

IGNATIUS JUNIUS VUSHANGWE
versus
TUTSIRAYI DORCAS CHADOKA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 5 November 2019 & 12 December 2019

Divorce Action

N. Zvidzayi, for the plaintiff
A.A. Debwe, for the defendant

MANZUNZU J: This is an action in which the plaintiff seeks a decree for divorce and other ancillaries. The only issue for trial was whether or not the marriage between the two had irretrievably broken down. The parties solemnized their marriage in church on 19 January 2013. By then the plaintiff was a widower and the defendant a spinster. Their first child was born in December 2013 with the second being born in February 2019 at the time divorce proceedings were pending before this court. Summons for divorce were issued in November 2016.

The plaintiff gave evidence to support his contention that the marriage has irretrievably broken down. On the other hand defendant also contend in her evidence that there were high hopes that the marriage could be salvaged.

Section 4 of the Matrimonial Causes Act [*Chapter 5:13*] provides that:

“A marriage may be dissolved by a decree of divorce by an appropriate court only on the grounds of;

- (a) irretrievable break down of the marriage as contemplated by section five.
- (b)

Section 5 lays down certain guidelines to assist in the determination whether a marriage has irretrievably broken down. These are no more than guidelines and are not exhaustive. If any of the facts in the guidelines are found to exist, there will be a presumption, rebuttable though, that the marriage has irretrievably broken down.

At the end of the day whether a marriage has irretrievably broken down is a question of fact determined on the circumstances of each case. The court must look through to see whether the marriage relationship between the parties is one which can be described as normal.

In his evidence the plaintiff said he developed irreconcilable differences with the defendant leading the defendant to move out and live with her parents. This led him to institute divorce proceedings. He said at some point during pre-trial conference the parties were given an opportunity to work out and see if they could salvage the marriage. He said that did not work despite a child being born during that period because according to him, defendant was trying to patch up love with a child. The plaintiff further said defendant was not prepared to live with him. He lives at the farm and the defendant lives with her parents. His position was that he has lost all love and affection for the defendant.

The plaintiff was cross-examined at length with the line of cross-examination taking the view that the marriage has not broken down irretrievably. He was asked why a child will be born out of parents without love for each other. His explanation was that she tempted her and manipulated him with the sole agenda to portray a false appearance to the world that all was normal in the marriage. He was adamant that he no longer loves the defendant who left him over 3 years ago to live with her parents.

The defendant on the other hand expressed a strong Christian view. She does not believe in divorce because the word of God tells her that God hates divorce. She narrated the events in her marriage upon which she maintains that the marriage can be salvaged. She is positive that they can still make up. The defendant is a devoted Christian who classified divorce as the devil's act which can be unchained through prayer. Such deep seated devotion remained with her even during cross examination when she was asked why she would insist on a marriage when the other party says he no longer loves her, she said it was his choice and her choice was to remain in marriage. Her main emphasis throughout her evidence was that she was the child of God and that God hates divorce.

The truth of the matter in this case is that there is no normal marriage relationship between the parties. It is clear that the parties have not enjoyed a continuous marriage relationship for the past 3 years. Their meeting is adhoc and most probably influenced by the bond of children more than the love between themselves.

The question one must answer is, given the circumstances of the parties, is there a reasonable prospect that the parties will restore a normal marriage relationship between themselves? My view is that there are no such prospects, more so that the parties though given a second chance did not come up with a normal relationship. The two parties did not show any compatibility even in court. Where one of the parties to a marriage is of a strong conviction that there is no marriage between the parties and circumstances do show in that direction, the

court cannot say to the contrary that the marriage should continue. Despite the pronouncement of the court, in support of the marriage the marriage will not be saved. As stated by J. Petersen in, “*Divorce Law Reform*” [1971] 88 SALT 478 e 479, “when a marriage which is essentially a social rather than a legal institution, had irreparably deteriorated, neither the State nor society has a justifiable interest in attempting to preserve by legal controls that which by social controls can no longer be maintained.”

In casu the parties’ marriage has irretrievably broken down, and the plaintiff’s action must succeed. The parties have agreed on the ancillaries to divorce.

IT IS ORDERED THAT:

1. A decree of divorce be and is hereby granted.
2. Custody of minor children, namely, Chikombero Vushangwe (born 1 December 2013) and Chishamiso Vushangwe (born 20 February 2019) is awarded to the defendant.
3. Plaintiff shall have access to the minor children twice every month during the first and third weekends.
4. Plaintiff shall pay maintenance for the said minor children at the rate of RTGS\$350 per month per child with effect from 1 January 2020 until each child attains the age of 18 years or becomes self-supporting whichever occurs sooner.
5. Each party to pay his/her own costs.

IEG Musimbe & Partners, plaintiff’s legal practitioners
Debwe & Partners, defendant’s legal practitioners