

TANZANIA / JUDGMENT

edulai springi chaula vs rehema william mandowa 2021 tzhc 7477 30 november 2021

COURT
TZHCDECIDED
30 November 2021

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IN THE HIGH COURT OF TANZANIA (MTWARA DISTRICT REGISTRY) AT MTWARA PC CIVIL
APPEAL NO. 7 OF 2021 (Arising from Masasi District Court in Matrimonial Appeal No. 17 of 2019.
Original Lisekese Primary Court Matrimonial Cause No. 41 of 2019) EDULAI SPRINGI @
CHAULA.....APPELLANT VERSUS REHEMA WILLIAM @
MANDOWA..... RESPONDENT

JUDGMENT

28th Oct. & 30th Nov., 2021 DYANSOBERA, J.: This appeal has been filed by the appellant against the decision of the District Court of Masasi in Matrimonial Appeal No. 17 of 2019 allowing the respondent's appeal. The factual background of this appeal is that is that on 26th day of September, 1992, the appellant and respondent celebrated a Christian marriage at Chidya in Masasi District, Mtwara region and were living in harmony. During the subsistence of their marriage, the parties were blessed with three issues and managed to jointly acquire some matrimonial assets. When disharmony ensued in their matrimony and the appellant deemed the marriage no longer intolerable, he on the 1st day of July, 2017, petitioned the Primary Court of Masasi District at Lisekese for dissolution of marriage and division of matrimonial assets on ground of adultery. i In the judgment delivered on 9th day of September, 2019, the trial Primary Court found the marriage between the parties irretrievably broken down and dissolved it. With respect to division of matrimonial assets, the appellant was awarded a house at Masasi, two beds and two mattresses, a motor vehicle, spraying machine and watering machine, a set of coaches and a farm. The respondent was given a house at Chidya, two beds and two mattresses, a motor cycle, a spraying machine, a sewing machine, a set of coaches and two farms. The respondent was aggrieved by that decision and on 8th day of October, 2019 she filed an appeal before the District Court challenging the decision of the trial court. She had preferred a total of three grounds of appeal. The: first and second grounds of appeal related to the complaint on the division of matrimonial order in that some of the properties which were ordered to be subject of division was non-existent and such as a house and that the order on division was made without taking into account the extent of contribution. On the third ground of the appeal, the respondent

was complaining that the decision arrived at by the trial court was biased in that some of the evidence the respondent had adduced was not recorded and analysed in the course of the judgment. The District Court, after hearing the parties, framed one issue that is whether the marriage between the parties was broken down beyond repair. In resolving this issue, the learned Resident Magistrate was satisfied that the adultery was not proved for want of sufficient evidence. He reversed the trial court's decision and ordered the parties to resume their marriage in harmony. The appellant was not satisfied with above finding of the first appellate District Court hence this appeal which has the following six grounds of appeal. 2

1. THAT, the District Court erred in fact and in law in allowing new evidence on appeal which is against the law.
2. THAT, the District Court erred both in law and in fact by allowing only the respondent to defend on appeal and denied the appellant to make the reply during hearing the appeal.
3. THAT, the Court erred both in law and in fact by holding that the marriage is maintained without looking and evaluation all evidence adduced during trial in Primary Court.
4. THAT, the District Court erred in law and in fact for not considering the evidence that the respondent was committed adultery in several times and the evidence that the parties was living separately in Four years (4) the fact which makes the marriage to dissolved as it goes beyond repair.
5. THAT, the District Court erred in law and in fact by holding that, the marriage should be maintained without evaluating that the conciliation body failed to solve the marriage between the parties and until the form Number 3 was presented to Court during Trial to evidence that the parties failed to solve their differences.
6. THAT, the District Court erred in law and fact by ordering that there is no House in Chiwata while respondent admitted during trial that there was the House in Chiwata and both should be considered in the division of matrimonial assets and reached to erroneously decision. At the hearing of this appeal, the appellant appeared in person while the respondent did not appear despite being served. The appeal, therefore, proceeded ex parte. When invited to argue his appeal, the appellant told this court that he had filed six grounds of appeal and had nothing useful to add. Having perused the records of the District and Primary Courts and after going through the grounds of appeal, the main issue calling for determination is 3 whether the marriage between the parties was broken down beyond repair to warrant its dissolution. According to the evidence, the main ground advanced by the appellant and relied on by the trial court in dissolving the marriage was adultery on part of the respondent. In reversing the decision of the trial court, the learned Resident Magistrate of Masasi District Court observed at pp. 2-3 of the typed judgment as-fol lows:- 'to welcome a person who is a co-tenant to eat some food cannot be termed as adultery commitment (sic). If could have said, the appellant was found welcome a male person in the sleeping room, or found a male person sit on the bed, in the bedroom, such circumstances could enter the mind that there Was adultery, but to find a male person eating some food, and a person who

is the same tenant, it is mere association of a person living in the same house. From such analysis, this court found there was no adultery committed by the appellant../ As said before, the appellant is challenging the above finding. A close look at the petition of appeal reveals that the said finding is being challenged on three grounds that is grounds nos. 3, 4 and 5. In the 3rd ground, the appellant is oppugning the learned Resident Magistrate's failure to evaluate ail evidence, in the 4th ground the appellant is complaining that the same magistrate failed to consider that the respondent committed adultery several times and in the 5th ground, the appellant is protesting the: failure by the learned Resident Magistrate take into account the fact that the Marriage Conciliatory Board had failed to reconcile the parties and certified to that effect to the trial court. 4 With respect, I agree that there -was failure on part of the learned Resident Magistrate at Masasi District to evaluate and analyse the evidence unfurled at the trial by the appellant to support the allegations of adultery on part of the respondent. According to the trial court's record, there were several instances of adultery committed by the respondent and the appellant had managed to lead supportive evidence. The appellant's evidence was corroborated with that of his two witnesses he called, namely Jerald Mandanda (PW 2), the local leader and Samson Lameck (PW 3), the church leader. The respondent, in her evidence, failed to rebut these allegations levelled against her. Besides, the Primary Court was clear in its evaluation of evidence and the application of the relevant legal provision. The trial court found that there was sufficient evidence to prove adultery on part of the respondent which was indicative that the marriage was broken down beyond repair and warranted the grant of dissolution of the marriage. According to the record as shown at the last but one page of the trial court's typed copy of the judgment, the court observed:- 'kutokana na ushahidi uliotolewa, Mahakama imenukuu Kifungu cha 107 (2) (a), Sheria ya Ndoa [Cap. 29 R.E.2002] ambacho kinaeieza kuwa ugoni uiiofanywa na mdaiwa, hasa kitendo hicho cha ugoni kinapo jirudia Zaidi ya mara moja ya kukemewa, ni sababu ambayo Mahakama inaweza kuzingatia na kuona kuwa ndoa imevunjika kiasi cha kutorekebishika tena na kuendelea kuvunja ndoa". With respect, that is the correct disquisition of the law. Although adultery is not defined under the Law of Marriage Act, adultery may be simply defined as an act of having voluntary sexual intercourse with a person other than the spouse of 5 the respondent. To prove adultery, the appellant had to demonstrate the existence of marriage between him and the respondent and the voluntary sexual intercourse by the respondent with a person other than him. This, the appellant managed to prove. Since the 3rd, 4th and 5th grounds of appeal suffice to dispose the whole appeal, I find a mere academic exercise to discuss the 1st, 2nd and 6th grounds of appeal Consequently and for the reasons I have indicated above, I am satisfied that the appeal is meritorious and should be allowed. The appeal is allowed, the decision of the District Court is quashed and set aside. The decision of the This judgment is delivered under my hand and the seal of this Court this 30th day of November, 2021 in the presence of Edolai Springi Chaula, the appellant, but in the absence of the respondent. Rights of appeal to the Court of Appeal are fully explained.

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