondent at Mwanza where he (respondent) claimed that the appellant committed adultery. Nonetheless, this cannot be an evidence of breakdown because the respondent was not the petitioner for the divorce decree. I have carefully considered the law especially **section 107 (2) of the Law of Marriage Act**, in-line with the evidence adduced, I find lack of evidence to suggest that the marriage has broken down beyond repair.

Now, as long as the parties are now living apart; the appellant works as a primary school teacher at Ngara and the respondent is a police stationed at Karagwe, if the parties will not resume their relationship, the appellant may be presumed to have been deserted by the respondent. When desertion exists for **more than three years**, it is sufficient evidence that the marriage has broken down. As of now, I find no reason to move this Court to grant a decree of divorce. I hereby dismiss the appeal and uphold the decision of the trial court. No order as to costs. It is so ordered.

Date at Bukoba this 13th August 2021.




Ntemi. N. Kilekamajenga
Judge
13th August 2021

Court:

Judgement delivered this 13th August 2021 in the presence of the parties present in person. Right of appeal explained.




Ntemi. N. Kilekamajenga
Judge
13th August 2021