THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE S.B.K. KAVUMA, JA

CIVIL APPEAL NO.30 OF 2007

JULIUS RWABINUMI …….APPELLANT

V E R S U S

HOPE BAHIMBISOMWE……RESPONDENT

(Appeal from the judgment of
the High Court of Uganda (Kasule, J)
dated 25th August 2006 in Divorce Cause No.4 of 2004)

JUDGMENT OF TWINOMUJUNI, JA

This is an appeal from the judgment and orders of the High Court of Uganda in which Hon. Justice Remmy Kasule granted to the respondent a Decree Nisi and made various consequential orders. He also dismissed a cross petition of the appellant with costs in which he had cross-petitioned for divorce and various consequential orders.

The brief facts of the petition were that the appellant and the respondent were wedded on 30th August 2003 at Our Lady of Africa Mbuya Catholic Church. Before this wedding, the two had lived together informally and produced a baby boy on 28th March 2003 named Edison

Rubarema. However, between the date of the wedding and July 2004, when the parties separated, the marriage was strained and broke down irretrievably. It was the case for the respondent that it was the conduct of the appellant that led to the break down of the marriage. In her divorce petition dated 14th February 2005, she complained that the appellant was guilty of the following conduct:-

(a) Adulterous co-habitation with another woman with whom he had a baby boy.
(b) Extreme cruelty leading to physical and mental torture.
(c) Persistently accusing her of involvement in witchcraft related conduct without just cause.
(d) Repeatedly using abusive and derogatory language towards her causing extreme mental torture and anguish.
(e) Forcefully ejecting her from the matrimonial home with his son on baseless grounds.

The petition prayed for an order for divorce including an order that the appellant maintains her and their child whom he had refused to maintain. She also asked the court to award her possession of a number of properties which she outlined in the petition.

In reply to the petition, the appellant denied the accusations of adultery, cruelty or any other conduct alleged to have caused the breakdown of the marriage. He also denied the paternity of Edison Rubarema.

In a cross-petition, the appellant prayed for divorce on the following grounds:-

(a) That the respondent was guilty of adultery that led to the birth of Edison Rubarema.
(b) That the respondent had during the subsistence of their marriage engaged herself in acts of witchcraft aimed at harming the appellant's child with assistance of her mother one Eva Bakeiha.
(c) That the marriage had irretrievably broken down.

The leaned trial judge, after hearing the evidence of all relevant witnesses who were presented, granted to the respondent the decree nisi and made other orders as already mentioned above. He dismissed the cross-petition with costs to the respondent. Being disatisfied, the appellant appealed relying on the following grounds of appeal:-

"1. The learned trial judge erred in law and fact when he held that the appellant was cruel towards the respondent.

2. The learned trial judge erred in law and fact when he held that the responded did not practice witchcraft.

3. The learned trial judge misdirected himself by failing to properly evaluate and analyze the evidence on record and to consider the respondent's evidence and thereby came to wrong conclusions.

4. The learned trial judge erred in law and fact when he ordered that the parties share the various properties when the respondent never proved any contribution towards acquisition of the same.

5. The learned trial judge erred in law when he awarded remedies like paying for the maintenance of the child retrospectively and interest against the appellant that were neither pleaded nor proved by the respondent thus occasioning a miscarriage of justice.

At the hearing of the appeal before us, the appellant applied for leave to add a sixth ground of appeal, which application was granted. The six ground of appeal states:-

"The learned trial judge erred in law when he wholly dismissed the appellant's cross-petition."

It should be noted from the start that the appellant did not raise a ground of appeal challenging the finding of the trial court that Edison Rubarema was an issue of the marriage between the appellant and the respondent. Since this was one of the framed issues at the trial, it follows that the appellant now accepts the finding of the trial judge that he was the father of the boy and I see no reason why the finding should be disturbed on appeal. I shall now consider the six grounds of appeal on their merits.

At a scheduling conference which took place before the Registrar of this Court on 12th December 2007, the parties agreed, among other things that:

“Each party will go by its legal arguments in the conferencing notes which will be supplemented by oral arguments on the day of hearing the appeal.”

The conferencing notes are on record and the parties supplemented the notes by oral arguments on the hearing of the appeal. In resolving the issues presented by this appeal, I have to consider, not only the evidence adduced in the High Court and the judgment of the court but also the conferencing notes as supplemented by the oral arguments in this court.

At the hearing of the appeal, the appellant was represented by Mr. Obed Mwebesa of M/s Nuwagaba, Mwebesa & Co. Advocates and the respondent was represented by Mrs Veni Murangira of Murangira Kasande & Co. Advocates. Both parties to the appeal were also physically present in court.

I propose to resolve the issues on appeal in the same order in which they were argued by counsel before us.

GROUNDS ONE & AND TWO

For ease of reference, I reproduce these two grounds here:-

1. The learned trial judge erred in law and fact when he held that the appellant was cruel towards the respondent.
2. The learned trial judge erred in law and fact when he held that the respondent did not practice witchcraft.

On the issue of cruelty, the learned trial judge held that the appellant was cruel to his wife because:-

(a) He boycotted taking food prepared by his wife.
(b) Persistently accusing her of adultery unjustifiably.
(c) Beating her several times and causing her mental torture whenever she complained about his coming home very late at night.
(d) His persistent accusation that she and her mother were practicing witchcraft without proof.

The appellant attacked some of these findings. He accused the trial judge of failing to take into account his evidence rebutting the accusation against him. He insisted that he had denied all of them and the court should have believed him.

The trial judge considered the evidence of both the appellant and the respondent on the issue of boycotting food. He stated:

> **"The petitioner's evidence is that the respondent was, from start of marriage, cruel to her because he boycotted taking food prepared by her; preferred to take that of DW3, the house girl. Respondent admitted this, explaining that, the boycott was due to the fact that the petitioner was practising witchcraft on him. The only way for him to survive was not to eat her food. *"That is why I am around."*, he testified.**
>
> **DW2, respondent's young brother, also confirmed that he, too, for the same reason boycotted food prepared by the petitioner.**
>
> **DW3 did not deny preparing food for the respondent and DW2.**
>
> **Court finds the conduct of respondent to boycott eating food prepared by the petitioner, his wife, to be demeaning of her in front of the occupants of the matrimonial home. This was aggravated by the respondent approving his young brother, DW2, to behave likewise towards the petitioner. The court holds such conduct to have amounted to cruelty by the respondent to his wife, the petitioner."**

It is obvious that the trial judge considered the appellant's defences but he did not believe the evidence. It is a question of credibility. Dealing with the other complaints on incidents of cruelty mentioned above the trial judge found:-

> **"The petitioner also stated that the persistent coming back home between 3.00 and 4.00 am at night by respondent, while in Kampala from Mbale, was cruelty to her.**

Respondent, in reply, first explained that, in so acting, he was exercising his freedom to socialize with his friends. Later he contradicted himself by denying that he was so behaving towards the petitioner.

The court observed the respondent's demeanour while denying this accusation. He was subdued. He did not appear truthful. The petitioner by contrast, was straight forward and clear in her testimony on the matter. The court accepts her evidence as truthful and rejects the denial of the respondent. The court holds such respondent's conduct, of persistent coming back home late at night, to have been cruelty to the petitioner.

Petitioner further testified that the respondent was cruel to her because of his repeated complaint to and against her, without any justification, that she was having intimate affairs with other men and was thus unfaithful to him. These men, respondent further complained, were returning her home late at night. Because of this, she was picking the respondent's son, Eddie Rugambwa, late from school

Petitioner denied this accusation. DW2 and DW3, both staying at home while respondent was in Mbale, never mentioned the same in their respective testimonies. They also never testified that the child was being returned home late from school. No man was named by respondent as having had an affair with petitioner.

Court finds the above accusation against petitioner to have had no foundation whatsoever. Thus it's being perpetuated by the respondent against his wife, the petitioner, amounted to cruelty to her.

Petitioner adduced evidence that respondent had at one time in the course of the marriage, physically hit her with a chair. This is when she had protested against his coming back late at night. He had also physically assaulted her in other incidents. When these incidents increased, she reported the same to police officers who knew the family at Kira Road

Police Station, CID Headquarters and Kabuli Training School. The respondent, every time on being summoned, requested police to let him and petitioner solve the misunderstandings, with the elders, as a family matter. Once out of police, respondent would then not allow any family elders to meet over the issue.

Respondent admitted that petitioner complained to police. He, however, denied ever assaulting her. But PW3 and DW3 confirmed that they had seen petitioner and respondent fight at Kisaasi home. Respondent also gave no explanation as to what complaints he was answering at police, if not those of assaults, reported by the petitioner.

Court accepts the evidence of petitioner that she used to be physically assaulted by respondent now and then. This too was cruelty to her by respondent.

The evidence of the petitioner that on 30.07.04, the respondent ordered her together with the infant, Edison Rubarema, out of the matrimonial home, is not controverted by the respondent.

The petitioner stated, and the respondent did not deny, that armed men were placed at the gate at Kisaasi to see to it that petitioner leaves and does not continue staying at the matrimonial home.

On the basis of this evidence court holds hat the way the petitioner was made to leave the matrimonial home, by use of armed personnel, amounted to cruelty by respondent to petitioner.

The court resolves the second issue by holding that, petitioner has proved to its satisfaction, that respondent committed cruelty against her."

Again it comes out clearly that the trial judge considered the evidence of the appellant along with that of the respondent, but he did not find it credible. He rejected it. The court clearly

stated why it found the evidence of the respondent preferable on this matter. I find no fault with the judge's finding and I would uphold the same.

I have also studied the handling of the issue of witchcraft by the trial judge. Again, the evidence of the appellant was considered at length and rejected as not credible. The trial judge preferred the evidence of the respondent. He therefore, concluded that it was not proved that she practiced witchcraft and that continually accusing her and her mother of doing so also amounted to cruelty. I find no fault within this analysis. The trial judge was entitled to reject evidence he did not find credible. In my judgment, I find no merit in the first two grounds of appeal which should fail.

GROUND NO. THREE

3. The learned trial judge erred in law and fact when he held that the respondent did not practice witchcraft.

On this ground, the appellant sought to challenge the trial court's right to prefer the evidence of the respondent, to that of the appellant, DW2 and DW3 on the issue of witchcraft. He further submitted that the evidence of DW2 and DW3 was totally ignored which led him to arrive at a wrong conclusion.

A perusal of the judgment of the trial judge shows that the judge considered at length the evidence of the appellant, DW2 and DW3. He did not find it satisfactory or reliable. He rejected it. He was entitled to do so. Therefore I find no merit in this ground of appeal which should fail.

GROUND NO. FOUR

This ground states:

> **"The learned judge erred in law and in fact when he ordered that the parties share the various properties when the respondent never proved any contribution towards acquisition of the same."**

In arguing this ground, counsel for the appellant complained that the trial judge was wrong to award the respondent various portions of matrimonial property when she did not produced documentary evidence to prove her contribution to the acquisition of the property. He also complained that the evidence of the appellant on sharing matrimonial property was totally ignored by the trial judge thus arriving at a one sided conclusion on the matter.

On the other hand counsel for the respondent submitted that the trial judge was correct in his decision to order the sharing of the property. He cited Article 31 of the Constitution of Uganda, 1995, and the authority of **Tom Kintu Muwanga vs Myllionus Gafabusa, Divorce Appeal No.135 of 1998 (HC).**

This ground of appeal raises a number of fundamental questions as to what happens to matrimonial property after divorce. Answers to two questions are particularly called for.

(a) Is there an established formula for division of the matrimonial property after the dissolution of a marriage under the Divorce Act?

(b) To what extent should the contribution of the spouses to the acquisition of each property be taken into account?

The law applicable to the holding and division of matrimonial property after divorce is that contained in our Divorce Act (Laws of Uganda Cap249) and a long line of decisions of the British Courts and those of Uganda Courts basing mainly on the Common Law provisions of marriage and divorce. Both of these have a long history of treating the woman as an inferior partner in marriage. A woman was regarded as a property of the man and totally incapable of holding property of her own independently of man. As a result, the earlier court decisions held that women in a matrimonial relationship could not acquire and hold real property. Later on, the decisions started recognising the right of women to hold property in their own right. Examples of such a decisions are to be found in **Chapman vs Chapman [1969] ALL ER 476**, **Gissing vs Gissing [1970] 2 ALL ER 780** and **Falconer vs Falconer [1970] 3 ALL ER 449.**

In this last mentioned case, the spouses and their parents had made varying contributions directly and indirectly to the construction of a matrimonial home which was at the time of divorce standing in the names of the wife. After divorce, the wife tried to exclude her former

husband form benefiting from the house. The Court of Appeal, per Denning, MR had this to say:-

"The next point taken by the wife in the notice of appeal is that while the parties lived together, the husband's contributions were made wholly or mainly in respect of housekeeping expenses'; that, on this account, they should not be regarded as contributions to the house or to paying off the mortgage instalments. This sort of point was discussed in Gissing v Gissing, and I will try to distil what was said. The House did not overturn any of the previous cases in this court on the subject. They can, i think, still provide good guidance. But the House did make clear the legal basis for them. It stated the principles on which a matrimonial home, which stands in the name of husband or wife alone, is nevertheless held to belong to them both jointly (in equal or unequal shares). It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of an inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it. This inference of a trust, the one for the other, is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. The financial contribution may be direct, as where it is actually stated to be a contribution towards the price of the instalments. It may be indirect, as where both go out to work, and one pays the housekeeping and the other the mortgage instalments. It does not matter which way round it is. It does not matter who pays what. So long as there is a substantial financial contribution to the family expenses, it raises the inference of a trust. But where it is insubstantial, no such inference can be drawn, see the cases collected in the dissenting judgment in Gissing vs Gissing of Edmumund Davis LJ, which was upheld by the House. The House did, however, sound a note of warning about proportions. It is not in every case that the parties hold in equal shares. Regard must be had to their respective contributions. This confirms the

practice of this court. In quite a few cases we have not given half-and-half but something different."

As I understand it, where the contribution of spouses to matrimonial property is substantial, then there is an inference that the spouses created a trust in the property whether it is in the name of the husband or wife. The spouses own the property equally. However where the contribution of one of them is not substantial, then the courts would have to determine the contribution of each one in order to equitably divide such property.

It is now generally accepted that in Uganda or Africa where most rural wives are not employed or in salaried employment, contribution does not necessarily mean cash payments. It is sufficient if as a result of division of labour, the spouses perform different functions all which enhance the good of the family including the acquisition of matrimonial property like the one in question - See the Kenyan Court of Appeal persuasive authority of **Kivuitu vs Kivuitu, Civil Appeal No.26 of 1985 (C.A)** and the **Uganda High Court Divorce Appeal No.135 of 1998 Tom Kintu Muwanga vs Myllious Gafabusa Kintu**. However, as rightly observed by Hon. Lady Justice S.B. Bossa, J in **Kintu Muwanga (**supra), the position of Ugandan women in a matrimonial relationship has drastically changed since 1995 Constitution came into force. Article 31(1) of the Constitution provides:-

"Men and women of age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and its dissolution." [Emphasis supplied]

In this petition, we are dealing with the dissolution of a marriage contracted in Church under the christian tradition. Quoting the bible here cannot be regarded as far fetched.

In Genesis Chapter 2 verses 21-25, we find the following provision:

"The Lord God made the man fall into a deep sleep, and while he was sleeping, he took out one of the man's ribs and closed up the flesh. He formed a woman out of the rib and brought her to him. Then the man said,

"At last, here is one of my own kind – Bone taken from my bone, and flesh from my flesh. 'Woman' is her name because she was taken out of man."

<u>That is why a man leaves his father and mother and is united with his wife, and they become one.</u>" [Emphasis supplied]

This statement supports the above cited constitutional provision, that though woman was created differently from man, yet they were made for each other to be equal to each other in unity as one.

The parties to this appeal were married in the Christian tradition on 30th August 2003. The ceremony took place in Our Lady of Africa Mbuya Catholic Church. All those who choose to be married in Church must take vows at the precise moment when they become husband and wife. The vows are to the effect that they undertake to live together as husband and wife, in shared companionship in riches or poverty.

These vows are usually made in presence of hundreds and sometimes thousands of their parents, relatives and friends. My understanding of the vows is that at the time the bridegroom and the bride become husband and wife, all the property they own become joint property. All the property they acquire during the subsistence of their marriage is theirs to share equally in unity and love. At the time of the vows, it is never envisaged that the spouses would have to split. In fact they are told in Church that:

"That which God has put together let no person divide".

Unfortunately, however, marriage breakdown are so common these days and have become a reality that cannot be ignored. Divorce proceedings normally follow. The issue as to what should happen to their joint property arises for determination as in this case.

In my humble judgment, I do not see why the issue of contribution to the property should arise at all. The property is theirs – Period. In 1995, for the first time in our history, the Constitution of Uganda clearly put into reality the equality in marriage principle contained in Genesis Chapter 2 verse 24 (supra) and what those who choose to contract marriages under the Marriage Act undertake to practice. My conclusion is that matrimonial property is joint

property between husband and wife and should be shared equally on divorce, irrespective of who paid for what and how much was paid. Very often, the woman will find a husband who is already wealthy and has a lot of property. If that property belongs to the man at the point of exchanging the vows in Church, that property becomes joint property. These days it is normal for a woman to come into marriage with wealth such as houses, land, cows and other properties form her own sweat, her parents, relatives and friends. If at the time of the Church vows, they are solely owned by the woman, they become joint matrimonial property. From then onwards the fact that they are registered in the names of the wife or husband is not relevant. It belongs to both. Therefore on separation they should be equally divided and shared to the extent possible and practicable.

I must hasten to add that this categorical statement is confined to the marriages under the Marriage Act, Cap.251 Laws of Uganda. This does not mean that the constitutional requirement of equality in marriage does not apply to other types of recognised marriages in Uganda. The principle applies to all marriages in Uganda. However, the application of the principle may vary depending on the nature of the marriage contract the spouses agreed to contract. I would also add that like in all other contracts, parties to a marriage have a right to exclude any property from those to be deemed as matrimonial property. This can be made expressly or by implication before marriage or at the time of acquisition of the property by any spouse. Otherwise the joint trust principle will be deemed to apply to all property belonging to the parties to the marriage at the time of the marriage and during its subsistence.

In the instant appeal, the learned trial judge tried as much as he could to share what he found as matrimonial property between the appellant and the respondent. However, he did not follow the formula proposed above. He took into account to what extent the spouses had contributed to the acquisition of each property in question. He was obviously following the common law and both British and local authorities which have followed. Most of those decisions were made before the promulgation of Uganda 1995 Constitution. Nevertheless, I do not think that we should disturb his findings and division of the property, especially when the respondent did not cross-appeal against it. I would uphold the decision of the trial judge on this issue. This ground of appeal should fail.

GROUND NO. FIVE

It states:

> **"The learned trial judge erred in law and fact when he awarded remedies like paying for the maintenance of the child retrospectively and interest against the appellant that were neither pleaded nor proved by the respondent thus occasioning a miscarriage of justice."**

There are two matters raised in this ground of appeal"-

(a) That the trial judge awarded remedies which were neither pleaded nor proved.

(b) That the remedy for maintenance of the child was given a retrospective effect.

It is true that the learned trial judge made the following order:-

- **"The respondent as a father, is ordered to contribute to the maintenance of the child's health, welfare and development which shall also include hospital and other expenses due to sickness, school fees and other education related expenses when the child becomes of school going age.**
- **Such respondent's contribution shall be paid to the petitioner in advance every six months commencing 01.09.06.**
- **The court holds that as from 30.07.04, the date the petitioner and the child were chased away by the respondent, the total monthly maintenance cost on the child has been shs.150,000/= thus making a total of shs.3,750,000/= to date. The respondent's share is half of this sum: shs.1,875,000/= which the respondent is ordered to pay forthwith to the petitioner.**
- **The sum of shs.75,000/= shall continue to be due contribution of respondent towards maintenance of the child until further orders of the court."**

In my judgement, there is nothing wrong with this order. The trial judge found that the child of the marriage had not received any maintenance from its father since 30.07.04. Yet it is the duty of a father, as in this case, to contribute to the maintenance of his child. It was proper

for the trial judge to order the appellant to maintain the boy from the time he chased him away from his home.

As for the complaint that the court made awards which were neither pleaded nor proved, I find no fault with the courts order. These are consequential orders of the court which must be proved but need not be specifically pleaded. Their being awarded depends on whether the main subject matter of the suit has succeeded or not. They are intended to give a full meaning of the verdict in the dispute. They can be awarded under the prayer for **"any other remedy the court may think fit."**

As to whether the petitioner had proved the awards, she gave oral evidence to the effect that since she left the matrimonial home, she was spending shs.150,000/= per month on feeding, school fees, medical care and other general expenses. Proof does not necessarily demand that a receipt for every item should be produced. It is within the discretion of the trial judge to determine weather the oral evidence is credible.

In the instant case, the appellant did not challenge the claim presumably because his line was that the boy was not his anyway. In these circumstances, the trial court was within its rights to hold that the figure of shsl.150,000/= was a reasonable estimation in the circumstances. I find no merit in this ground of appeal, which should fail.

GROUND NO SIX

This ground states:-

> **"The learned trial judge erred in law when he wholly dismissed the appellant's cross-appeal."**

The appellant submitted that the dismissal of his cross-appeal was erroneous because it contradicted the holding of the leaned judge that the marriage had irretrievably broken down. In his view, since one of his grounds for the cross-appeal was irretrievable break down of marriage, he should have allowed the cross-appeal, at least to that extent.

The cross-petition of the appellant was based on three grounds:-

(a) Adultery.

(b) Practising witchcraft.

(c) Irretrievable breakdown of marriage.

The learned trial judge found no evidence to support the grounds of adultery and practicing witchcraft. He also did not find evidence to support the appellant's claim that the marriage had irretrievably broken down as a result of the respondent's conduct or misconduct. He found that the marriage had irretrievably broken down due to the misconduct of the appellant. The claim could only have succeeded if the court had found fault with the respondent's conduct leading to the irretrievable breakdown of the marriage. I find no merit in this ground of appeal, which should fail.

In the result, I would hold that this appeal has no merit and therefore it should be dismissed with costs to the respondent here and in the High Court.

Dated at Kampala this……19th …..day of …….June…..2008.

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Hon. Justice A. Twinomujuni

JUSTICE OF APPEAL