IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CIVIL APPEAL NO. 63 OF 2005

RAZIA JAFFER ALI ..... APPELLANT

VERSUS

1. AHMED MOHAMEDALI SEWJI ..... 1ST RESPONDENT
2. AMINA MOHAMEDALI SEWJI ..... 2ND RESPONDENT
3. MURTAZA MOHAMEDALI SEWJI ..... 3RD RESPONDENT
4. AMIN MOHAMEDALI SEWJI ..... 4TH RESPONDENT
5. MUNIRA MOHAMEDALI SEWJI ..... 5TH RESPONDENT
6. NASIM MOHAMEDALI SEWJI ..... 6TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Zanzibar at Vuga)

(Mshibe Ali Bakari, J.)

dated the 29th day of June, 2004
in
Civil Case No. 49 of 2003

JUDGMENT OF THE COURT

7 & 17 November 2006

MROSO, J.A.:

The appellant who is an Indian citizen was married to the first respondent in India in 1998 according to Islamic rites. Both moved to Zanzibar where the first respondent was domiciled. She did not get any issues with the husband but the latter had five grown up

children, some of whom are the rest of the respondents in this appeal.

While the couple were living together in Zanzibar the husband became ill in 2003. According to the appellant, the husband suffered from "severe stroke and paralysis." He was taken to Dar es Salaam for treatment and the appellant stayed with him until subsequently he was taken back to Zanzibar. He did not return to the matrimonial home but was taken to a home of his children. The appellant claimed that the children denied her access to her husband. They also denied her free use of the matrimonial home. The rooms in the matrimonial house were locked up except for one room where she was confined. She claimed that some of the children assaulted her on several occasions, denied her maintenance and constantly harassed her, telling her that she had been divorced by her husband. Her jewellery was also taken away from her. Following from all this she decided to file a suit in the High Court of Zanzibar against her husband and five children of the husband. She wanted the High Court to order the husband and his children to pay her USD

55,000.00; general damages for assault and harassment; incidental costs of USD 5,500.00; return of her passport and interest on the decretal amount. The High Court, Mshibe Ali Bakari, Judge, decided that she had been validly divorced and should return to India. Otherwise her suit was dismissed but costs were not ordered. Aggrieved by the dismissal of her case, she has appealed to this Court.

At the hearing of the appeal the appellant who had already returned to India was represented by Mr. Mbwezeleni and Mr. Mnkonje learned advocates. The first, second, fourth and fifth respondents were represented by Mr. Mushumba, learned advocate. The third and sixth respondents had not been served and were unrepresented. The advocates for the appellant decided to drop them from the appeal.

Six substantive grounds of appeal were filed and all except grounds four and five were argued seriatim. Grounds four and five were argued together. On the first ground it was complained that

the trial judge should have found that the case had been proved against the first and fifth respondents and the second ground, that the trial court should have found the appellant had been assaulted and harassed and that she had reported those incidents to the police, the Sheha and the Indian Consulate Officials. On the third ground of appeal it was claimed that the trial court should not have found the second respondent Amina Mohamedali Sewji (DW1) a credible witness. On the fourth ground the appellant sought to fault the trial judge for not having found that the first respondent had not divorced the appellant in accordance with the Shia Ithnaasheri law on marriage and divorce. On the fifth ground the appellant criticized the trial judge for not rejecting a divorce certificate which was produced at the trial because it did not apply to the Shia Ithnaasheri Muslim Sect. The trial judge was criticized on the sixth ground for not ordering distribution of matrimonial assets as a logical consequence of his finding that there was a valid divorce. The appellant then prayed that if the Court allowed the appeal it should "enter the Trial Court shoes and award reliefs prayed for in the plaint". Alternatively, if this Court also found that there was indeed a valid divorce, then

order the division of matrimonial properties. Finally, she asked for costs both in this Court and in the trial court.

We have found it curious that since the appellant was disputing the claim by respondents that she had been divorced, she did not ask the trial court to grant a declaratory decree that her marriage to the first respondent was still intact and from such a declaration would follow such reliefs like the right to maintenance from and to cohabitation with the first respondent. Be it as it may. We now wish to consider the most crucial question whether there had been a valid divorce from the first respondent.

It is noted that the first respondent who was said to have divorced the appellant did not give evidence at the trial. Assuming he was bed-ridden, there could have been a request to the trial court to move to his bed to take his evidence unless he was too ill at the time to communicate by speech or even by gesture.

Of the respondents only the second respondent Amina Mohamedali Sewji gave evidence at the trial. The only other witness for the defence was one Himid Omar Khamis, a Sheha. According to Amina (DW1), the appellant was divorced on 16th September, 2003 but that seemed to be hearsay because she was then in Dar es Salaam. She claimed her father told her so, suggesting that the father could speak. A divorce certificate number 94 of 16th September, 2003 had been obtained and was tendered in evidence at the trial. Amina (DW1) further claimed that since the appellant had insisted that she should hear the talak from her husband, arrangements were made so that in the presence of an Immigration Officer, a Sheha, a Sheikh and the appellant, the husband pronounced talak three times. Later a Kadhi informed the appellant that she had been validly divorced but she insisted that she should be given a Shia divorce.

Himid Omar Khamis, the Sheha said he was present as a witness when the husband pronounced the talak. A Maalim Suleiman Khelef was also present. The husband signed a divorce statement.

A Kadhi at Kariakoo issued a divorce certificate. During all this, there is no mention of the appellant being present. But two weeks later, according to the Sheha, the divorce was disputed apparently by a Sheikh Abbas – "Sheikh Abbas was aggrieved with that talaka that it didn't follow the Shia procedure." The appellant was also aggrieved, according to the witness. On the instructions of an Immigration Officer another Immigration Officer accompanied the Sheha to the husband to ascertain if he had in fact given a talak. The husband then confirmed that he had divorced his wife.

It is pertinent that the appellant had all along disputed the divorce, insisting that it was not in accordance with the Shia sect procedure. The trial court said in this respect –

> "Since there was evidence that the 1st Defendant (the husband) pronounced the divorce before the witnesses more than three times, the said divorce is valid ---. Whether the procedure was followed is immaterial ---. According to Islamic law as soon as the divorce is pronounced, it is a valid one

although each sect has got its own procedure of confirming the said talak."

It was not disputed that the couple were members of the Shia Ithnaasheri sect of the Islamic religion. It is also apparent that the divorce procedure which was followed was of the Sunni sect. Was it correct, as the High Court Judge said, that the procedure did not matter? That Islamic law provided that all that was needed was that divorce should merely be pronounced thrice?

According to the **Holy Qur-An** (containing the Arabic Text with English translation and Commentary) by Maulvi Muhammed Ali, Second Edition, it is provided in Section 29, verse 229 as follows –

"229 Divoirce may be (pronounced) twice ---"

The book – **"The Islamic Law of Personal Status"** by Jamal J. Nasir, Second Edition (Arab and Islamic Law Series) the Sharia Law allows a marriage to be dissolved during the life-time of the parties in three forms –

(i) by the act of the husband or wife (talaq);

(ii) by mutual agreement (khula or mubaarat); or

(iii) by a judicial order of separation in a suit by the husband or the wife.

The author says that there are three more forms which are described by the classical jurists, but have little practical relevance in modern days.

Mulla's Principles of Mohamedan Law, 18th Edition by M. Hidayaatullat, former Chief Justice of India, says that according to Shia Law, a divorce must be pronounced orally in the presence of competent witnesses and a talak communicated in writing is not valid unless a husband is incapable of pronouncing it orally. The book **"The Five Schools of Islamic Law"** Edited by Muhammad Jawad Maghniyyah, published by Anssariyan Publication says at page 385 that according to the Imamiyyah (The Shia), divorce requires the

pronouncement of a specific formula without which it does not take place. In addition, divorce does not take place through writing or by gesticulation, unless the divorcer is dumb. The book further says –

> "--- the Imamiyaah have restricted the scope of divorce to its extreme limits and impose severe conditions regarding the divorce, the divorcee, the formula of divorce, and the witnesses to divorce. All this is because marriage is a bond of love and mercy, a covenant with God."

Regarding witnesses, alShaykh Abu Zuhrah had observed that –

> "The twelve Imami Shii legists and the Ismailiyah state: A divorce does not materialize if not witnessed by two just (adil) witnesses, in accordance with the Divine utterance regarding the rules of divorce and its pronouncement"

A little earlier it is said in the Book "It is necessary that the divorce be recited in Arabic when possible." Then citing the author of al-Jawahir, himself citing a statement from al-Kafi, said –

> "There can be no divorce except (in the form) as narrated by Bukaya ibn A'yan, and it is this: The husband says to his wife (while she is free from menses and has not been copulated with during that period of purity). You are divorced, and (his pronouncement) is witnessed by two just (adil) witnesses. Every other form except this one is void."

There are here the significant words "... says to his wife" which clearly indicate that the formula words have to be pronounced to his wife who would be present.

DW1 – Amina and DW2 – Himid Omar Khamis conflict on this aspect in their respective evidence. While Amina said that after the first pronouncement of divorce (when she was away in Dar es Salaam) later, in the presence of witnesses (including the Sheha –

DW2), the husband again pronounced the talak three times in the presence of the wife, the appellant. But no where in the evidence of DW2 – the Sheha, was it said that the wife was present when the husband pronounced the divorce. The appellant categorically denied that her husband pronounced divorce in her presence. She said there was no talak at all and that she never saw the divorce certificate before seeing it in court. According to Amina, the first respondent could speak yet, and surprisingly, he never testified at the trial, even while in bed. We accept, in view of the conflicting evidence between DW1 – Amina and DW2 – the Sheha, that the denial by the appellant that her husband, the first respondent, repudiated their marriage in her presence and in the presence of two **adil** witnesses as correct. Consequently, we find that the High Court had no basis for finding that there was a valid divorce. The procedure to be followed among the members of the Shia Moslems is important and not immaterial as the learned High Court Judge believed. The fourth ground of appeal therefore succeeds.

Was the appellant assaulted and harassed? Apart from the appellant's word as against Amina's the former who had the onus to prove her claims did not call for available evidence from the police or the Sheha to whom she claimed she reported the assaults. We think the High Court justifiably rejected the claim that Amina and others assaulted her on several occasions.

We think however that there was credible evidence of harassment. It was not seriously disputed that she was denied free access to her husband and thus depriving her the right to cohabit with and enjoy the companionship of her husband, for no valid reasons, especially because this Court found that there had not been a valid divorce. She was also deprived the full use of the matrimonial house and was confined into only one room.

It was undisputed, and the letter – Exh. 'C' – from the Indian Consulate General, that her jewellery would be returned to her, was proof that indeed the respondents took away her jewellery and passport for no lawful reasons. We accept that the appellant would

be entitled to both special damages in respect of the jewellery and general damages for the other forms of harassment.

The claim for USD 55,000.00 was contingent on the appellant accepting that she had been divorced. But this Court has found that she had not been validly divorced, therefore, she is not entitled to that payment on the basis for which she claimed it.

The claim that her passport be restored to her must have been overtaken by events because when she travelled back to India she must have had possession of it.

The question of division of matrimonial assets on the basis that she had been divorced now no longer needs an answer. But following from the decision in this appeal, since the appellant has remained a lawful wife of the first respondent, she will be entitled to maintenance from the time of the husband's separation from her by living away from the matrimonial home.

The appellant will have her jewellery restored to her if that has not yet been done already. In the event the jewellery is no longer traceable, she should get the monetary value thereof. According to her evidence, it was worth USD 500.00.

On the issue of an award of general damages for the harassment she endured it is surely to be presumed to be "the direct, natural or probable consequence" of the deprivation of conjugal rights, the denial of free use of the matrimonial house, the unwarranted dispossession of her passport and the threats of deportation from Zanzibar. She averred in her plaint to the High Court that she had suffered damage and that she should be paid general damages.

Assessment of general damages is by no means easy. The High Court did not make any assessment because it found that there was neither assault nor harassment of the appellant.

In **Livingstone v. Rawyards Cool Co.** (1880) 5 App. Cas. 25 at page 39 Lord Blackburn said of damages to be –

> "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Elaborating on that principle Asquith, L.J. in **Victoria Laundry v. Newman** [1949] 2 KB 528 at page 539 said that the purpose of damages is to put the plaintiff "... in the same position, so far as money can do so, as if his rights had been observed."

A trial court which has seen and heard the parties is certainly in a far better position to assess damages than an appellate court can do. **Lord Wright in Davies v. Powell Duffryn Associated Colliers Ltd.** [1935] 1 KB 354, 360, referring to a decision by Greer, LJ, said –

> "In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these reasons or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference."

In the appeal before the Court we are not considering the propriety of an award of damages by the trial court but this excerpt quoted above merely helps to remind us that we must not misapprehend the facts and must be careful of the estimate we make of the damages. Thus, considering all the circumstances of the case we think that an award of fifteen million Tanzanian Shillings as general damages will meet the justice of the case.

On maintenance, we do not have enough facts before us to enable us to decide on the quantum of maintenance. The parties may wish to go back to the High Court to be heard on this issue or file a fresh suit for it.

The appeal has been allowed to the extent indicated. The appellant will get seventy five of the taxed costs both in this Court and in the High Court.

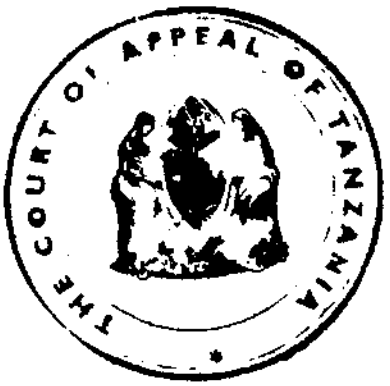
GIVEN at ZANZIBAR this 17th day of November, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(S.M. RUMANYIKA)
DEPUTY REGISTRAR