

A A, charged with refusing without lawful excuse to answer a question contrary to section 116(b) Penal Code. Court takes cognizance of offence under section 116(2) and sentences A ...

B Of course in that case, the Court of Appeal was also influenced by the fact that the trial court's record showed that appellant had been persistently warned by the court to answer questions but in vain. In the present case, before convicting the appellant the learned trial magistrate recorded:

C Court: This accused witness has been repeatedly warned by the court to answer questions put to him by his co-accused but he has deliberately refused to answer. This is, in my view a disrespect to the court and as such the accused witness has committed the offence of Contempt of Court contrary to section 114(1)(b) of the Penal Code Chapter 16.

D The accused witness is therefore asked to state his reasons as to why he should not be punished for Contempt of Court.

E Accused witness states: I have refused to answer the questions put to me by the co-accused (number 3) because they are irrelevant to this instant case except that they are relevant to the previous case (Criminal Civil Number 30 of 1981) which has already been determined by this court on 26 June 1981. I repeat that I am not going to answer the accused's question in this cross-examination.

F And after the appellant's reply, the learned trial magistrate summarily convicted the appellant. With respect, I am quite convinced that from the court record as quoted above the learned trial magistrate slavishly complied with the provisions of subsection (2) of section 114. The learned defence counsel's argument, which unfortunately was not challenged by the learned Senior State Attorney, is dismissed.

H However, I totally agree with both learned counsel that the sentence of six months imprisonment imposed on the appellant is illegal. According to section 114(2) under which the summary conviction was entered, the maximum sentence which a court is empowered to impose is a fine of TZS. 400 (four hundred) or one month imprisonment in default.

I It is only where the accused has been convicted through normal indictment

A that the court is empowered to impose a maximum sentence of six months or a fine not exceeding 500 (five hundred) TZS.

B In conclusion, the appeal against conviction is dismissed. But on the ground of illegality, the appeal against sentence is allowed. Hence the sentence of six months imprisonment is set aside and in substitute the appellant is sentenced to imprisonment for one month. This alteration of sentence is of no beneficial value to the appellant as he has already completed serving the said illegal sentence. It is, however, important for record purposes.

D MWANAHAWA HEMEDI v. RASHIDI KULOMBA

E IN THE HIGH COURT OF TANZANIA

AT MTWARA

(Kyando, J.)

F (PC) MATRIMONIAL CIVIL APPEAL No. 2 OF 1983

(From the decision of the District Court of Newala at Newala in Civil Appeal No. 9 of 1982 Original Chilangala Civil Case No. 36 of 1981)

G *Family Law – Divorce – Grounds for the court to grant divorce – Whether willful neglect is a sufficient ground for granting divorce.*

H *Family Law – Petition for divorce – Attendance before the Marriage Conciliation Board before petitioning for divorce – Party failing or refusing to attend before the Board – Effect thereof – Section 101 of the Law of Marriage Act 1971.*

I The appellant had petitioned the Primary Court for a Decree of Divorce due to conflicts in her marriage with the respondent. The Primary Court unanimously granted the petition and dissolved the marriage. The respondent successfully appealed to the District Court. The appellant appealed further to the High Court.

A **Held:** (i) According to section 101 of the Law of Marriage Act 1971, no person shall petition for divorce unless he/she has first referred the matrimonial dispute to the Marriage Conciliation Board and the Board has certified that it has failed to reconcile the parties.

B (ii) Section 101(c) of the Law of Marriage Act 1971 provides that a party cannot be compelled to attend before a Marriage Conciliation Board but the effect of refusal or failure to attend is to allow the other party to proceed to petition for divorce without the Board's certificate.

C (iii) Section 107(1) of the Law of Marriage Act 1971 requires the court, in determining whether or not a marriage is irreparably broken down, to have regard to all relevant factors regarding the conduct and circumstances of the parties.

D (iv) To establish that a marriage is irreparably broken down, the court may accept evidence to show any of the factors mentioned under section 107(2) of the Law of Marriage Act 1971, which mentions wilful neglect as one of the factors.

(v) There was wilful neglect on the part of the respondent.

E **Appeal allowed**

JUDGMENT

(Dated 01 October 1987)

F **KYANDO, J.:** This is a second appeal. On 30 September 1987, I allowed it but reserved my reasons for doing so. I now proceed to give them.

G The appellant, Mwanahawa Mohemedi, had petitioned the Primary Court of Chilangala, Newala District, for a decree of divorce. In a unanimous decision the Primary Court decided in her favour and dissolved her marriage to the respondent, Rashidi Kulomba. The respondent was aggrieved and he appealed to the District Court. The District Court (S.M. Ngwawasya, DM) allowed the appeal and set aside the decision of the Primary Court. The appellant then appealed to this court.

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A Briefly, the parties were married in 1974. The appellant stated in her evidence that they lived happily thereafter until in 1977 when conflicts started to afflict their marriage. Those conflicts were narrated by the appellant to the Primary Court as follows:

B *Mdaiwa alilima shamba, akasema ni letu wote mimi na mke mwenzangu. Wakati wa mavuno aliuza na fedha akanunua kanga pande 9. Mimi akanipa pande 2 na mwenzangu akampa pande 7.*

C *Nilipomuuliza sababu ya kufanya hivyo hakunipa jibu. Mwaka 1978 mdaiwa alilima shamba na kumpa mwenzangu tu, mimi aliniacha bila shamba, ilibidi nijitegemee mwenyewe kulima hadi kuvuna bila kumuona mdaiwa shambani kwangu. Siku moja mdaiwa alifika nyumbani nilimokuwa nalala akachukua kitanda akakikatakata na kunipiga akidai kuwa mimi ninatembea na wanaume ovyo.*

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Mwaka 1979 mdaiwa alilima tena shamba kwa mke mwenzangu bila mimi kunisaidia ama kunijali. Mke mwenzangu aliuguliwa na mtoto wake akalazwa hospitali. Alikaa huko muda mrefu sana hadi mtoto akapata nafuu. Aliporudi kulikuwa kilimo cha soya naye aliambiwa akapumzike. Akaenda kwao. Mimi na mume huyu tukalima soya na mahindi tukapata gunia 9 za soya na mahindi kiasi, mdaiwa alienda kumchukua mke mwenzangu na kumkabidhi mahindi yale bila kunishauri. Nilipomuuliza alisema hawezi kulazimishwa maana sikutoka na kitu kwetu. Baada ya kuuza soya alininunulia vitu vichache tu, nilipomuuliza akasema nisimpangie. Mwaka 1981 alisema nataka kulima shamba lake peke yake anakataa ugomvi. Wakati wa kukata mtama alikata wake na wa mke mwenzangu, nilipomuuliza kuhusu wangu akaniambia hujui tu kwamba sikupendi? Mimi nilipika mkumi watu wanisaidie kukata mtama, mdaiwa aliwakataza watu wasinisaidie. Nilipomuuliza akasema ni kwa kuwa ni mwezi wa Ramadhani, ungekuwa mfungo Mosi ungepata talaka yako. Nilikwenda kwa Balozi akaitwa akakataa. Nikaenda Bodi ya Ndoa, nako alikataa kufika kiasi cha mara tatu, nikapata barua kwenda mahakamani, ambako tulipangiwa kusuluhishwa nyumbani. Wazee walisema mashauri yatazungumzwa tarehe 8 Septemba 1981. Siku hiyo ya tarehe 8 Septemba 1981 mdaiwa aliondoka akaenda

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A *safari zake. Wazee walisubiri hadi kushindwa wakarudi majumbani kwao. Baada ya siku chache nikaenda kusalimu wazazi huko Mtama. Niliporudi nikakuta gunia mbili za Mtama hazipo, viazi vikuu shambani hakuna. Nilipomuuliza mdaiwa alisema ameuza.*

B In his defence to the above allegations by the appellant the respondent merely told the Primary Court as follows:

C *Mimi nafahamu kuwa mdai anataka talaka mimi nimemkubalia. Sina zaidi.*

C *Mshauri Na.1: Matatizo yetu yamesuluhishwa zaidi ya mara tano.*

C *Mshauri Na.2: Mdai ana tabia ambayo hadi sasa mimi nimeshindwa kwa kweli madai yake yana msingi. Nakubaliana naye apate talaka.*

D On the basis of the above, the Primary Court proceeded to decide the matter in favour, as shown already, of the appellant. I might add that she (the appellant) had produced a letter from the Marriage Conciliatory Board which stated that the board had failed to reconcile the parties because the respondent would not attend before it.

E In allowing the respondent's appeal to the District Court, the learned District Magistrate observed, *inter alia*, that the trial court, in granting divorce, had argued (*sic*) that because the appellant had refused to attend a Conciliatory Board, then this is clear evidence that the marriage has broken down. On perusing the record there is no where to the effect that the appellant was served with notices to attend the board. If a person refuses to attend a board, the procedure is that the Chairman may apply for a court summons to compel him to attend the board. As the case stands there is no where showing that the Chairman had applied for the court's assistance.

H The learned District Magistrate went on to state:

I Also the only evidence that the marriage has irreparably broken down is as listed under section 107(1)(2)(3) of Act Number 5 of 1971. With due respect, this is not one of them.

A The District Magistrate finally held that the points raised by the respondent (now appellant) were not "so strong to compel the court to grant divorce. These are minor quarrels which could be reconciled by the elders or their Marriage Conciliatory Board".

B In admitting appellant's appeal to hearing my learned brother, Msumi, J, minuted:

Admit.

C District Court's decision at variance with the evidence on record.

D With very deep respect, this is so. The learned District Magistrate mistakenly and unjustifiably assumed that the Primary Court granted the petition only on the ground that the respondent had failed to attend Conciliatory Board meetings. The Primary Court, on the contrary, went behind the refusal of the respondent to attend the Conciliatory Board Meetings and analysed and considered the evidence constituting the appellant's complaints which she wanted the Conciliatory Board and the court to consider and resolve. The learned District Magistrate therefore misdirected himself in considering the case as decided by the Primary Court in the manner he considered it. Besides what has been just stated above, the learned District Magistrate seriously misdirected himself on the two points of law he considered in his judgment, i.e. that in relation to the procedure for procuring the attendance of a party to a matrimonial dispute before a Conciliatory Board, and that on the grounds upon which a court can dissolve a marriage. As regards the first point the learned District Magistrate no doubt had in mind the provisions which are in section 104 of the Law of Marriage Act 1971. The relevant parts of section 104 state:

H 104(1) A board to which a matrimonial dispute or matter has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard and *may hear such other persons and make such inquiries as it may think fit ...* [emphasis supplied]

I (2) Where a board is of the opinion that it is necessary for it to require the attendance of any person before it, may by Notice in Writing

A require such person to attend before the Board on the date and at the time and place specified in such notice.

(3) Where a person on whom a notice under subsection (2) is served fails to comply with such notice, the board may apply to a Primary Court or District Court for a summons to be issued to such person to appear before the board on the date and at the time and place specified in such summons.

(4) Every summons issued under subsection (3) shall be in the same form and shall have the same effect as a summons issued by a court requiring the attendance of a witness in any suit, and any non-compliance with such summons shall constitute a Contempt of Court and be punishable accordingly.

D In construing these provisions, reference has to be had to the provisions of section 101(c) of the Law of Marriage Act 1971, also section 101(c) provides:

E No person shall petition for divorce unless her or she has first referred the matrimonial difficulty to a board and the board has certified that it has failed to reconcile the parties:

Provided that this requirement shall not apply in any case:

F (a) ...

(b) ...

(c) Where the respondent has been required to appear before the board and has willfully failed to attend; or

H Under section 101(c), therefore, a party can decide not to attend before a Marriage Conciliatory Board and the consequences will be not to compel his attendance by a summons, but to allow the other party to proceed to petition for divorce without referring the matrimonial difficulty to a board. This means then that the procedures for summonses do not apply to parties themselves to matrimonial disputes or matters; they apply to other persons whom a board may deem fit to require their attendance. The situation is analogous to an ordinary civil suit:

A if a party to a suit fails to appear after being duly notified, the suit proceeds without hearing him; if a witness fails to attend court, however, after being summoned, he can be liable to penalties.

B So in the instant case there was no legal requirement for the board to summon the respondent. He failed to attend before the Board and under section 101(c) of the Law of Marriage Act, 1971, the board gave the appellant a letter to take to the court. This was a very proper procedure.

C Turning to the second point, it is not clear what the learned District Magistrate meant when he stated in his judgment that the only evidence that a marriage has irreparably broken down is as listed in section 107(1), (2) and (3) of the Law of Marriage Act Number 5 of 1971. This is because section 7(1) contains general provisions. It states:

107(1) In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties... [emphasis supplied]

E These provisions do not specify any particular kind of evidence to establish that a marriage has broken down. They empower, in fact compel, a court to have regard to all relevant evidence regarding the conduct and circumstances of the parties, and in the instant case the appellant was complaining about the conduct of the respondent towards her.

Even if specifics were required, section 107(2) provides:

G 107(2) Without prejudice to the generality of sub-section (1), the court may accept anyone or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as a right to a decree:

(a) ...

(b) ...

(c) ...

A (d) Wilful neglect on the party of the respondent.

(e) ...

B The appellant's complaints fell within the ambit of section 107(2)(d) of the Law of Marriage Act. As noted above, the learned District Magistrate was blinded from considering these by the assumption, which he made, that the Primary Court granted the Decree of Divorce solely on the ground that the respondent had failed to attend before the Conciliation Board. With respect, he erred. There was more than
C this on record to justify the Primary Court's decision. If he (the learned District Magistrate) was not in a hurry to write a brief and cursory judgment he would have found time to see the overwhelming evidence which the Primary Court considered in reaching its decision.
D I hold that the Primary Court was justified in dissolving the marriage in this case. I restore therefore that decision and set aside that of the District Court.

E Before me, the respondent pretended to be still in love with his wife. He revealed that she married another man after she was granted the decree of divorce by the Primary Court. She later divorced that other man too and is now with yet a different man. In the Primary Court, he (the respondent) agreed that his marriage with the appellant
F was ridden with conflicts and that they should be divorced. I fail to understand him now therefore when he says he would like her back. The situation is almost impossible now, with the marriage she has contracted.

G It is for the above reasons that I allowed appellant's appeal in this matter.

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JUMA RAHISI NANYANJE v. SHEKHE FARISI

HIGH COURT OF TANZANIA
AT MTWARA

(Kyando, J.)

(PC) CIVIL APPEAL No. 24 OF 1985

(Appeal from the judgment of Newala District Court in DC Civil Appeal No. 21 of 1985)

Civil Practice and Procedure – Jurisdiction – Pecuniary jurisdiction of Primary Court – Whether a Primary Court may entertain a suit for recovery of a debt arising out of contract between natural persons exceeding the value of TZS. 10 000 000 – section 18(1)(a)(iii) of the Magistrates Courts Act 1984.

Family Law – Property – Property owned jointly between husband and wife – Death of one spouse – Property devolves on the survivor.

Contract of Sale – Jointly owned property between spouses – Death of one spouse – Whether the survivor upon whom the property devolves may dispose of such property.

Farisi Mbwana and his wife jointly owned a house. After the death of the wife the husband sold the house to the appellant for TZS. 15 000 without informing his five children. One of the children successfully filed a suit in a Primary Court to recover the house on the grounds that their father could not validly sell the house which he jointly owned with their mother. An appeal by the appellant to the District Court challenging, among others, the jurisdiction of the Primary Court was not successful. A further appeal was made to the High Court.

Held: (i) The District Court Magistrate erred in holding that the Primary Court had pecuniary jurisdiction to entertain this matter by virtue of the provisions of section 18(1)(a)(ii) of the Magistrates Courts Act 1984;

(ii) Since Farisi Mbwana and his late wife, the mother of the respondent, were joint owners of the house during her lifetime then, upon her death, and in the absence