IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 214 OF 2000

(Appeal from the judgment and decree of the District Court of Ilala at Samora Avenue, Dar es Salaam in Matrimonial Cause No. 6 of 1995)

LAWRENCE MTEFU ……..…… APPELLANT

VERSUS

GERMANA MTEFU ……..…….. RESPONDENT

JUDGMENT

KIMARO, J.

This is an appeal which was heard by my Sister Judge – The Late Muro. Unfortunately, she passed away before preparing the judgment. Fortunately however, she had ordered the hearing to proceed by way of written submissions. Mr. F. Mbuya, the learned Advocate appearing for the appellant and the respondent with the assistance of the Women Legal Aid Centre have complied.

The parties were united by a Christian marriage contracted in 1979. It was dissolved on the ground of adultery and cruelty allegedly committed by the appellant. The matrimonial proceedings were initiated by the respondent. Consequent to the granting of the divorce, the trial magistrate ordered division of three houses equally among the parties together with sixteen sewing machines. An order for maintenance at Tshs 10,000 per month effective from the date the case was filed was also made. The appellant was aggrieved by the decision of the trial court. It is now being challenged. There are four grounds of appeal. In the first and second ground, the decision of the trial court is faulted for an error in law and

fact for holding that the marriage was irreparably broken on an account of adultery committed by the appellant while the respondent had condoned it and also for holding that the appellant was cruel.

Regarding the third and fourth grounds, the trial magistrate is faulted for having erred in law in ordering the appellant to pay the respondent maintenance at Tshs 10,000/- per month without ascertaining the appellant's income and for ordering equal distribution of all houses and sixteen sewing machines.

During the trial, the appellant did concede having resided with one Domina Lawrence Msoka for years in adulterious association. Mr. Mbuya's submission is that the issue of adultery should not have formed a ground for breaking the marriage because the respondent had been aware of it since 1983 but she did not complain. This means that she condoned it. Mr. Mbuya said the respondent went to the extent of even facilitating the adultery by taking care of Domina and her children fathered by the appellant. The respondent on the other hand refuted having condoned the adultery and denied having been aware that the appellant was committing adultery with the said Domina. According to the respondent, Domina is a close relative. She is her niece.

The first ground of appeal has no merit. Given the close relationship between the respondent and the said Domina, it was hard for the respondent to suspect the adulterious relationship between the appellant and Domina. If she had condoned the relationship, there was no reason for the respondent to complain before the elders about the adulterious relationship between the appellant and Domina. The complaint by the respondent signifies that she never condoned the behavior. It is on record that the parties had a Christian marriage. A Christian marriage is a union of one man and one woman. The relationship lasts forever. It is ridiculous and indeed absurd for the appellant to justify the adultery and then claim that the respondent never protested it. The type of the marriage which appellant had with the respondent, is in itself an answer that adultery was prohibited. He cannot now justify it while he himself knew that it was prohibited. Since the adultery was admitted by the appellant and given the circumstances under which it was committed, the trial magistrate held, quite correctly that it was one of the ground which broke the marriage. It

is also on record that a protest by the respondent against the adulterous association between the appellant and the said Domina, led her being arrested and detained at a police station for three days. The appellant was not bothered by the arrest. It was one Siril Martin who bailed her out.

As for the second ground of appeal, there is no reason for wasting time. The ground has no merit. There is abundant evidence that the appellant was cruel. First and foremost, the act of committing adultery with the respondent's niece w as in itself cruelty. It caused a lot of mental torture on the respondent. There was also evidence that the respondent was arrested and detained at the police station at the instance of the appellant. For three days the respondent remained in police custody and the appellant did nothing. The worst side of the whole matter is the fact that the arrest was prompted by the respondent's protest against the adultery. Given this analysis I find Mr. Mbuya's submission evasive of the real question. His submissions is a reflection of the stereo types where a man would never admit a wrong. The wrong is given an interpretation which shows that it is the woman who has to be blamed for a wrong committed by the man. Mr. Mbuya has also submitted that the respondent failed to prove that the appellant did not maintain the respondent. I do not quite agree with Mr. Mbuya. If the appellant says that he was maintaining the respondent then he should have shown how much he was supplying. But whether the appellant was supplying maintenance or not the fact remains he was cruel to the respondent particularly in his adulterous association with the said Domina Msoka who was a very close relative of the respondent. The association made the respondent suffer mental torture. It was sufficient cruelty to break the marriage. The respondent did testify that the appellant sent her home since 1981 and no maintenance was sent to her.

The third ground of appeal is that the assessment of maintenance at Tshs 10,000/= per month was arbitrary and was made without ascertaining the appellant's means of income. The case of **Jereme Chilumba Vs Anna Adamu** [1989] T.L.R. 117 was cited in support of the argument.

Indeed the law regarding assessment of maintenance is as per Mr. Mbuya's submission that the assessment must be based on the income of the person who is ordered to pay maintenance. However, in the circumstances of the case, it cannot be said that the assessment is high. The respondent gave evidence that the appellant is an employee of the bank. He has a grinding

mill. He has sixteen sewing machines and one half acres of coffee estate. For a person with such properties an amount of Tshs 10,000/- cannot be said to be high. The income realized from such property can enable him pay the amount of maintenance ordered by the court.

The last ground of appeal is on the division of the matrimonial assets. The submissions by Mr. Mbuya is that according to Chagga custom, the respondent should not have been given a share in the two houses built in Moshi because they are built on a clan land. It is not allowed to alienate such property. Mr. Mbuya said this is the spirit in section 114(2) of the Law of Marriage Act, 1971 which requires the court to put into consideration the custom of the community to which the parties belong.

Regarding other properties that is the house at Tandika and the sewing machines, Mr. Mbuya submitted that the respondent was an unemployed house wife who earned no income and could not contribute anything in terms of money or property towards the construction of the house. That the only contribution made is "house keeping" which amounts to a purely conjugal obligation which does not entitle the applicant to the division of the house in Tandika. As for the sewing machines, the submission was that they were acquired before the marriage and therefore the respondent never contributed towards their acquisition.

The submission by Mr. Mbuya to say the least, is a clear reflection of the violence and discrimination which a woman has lived with in the society for years. Services by women which require recognition and compensation are termed conjugal obligations on the part of the woman. This is so even where they are not reciprocated and the woman ends up in being exploited and a looser. In this case the respondent did testify of being sent to Moshi to take care of the appellants grandmother who was old. She stayed with her until her death. She also used to take care of the appellants "kihamba's and cows" and the income was used for the development of the houses in Moshi. Definitely the respondent made contributions towards acquisition of the properties.

The case of Bi Hawa Mohamed recognizes housekeeping as services requiring compensation. As was observed by the Court of Appeal, the rendering of such services make the other spouse stable and enhances the ability to concentrate on development of properties.

From the submission made by Mr. F. Mbuya, he appears to suggest that despite the years the respondent spent in the matrimonial life with the appellant, she should leave bare handed and leave the appellant with all the properties at Moshi and Dar es salaam. That on the years she spent with the appellant, she was fulfilling her conjugal obligation how was this obligation reciprocated? Commission of adultery by the appellant and being thrown out without anything?

Will such a decision be fair? With greatest respect to Mr. Mbuya such a decision will be discriminatory. The Constitution of the United Republic of Tanzania 1977 Article 13(1), bars discrimination. All persons are required to be protected equally before the law.

Article 9(f) of the Constitution requires State Authorities and all its agencies to direct their policies and programs towards ensuring that the human dignity is preserved in accordance with the Universal Declaration of Human Rights which is the source of human rights law. This means that policies and programs of the courts must be geared towards ensuring preservation of human dignity.

While the Convention on the Elimination of all Forms of Discrimination Against Women was ratified by Tanzania since 17th July, 1980, Article 15 requires State Parties to accord women equality with men before the law. The women should not be discriminated simply because of being women.

Since there was evidence that the respondent did contribute towards the acquisition of the properties, it was not wrong for the trial magistrate to grant her a division in the matrimonial properties. The only thing which I fear may make the respondent fail to get the remedy, is the grant of the division in the houses at Moshi. Customary rites may be an obstacle toward realization of what was granted to her. Under such circumstances I quash and set aside the order of the trial court on the division of matrimonial assets. Instead, I will replace it with an order that the respondent is given the house at Tandika as her share in the matrimonial assets. The appellant to remain with all other properties. In this way the remedy to the respondent will be more effective than the remedy granted to her by trial court. The appeal is dismissed.

No order for costs. Each party to bear own costs.