

TANZANIA / JUDGMENT

Fatuma Bihizi Said

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The Judiciary of Tanzania IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT SHINYANGA CIVIL APPEAL CASE REFERENCE NO. 202501301000002177 FATUMA BIHIZI SAID APPELLANT Versus FREDNAND JULIUS..... RESPONDENT (Originating from the Decision of the District Court of Kahama at Kahama) (Hon. D. J. Augustino - PRM) Dated the 4th December 2024 in Criminal Case No. 29778/2024

JUDGMENT

4th & 24th March, 2025. F.H. MAHIMBALI, J. The Appellant and the respondents are couples. Whereas believing that their marriage had broken down irreparably on cruelty and adultery, the appellant had successfully filed a divorce cause at the trial court which decision was overturned by the first appellate court that it was not broken beyond repair. Aggrieved with the Judgment of Kahama District Court in Matrimonial Appeal No. 29/2024 in Kahama District Court (Hon. Donasian, 1 PRM), the appellant has hereby appealed before this Honorable Court on the following grounds:-

1. That, the first Appellate Magistrate erred in law and fact when he faulted the decision of the trial court that the Marriage between the Appellant and the Respondent had broken down beyond repair and held that it was not proper for the trial court to issue decree of divorce between the parties.
2. That, the first Appellate Magistrate erred in law and fact when he discredited the Appellant's clear and plausible evidence which, in law warranted issuance of decree of divorce as the trial court decided, and instead, proceeded to quash the trial court's decision.
3. That the first Appellate Magistrate erred in law and fact in allowing the appeal before him and failed to take note that the Appellant had thoroughly proved her on the balance of probabilities. Wherefore, basing on the grounds of appeal above the Appellant prays that, this appeal be allowed, the judgment of Kahama Urban Primary Court be 2 restored and that the judgment of the first Appellate Court be quashed and set aside. During the hearing of the appeal, Mr. Alex Magomele Chiliko learned advocate represented the appellant, while the respondent had represented himself. Arguing in support of the appeal on the three grounds

of appeal generally, Mr. Chiliko submitted that, the appellant had filed a matrimonial cause at Kahama Primary Court for a decree of divorce. Two main grounds were raised for the said grant: cruelty and adultery. On cruelty, the appellant had testified that the respondent was frequently uttering abusive language and repeated beatings (as per pages 6 and 8 of the Primary Court's proceedings) against the appellant. These claims were established by SM2 - Devota Stanley whom were living together and established how the respondent was frequently beating the appellant. And that at one time, she witnessed the Respondent holding the appellant's neck and twisting it and that it was herself who intervened and separated them from the fight (See page 10). This was corroborated by the testimony of SM3 - Aron Frednand (Respondent's own son by another mother). He testified how the respondent was frequently beating the appellant and that himself had witnessed so, 3 more than thrice (see page 13 of the trial court's proceedings). All this evidence was not controverted by the respondent at the trial court. With adultery, the appellant had established how the respondent was in extra marital affairs with someone else while their marriage was in existence. She testified that the respondent wanted her to vacate from home premises so that he could bring the other woman whom was his lovely one. This evidence is corroborated by SM4 - Hamis Mohamed who was the member of marriage conciliation board of kahama. He testified that, the Respondent had gone there in efforts of referring their dispute to that board as he was fed up with the appellant as she was unable to conceive and that he had got a good small chick. This evidence was neither cross-examined nor controverted during trial. Failure to cross-examine or controvert the evidence laid against a party to the case, is acceptance to it - see Halima Wakara and 2 Others V. Jeremiah M. Mkama, Civil Appeal No. 493 of 2020, CAT at Tanzlii at page 16 - second paragraph. It is his humble submission that the appellant had legally established that the marriage the two had irreparably broken down. 4 Whether the marriage had broken irreparably, he sought guidance under section 107(2) of the Law Marriage Act that amongst the issues listed there, cruelty and adultery are amongst them. Thus, the trial court was justified in granting the prayers sought and ordering the distribution of the jointly acquired properties. However, with a different view, he wondered how the first appellate court, faulted the trial court's findings and judgment of the trial court. It is his humble submission that the first appellate court had erred in allowing the appeal on the ground that there was no evidence from Police vide PF3 establishing the said cruelty. The first appellate court had erred simply because, all the witnesses who had testified, were direct witnesses and that had come from the same home. He added that, in assessing the value of the evidence, the first appellate court had applied unknown legal principle in proof of civil cases. That the PW3 had given testimony adverse his father but in favour of his step mother, that was improper in terms of section 62 of the Tanzanian Evidence Act. The argument that the step son testifying against his father was unlawful, it is his first hearing. As the learned first appellate magistrate had admitted the proof of the case by the appellant, he wondered how then in his conclusion, he took a different view (See page 4 - first paragraph). As 5 his conclusion is different from his own reasoning, it is his humble view that let the appeal be allowed on these grounds of appeal and the submission done. Therefore, the findings of the first appellate court be quashed and

set aside and that in its place, the decision of the trial court be revived. On his part, Mr. Frednand – the Respondent, in resisting the appeal, firstly humbly prayed that his grounds of appeal be adopted by the court to form part of his submission. In addition, he submitted that on cruelty factor, the District court was justified in ordering their marriage is alive and thus, should continue existing. There are no such quarrels as alleged. What has been testified by SM3 and SM2 is in essence a cooked evidence. He being now a retiree - TPDF ex officer, he faulted his wife that after he had consumed all the said pension allowance, money less as he is, she is thinking of running away from him. The argument of adultery has not been established. There is neither any adultery charge nor any complaint lodged anywhere. What he mainly gathered from her complaint is asset based mindset. The argument that he had not opposed the said evidence at the trial court is not true as he had opted to challenge the whole of it by way of appeal at the District Court. 6 Having heard the parties' submissions, for and against the appeal, and having carefully scanned the trial court's proceedings and evidence, the main issue for determination here is one, whether the appeal is meritorious. To arrive at that end, is to consider whether there was sufficient evidence received at the trial court on issues of cruelty and adultery to the extent that the said marriage was broken down irreparably. Whereas the trial court said yes, the first appellate court recounted it. Our Evidence Act, (TEA), Cap 6 R.E 2022, defines "evidence" to mean an alleged matter of fact, the truth of which if submitted to investigation, is proved or disproved. I have carefully studied the evidence by the appellant and that of the respondent in respect of this matter, for sure the alleged cruelty and adultery has not been established to the satisfaction of this court to pronounce that the marriage between the parties as irreparably broken down. A mere quarrel by the married couples in the existence of any marriage is not a conclusive proof that the marriage has broken down irreparably as such a situation is inevitable in marriage life. The Law of Marriage Act on proof of breakdown of a marriage and issuance of decree of divorce, has the following guidelines: 7 107.-(1) In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular shall-

- (a) unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and
 - (b) have regard to the custom of the community to which the parties belong.
- (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; 8
 - (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; or
- (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. the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce [Emphasis added]. The alleged allegations, is a question of fact. There ought to have been a clear evidence that the alleged allegations – cruelty and adultery association have been established to the satisfaction of the court that existed. A marriage can be broken, but for a decree of divorce to issue is a question of evidence that it has broken down beyond repair. Has there been such evidence in record leading to that conclusion explicitly? None of the appellant's witnesses conclusively established so. They were in my considered view mainly normal family misunderstandings on the issue of properties, which should not even be the basis of the said fracas as each one owns his/her own property registered in his/her own name. The appellant has registered properties in her own name as well as the respondent. 10 The above notwithstanding, I agree with Mr. Chiliko's observation that the holding by the first appellate magistrate that the step son testifying against his father was unlawful, is against the law. The law is, every person is a competent witness to testify provided that he is capable of understanding the questions put to him, gives rational answers to questions put to him and this is regardless by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause. Extreme old age, being of tender age, sickness can only be hind rant to one being a witness to a case if the said person is incapable of understanding the nature of questions put to him, or fails to give rational answers. Thus, the issue of consanguinity or sanguinity is not a determining factor for one to be a competent witness (see section 127(1) of TEA, Cap 6). In my considered view, as to the available testimony supporting the grant of divorce fell short of range for want of proof to the satisfaction of the court that the marriage has broken down irreparably. It is important to observe that; the grant of divorce is only issued when the Court is satisfied that the marriage

has broken down beyond repair. Scanning the testimony of SM1, SM2, SM3 and SM4, mainly center on trivia family issues. 11 It was merely a family quarrel and hardly unreasonable behavior to the grade of being a matrimonial offence. As to the alleged adultery, the appellant banked on SM4's testimony which is hardly direct evidence. It being a hearsay evidence, it did not qualify to be direct evidence for its reliance. By the way, hearsay evidence is not admissible. All in all, there was no such evidence available worth of credit that the marriage had broken down irreparably to the satisfaction of the court. That said, the appeal is dismissed in its entirety for want of sufficient cause. The decision of the first appellate court is hereby upheld. In consideration of the fact that this is a matrimonial case, I make no orders as to costs. DATED at SHINYANGA this 24th March 2025. F.H. Mahimbali
Judge 12

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