

UGANDA / JUDGMENT

Tusiime v Abdinajib (Divorce Cause 13 of 2020) [2021] UGHCFD 232 (19 November 2021)

[2021] UGHCFD 232

COURT

HC: Family Division (Uganda)

BEFORE

Komuhangi, J

CASE / FILE NUMBER

Divorce Cause 13 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA (FAMILY DIVISION)
DIVORCE CAUSE NO. 013 OF 2020 TUSIIME
CHRISTBELL=====PETITIONER VERSUS ABDINAJIB ABDULLAH
MOHAMED=====RESPONDENT

JUDGEMENT

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA**Introduction**

This judgement is in respect of a Divorce petition filed in this Honorable court on 29th January 2020 by one Tusiime Christbell (herein after referred to as "the petitioner") against her husband Abdinajib Abdullah Mohamed (herein referred to as "the respondent"). The petitioner seeks for dissolution of the marriage between her and the respondent which was solemnized at the Office of the Registrar of Marriages under the provisions of the Marriage Act Cap 251 on grounds of cruelty. The petitioner further seeks that the respondent should pay the costs of this suit and any other such relief that this honorable court deems fit.

Representation

At the hearing of the petition, the petitioner was represented by Counsel Patrick Musiime. The respondent was not in court and did not defend the petition. Counsel for the petitioner filed written submissions and provided court decisions which have been considered in this judgement.

The petition

The petition was filed in this honorable court on 20th January 2020 but the respondent was not served with summons to answer the petition for reasons that his whereabouts were unknown and efforts to trace him were futile. The petitioner then applied to court to be allowed to serve the summons by way of substituted service. The same was granted and the summons were affixed on the court's Notice Board and advertised in the Daily Monitor Newspaper of 16th November 2020 at Page 39. With this evidence on court record and court being satisfied that all necessary efforts were made to serve the respondent in vain, court allowed the petitioner to proceed ex parte.

Facts.

The petitioner and the respondent got married on the 21st day of May 2018 at the office of the Registrar of Marriages where a Marriage Certificate No. 6229 was accordingly issued. Later another Marriage Certificate No. 3043 was issued as a replacement of the former after correcting the age of the respondent which had been wrongly recorded on the first Marriage Certificate. After the said marriage, the two lived in rented premises in Ndejje and then in Zaana, Wakiso until their time of separation in April 2019.

The petitioner and the respondent did not have any children together and they also did not acquire any property. According to the petitioner, upon solemnization of the marriage, the respondent became so cruel to the petitioner until he chased her away from the rented premises in Zaana which she was paying for. The acts of cruelty the petitioner complained about include; ungoverned temper, physically assaulting the petitioner, failing to provide for the family even when he had the resources, causing her arrest and detention on allegations of theft among others.

It is upon this background that this petition was filed in this honorable court.

Issues

1. Whether the respondent committed cruelty towards the petitioner

2. Whether the petitioner is entitled to the reliefs sought.

Resolution.

1. Whether the respondent committed cruelty towards the petitioner

Section 4 of the Divorce Act provides the grounds under which a husband and a wife can petition for divorce. However, our courts have pronounced themselves on the unconstitutionality of those grounds in the case of **Uganda Association of Women Lawyers and Others Versus Attorney General Constitutional Petition No. 2 of 2000**. In this case, it was held that Section 4 of the Divorce Act is null and void in as far as it required women to prove many grounds for divorce as opposed to men who were required to prove only one. The court considered this as

discrimination on the basis of sex and in violation of the equality provisions under the 1995 constitution of the Republic of Uganda. It was the view of the learned Justices that all grounds of divorce mentioned in Section 4 (1) and (2) of the Divorce Act are available to both parties to the marriage.

In **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.

Counsel for the petitioner also cited **Vivian Ntanda Versus James Kayemba Divorce Cause No. 4 of 2008 (2008) HCB** where it was held;

"*There is no comprehensive definition of cruelty accepted as satisfactory. It depends on habits and circumstances of the matrimonial life of the husband and wife, their characters, normal mode of conduct to one another and 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 could be granted even upon a single act of cruelty."*

In addition to what was pleaded in the petition and the affidavit, the petitioner also gave testimony on oath and informed court that immediately after the solemnization of the marriage, she suffered physical assault at the hand of the respondent. That the respondent would pick up a fight on a very small issue and torment her. In fact, even on the day she left the home where the two were residing, it was police which separated them and also witnessed the separation. The petitioner further informed court that the respondent deliberately refused to make any financial contribution in the home and the petitioner paid all the bills ranging from house rent, food and all other home utilities. She availed the Tenancy Agreement and receipts for house rent in court which were admitted as exhibits PE 3 and PE 4 (a), (b), (c) and (d) respectively. This was despite the fact that the respondent actually had money as she later found out. She informed court that the respondent had money which he had kept in the house in dollars. When the petitioner discovered that, she picked some money and the respondent reported her at Katwe Police station and she was detained. According to her, this caused her a lot of psychological torture and mental anguish.

It was also the evidence of the petitioner that she never enjoyed companionship with the respondent because the latter ignored her as he spent most of his night time on phone. According to her, this caused her a lot of psychological torture and mental anguish and agony. The petitioner further testified that the respondent denied her conjugal rights. Counsel cited the case of **Sarah Kiyemba Versus Robert Batte Divorce Cause No. 127 of 2018** where Lady Justice Ketrah K. Katunguka held that;

"*Denial of companionship and a right to conjugal both imbedded 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"*

As already observed, the respondent did not respond to the petition and so the evidence of the petitioner was uncontroverted and or undisputed. Counsel for the petitioner cited Order 8 Rule 3 of the Civil Procedure Rules SI 71-1 which provides that;

"*Every allegation in a plaint (in the instant the petition), if not denied specifically or by necessary implication or stated not to be admitted in the pleadings of the opposite party, shall be taken to b admitted".*

The applicant's sworn evidence was not rebutted by the respondent. On the authority of *Massa Versus Achen 1978 (HCB) 279,* an averment on oath which is neither denied nor rebutted is admitted as the true fact.

As earlier observed in this ruling, the respondent neither filed a reply to the petition nor appeared in court to defend himself. This therefore means that the averment of the petitioner in her affidavit in support of the petition and her evidence on oath while in court which were not rebutted are true facts in as far as they prove the fact of cruelty.

In light of the above and on the account of the adduced evidence, the petitioner has proved to the satisfaction of this honourbale court that the respondent was cruel to her during the subsistence of the marriage.

2. Whether the petitioner is entitled to the reliefs sought.

The petitioner seeks for dissolution of the marriage between her and the respondent on grounds of cruelty. Besides cruelty, the petitioner and the respondent have not lived together since April 2019. In fact, from the evidence of the petitioner, she has not seen nor heard from the respondent since April 2019. This in actual sense implies the marriage between the petitioner and the respondent has irretrievably broken down.

I therefore, find that the petitioner has proved the ground of cruelty against the respondent. I hereby allow the petition and decree that the Marriage between Tusiime Christbell and Abdinajib Abdullah Mohamed celebrated at the Office of the Registrar of Marriages Kampala on 21st day of May 2018 is hereby dissolved on the ground of cruelty.

A Decree Nisi is entered under Section 8(1) of the Divorce Act.

The petitioner will bear the costs of this petition since it is the evidence of the petitioner that the whereabouts of the respondent are unknown and efforts to trace him have been futile.

Dated at Kampala this 19th day of November 2021.

Alice Komuhangi Khaukha Judge. 19th November 2021.

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