

UGANDA / JUDGMENT

Kigozi v Nabukeera (Civil Appeal 18 of 2021) [2023]

UGHCFD 187 (19 October 2023)

[2023] UGHCFD 187

COURT

HC: Family Division (Uganda)

BEFORE

Komuhangi, J

CASE / FILE NUMBER

Civil Appeal 18 of 2021

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (FAMILY DIVISION)

CIVIL APPEAL NO. 18 OF 2021

5 (Arising out of Divorce Cause No. 042 of 2020)

FORTUNESSEN KIGOZI APPELLANT

VERSUS

REMMY NABUKEERA..... RESPONDENT

10 BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA JUDGMENT

Introduction

This Judgment is in respect of an Appeal against the decision of Her Worship Nassozi Rehema Ssebowa, Magistrate Grade One at Mengo Chief Magistrates Court

in Divorce Cause No. 042 of 2020. The Judgment was delivered on the 7th 15 day of June 2021 in favour of the Respondent and the Petition was dismissed. The Appellant, being dissatisfied with the Judgment lodged this Appeal and prayed for orders that: the Appeal be allowed; the decision and Judgment of the Lower Court be set aside; and the costs of this Appeal and the proceedings in the Lower Court be

20 provided for by the Respondent.

Appearance and Representation

At the hearing, the Appellant was represented by Counsel Hamza Sebuta of M/S Nsibambi & Nsibambi Advocates while the Respondent was represented by Counsel Kayanja Osma of United Advocates & Solicitors. Both Counsel filed written submissions and the same have been considered in this Judgment.

Facts Leading to the Appeal

5 The Appellant petitioned for the dissolution of the marriage between him and the Respondent that was solemnized at St. Paul's Cathedral Namirembe on the 3rd day of June 2016 on grounds of cruelty by the Respondent. The parties during the subsistence of the marriage did not have issues (children) together but only acquired a kibanja and a house situate at Migadde, Kigogwa in Wakiso District. During the 10 hearing, the parties were the only witnesses for their respective cases. The Learned

Trial Magistrate dismissed the Petition hence this Appeal.

The Appeal

The grounds of the Appeal are contained in the Memorandum of Appeal and they 15 are:

- 1. The Learned Trial Magistrate erred in law and fact in failing to properly evaluate the evidence on the Court record thereby arriving at a wrong conclusion of dismissing the Petition thereby occasioning a miscarriage of justice to the Appellant;
- 20 2. The Learned Trial Magistrate erred in law and fact when she held that the ground of cruelty was not proved by the Petitioner against the Respondent to the required standard whereas not hence arriving at a wrong conclusion occasioning a miscarriage of justice;
- 3. The Learned Trial Magistrate erred in law and fact when she concluded that 25 the Respondent never changed her religion during the subsistence of the marriage hence arriving at a wrong conclusion thereby occasioning a miscarriage of justice;
- 4. The Learned Trial Magistrate erred in law and fact when she held that the Respondent's entry into the incomplete house under construction was justified 5 whereas not hence arriving at a wrong conclusion thereby occasioning a miscarriage of justice; and
- 5. The Learned Trial Magistrate erred in law and fact when she failed to make Orders on the matrimonial property hence arriving at a wrong conclusion thereby occasioning a miscarriage of justice.
- 10

Resolution of the Grounds of Appeal

The duty of the 1st Appellate Court is to re-evaluate the evidence of the Trial Court as a whole and come to its own conclusion. However, the Appellate Court should be mindful of the fact that it didn't have the opportunity to physically observe the

- 15 parties testify. [See: *Bogere Moses & Another versus Uganda SCCA No. 01 of 1997, Uganda versus George Willian Ssimbwa SCCA No. 03 of 1997, Kifamunte Henry versus Uganda SCCA No. 10 of 1997, Banco Arabe Espanol versus Bank of Uganda SCCA No. 08 of 1998*].
- 20 Counsel for the Appellant argued Ground 2 first, Grounds 4 and 5 were argued together, followed by Ground 3 and Ground 1 was argued last. I will resolve the grounds of Appeal in the like manner.

\$\$\overbrace{\hspace{1cm}}\$\$

Ground 2: *The Learned Trial Magistrate erred in law and fact when she held that* 25 *the ground of cruelty was not proved by the Petitioner against the Respondent to the required standard whereas not hence arriving at a wrong conclusion occasioning a miscarriage of justice.*

Counsel for the Appellant argued that the Learned Trial Magistrate erred when she made a finding that the ground of cruelty was not proved to the required standard. He insisted that it was an error for the Learned Trial Magistrate to make a finding that for conduct to amount to cruelty, it must be grave and weighty, and it must have 5 caused injury to life or health or caused reasonable apprehension of such injury.

While relying on the Court decision in the case of *Nassuna Edith Zavuga Versus Jasper Nimron Semwanga and Hajji Senyonjo Divorce Cause No. 10 of 2003*, he argued that the position taken by the Learned Trial Magistrate is old law and the

- 10 Courts have since moved from such strict application on the definition of cruelty. He argued that the Court in the case of *Nassuna Edith Zavuga (supra)* found the Respondent to have committed cruelty when he threw the Petitioner out of their bedroom to sleep in the corridor and shutting her out on her return from work.
- 15 Counsel for the Appellant further argued that the Appellant adduced sufficient evidence to the effect that he was subjected to emotional and psychological torture by the Respondent who denied him conjugal rights and food and made the conditions in the home unbearable which made him leave the home. He contended that his evidence was not challenged because the Respondent in her evidence just made a 20 blanket statement of denial of the allegations by the Appellant. According to Counsel for the Appellant, the Respondent was not being truthful because there is no one in their right mind who would just wake up and leave their home to a whim.

Counsel for the Appellant also submitted that the Appellant adduced evidence to the effect that the Respondent lied to the Appellant that she was pregnant and the Appellant kept on sending her money to take care of the pregnancy and yet there

was no pregnancy. According to him, all these amounted to cruelty which made the atmosphere at home unbearable for the Appellant.

On the other hand, Counsel for the Respondent supported the decision of the Learned Trial Magistrate and insisted that she did not make any error. According to him, the Appellant did not adduce any evidence to the required standard to prove cruelty and the Learned Trial Magistrate was right to find that apart from putting up bare assertions, the Petitioner (Applicant) did not adduce any evidence to prove cruelty as a ground for dissolution of the marriage.

Counsel for the Respondent further distinguished the case of **Nassuna Edith Zavuga (supra)** from the facts of this Appeal and submitted that whereas in the *Zavuga* case there was evidence adduced to the satisfaction of the Court that the Respondent had thrown the Petitioner out of their bedroom and had on several occasions shut her out of the house on her return from work, there was no such evidence in this case. While relying on the case of **Kasingye Emmanuel versus Genevieve Kasingye, Civil Appeal No. 096 of 2014** which cited the decision in the case of **Dr. Specioza Wandera Kazibwe versus Engineer Nsubuga Kazibwe Divorce Cause No. 3 of 2003**, he argued that the proof of facts in the Divorce Act have been placed at a pedestal higher than a mere balance of probabilities. He insisted that the Petitioner/ Appellant did not adduce sufficient evidence to prove cruelty to the required standard.

Court's consideration of Ground 2

25 In the case of **Habyarimana versus Habyarimana [1980] HCB 139**, it was held that there is no definition of cruelty in the Divorce Act but case law has established that no conduct can amount to cruelty unless it has the effect of producing actual or

apprehended injury to the petitioner's physical and mental health. That there must be danger to life, limb or health, bodily or mental or reasonable apprehension of it to constitute cruelty.

In the case of **Vivian Ntanda versus James Kayemba Divorce Cause No. 4 of 2008**

5 **[2008] HCB** it was held:

"There is no comprehensive definition of cruelty accepted as satisfactory. It depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct to one another and the knowledge which each has of the intention and feelings of the other. The party seeking relief must prove probable injury to life, limb or health. A decree

10 **could be granted even upon a single act of cruelty."**

In the case of *Sarah Kiyemba versus Robert Batte Divorce Cause No. 127 of 2018* cruelty was given a dictionary definition of to mean, *"readiness to give pain or cause suffering to others"*. Hon. Lady Justice Ketra Kitariisibwa Katunguka while quoting

15 Merriam Webster observed that *"conjugal rights are the sexual privileges implied by and involved in the marriage relationship- the right of sexual intercourse between husband and wife"*.

In the case of *Sarah Kiyemba case (supra)*, Hon. Lady Justice Ketrh K. Katunguka 20 held that:

"Denial of companionship and a right to conjugal both embedded in the marriage contract without reason causes suffering and mental torture and therefore amounts to cruelty."

She further stated that *"a marriage without companionship and intimacy unless by consent of parties does not exist... that marriage has irretrievably broken down."*

In light of the above Court decision, it is evident that Courts have ruled that the denial of conjugal rights amounts to cruelty.

However, as a first Appellate Court, I have a duty to re-evaluate the evidence and determine whether it was sufficient to prove cruelty.

I have had the benefit of reading the record of proceedings and I find that the evidence adduced by the Petitioner/ Applicant during trial was that the Respondent constantly denied him sex and food and always told him that for him he was always thinking about sex. He further testified that this caused him a lot of emotional and psychological distress and on 20th 10 June 2019 he left the home where he was staying with the Respondent at Kawempe-Tula and went to rent in the neighborhood because the Respondent had made his life hard. To date, the Appellant has never returned to the Respondent. The Appellant also testified that after he left the home, the Respondent kept on calling him on the phone and pestering him to provide money 15 for a pregnancy which he did, and for over a year, there was no child and according to him, he knew that the Respondent was lying she was not pregnant.

On the other hand, the Respondent in her evidence denied having denied the Applicant the right to conjugal. She insisted she had been a very submissive wife 20 and gave the Appellant everything he needed but the Appellant just moved out of the home on his own volition and her pleas to him to return home have been in vain. She testified that she is still interested in the marriage and waiting for the Appellant to return home.

25 I need to observe that the Appellant was the only witness to his allegations and apart from the assertions that he was denied conjugal rights by the Respondent and this caused him depression and psychological torture, there was no other evidence to support his claim. His evidence was further negated by the denial by the Respondent who insisted that she had never denied the Appellant conjugal rights and she was always giving him whatever he desired and she still cherished her marriage. Counsel

- 5 for the Appellant submitted that the denial by the Respondent was a mere falsehood because no man can just walk out of his home without a reason. With all due respect, I am inclined not to agree with him, especially in light of the Respondent's evidence who insisted she did not deny the Appellant conjugal rights.
- 10 In her Judgment, the Learned Trial Magistrate, after analyzing the evidence adduced before her and having had the opportunity of observing the witnesses stated thus: *"I agree with Counsel for the Respondent that the averments above are just mere allegations that haven't been proved by any corroborative evidence, and further rely on the case cited of Gollins versus. Gollins [1963] 2 ALL ER 992 that for conduct to constitute cruelty, it must be grave and*
- 15 *weighty, and it must have caused injury to life or health or caused reasonable apprehension of such injury. I am alive to the decision of Court in Doreen Kirungi V Ronald Mugabe Divorce Cause 48/2013 where it was held that the Respondent's denial of sexual intimacy to the Petitioner amounted to cruelty. The Respondent denies the allegations of the denial of sex. There has been no proof that the Petitioner was forced out of the home, but only alleges to have left for fear that*
- 20 *he may commit marital rape. The Petitioner does not say in his Petition that he was denied sex since the solemnization of their marriage, in fact, he states that when he left the house, he was asked to provide for a pregnancy which he continued to do. If he was denied conjugal rights as he alleges, I find it was not incessant, and that such incidences that are occasional in all marital settings, can be remedied or patiently talked about by both parties with the help of their families,* 25 *elders or counselors, rather than leave the house."*

She concluded by making a finding that all is not lost for this marriage and that there is no basis for its dissolution.

I agree with her finding because the Appellant did not adduce sufficient evidence to the satisfaction of the Court that the Respondent denied him conjugal rights. Indeed as the Learned Trial Magistrate rightly observed, if it is true that the Appellant had been denied conjugal rights, then he would not have had reason to believe that the

- 5 Respondent was pregnant which required him to support the pregnancy. In fact, this gives credence to the Respondent's evidence that she did not deny the Appellant conjugal rights. She was confident enough to ask for support for the pregnancy. Besides, the Respondent insisted that she had been pleading with the Appellant to return home to no avail.
- 10 In light of the above, I find that the Learned Trial Magistrate did not make an error in finding that the Appellant did not prove the ground of cruelty. This ground, therefore, fails.

Ground 3: *The Learned Trial Magistrate erred in law and fact when she* 15 *concluded that the Respondent never changed her religion during the subsistence of the marriage hence arriving at a wrong conclusion thereby occasioning a miscarriage of justice.*

Counsel for the Appellant submitted that the Appellant adduced unchallenged evidence that after the church marriage between her and the Respondent, the latter

20 changed religion back to Islam and later forced the Appellant to go through an Islamic marriage ceremony. While relying on the cases of *Tatiana Adebiyi versus Adenji 1990-91 KALR* and *Thakker versus Thakker Divorce Cause No. 3 of 2002*, he invited the Court to find that concealment of true faith of a spouse and change of religion is ground for nullification/ dissolution of a marriage.

On the other hand, Counsel for the Respondent contended that the Appellant did not adduce any evidence to prove the claim that the Respondent had converted to Islam. He argued that the Appellant merely stated that he went alone to the home of the Respondent and found there a ceremony which showed that the Respondent had

5 converted to Islam.

Court's consideration of Ground 3

After perusal of the record, I find that apart from the Appellant's allegation that the Respondent converted to Islam and the Appellant was engaged in a private Islamic

10 marriage ceremony, there is no evidence to corroborate or support that claim. The Respondent denied that claim and the Appellant did not adduce any evidence in support thereof. If indeed there was a ceremony, there would have been witnesses to that and the Appellant would have adduced their evidence. I also find that even if it was true that the ceremony happened as claimed by the Appellant, I would find that 15 he was a willing participant and he fully consented to it because it is unbelievable that a male adult was compelled and or coerced into a marriage ceremony.

I, therefore, agree with the Learned Trial Magistrate that there was no evidence to support the allegation of change of religion by the Respondent which is a ground for

20 nullification of the marriage. Ground 3 also fails.

Ground 4: *The Learned Trial Magistrate erred in law and fact when she held that the Respondent's entry into the incomplete house under construction was justified whereas not hence arriving at a wrong conclusion thereby occasioning a* 25 *miscarriage of justice.*

Upon perusal of the record of the Lower Court, I deduce that the Appellant's complaint is that when he left the home in Kawempe Tula, the Respondent went to

the incomplete house at Migadde which the Appellant was constructing and started living there without his consent.

The Respondent on the other hand testified that they were living in a house belonging to the Appellant's friend when the Appellant left the home. At that time, they were constructing their matrimonial home in their kibanja in Migadde. When the Appellant left the home, she also decided to complete the house and started staying in. She insisted she did this with the consent of the Appellant. It is in the same home where the Respondent still resides. The Respondent further testified that the Appellant seemed to have wanted to sell the kibanja and the house and that is why he is objecting to her occupancy.

It is also important to note that the Appellant in his pleadings, Joint Scheduling Memorandum, and evidence, confirms that the kibanja and the house thereon was the only matrimonial property owned by the couple.

In light of the above, I am in total agreement with the finding of the Learned Trial Magistrate that the Respondent was justified to enter in the house. The Respondent testified that it was incomplete and she completed it and then entered it. I find that this act was conduct of a prudent wife. Other than staying in a house belonging to the Appellant's friend, she did right to complete their family house and occupy it. Ground 4 also fails.

Grounds 1 and 5

Ground one relates to the evaluation of evidence and the same has been covered in Grounds 2 and 3.

In ground 5, Counsel for the Appellant faults the Learned Trial Magistrate for failing to make orders on matrimonial property. However, the Learned Trial Magistrate dismissed the Petition for divorce and there was therefore no need to make Orders

related to the matrimonial property. I therefore find that she did not err in that regard and ground 5 also fails.

Conclusion

In light of the above findings, this Appeal wholly fails and is dismissed with the following Orders:

- 1. That the Judgment of the Lower Court in Divorce Cause No. 042 of 2020 is upheld;
- 2. That the Orders made in the Judgment of the Lower Court in Divorce Cause 042 of 2020 are upheld;
- 15 3. That the Appellant shall bear the costs of this Appeal.

I so order.

Dated at Kampala this 19th day of October 2023.

20 Alice Komuhangi Khaukha **JUDGE**

19/10/2023

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ughcfd/2023/187/eng@2023-10-19>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/kigozi-v-nabukeera-civil-appeal-18-of-2021-2023-ughcfd-187-19-october-2023-unknown-topic-unknown-court-2023>

Prepared on 14 October 2026 · Esheria