IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL APPEAL NO. 2 OF 2023

(C/F Arusha District Court in Matrimonial Cause No. 09 of 2021)

BENEDICT PIUS MOREMBWA.....APPELLANT

VERSUS

AMBROSIA MICHAEL JENGO.....RESPONDENT

JUDGMENT

1/11/22023 & 27/12/2023

GWAE, J

This matter originates from the District Court of Arusha at Arusha ("the trial court") in Matrimonial Cause No. 09 of 2021 duly filed by the respondent, Ambrosia Michael Jengo. The respondent petitioned to the trial court claiming for; declaration that the marriage between her and the appellant, Benedict Pius Morembwa has broken down irreparably, grant of divorce, Distribution of matrimonial assets, costs of the petition, any other reliefs.

The brief material background and essential facts of the matter as achieved from the trial court's records giving rise to the present appeal reveal that, the appellant and the respondent contracted their marriage under Christianity rites on the 30th day of December 2000. During the

subsistence of their marriage, they were blessed with four (4) issues and that; during subsistence of their marriage, they jointly acquired various matrimonial properties.

The appellant and respondent herein had common versions on the following facts, that, initially they had happier marriage. That, both parties complained to each other about denial of conjugal rights. Further to that, both parties accused to each other of adulterous conducts or behaviours, the appellant complained that, the respondent has sexual relations with many women, she mentioned three women out of those women including housemaids.

The respondent exceptionally complained deaths threats from the appellant, assaults in front of the children and other persons, desertion, a denial of maintenance of herself as appellant's wife and their issues. The respondent also complained that, the appellant persistently attempted to force her to have sexual intercourse against the order of nature. She finally stated that, the Police Ward Authority attempted to reconcile the dispute but the same went in vain.

The appellant on his exceptional averments as well as his evidence, he started that, the respondent evicted him from their matrimonial home with collaboration with Officer Commanding District. He further contended

that, he is still in love with his wife and he ready and willing to have their marriage repaired so that, he could be comfortably living with his wife and their children. He added contended that, as responsible husband, he used to properly maintain his children that is why the children are living in the parties' matrimonial home located at Baraa- Moshono area in Arusha Region. The appellant also refuted their marriage to have undergone the requisite reconciliation process. Therefore, he sought the appellant's petition be dismissed.

Having heard the evidence of the witnesses for both sides, the trial court was convinced that, the marriage between the parties had broken down beyond repairs. Consequently, it proceeded issuing the decree of divorce. Custody of the children was placed to the respondent. The trial court further granted the appellant with an access to the children and it proceeded to order division of matrimonial assets as follows;

1. The appellant was given a Matrimonial home at Baraa area-Moshono-Arusha, one house located at Magugu-Babati, one plot measures 22 x35 located at Majengo Magugu, 5 acres located at Bwawani- Nduruma in Arusha Region and 16 acres located at Mbuyu wa Mjerumani Babati as well as the heads of cattle to cater for the maintenance of the children

2. The respondent was give one a matrimonial house located at Longdong Sokoni one-Arusha, One plot measures 35 x 35 located at Sangaiwe within Babati District and one acre located at Kichangani Matufe-Babati
3. The parties' children were given their house located at home village

The trial court's decision delivered on the 25th April 2023 seemingly aggrieved the appellant. Therefore, he is before the court challenging the same with the following grounds of appeal;

1. That, the trial court erred in law and fact by holding that the Baraa Marriage Reconciliatory Board failed to reconcile the parties without tangible evidence
2. That, the trial court erred in law and fact by failure to obtain an independent opinion of the elders of the parties hereof before issuing the custody order
3. That, the trial court erred in law and fact by failure to drawn an adverse inference against the respondent for failing to call her material witness
4. That, the trial court erred in law and fact for ordering material properties contrary to the principles governing matrimonial properties
5. That, the trial court erred in law and fact by failure for holding that the marriage between the parties had been broken down

irreparably in absence of evidence in the court record to that effect

However, on 25th April 2023 the appellant's advocate sought and obtained leave to file an additional ground of Appeal which reads;

> *"That, the trial court erred in law and fact by holding that the, Baraa Conciliatory Board failed to reconcile the parties hereof while there is ample evidence to the contrary"*

With consensus, when the appeal was called on for hearing before me, the appellant and respondent were enjoying legal services from their respectively learned advocates that is Mr. James George and Mr. Anold Tarimo.

Before the learned counsel for the appellant had started submitting the grounds of appeal presented through the Memorandum of Appeal whose grounds of appeal are reproduced herein above, he expressly informed the court that he had abandoned the 1st ground. Hence, argued the 2nd, 3rd, 4th and 5th ground.

Challenging the trial court custody order of the children, it was the view of the appellant's advocate that, the trial court contravened the law under section 125 (2) of the Law of Marriage Act, Cap 29, R.E, 2019 (LMA) as stipulated for not asking the children themselves especially children whose age is above seven years. He cited the cases of **Mariam Taumbo**

Harold vs. Harold Tumbo (1983) TLR 293 and the decision of this court in **Max Hassan vs. Zainabu Kalenga**, Dc. Matrimonial Appeal No. 8 of 2020 (unreported).

Submitting on the 3rd ground, the appellant's counsel stated that the respondent's failure to call her vital witnesses especially the children and guest whom she testified to have witnessed the alleged gross assaults justified the trial court to draw an adverse inference. He then urged the court to refer to the case of **Hemed Said vs. Mohamed Mbilu** (1984) TLR. 112.

Supporting ground 4, Mr. George argued that the trial court's decision ought to have guided by evidence on record relating to existence of such properties allegedly jointly acquired. He referred the case of **Hassan Omary vs. Zainabu Kalenga,** Dc. Matrimonial Appeal No. 8 of 2020 (unreported). According to him, the respondent had failed to prove the existence of some of enlisted properties in her petition except those admitted by the appellant of their existence. He thus argued that, those properties not proved their existence were; the house located at Magugu-Babati, 16 acres at "Mbuyu wa Mjerumani" and Plot measuring 22 x35 acres at Majengo-Magugu in Babati as well as 28 cows. He added that since the landed property located at Moshono area has business frames that, were not divided to either of the parties.

In the 5th ground, the appellant's advocate argued that, it is the duty of the respondent to prove that their marriage has been broken down irreparably unlike her testimony on record. He referred to section 110 (1) and (2) of TEA.

Finally, the appellant's advocate submitted on the additional ground of appeal, to wit; it was wrong for the Baraa Conciliatory Board to continue with hearing instead of reconciling the parties as required by section 101 of the LMA. He cited the case of **Hassani Sandali vs. Asha Ally,** Civil Appeal No. 246 of 2019 (unreported) where the Court of Appeal held that, BAKWATA could not have certified that, it has failed to reconcile the dispute by involving the respondent alone.

Before responding to the appellant's submission, the respondent's advocate was of the view that, this appeal lacks merit, thus subject to being dismissed since the decision of the trial court was valid and fair and in accordance with the law. Arguing the 2nd ground, Mr. James stated that section 125(2) of LMA was complied with and that since the appellant was not sure if the infant was his. It follows that; the custody would not be placed to him. He further argued that, the cases referred by the counsel for the appellant are quite distinguishable.

Submitting to the 3rd ground of appeal, Mr. James argued that, since there was enough evidence in support of her petition, there was no need of drawing an adverse inference.

Replying to the 4th ground of appeal, the respondent was the view, that the division of the matrimonial assets was appropriately done since the respondent established their existence. He went on arguing that, the appellant admitted through his answer to the petition at paragraph **7** and exhibit **P11** and **P10** establishing existence of the matrimonial assets namely; 4. 8 acres at Sangiwe, a house at Magugu and 25 acres at Ngole, which the appellant is now strangely refuting. Equally, the said cows, which he testified to have been stolen but subsequently recovered /found by Dodoma Region Police.

In the 5thground of appeal, the respondent's reply is to the effect that, the respondent's evidence sufficiently proved that, the marriage had been broken irreparably. Equally, arguing the additional ground, Mr. Anold, relying section 104 (1) of LMA was complied with as both parties were afforded an opportunity to be heard vide exhibit P3. He added that, the Conciliatory Board conducts its proceedings as per section 104 (9) of the LMA. Having made his response as herein above, Mr. Anold sought an order of the court dismissing this appeal.

It is now noble duty of the court to determine the appellant's grounds of appeal save the 1st ground which was abandoned. Starting with the ***2nd ground of appeal.*** Power to order maintenance is derived under section 125 (1) and (2) of LMA which reads;

> *"125.-(1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare.*
>
> *(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-*
>
> *(a) The wishes of the parents of the child;*
>
> *(b) The wishes of the child, where he or she is of an age to express an independent opinion; and*
>
> *(c) The customs of the community to which the parties belong.*
>
> *(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody.*

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

According to the above statutory provisions, it is the best interest or welfare of the child, which shall be a paramount consideration by a court when placing a custody of a child to either his or her mother, father or relative or any specified association. In the first place, the court placing custody should think of any of the child's biological parent followed by the child wishes. The appellant is found complaining that, the trial court erred in law and fact by not entertaining the opinion of the elder, with due respect, the above quoted provision of law does not require the court to do so save to looking into the customs of the community to which the parties belong.

As to the child (4th child) aged seven (7) years by then, it is general rebuttable presumption that custody order should be placed to the mother of such child unless exceptional circumstances are proved, which is not the case here. The respondent is proven an employee and above all, she has not deserted the appellant from matrimonial home as the case on the part of the appellant.

Worse still, the appellant is proved to be suspicious if he is the child's biological father of the child. Equally, other children are proved to be above the age of seven; therefore, they would have been summoned to express their wishes taking into account that the trial court was not legally bound to place the custody of all children of the parties to the respondent. However, the appellant's change of residence from that of matrimonial to another residence is a factor that necessitated the trial court to issue custody in the manner it issued. Therefore, the 2nd of appellant's appeal lacks merit and the same is dismissed.

In the 3rd ground herein above, on the complained failure to call the parties' children to testify on the alleged cruelty/ assaulting in the presence of the children or housemaids.

I alive of the principle of drawing an adverse inference where a party to a judicial proceeding fails to call a material witness who actually witnessed a certain occurrence. Our courts are entitled to drawn an adverse inference against a party who fails to call a vital witness (***A*ziz Abdallah vs. Republic** [1991] TLR 71.

In the matter at hand, I am of the firm view that, this ground is misplaced since children, in normal circumstances, are not expected to facilitate hatred between their father and mother as well as between any

of their parents and them. Hence, the testimonies of the respondent and other two witnesses, in my considered view, is sufficient (PW2 & PW3) exhibiting cruelty on the party of the appellant (See section 107 (2) (c) of the LMA.

Regarding the 4th ground of appeal on, the trial court's division of the matrimonial assets, I have examined the trial court's records including the parties' pleadings and observed that, the appellant greatly admitted that, there are assets that, were jointly acquired by the parties during subsistence of their marriage. This position is echoed in Paragraph 7 in the appellant's reply.

When I further look at the evidence of the parties in the trial court record, if find both parties have endeavored proofing their contributions towards acquisition of matrimonial assets. The complaint that the frames of the house located at Moshono Baraa were not divided to either of the parties is unfounded since the said frames are attached to the house so given to the respondent

As to the said non-existence assets, I am in agreement with the appellant's assertion in that, property at Kichangani Babati has been disposed. The respondent through her advocate one Alex. Also, admitted this position as reflected by this court's proceedings of 13th December

2023. Hence, the appellant is now given one-plot measures 22 x35 located at Majengo Magugu-Babati initially given to the respondent. The 4th ground is thus partly allowed.

As to the **5th *ground on whether the trial court was justified to hold that the parties' marriage was broken irreparably.*** Carefully examining the evidence on record. I find that there was proof of denial of conjugal rights by both parties, desertion by the appellant and cruelty. Thus, the trial court was justified to hold that the parties' marriage had been broken irreparably as per the provisions of section 107 (2) of LMA taking into account the trial court was justified to consider even one ground for divorce.

In the additional ground of appeal on the complaint that, it was wrong for the trial court to hold that, the parties' marriage was reconciled but in vain. According to the evidence on record, it seems that the parties' disputes have been referred to police authority (PE2 and DE1, District Commissioner's office (PE13). As correctly complained by the appellant's counsel, Marriage Conciliatory Board was responsible to reconcile the parties' marriage and not hear and determine the matter as depicted in its purporting judgment dated 14th July 2020 (DE7). Nonetheless, in our present case, there is a certificate of reconciliation dated 14th July 2020 (PE4), which to the effect the intended reconciliation by the Baraa

Conciliatory Board had absolutely failed and it actually gave its findings as required under section 104 (5) of LMA which reads;

> *"(5) Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings."*

As indicated in PE4, the Baraa Conciliatory Board seems to have reconciled the parties unlike to the holding in the case of **Hassan Ally Sandali** (supra) since in the former case, it was only the respondent who was involved in the reconciliation process whereas in the instant matter both parties were adequately involved.

Therefore, in my considered view, the appellant's assertion that, he was not heard is unfounded and also argument that, the parties were not reconciled is nothing but a misdirection and reliance on mere technicalities as the parties' marriage was substantially reconciled by the institutions earlier mentioned.

In the event and for the foregoing reasons, I find no merit in the appeal and dismiss it save the 4th ground which is partly allowed entitling the appellant to a division of a plot measures 22 x35 located at Majengo Magugu-Babati in additional to the properties given to him by the trial

court. In terms of proviso to section 90 (2) of the Marriage Act, I make no order as to costs of this appeal.

It is so ordered.

DATED at **ARUSHA** this 27st December 2023

M. R. GWAE

JUDGE