

DLW 201: FAMILY LAW

INTRODUCTION TO FAMILY LAW

MEANING OF MARRIAGE

ACCORDIND TO LMA

Marriage has been defined under section 9(1) of LMA that marriage is the voluntary union of man and woman intended to last for their joint lives. Generally this definition has got the following perceptions or elements as follows;

- ✓ Marriage must be voluntary union.
- ✓ Marriage must be union of man and woman.
- ✓ Marriage must intend to last for the rest of the joint lives of the parties.

ACCORDIND TO CANNON LAW

Marriage is the conjugal union of man and woman which arise only from free consent of each spouse but this freedom relates to the question whether two persons really wish to enter into a marriage.

ACCORDING TO THE CASE OF HYDE V HYDE

Under this case marriage is defined as the voluntary union for life of one man and woman with exclusive of all other. Under that definition different elements were discovered as follows:

- ✓ Marriage must be made voluntary.
- ✓ Marriage must be for life.
- ✓ The union must be heterosexual therefore not homosexual.
- ✓ Marriage must be monogamous though even polygamous is allowed under the LMA.

MARRIAGE AS THE CONTRACT

Marriage is a contract like other contract such as commercial contract in terms of duties and obligations though marriage contract differ in one way or another from other contracts.

DIFFERENCES BETWEEN MARRIAGE CONTRACT AND OTHER CONTRACT

- ✓ The law relating to capacity to marry is different from other contract. A person under 18 yrs is capacity or eligible to marry as explained under section 13(1) of the LMA. While under LCA section 11 a minor under the age of 18 can't enter into a contract.
- ✓ A marriage may be only contracted under special formalities such as marriage requires presence of witnesses as provided under section 27(1) of the LMA, evidence of marriage certificate as per section 33(1) of the LMA While commercial contract can be made orally.
- ✓ A marriage give totally different grounds from other contracts in which may be void or voidable.
- ✓ On termination, a marriage contract can't be discharged by agreement , frustration or breach a party from death of either parties. It can be terminated by formal legal act usually a decree of dissolution or divorce provided by a competent court as per section 99 of the LMA.

AGREEMENT TO MARRY

Sometimes refers to an engagement, This entered into respective spouse that the would wish to contract a marriage in the future. Legal consequences do not go a party from other contract since parties in breach may be sued for damages.

AT COMMON LAW

Agreement to marry is treated as the contract provided that there was an intention to enter into a legal relations since their nature of contract possess a certain pecuniary features which is governed by general principles of LCA. So if either party withdraw from engagement without lawful justification the other or aggrieved party may sue for breach of contract.

AT TANZANIA

GENERAL RULE

A suit may be brought for damages for the breach of a promise of marriage made in Tanzania whether the breach occurred in Tanzania or elsewhere, by the aggrieved party or, where that party is below the age of eighteen years, by his or her parent or guardian as per section 69(1) of the LMA.

EXCEPTIONS

- ✓ No suit shall be brought against a party who, at the time of the promise, was below the age of eighteen years.
- ✓ No damages shall be awarded in any such action in excess of loss actually suffered as a result of expenditure incurred as a direct result of the promise.

This exceptions has been provided under section 69(1)a & b of the LMA.

However the section is contravening with section 13 of the LMA which provides minimum age for parties to contract a marriage that

“No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years”.

But the court can give consent to the parties to contract the marriage under special circumstances if both parties were below the age given as per section 13 of the LMA but each party must have attained the age of fourteen yrs.

NOTE:

- Under section 70 of the LMA no suit shall be brought for damages for the breach of a promise of marriage more than one year after the date of the breach.
- Also under section 69(2) of the LMA explains that no suit shall be brought for specific performance of a promise of marriage that means parties can't seek for other remedies such as specific performance.

PROPERTIES OF ENGAGEMENT COUPLE

It is a common practice for the engagement to share or own properties but remember engagement doesn't constitute itself a marriage.

Properties can't be considered as a matrimonial assets rather should be directed to ownership of each individual. In case the party has intended to give the other gifts then it shall be deemed to be the property of the donee unless otherwise proved contrary.

AT COMMON LAW

A man who buys a property with his own money and converts it to his fiancée's name is presumed to intend to make gift like a husband who converts his property into wife's name.

GIFT BETWEEN ENGAGED COUPLE

If there is exchange of gifts between engaged couples and their ultimate intention of marrying is devastated then the general test to be applied to cover them should be, was the gift made to the donee as an individual or solely as the donor's future spouse. If it is later class can

be regarded as a conditional. If it is formal will be regarded as absolute and recoverable only in the circumstances as any other gifts as per section 71 of the LMA as follows:

“..... A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise...”.

AT COMMON LAW

A gift made by donor to an engagement in the contemplation of marriage cannot be recoverable if he was in breach of the promise since no one should benefit from his wrong as the principle.

AT TANZANIA

Where parties are engaged gifts may be given either and there is a breach of promise to marry then an important element to consider is an intention of the giver 71 of the LMA states Gift will be only returned if the marriage has not been contracted and the gifts was made in the contemplation of a marriage been contracted but must be proof that the giver intended to give the condition that the marriage will be contracted then such gifts will be returned

NOTE: The gift given unconditional will become absolute property of the donee and will be dealt with like any other gift.

CASE GENEROZA NDIRIMBO V BLASIDUS YOHANES KAPESI 1988 TLR 73

The respondent successfully sued the appellant in Primary Court for breach of promise to marry and the return of gifts allegedly given to her in contemplation of marriage. She appealed to the District Court but lost with costs.

In the court of first instance, the respondent claimed six bags of beans, ten bags of maize one sponge mattress, a bamboo basket, a sieve and several other things. The parties cohabited in concubinage from 1984 to 1986. Aggrieved by decisions of lower courts the appellant has appealed to this court.

Held:

- ✓ A suit may be brought for the return of any gift made in contemplation of marriage which has not been contracted.
- ✓ The respondent must prove to have given the gifts to the appellant on the condition that the parties intended to marry.
- ✓ It is the duty of the parties to a suit to prove their claim. The Court can only summon witnesses if asked by the parties to do so.

So it is obvious that gifts unconditionally given on birthday or christmas to a party may not be recovered for it does not fall within the provision of LMA.

TYPES OF MARRIAGE

✓ **Monogamous marriage.**

The union involving one man and woman to the exclusion of all others as per section 9(2) of the LMA. But under this marriage neither party can contract another marriage while the marriage is still subsisting as per section 15(1) of the LMA.

✓ **Polygamous marriage.**

The union in which husband may during the subsisting of marriage be married to many other woman (en) as per section 9(3) of the LMA. This give the right to the husband to contract another marriage while the other subsists but prohibits the man to contract a marriage in any monogamous form with any other person while married by a

polygamous or potentially polygamous marriage as per section 15(2) of the LMA.

NOTE: A marriage contracted under Islamic rites will be presumed to be a polygamous or potentially polygamous until the centrally.

TYPES OF MARRIAGE CONTRACT

✓ **Customary marriage.**

The union of man and woman for their joint lives however permits plurality of wives. This can be either polygamous or potentially polygamous marriage as provided per section 25(1)d & 32(b) of the LMA.

✓ **Islamic marriage.**

The union of man and woman for their joint lives but which permits plurality of wives and yet prohibits marriage of more than four wives. Muslim conduct this type of marriage according to Muslim rites or Mohammedan law as per section 25(3)a & 32(a) of the LMA.

NOTE: Under Islamic law marriage is said to be civil contract where parties are free to negotiate and include offer and acceptance.

✓ **Christian marriage.**

- The union of man and woman for their joint lives and the parties can contract this marriage according to Christian religion.
- The Christian marriage is purely monogamous marriage.
- This marriage is due under Christian rights as per section 25(3) of the LMA.
- No marriage between two Christians faith, be converted from monogamous to polygamous and the provisions form so long as both parties continue to profess the Christian faith as per section 11(5) of the LMA.

✓ **Civil marriage.**

This is a marriage contracted before the District Commissioner's Office in the presence of Registrar of marriage. This may be monogamous, polygamous or potentially polygamous marriage. But where the man is married to one woman without declaring whether the marriage is intended to be either monogamous or polygamous is said to be polygamous as per section 11 of the LMA.

PRESUMPTION OF MARRIAGE

Under this presumption no formal marriage but they presume that there is a marriage though depending on life style of the cohabitants. So under section 160(1) of the LMA provides the presumption of marriage as follows:

"....Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.."

Not only the existence of presumption of marriage but also some elements must be proved under that presumption to stand as follows:

- Must be proved that parties were cohabited for two years.
- They must have acquired the reputation of being husband and wife.

Under this point neighbor must understand and know that the parties are living as husband and wife since living together as girlfriend and boyfriend can't raise a presumption that they are duly married.

CASE CHARLES RUNYEMBE V MWAJUMA SALEHE [1982] TLR 304

In this case parties cohabited since 1976 to 1980 and children were born out of that union. After the relationship grown sour the respondent sued in the District Court that she was not appellant's wife and the appellant has no right to custody of children.

The Court stated that among other things for rebuttable presumption a marriage to arise the parties shouldn't only have lived together for two (2) years or more but should have acquired the reputation of being husband and wife. The judge said that the life of girlfriend and boyfriend couldn't equate that of husband and wife so as to accommodate the presumption that they were duly married.

In this case the presumption was rebutted on the evidence given by the neighbours who considered parties as boyfriend and girlfriend. So once the marriage which was presumed has been rebutted the Court will usually pursue the normal steps to dissolve the marriage as if any other marriage is being determined.

Under the case of **HARUBUSHI SEIF V AMINA RAJABU [1986] TLR 22**

In this case it was held as follows:

- If the presumption of marriage under s.160(1) of the Marriage Act has been rebutted then under s. 160(2) the woman becomes a deemed legal wife devoid only of the legal right to petition for divorce and separation.
- The children of such relationship become deemed legitimate children and they need no legitimization.

Also the case of **ELIZABETH ISMAIL V MELIKISEDEK HARUNI [1982] TLR 322**

In this case the Court states that where a presumption has been rebutted s. 160(2) of the Marriage Act gives right to either party in relation to maintenance, custody of children and any other relief as the Court is competent to give under the LMA.

However there is different position on the children of the presumed marriage. No problem where the parties have been presumed to be dully married as the children will be regarded as legitimate but the controversy arises when the presumption is rebutted. So the High Court judges have been disagreements on the position of children. Some hold that the children resulting where the presumption has been rebutted will be illegitimate as provided in the case of

CHARLES RUNYEMBE V MWAJUMA SALEHE [1982] TLR 304

“...In this case it was provided that the presumption of marriage once has been rebutted under the LMA then children of the association are illegitimate, Since it is agreed that there is logic on their provision for marriage never existed in the eye of law hence children also should be treated the same way as the resultant of an illegal marriage..”.

HARUBUSHI SEIF V AMINA RAJABU [1986] TLR 22

On the other hand under this case there is argument given the effect that the children of rebutted presumption of marriage should be deemed legitimate and do not need any legitimization Pointed out that the children of such relation of rebutted presumption became deemed legitimate and need no legitimization. The position based on the fact that under s. 160(2) of the LMA gives a new right for parties to apply maintenance, custody of children and another relief. This gives implication that children are legitimate.

QUESTION:

What are the judicial interpretations on the school of thought regarding the formalities of marriage contract ?.

1st presumption of marriage should require many other requirements like ceremony and payment of dowry as provided in the case of

FRANCIS LEO V PASKALI SIMON MAGANGA [1978] LRT NO. 22.

In this case Mfadhila J stated that duly married means going through the forms and procedures as provided under the provisions of LMA. Therefore marriage can't be presumed just on the reason that parties have cohabited for two (2) years and more and they have acquired reputation of being husband and wife.

But in the case of **ZACHARIA LUGENDO V SHADRACK**

LUMILANG'OMBA [1987] TLR 31 Mwalusanya J stated that where a man and woman live as husband and wife under the belief that they are legally married, their cohabitation amounts to concubine.

-Marriage unlike concubine is a solemn and serious institution. There ought to be evidence of customary law marriage to constitute marriage, such as handing over ceremony by parents of the girl to the boy, or evidence of certain rites recognized by the relevant customary law of that tribe like a festival of pombe or other like ritual - Sec. s. 25 (1) (d) of Law of Marriage Act No. 5 of 1971.

-The presumption of marriage may be rebutted if it can be proved that the parties had never gone through a ceremony of marriage recognized under the law.

2nd School of thought has no much to do other than that provided under s. 160 of the LMA, under this school of thought a mere proof that parties have cohabited for a period not less than two (2) years and have attained the reputation of being a husband and wife. Therefore the Court shouldn't take further measures in presuming the marriage.

This has been explained in the case of **JOHN KIRAKWE V IDDI SIKO 1989 TLR 215**. In this case judge made another element that the parties haven't undergone a formal ceremony. This shows that no need of ceremony in construction the marriage, so this school of thought

disagree with the first trend who supports demand of ceremony which led to the presumption of marriage. This consider only s. 41 of the LMA which the first trend didn't consider which provides non payment of dowry or any irregularity doesn't invalidate the marriage.

Also the case of **RAMADHANI SAID V MOHAMED KILU 1983 TLR 309**

In this case it was held that failure to give notice of the intended marriage, absence of "shangwe za harusi" or any procedural irregularity in the ceremony are not matters which would affect the validity of such a marriage if in all other respects it complies with the express requirements of the Act.

NULLITY OF MARRIAGE (VOID & VOIDABLE MARRIAGE)

VOID MARRIAGE (SECTION 38 OF THE LMA)

Void marriage are those marriage with no legal effect had ever existed. In other word void marriage are those marriage which are so defective on social and public grounds, their imparable therefore is void abinitio.

GROUND FOR VOID MARRIAGE

I. Minimum age.

Lack of legal capacity to contract marriage as per section 13(1) of the LMA together with section 38(1)a of the LMA lender the marriage void. This has been explained in the following case laws:

ALHAJI V KNOTT [1968] 2 ALL E.R 563.

In this case Alhaji (A Nigerian) married a 13 years old Nigerian girl. The marriage was contracted in Nigeria and it was recognized under Nigerian law. They moved to England where a 13 years girl can't get married hence the marriage void. It was held that if there were living in

Nigeria then the marriage would be valid but since they were living in England the marriage was void in the eye of England law.

PUGH V PUGH [1951] 2 ALL ER 680

A British soldier domiciled in England who married a 15 years girl (Hungarian girl) Under the Hungarian law the marriage is valid but in UK (United Kingdom) it was held since the marriage is domicile in England it was void.

II. Parties to the marriage have relation whether blood & legal (Prohibited decree).

It is provided under section 14(1) & (2) of the LMA “that no person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, as the case may be. Also no person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse”. So failure to observe this conditions render the marriage void as per section 38(1)b of the LMA

CASE FATUMA MASUDI V ALLY MASUDI [1977] LRT 3

The appellant (wife) petitioned for divorce in the Primary Court in the cause of adducing evidence in issue arose to the effect that the marriage in question between persons within the prohibited degree of relationship in terms of section 14 of the LMA on the supported evidence that the parties were man and his niece. This however was not supported by the evidence of appellant’s father together with respondent’s father which clearly showed that the appellant’s father (Mr Masudi) and respondent’s father (R. Masudi) have a common surname so that the furthest why they can go.

That is to say parties belong to the same clan, therefore the Court decided on whether the parties were within the prohibited degree of

relationship according to the meaning of section 14 of the LMA. It was held that the relationship belonging to the same clan doesn't fall within those prohibited relationships as per section 14 of the LMA.

III. Subsisting marriage.

A marriage is void if it is proved that at the time of the ceremony one of the parties were duly married to the third part. This has been covered under section 38(1)c of the LMA and explained also in the case of

RAMADHANI SAID V MOHAMED KILU 1983 TLR 309

In this case the married couple was in conflict as the result the wife decided to move away from the matrimonial home. The parties stayed in separation for a long period of time but they didn't take any legal formal procedure for divorce. The wife believed that she was duly divorced from her husband and married another man. The second marriage was in issue and the Court held that since the first marriage was valid then the second marriage was void.

NOTE:

No woman who is still married, while that marriage subsists can contract another marriage; (see s. 15(3) and s. 152(1) of the Law of Marriage Act, 1971); it is an offence for a married woman to be a party to a ceremony of marriage whereby she purports to marry another man.

IV. Where the marriage is prohibited by the Court or Marriage Board as provided for under section 18 & 38(1)d of the LMA.

V. Lack of consent by the spouse (Absence) where there is no free consent the marriage is void as per section 38 & 16(1) and (2) of the LMA

This has been explained clearly in the case of

BUCKLAND V BUCKLAND [1968] P. 296

In this case it was held that the marriage which contracted under the absence of free consent became void.

The point to note is that if the consent was not obtained through mistakes such as mistake to the nature of ceremony as explained in the case **of VALIER V VALIER [1924] 133 LT 830**. In this case a wife took the husband who was an Italian and didn't understand English language to the Registrar office and they went through usual marriage. He didn't understand what happening at the time, parties never cohabited and the marriage was never consummated. It was held that the marriage was void since was done under mistake to the ceremony. Fraud which led to the absence of free consent to the husband.

Also mistake as to the identity of the other party as explained in the case of **SWIFT V KELLY**. In this case it was stated that "It should seem, indeed to be the general law of all countries as it certainly in English that unless there are some provisions of statute laws requiring certain things to be done in a specified manner, no marriage shall be held void merely because it had been contracted upon false presentations unless it proved that without such contrivances consent would never have been secured, Unless the party imposed upon has been deceived as to the person and thus has given no consent at all then there is no degree of deception which can avail to set aside a contract of marriage knowingly made.

VI Absence of parties to a ceremony as per section 38(1)f of the LMA.

VII Two competence witnesses must be present at the ceremony as per section 38(1)h of the LMA.

This is due to the effect that at the time of conducting the marriage there must be two witnesses which means one witness from both sides. Failure to observe this condition render the marriage void.

VIII The parties must knowingly and willfully allow a person who is not authorized to officiate at the ceremony as per section 38(1)g of the LMA.

IX. Parties of the same sex.

This ground is not expressly provided under the LMA but can be implied from section 9(1) of the LMA. The meaning of marriage as voluntary union of man and woman which is different sex and not the same sex. Marriage of the same sex is void since doesn't meet the requirement of definition of marriage as provided under section 9(1) of the LMA.

This has been explained through different case laws as follows:

TALBOT V TALBOT [1968] 111 SJ.

In this case where by a widow went through a marriage ceremony with a bachelor who was subsequently transpired to be a woman and the marriage was held void. The marriage is void if the parties are not respectively male and female. This is done to cover the situation of a party who had previously undergone an operation to achieve an alleged sex or about whose sex is in doubt. The operation involves hormone treatment, the surgical removal of genital and construction of artificial vagina and person who undergone such a treatment may be treated as a woman for official purposes but not marriage contract.

CORBET V CORBET [1970] WLR 1306.

In this case the defendant (Mr. Ashley) decided to change his sex by severing his male organ and creating a female given. He managed to change into a woman and became successful carrier of female model. She got married to the petitioner but later he discovered that Ashley was not a woman in nature hence petitioned for annulment. The issue was whether the marriage was valid but it was held that person's biological sex is fixed at birth and can't be substantially changed by artificial means. Therefore Mr. Ashley who was a male at birth was not a woman and therefore the marriage was void

VOIDABLE MARRIAGE SECTION 39 OF LMA

A Voidable marriage is for all purposes a valid marriage until it is annulled by a decree of the Court as per section 40 of the LMA or in other word Voidable marriage is perfectly valid unless and until it is put to an end by either of the parties. Voidable marriage is valid from the beginning but it have some defects

GROUND FOR VOIDABLE MARRIAGE

I. Non-consummation.

Consummation means sexual intercourse which is ordinary and complete and they must be both election and penetration of reasonable length of time. It is not necessary for either party to share unorgens. Failure to have sexual intercourse soon after marriage led to voidable marriage as per section 39(a) of the LMA.

CAUSES OF NON CONSUMMATION

A. Willful Refusal.

Express, implied one of the parties make difficult to construct sexual intercourse. Husband should use appropriate test and encouragement

of his wife since the wife is not guilty of willful refusal if the husband has failed to do so as per section 39(b) of the LMA.

NOTE. If the respondent shows just excuse for his refusal to consummate he or she is as well not guilty of willful refusal for example when the wife is in time of evolution this by itself can be considered as just excuse. In the case of **BAXTER V BAXTER** it was held that a wife refusal to allow intercourse unless her husband used a condom was not a refusal on her party to consummate the marriage.

B. Biological incapacity.

In order for the biological incapacity to be ground for nullifying the marriage due to lack of consummation the following grounds should be considered.

- ✓ The defects must occurred or happen after the marriage is contracted.
- ✓ Lack of knowledge on the existence of defects.
- ✓ The defects must be incurable that is incorrectable.
- ✓ There must no post marriage consummation.

Standard sexual intercourse amounting consummation.

- ✓ Sexual intercourse is ordinary and complete. That means doesn't means partial and imperfect.
- ✓ Full penetration.
- ✓ Lack of satisfaction is irrelevant.
- ✓ Wearing condom is irrelevant.
- ✓ Good Lunc is immaterial. That means the respondent is incapable of having intercourse with another partner.

II. Permanent Insanity or Mental Disorder.

If the party at the time of ceremony was incapable of understanding the nature of the marriage and duties and responsibilities became voidable as per section 39(a)ii of the LMA. Mental disorder will affect the validity of marriage when one party at the time of the ceremony was incapable of understanding the nature of marriage and the duties and responsibilities it creates.

III. Mistake and Fraud.

Caveat emptor means let the buyer be aware.

Mistake and fraud may impair consent. Generally there are three types of mistakes as follows.

1. Mistake as to identity.

For example X contended to contract a marriage with Y but unfortunately conducted a marriage with Z. This marriage is voidable.

2. Mistake as to status.

This is a common mistake as to status may never affect the marriage.

3. Mistake as to ceremony of marriage.

For example X intended to conduct ceremony under Islamic but instead was conducted under Hindu style. This may affect the marriage as the mistake of ceremony as per section 16(2)b of the LMA.

IV. Duress or fear as

This affects consent since one went to marriage at immediate threat of death so one has to choose between marriage or death, injuries to grave, as per section 16(2)a of the LMA.

V. Sexual transmitted diseases or Venereal diseases.

Diseases which can be transmitted from one person to another such as Gonorrhea, HIV aids, etc. This may affect the validity of marriage as per section 39(a)iii of the LMA.

VI. Pregnant by the third party (Pregnant Peralium).

Immediately after contracting a marriage the husband discovered that his wife is already conserved pregnant and that pregnant is for another person other than a husband then this marriage may be nullified as per section 39(a)iv of the LMA.

So after discovered that the wife has a pregnant a husband is not allowed to consummate or to have sexual intercourse with his wife. Also pregnant may be conserved by the contract of marriage. If the pregnant discovered before the marriage contract then the marriage cannot be nullified.

VII. Lack of parental consent.

The LMA provides for the minimum age under which a person can contract a marriage. Under this provision an eighteen and fifteen years old male and female respectively can enter into a marriage contract as per section 13(1) of the LMA.

But where the female is below the age of eighteen years, the parent or guardian must give consent before the marriage is contracted as per section 17(1) of the LMA.

It follows therefore that the marriage shall be voidable if the wife hadn't attained the age of eighteen years and consent of the parent was not sought. This marriage shall only be nullified if the court sees good and sufficient reason to set the marriage aside as per section 39(c) of the LMA.

This is to the effect that the girl at this age cant give rational decision. Under this ground, the decree can only be granted if it is proved that the petitioner was filed before the girl had attained the age of eighteen years as per section 96(1)b of the LMA. If the girl attains the age of eighteen she is deemed under the law to have an independent decision to her marriage.

BARS TO DECREE OF NULLITY

Under certain circumstances the decree of nullity may not be granted. The LMA provides bars under which the petitioner may be prevented from seeking a decree. Outstandingly, bars operate to voidable marriage only because void marriage do not need the verdict to put it to an end.

Voidable marriage basically needs such an order to set aside as per section 96(1) of the LMA. Where the bar operates to deter the petitioner from being granted the decree, the marriage remains valid throughout the lifetime of parties unless terminated on other grounds such as divorce.

I. Lapse of time.

A decree of nullity may be refused if the proceedings were not instituted within one year from the date of the marriage as per section 96(1)(a)(i) of the LMA. The reason for this bar is to ensure that the parties' status is not left in doubt for too long. It is unreasonable for the petitioner to institute a nullity petition after let say ten years of marriage.

Consequently, there is no power to extend the period even if the petitioner was unaware of the facts that they made the voidable marriage. For example the husband doesn't discover the defect for

more than one year that he is not the father of the child, which his wife was carrying at the time of the marriage, he can't claim any matrimonial relief at all. He can neither base a petition for divorce nor premarital sexual intercourse. If time limit couldn't apply, many marriages were likely to be affected as the mere loss of core love could proffer an opportunity to deceitful spouses to hunt for reasons to half the marriage.

Meanwhile, lapse of time is not a bar in the case of inability or willful refusal to consummate the marriage because the petitioner may properly try to overcome the impediment or aversion for a longer period than a year.

II. Knowledge of the defects.

In all intents the marriage must receive protection when it is set to exist and should be treated as a special institution on which one should go through with reasonable care and diligence. It follows that when a party enters into a marriage contract fully informed that the other spouse has a defect which would otherwise nullify it, when it turns up that he wants to nullify the marriage the court should stop him as per section 96(1)(a)ii of the LMA.

The decree may be ultimately be denied unless the court is satisfied that the petitioner was badly informed of the facts alleged at the time of marriage. The petitioner can plead ignorance only if a reasonable man in his shoes could have done so. In other words if it could appear in the eyes of the court that as a reasonable man he ought to know the facts before the marriage otherwise it may prove failure to render the marriage voidable. The principle of **“buyers be aware”** may as well operate in marriage contracts.

III. Post defect marital intercourse.

As provided under section 96(1)(a)(iii) of the LMA if you discover the defects of a wife don't continue having sexual intercourse with her.

IV. Attainment of eighteen years.

V. Approbation of marriage.

The operation of this principle which is known as "approbation" or "insincerity" is in practice confined to petitions alleging impotence or willful refusal. It prevents the grant of a decree to a petitioner who with knowledge of the annulment of his marriage treats it as valid and subsisting before seeking to annul it.

Precisely the principle plays its role where the petitioner ought to have set the marriage aside but treats it as legitimate. So in case he wants to annul it the decree may be denied. In other words, the decree shall only be granted if it is proved that the marital intercourse has not taken place with the consent of the petitioner since discovery by the petitioner of the fact alleged as per section 96(1)a(iii) of the LMA.

For example where the petitioner knew that the respondent is suffering from venereal diseases but behaves as if no impediment exists, the court may deny him a decree. However, the petitioner may challenge the decree by submitting that he had hope of treatment or that there was no other alternative than upholding his marriage. However, this principle may depend on the material fact of each case, direction or findings of the court may be important.

Also refer the case of **PETTIT V PETTIT 1862 VOL 3 ALL ER No. 321**

QUESTION:

Who may petition for nullification of marriage?.

Who may petition for nullification is provided under section 97 of the LMA.

- (a) Both parties.
- (b) The injured parties.
- (c) The parent or guardianship.

DIFFERENCES BETWEEN VOID AND VOIDABLE MARRIAGE.

CASE DE-RENEVILLE V DE-RENEVILLE [1948] 1 ALL E.R 56

In this case the court gives the difference between void and voidable marriage. The substance in my view, may be thus expressed, a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree of annulling it, Voidable marriage is one that will be regarded as valid subsisting marriage until a decree of annulment has been pronounced by a court of competent jurisdiction.

So the other differences between void and voidable as follows:

1. A void marriage can be nullified at any time even after the death of the parties however voidable marriage can be nullified during the life time of the parties.
2. Void marriage never existed but voidable marriage is valid unless and until is nullified.
3. Proceeding against void marriage can be commenced by any person but voidable marriage can be commenced only by parties of the marriage themselves.
4. Interm of effects of void and voidable marriage: When the marriage is void the following features will be obvious;
 - ✓ No right of inheritance.

- ✓ No right of maintenance.
- ✓ No division of matrimonial assets or properties.
- ✓ Children are illegitimate.

The LMA doesn't specifically explain about marriage ceremony of void marriage but in voidable marriage there is a presence of division of matrimonial assets or properties and Children are legitimate.

EFFECTS ON NULLITY DECREE.

Under section 98 of the LMA provided that the decree of annulment shall not render;

- ✓ Any child of the marriage illegitimate.
- ✓ Economic consequences the LMA is silent on this factor so the **Law of Contract Act** is applicable.
- ✓ Liability stand.
- ✓ The nullity decree will not affect the competence and compellability of spouse in Law of Evidence.

THE LEGAL EFFECTS OF THE MARRIAGE, RIGHTS & OBLIGATIONS OF MARRIAGE.

A. RIGHTS.

I. Rights and consortium .

The rights arise generally from the institutions of the marriage and include surname, this is where by the wife is allowed to use that name of husband even though the husband died.

II. Right to sexual intercourse, matrimonial home helps and supports from each other, marital confidence, confidentiality (usiri wa ndoa), home sharing and matrimonial services.

Conditions for protection information

- ✓ Necessity of confidentiality.

- ✓ Implied or shared in circumstances imposing an obligations of confidentiality.
- ✓ Evidence in court, a party to a marriage contract is competent but not compellable witness.

Reasons for that protection

- ✓ Family harmony.
- ✓ Protects marital confidence.
- ✓ Undesirable.
- ✓ Untrustworthiness.

The kinds of love

- ✓ Iro-erotic love.
- ✓ Platonic or family love.
- ✓ Unconditional love or true love (Agape love).
- ✓ Affectional love (Upendo wa kibinadamu).

B.OBLIGATIONS

I. Duty to cohabit, say, live together. This is divided into two categories;

- ✓ Permanent cohabitation where husband and wife stay together.
- ✓ Intermittent or periodic cohabitation where husband and wife didn't stay together at all.

In Tanzania the law is silence but in England it has been provided under the law, however by implications there is a duty to cohabit and this implications is perceived under section 67 of the LMA where parties may decided to live apart. Also section 111 of the LMA where the parties will not be under the duty to cohabit after decree of separation have been provided. Also section 140 of the LMA provides that the court has no power to force the spouse to live together.

II. Contractual and liability tortuous

Before 19th identity of a wife was not separated in England as both were living jointly section 56 of the LMA is provided for this that is contractual and tortuous liabilities.

III. Duty to maintain.

This is divided into two categories namely:

- ✓ Maintenance during marriage.
- ✓ Maintenance after marriage.

Maintenance has been provided under section 63 of the LMA where it is the duty of the husband to maintain his wife in terms of clothes, food and other accommodations. Also as per section 64 of the LMA if the husband fails to maintain his wife hence the wife has a right to take any procedure to get her requirement but in the name of his husband and the husband is required to pay that bill and not otherwise.

CASE MISGRAY V LORD CATHCANT VOL 38 TLR 562.

The wife brought 8 evening dresses and the bill directed to her husband but he refused because there were too much and also his wife is rich therefore she can pay all the costs instead of him. It was held as follows;

1. The marriage in itself doesn't give the wife the right to pledge credit in the name of the husband automatically.
2. Cohabitation gives rise to the right of the wife to pledge credit in the name of husband.
3. Quality of the goods depends on the standards of the life of the parties.
4. Husband can avoid liabilities by showing the following grounds:
 - ✓ He has expressly won't the seize man or shopkeeper not to supply goods on his credit.

- ✓ Wife was already supplied with the same sufficiently.
- ✓ Wife was given sufficient allowance or means of buying the goods without credit.
- ✓ Husband has forbidden not to pledge on credit.
- ✓ Where the husband prove that the orders although was for necessary it was excessive in extent taking into our accounts his income.

*******MAINTENANCE AFTER DISSOLUTION OF MARRIAGE.*******

PROPERTIES RELATION BETWEEN PARTIES DURING MARRIAGE CONTRACT

TYPES OF PROPERTY

I. Personal property.

Marriage doesn't change ownership of property he or she will continue to enjoy his or her ownership after the marriage contract. Section 60 of the LMA, however under the law we have several presumptions namely;

- ✓ Presumption of facts.
- ✓ Presumption of law.

Presumption of facts is the one which is raised but the same can be proved otherwise. It can be rebutted example every person is presumed to be innocent unless proved his guilty as provided under the Constitution of the United Republic of Tanzania.

Presumption of law is the one which can't be proved otherwise. It can't be rebutted example a child before ten years old can't commit any offence as provided under the penal code.

Irrebuttable presumption – Normally falls under Presumption of law. Section 60(a) of the LMA provides presumption of facts that parties have own his properties acquired in their name. Section 58 is relevant.

Section 56 of the LMA empower women to have a right as a man to acquire, holds and dispose of property.

Section 61 of the LMA Where, during the subsistence of a marriage, either spouse gives any property to the other, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the donee.

II. Joint property.

This has been covered under section 60(b) of the LMA that Where during the subsistence of a marriage, any property is acquired in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

But section 59 of the LMA shows that both wife and husband have the equal right regarding the house.

Joint property in the Land Act it is common that more than person can acquire land. In the Land Act there are two types of Co-ownership which originated from England which means possession of land by more than one person. In England there is Co-ownership but in Tanzania there is co-occupancy. Under section 159 of the Land Act provides two types of co-occupancy namely;

- ✓ Occupancy in common.
- ✓ Joint occupancy.

I. Occupancy in common.

Means you occupying in common but in divided shares that means every one knows his percentage as per section 159 of the Land Act.

II. Joint occupancy.

Occupies they occupies in undivided share therefore all parties they entitled to acquire hundred percentage. The death of one person or party the remaining land is owned by those who is surviving or remaining. No one who is entitled to dispose to another under occupancy in common. Parties under the LMA are entitled to acquire land under Joint Occupancy others may acquire land under joint occupancy upon approval of the court.

Under section 161(1) of the Land Act there is rebuttable presumption as to ownership of land. It is provided that the land is acquired by spouse for the use of both there must be a presumption that the land is owned jointly therefore the registration must be registered upon all names of parties except when one of them didn't want to include the other.

Under section 161(2) of the Land Act provides that the other spouses, the land which is registered in the name of spouse exclusively, so the other spouse will use that land under the law if three things will happen;

- ✓ If the other will share efforts to its productive.
- ✓ If the other will share efforts to improve that particular land.
- ✓ If the other will assist to upheld the land (To make it stay at his standard).

But he or she is not a joint occupancy but she or he will be occupancy in common.

Read section 59(1) of the LMA since it gives a little discussion on house.

ENTICEMENT AND ADULTERY SECTION 72-74 OF THE LMA

The marriage is an institution so the law is protecting the institution against interference against third parties.

Adultery means to induce the spouse to live the other. So the aggrieved party may go to the court and sue for damages. This has been accommodated under section 72 of the LMA.

However the proceedings will not succeed if the following issues is discovered.

- ✓ Aggrieved party consented or connived at adultery as per section 72(1)a of the LMA.
- ✓ Damages for adultery have been claimed in a petitioner for divorce as per section 72(1)b of the LMA.
- ✓ If the defendant didn't know marital status of the partner as per section 72(2) of the LMA.

Enticement, this has been covered under section 73 of the LMA. But damages as the result of enticement will not be awarded if the following conditions is satisfied.

- ✓ By the conduct of the claimant or complainant, the spouse left.
- ✓ If the wife left at the sake of the parents.

PROVE OF ADULTERY

- ✓ Penetration is enough to prove adultery. But in England there is a great legal laws that even shaking hands is not allowed since it amounts to adultery to some extent. This is because in England they are governed by law each and every thing.
- ✓ Fraglent delito (when caught doing the action) during or immediate after the act.
- ✓ Pregnancy by another man.
- ✓ Communicable diseases, sexual transmitted diseases, venereal diseases.

ASSESSMENT OF DAMAGES (HOW DAMAGES TO PAT)

Factors to be considered in making the assessment of damages are as follows;

1. Damages are just for compensation but not to punish this is due to the fact that adultery is considered as defamation.

Also adultery is the civil offence and not a criminal offence or in other words adultery it is not a crime but it is a civil wrongs. The court is not aiming to punish but to compensate but in real cases punishments can be given since there is another person who has intention to punish the husband of the respective wife and not to have sex or penetration.

2. Damages will base on the actual loss to the husband.

3. Damages depends on the value of the wife. The value of wife will depend on the following circumstances.

- ✓ Her contribution to the economic life of the family.
- ✓ Her capacity has a house keeper.
- ✓ Her ability generally at home.
- ✓ Consortium aspects. Here the moral character and affection, her general qualities as wife and mother.

4. The injury to his fillings.

5. The damages to the family states.

6. The seriousness of the damage to the matrimonial and family life.

7. The conduct of the husband such as hashness, regulation, failure to met the matrimonial obligations.

8. The custom of the community since other custom adultery is seen as normal things rather than civil wrongs.

Generally the assessment of damages for adultery as well as enticement have been covered under section 74 of the LMA.

PARENT AND CHILD

I. A CHILD

Who is a child?.

Generally there is a confusion on the definitions of a child by many writers and authors. A child sometimes is required to be juvenile/ non adult, younger persons, minor/ infant child. All these are persons who are not attained the age of the majority.

LAWS GOVERNS CHILDREN

ACCORDING TO CHILD ACT NO. 21 OF 2009

Under section 4(1) of this Act, A child as a person below the age of (18) eighteen years.

ACCORDING TO INTERPRETATION OF LAWS ACT [CAP 1 R.E. 2002]

Under section 4 of this Act, A minor means a person who has not attain the apparent age of (18) eighteen years.

ACCORDING TO THE ADOPTION OF CHILDREN ACT [CAP 335 R.E 2002]

Under section 2 of this Act, "child" means a person under twenty-one years of age, but does not include a person who is or has been married.

ACCORDING TO THE LAW OF MARRIAGE ACT [CAP 29 R.E. 2002]

Under section 2 of this Act, Infant or infant child means a child who has not attained the age of (18) eighteen years. It also include adapted child.

ACCORDING TO THE AGE OF THE MAJORITY ACT [CAP 43 R.E 2002]

Under section 2 of this Act provides that, Every person domiciled in Tanzania shall attain full age and cease to be under any disability of minority at the beginning of the eighteenth anniversary of the day on which he was born.

ACCORDING TO THE MINIMUM SENTENCE ACT [CAP 90 R.E. 2002]

Under section 2 of this Act, "juvenile" means any person under the apparent age of (18) eighteen years.

ACCORDING TO THE CRIMINAL PROCEDURE ACT [CAP 20 R.E. 2002]

Under section 2 of this Act, "child" means a person who has not attained the age of (16) sixteen.

Also under this Act within the same section, "adult" means a person of or above the age of sixteen years.

ACCORDING TO THE PRISONS ACT

A child is a person between the apparent ages of (16) sixteen and (21) years. This child is considered to be younger prisoner.

THE CHILDREN AND YOUNG PERSONS ACT [CAP 13 R.E 2002]

Under section 2 of this Act, "child" means a person under the age of (12) twelve years.

Also provides that a children is the younger person who is in between (!2) twelve years of age or more but under the age of (16) sixteen.

THE CORPORAL PUNISHMENT ACT [CAP 17 R.E. 2002]

Under section 2 of this Act, "juvenile" means a person under the age of (16) sixteen years.

THE CHILDREN'S HOMES (REGULATION) ACT [CAP 61 R.E 2002]

Under section 2 of this Act, "child" means a person under the age of (18) eighteen years.

ACCORDING TO THE DAY CARE CENTRES ACT [CAP 180 R.E. 2002]

Under section 2 of this Act, "child" means a person of the age of between two and six years.

"day care centre" means any premises, other than an approved school, a children's home or a nursery school, where fifteen or more children are received to be cared for and maintained during day time in the absence of their parents or guardians.

ACCORDING TO THE TANZANIA CITIZENSHIP ACT [CAP 357 R.E. 2002]

Under section 3 of this Act, "minor" means a person who has not attained the age of eighteen years.

ACCORDING TO THE EMPLOYMENT ACT [CAP 366 R.E. 2002]

Under section 2 of this Act, "child" means a person under the apparent age of fifteen years.

ACCORDING TO EMPLOYMENT AND LABOUR RELATION

A child is a person under the age of (14) fourteen years provided that for the employment in dangerous sectors a child means a person under (18) eighteen years.

ACCORDING TO THE PRIMARY SCHOOL RULES

A school child means any child who has attained the age of (7) years and includes any child who is pursuing primary school education.

BIOLOGICAL MEANING OF A CHILD

A child is the young person or human being below the age of full physical development.

II.PARENT OF A CHILD

A parent of a child is the natural or legal mother or father of a child. But the advancement of science and technology has made difficulties to define who is a parent of a child because of the modern artificial fertilization.

HOW TO PROVE PARENTAGE

A. PROOVING OF MOTHER

The mother of a child can be proved under three different ways:

- ✓ Witnesses at birth or deriverness.
- ✓ Resemblance (Kufanana).
- ✓ DNA test (scientific mechanism which is sufficient).

PROBLEM OF PROVING THE MOTHER

- ✓ Change of children in maternity hospital.
- ✓ Death of parents , where by DNA test can't applied when the parents has already passed away.
- ✓ Misplacement of genetic materials.
- ✓ Prostitution.
- ✓ Costs and accuracy of genetic examination.

B. PROVING OF FATHER HOOD

There are two types of fatherhood namely:

- ✓ Putative father.
- ✓ Legal father.

Putative father, this is a natural father of a child.

Legal father, this refers to a father hood by adoption.

WAYS OF PROVING THE FATHERHOOD

- ✓ Circumstantial evidence.

This refers to opportunities, chances, and conducts of parties at the material time.

- ✓ DNA test.
- ✓ Resemblance (Sometimes it is very effective but on the other hand is not effective).
- ✓ Presumption paternity. This is raised under section 121 of the Law of Evidence Act.

REBUTTED PRESUMPTION

This presumption raised under section 121 of the Law of Evidence Act can be rebutted on the following circumstances;

- ✓ Absence of the husband at the material time.
- ✓ Impotence (Prove that a husband isn't biologically competent to do sexual intercourse).

ADOPTION

Adoption is the process of taking a child of other parent into one's or family become its legal parent. Adoption replaced permanently natural parents of any right, duties, in respect of their children and vests them into their adoptors.

REASONS FOR ADOPTION

- ✓ To assist children with social or Economic problems.
- ✓ To mitigate the problem of lack of children.
- ✓ Adoption can be made for natural love and affection. That means someone can admire the child and proceed to make adoption.
- ✓ To put to an end illegitimate child.

CONDITIONS FOR ADOPTION

This condition of adaption has provided under section 4 of the Adaption of Child Act. This condition based on;

- ✓ Age of the applicant.
- ✓ Relation with a child.
- ✓ Gender.
- ✓ Consent.
 - By parent or guardian.
 - By a spouse.
- ✓ Residence of the applicant.
- ✓ Prior possession of the child.

FACTORS FOR CONSIDERATION BY THE COURT TO ORDER PETITION

- ✓ Whether the consent by the parent is freely given (free consent by the parents, inducement of any kind didn't attained).
- ✓ Wishes and the best interest of the child.
- ✓ Whether there is no inducement (Interference) by the third party.

Read section 6 & 5 are relevant to the above facts. Also adaption must be registered as provided under section 16-20 of the Adaption of Child Act.

NOTE: It is only the High Court which can analyze the adaption age. Offences concerning adaption is provided under section 21 of the Adaption of Child Act.

EFFECTS OF ADAPTION

- ✓ Change of rights and obligations in respect with the child.
- ✓ A child has full rights from the adaptors.
- ✓ The child and adaptors they are under prohibited relations for the purpose of marriage. This is provided under section 14 of the LMA.

- ✓ Maintenance or affiliation order will not operate prospectively.
- ✓ The child became a legal child of the adaptors.

RETIFICATION OF ADAPTION ORDERS

Collection of adaption order is covered under section 18 of the Adaption of Child Act. In the matter of adaption ordinance subject infant by the name of

RAMESH RAJPUT V MRS SUNANDA RAJPUT 1988 TLR 96

This case concerned custody of a child of two years. The husband applied to the District Court for an order of custody of the child. The mother of the child had gone away to her parents and refused to return to her husband until certain conditions had been met. Before the trial court was an affidavit by the husband, a counter affidavit by the wife and a reply to the counter affidavit by the husband. The affidavit by the wife was in fact sworn to by her advocate.

The District Court decided in favour of the husband . On appeal, this decision was overturned by the High Court. The first appellate court also awarded maintenance in the sum of Shs. 3000/= per month to be paid by the husband for the child. On appeal to the Court of Appeal of Tanzania counsel for the appellant husband submitted that the counter affidavit should not be looked at as it was pure hearsay having been deposed by the wife's advocate. No objection was raised by the appellant at the trial court to the admissibility of the counter affidavit on the ground that it was hearsay. The appellant also attacked the quantum of maintenance awarded by the High Court.

MUSTAFA JJA, MAKAME JJA, OMAR JJA Held as follows:

- ✓ The most important factor in custody proceedings is the welfare of the child.
- ✓ An infant child of two should be with the mother unless there are very strong reasons to the contrary.
- ✓ In the circumstances of this case no strong reasons have been advanced to rebut the presumption that an infant below the age of seven years should be with the mother.
- ✓ The sum fixed as maintenance was manifestly excessive and was not supportable on any evidence.
- ✓ By not objecting to admissibility of the counter affidavit at the trial court the F appellant, on the basis of something in the nature of an equitable stoppel, had waived his right to object to the admissibility of hearsay evidence in this appeal.

**VIOLET ISHENGOMA KAHANGWA AND JOVIN MUTABUZI V THE ADMINISTRATOR GENERAL AND MRS. EUDOKIA KAHANGWA
1990 TLR 72**

In an application for directions the High Court directed that the life style of the deceased at the time of his death was governed by the traditions, customs and practices of the Bahaya tribe to which he (the deceased) belonged, therefore, the law applicable in administering the distribution of the estate was the customary law of the Bahaya.

The High Court further directed that since the first appellant was not lawfully married to the deceased because the previous monogamous marriage to the second respondent was still subsisting, the 2 issues of the deceased's cohabitation with the first appellant were illegitimate children who under the applicable Bahaya customary law did not legally qualify for distribution, because an illegitimate child cannot inherit from the father's side upon his dying intestate. On appeal to the Court of Appeal against the directions.

Held:

- In administering the estate the Administrator-General does not have to appear in the Primary Court for any purpose because he is not acting as an advocate representing a particular party. All that is required of him is to distribute the estate to all those who qualify for distribution. In case he runs into a difficulty he may turn to the High Court for direction.
- Under paragraph 43 of the Local Customary Law (Declaration) (No.4) Order, 1963, G.N. No.436 as applied to the Bahaya tribe vide G.N.No.605 of 1963, an illegitimate child cannot inherit from the father's side upon his dying intestate.
- A child as defined under the Law of Marriage Act, 1967 does not include an illegitimate child, thus the word "children" in section 129 (1) of the Law of Marriage Act does not include illegitimate children;
- A putative father's obligation to his illegitimate children is personal and ends with his death. It does not survive him and cannot attach to his estate upon his dying intestate.

CUSTODY OF CHILDREN

Custody of children is covered under section 125 of the LMA. But the custody of children is governed by the principle of best interest of the child (Principle of welfare of the child).

POWER OF THE COURT

Custody may be vested firstly to the parents either male or female parents however the court may declare the custody of children of either one of the parents or the third party.

But as per section 125(2) of the LMA it is mandatory that in deciding in whose custody an infant should be placed the paramount consideration

shall be the welfare of the infant and, subject to this, the court shall have regard to-

- The wishes of the parents of the infant.
- The wishes of the infant, where he or she is of an age to express an independent opinion.
- The customs of the community to which the parties belong.

Also there shall be a rebuttable presumption that it is for the good of an infant 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 infant by changes of custody as per section 125(3) of the LMA.

But on the other hand 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 as per section 125(4) of the LMA.

CONDITIONS FOR SUBJECT TO ADAPTION

The court has a wider power for any condition if the court thinks is sufficient and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the infant as per section 126(1) of the LMA.

But as per section 126(2) of the LMA an order for custody may contain the following conditions:-

- .Contain conditions as to the place where the infant is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;

- .Provide for the infant to be temporarily in the care and control of some person other than the person given custody;
- .Provide for the infant to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;
- .Give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the infant at such times and with such frequency as the court may consider reasonable; or
- .Prohibit the person given custody from taking the infant out of Tanzania.

CASES REFFERED UNDER THAT ISSUE:

MARIAM TUMBO v HAROLD TUMBO 1983 TLR 293

The parties to this proceeding were married under Christian rites in 1958 and have seven issues of the marriage. The petitioner sought dissolution of marriage alleging adultery, cruelty and desertion. She also prayed for custody of the youngest five children and for the division of assets. The respondent has cross-petitioned for divorce, alleging cruelty and desertion. He also prayed for custody of the youngest three children.

LUGAKINGIRA J Held as follows:

- ✓ Under paragraph (f) of the proviso to s. 101 of the Law of Marriage Act, 1971 the court may dispense with reference to the Marriage Conciliatory Board where it is satisfied that there are extraordinary circumstances which make reference impracticable;
- ✓ It is one thing to tolerate a spouse's misconduct, it is another to put up with the consequences thereof; in contemplation of this

- the legislature enacted s. 85 of the Law of Marriage Act, 1971 that evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground that the misconduct was condoned by the aggrieved spouse.
- ✓ When reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this spouse should not be called on to tolerate it.
 - ✓ It is settled that where one spouse behaves in such a manner that the other is virtually compelled to leave, the former may in law be the deserter; it is imperative for there to be conduct which amounts to dismissal from the consortium.
 - ✓ In matters of custody the welfare of the infant is of paramount consideration, but where the infant is of an age to express an independent opinion, the court is obliged to have regard to his or her wishes.
 - ✓ In accordance with s. 114(2)(b) of the Law of Marriage Act, 1971, the court is required in exercising its power of division of assets to have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets; housekeeping is a conjugal obligation and cannot be equated to work which refers to the physical participation in the production of the asset itself.

RAMADHANI OMARI v FATUMA MAHUMBI 1983 TLR 227

The parties had been married in 1972 and cohabited until 1974 when the respondent deserted the appellant taking along with her one child

of their marriage. Two more children were begotten with the appellant during the period of separation. In 1982 the respondent petitioned for divorce which was granted on proof of the longevity of the separation.

The custody of the two elder children was given to the appellant. The youngest was left to the respondent and the appellant was ordered to pay maintenance for it. The respondent subsequently instituted proceedings claiming compensation of Shs.4,000/= for having maintained those children. The respondent lost in the trial court, but succeeded in a subsequent appeal to the District Court. From that decision the appellant brought this appeal.

LUGAKINGIRA J Held that:

A woman cannot claim or receive compensation for maintaining a child she has willfully removed or kept from the father's custody.

NB: There is a presumption that under Islamic law a child under (7) seven years is vested interest on his or her mother (Put under custody of her mother). The burden of proof is against who is against the presumption. This has been explained in the case of

ABDULRAHMAN SALIM MSANGI v MUNIRA MARGARET 1984 TLR 133

The appellant and respondent were married in 1975 according to Moslem rites and their marriage was dissolved in 1982 by Islamic 'talaks' effected by the appellant upon the respondent. The respondent was granted the custody of two children of the marriage aged two and five by the Kadhi's court in Zanzibar. The appellant now objects to the grant of custody of children to the respondent.

MUSTAFA JA Held that:

According to Islamic law infants who have not yet attained the age of some understanding, which is usually taken to be seven, are left in the custody of their mothers provided they satisfy the following seven conditions.

- ✓ The mother must be of sound mind.
- ✓ She is a free woman, not a slave.
- ✓ She should have a religion (Islam).
- ✓ She should have the ability to bring up children.
- ✓ She should be faithful.
- ✓ She has to be single.
- ✓ She must have a domicile.

PARENTAL RIGHT AND DUTIES

Generally these are rights, power, duties, authorities and responsibility vested in the parent or guardian of the child. These rights and duties differ according to the needs and circumstances.

FEATURES OF A RIGHT AND DUTIES

- I. They are centered on the care and upbringing of the child.
- II. Depends on whose custody the child is vested.
- III. Depends on the age of the child.

CASE HEWER V BRYANT 1970 VOL 1 QB 357.

Lord Denning explained that Parental responsibility is a dwindling right which the court will estate to enforce against the wishes of the child, the order he is. It starts with the right or control and ends with little. More advise.

SOME RIGHTS AND DUTIES OF THE PARENTS

This is covered under the LMA and Adaptation of Child Act. So under section 126(1) of the LMA provides different rights to be enjoyed by the child as follows:

- ✓ A child is entitled to education.
- ✓ A child is entitled to accommodation.
- ✓ A child is entitled to medical treatment.
- ✓ A child is entitled to maintenance
- ✓ A child is entitled to have a name.

H/W: Section 5 of the Child Act up to section 15 of the child Act explains the rights to be enjoyed by a child.

MATRIMONIAL PROCEEDING

JURISDICTION OF THE COURT IN MATRIMONIAL PROCEEDING.

- ✓ Matrimonial proceedings includes
- ✓ An objection to marriage
- ✓ Petition for divorce, separation or annulment.
- ✓ Petition for maintenance of the child.
- ✓ A declaratory application.
- ✓ Original jurisdiction.

In matrimonial proceeding jurisdiction is concurrently vested on High Court, Resident Magistrate Court, District Court and Primary Court as per section 76 of the LMA, But this section is contravenes with section 13 of the Civil Procedure Code Act which provides as follows:

“..... Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section, a court of a resident magistrate and a district court shall be deemed to be courts of the same grade....”

But the LMA is the superior than the Civil Procedure Code Act therefore The LMA will prevail. So you can decide to file a case in the Primary

Court or other Court as the person thinks fit. An aggrieved party by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal there from to the High Court as per section 80(1) of the LMA but this section was repealed by Act no. 15 of 1980 by Miscellaneous Amendment Act.

Now the current law is that the aggrieved party from the Primary Court may appeal to the District Court, from the District Court to the High Court. Time for appeal is (45) forty five days as per section 80(2) of the LMA. Also appeal against declaratory decree should be made within (90) ninety days unless that appeal is null and void.

Appeal against the decision or order of the High Court in its appellate jurisdiction may be made on any ground of law or mixed law and facts

HOW TO MOVE THE COURT

For the purpose of matrimonial proceeding by move by petition or chamber summons as provided under section 81 of the LMA. But again you can move the court by application as provided under Government Notice No. 310 of 1964 under Rule 15(1).

Proceeding must be conducted in an open court unless there is exceptions as follows.

- ✓ Where there is special exception circumstances.
- ✓ When the subject matter is wishes of the infant or custody as per section 125(2)b of the LMA.

But under section 108(a) of the LMA the court shall inquire Inquisitorial approach in solving the matter and this condition it is mandatory and not optional. Also it is provided under section 110(2) of the LMA that where there is a cross of divorce the court can't entertain them simultaneously.

A SPECIAL CASE IN MATRIMONIAL PROCEEDING

This is provided under Regulation 40 of the Law of Marriage (Matrimonial Proceedings) Rules of 1971. A magistrate may face difficulties in accounting the problems and application of law in solving the disputes. The magistrate will draw the statement of facts complied the doubt and then may send it to the High Court for the solution.

DIVORCE.

Section 12 of the LMA provides that the marriage is subsists until determined by:

- ✓ By the death of either party thereto.
- ✓ By a decree declaring that the death of either party thereto is presumed.
- ✓ By a decree of annulment.
- ✓ By a decree of divorce.
- ✓ By an extra-judicial divorce outside Tanzania which is recognised in Tanzania under the provisions of section 92 of the LMA.

NOTE: Divorce is only issued by the court and not otherwise.

TYPES OF DIVORCE

- ✓ Legal divorce
- ✓ Extra judicial divorce

REQUIREMENTS OR FOR GRANTING DIVORCE IN TANZANIA

I. The condition on time as covered under section 100(1) of the LMA. That the marriage shall survive for (2) years unless with the leave of the court.

II. Reference on Reconciliation Board as provided under section 101 of the LMA but there is exceptions to that section 101 that this requirement shall not apply in any case

- ✓ Where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse.

- ✓ Where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition.
- ✓ Where the respondent has been required to appear before the Board and has willfully failed to attend.
- ✓ Where the respondent is imprisoned for life or for a term of at least five years..
- ✓ Where the petitioner alleges that the respondent is suffering from an incurable mental illness.
- ✓ Where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.

III. The marriage must be proved to have broken down irreparably as per section 99 of the LMA.

IV. Manner of instituting proceedings that is by petition through petition is limited to superior court other than Primary Court. For Primary Court proceedings of civil nature normally instituted in the Primary Court although a different register is to be used that is matrimonial cause of register instead of civil register.

In Tanzania we have only one type of divorce that is legal divorce but the marriage can be divorced in extra judicial divorce in outside Tanzania and come to be registered in Tanzania but that divorce can't be granted in Tanzania but outside Tanzania.

CASE REFERED UNDER THIS REQUIREMENTS

ATHANAS MAKUNGWA V DARINI HASSANI 1983 TLR 132

This is an appeal against the judgment of the District Court at Kisutu in which the learned District Magistrate reversed the judgment of Kinondoni Primary Court and granted divorce to the respondent in this

appeal. The Primary Court had dismissed the petition on the ground that there was no reference to the Conciliation Board prior to the filing of the suit.

The District Court had found that the marriage between the parties had irreparably broken down and that exhibit 3 (which was in the form of a letter) in the trial court was a document from the Conciliation Board showing that the matter had been referred to them. The main issues on appeal are whether the marriage had broken down irreparably and whether the matter was referred to the Conciliation Board prior to the filing of the petition for divorce in the Primary Court.

BAHATI J Held as follows:

- ✓ Where the petition is founded exclusively on the petitioner's own wrong-doing I in the absence of any special reason a divorce decree should not be granted.
- ✓ Where there is no certificate within the meaning of s. 101 of the Law of A Marriage Act, 1971 from the Conciliation Board indicating its failure to reconcile the spouses a petition for divorce becomes incomplete.

HALIMA ATHUMANI V MAULIDI HAMISI 1991 TLR 179

The appellant successfully applied for divorce at Utemini Primary Court in Singida District, against her husband, the respondent. She sought divorce on the ground of cruelty on the part of her husband. The trial Court was satisfied that the husband had treated his wife with cruelty and granted the application for divorce.

The respondent successfully appealed to the District Court. The district magistrate reversed the decision of the Primary Court for two reasons. First, that as the couple was Islamic, the body that attempted to reconcile them had no jurisdiction as it was not an Islamic body.

Second, that the Marriage Conciliatory Board did not certify that it failed to reconcile the parties. The appellant appealed to the High Court.

MWALUSANYA J Held that :

- ✓ The mere fact that the Board that reconciled the parties was not a Moslem Conciliatory Board did not render the reconciliation a nullity.
- ✓ Under section 101 (f) of the Law of Marriage Act the court may dispense with reference to a Marriage Conciliatory Board if it is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.
- ✓ The appellant had succeeded to prove that the marriage was broken down beyond repair.

In Tanzania it is only the court which can put the marriage to an end or declare divorce. There is only a single ground for divorce that is irreparably breaking down of the marriage.

CONCEPT OF IRREPERABLE BREAKING DOWN OF MARRIAGE

Before 1938 the law on divorce based on punishing the sinner. Divorce was granted upon proving matrimonial offences but there after the position changed where the issue was not who is guilty rather than how to assist the parties to settle the relations amicably. In England after 1945 more reforms were made that is divorce which was granted aiming not to punish or to reward any party.

Later in 1960's the concept of irreparable breaking down of the marriage was introduced and maintained subsequently. In Tanzania the concept was adopted in 1971 and the same is reflected under the LMA. The court basing on the concept must consider circumstances of

the parties and their historical background. It is after the LMA and out of the nature of the problem the court may proceed to gauge the nature of the breakdown of the marriage. The court to inquire into facts causing (undesirable) matrimonial difficulties. This system is in line with inquisitorial approach

EVIDENCES THAT THE MARRIAGE HAS BROKEN DOWN

This evidence has been provided under section 107(2) of the LMA.

This evidence includes the following:

I. ADULTERY, SECTION 107(2)a OF THE LMA.

This is also covered under section 72-74 of the LMA together with section 108 of the LMA. The old position of English law provides that it is only the woman who was committing adultery and not man coverts.

CASES REFERED:

JUMANNE JINGI V NJOKA KIDUDA 1984 TLR 51

The appellant lost in the Primary Court and the District Court in an action for damages for adultery and therefore appealed to the High Court.

Held:

A suit brought under section 72 of the Law of Marriage Act, 1971 shall be dismissed if the defendant satisfies the court that he did not know and could not by exercise of reasonable diligence have known that the person with whom he or she committed the act of adultery was married.

JUMA MISANYA AND ANOTHER V LISTA NDURUMAI 1983 TLR 245

The respondent successfully sued the first appellant in a Primary Court for adulterous association with his wife. The appellant paid shs.1,000/= and promised to stop the relationship. But the

relationship continued and the appellant married the second appellant (respondent's wife) according to Islamic rites.

The respondent filed another action and claimed Shs. 5,000/= for adultery, Shs. 5,000/= as special damages, costs of the suit and mesne profits of Shs. 1,000/= per month for adultery from the date of filing the suit till divorce was granted between the respondent and the second appellant. In an ex-parte judgment the

District Court entered judgment for the respondent as prayed. The appellants' application to set aside the ex-parte judgment was refused, and they appealed against the ruling. One of the grounds of appeal argued in favour of the appellants was on the merits of the District Court's judgment allowing all the reliefs as prayed.

Held:

- ✓ Damages for adultery are awarded on the principle that they are to be by way of compensation for the husband's loss and injury, and not by way of punishment of the adulterer for his misconduct;
- ✓ Where special damages are claimed they must be proved in evidence. In this case no special damages were proved;
- ✓ "mesne profits" are not a head of damages allowed in adultery cases.

MAFURU MAGABANYA V JOSEPH MULYA 1987 TLR 22

This was an appeal from the District Court of Bunda against quantum of damages assessed by District Magistrate. There was enough evidence that the appellant was living with the respondent's wife after inducing her to desert the respondent.

The two had previously been found committing adultery in consequence of which the respondent was brought to court and adjudged to pay damages to the appellant in civil case No. 124/1984. The parties in this case do not belong to one community. One is a Msukuma and the other a Mruri and there was nothing to show that the relevant custom of Wasukuma corresponds to that of Waruri.

MAPIGANO J Held that:

- ✓ Under the law, damages for adultery or enticement is in the discretion of the A court and in the exercise of its discretion the court is obliged to pay due regard to any relevant custom of the community to which the parties belong;
- ✓ this was a serious case of enticement and adultery and that is a circumstance which the court can properly take into account when assessing damages;
- ✓ Damages which were awarded in this case namely twelve heads of cattle were excessive and the award contained an element of punishment which is not permissible in law;
- ✓ An award of five head of cattle should have met the justice of this case.

Adultery will be of not affect if a spouse is enticed or consented or didn't not care about his wife or husband.

PROVING OF ADOLTERY

- ✓ The doctrine of fraglent delicto (when they are caught immediately before or after the action.
- ✓ Pregnancy by the third party.
- ✓ Sexual transmitted diseases such as HIV AIDS.

II. CRUELTY, SECTION 107(2)c OF THE LMA

It is very difficult to define the term “cruelty” but there are some injuries that are self illustrative which means they are speaking themselves. Under this injuries you can call a doctor to prove it because it is visible. But there some injuries that which can’t be proved y anyone and this injuries are invisible, so they may affect bodily health or mental health.

FORMS OF CRUELTY

- ✓ Physical cruelty.
- ✓ Mental cruelty.

A. PHYSICAL CRUELTY

This is the injury rooted from the defendant’s conduct which causes danger to the body of the complainant or plaintiff.

B. MENTAL CRUELTY

This is the cruelty affects the faults of mental reasoning. (This refers to mental anguish). This has the following features:

- ✓ It is the most painful cruelty.
- ✓ Most women suffer the same.
- ✓ Very difficult to prove.

NOTE: Mental cruelty can stand even to the children (That means can affect the children mentally).

SAIDI MOHAMED V ZENA ALLY 1985 TLR 13

Appellant was constantly beating the respondent, he threatened to kill the respondent. Moreover he, once stripped her naked before other people including her father-in-law.

Held:

- ✓ Cruelty means willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or

mental, so as to give rise to a reasonable apprehension of such danger.

- ✓ The appellant's conduct of not only beating but also undressing his wife in front of other people generally, and her father-in-law in particular was an embarrassing and distressing act of cruelty which inflicted a considerable physical and mental torture to the respondent.

CHARLES AOKO V DORINA GIBONGA 1988 TLR 44

Shirati Primary Court in Tarime District. The courts granted divorce under section 107 (3) (c) and 107 (3) (b) of the LMA Dorina claimed to have been frequently beaten and threatened and that she had consented both the family council and the Marriage Conciliation Board, whose decisions she was not satisfied with. The following are the principles of the High Court.

- ✓ The two incidents that are established by the evidence to have happened cannot be said to have been clear indication that this marriage was irreparably broken. They were the usual wear and tear of married life. They did not amount to cruelty in terms of sec. 107 (2) (c) of the law marriage Act 1971, nor did they fall without the purview of section 107 (3) (b) of the Law marriage Act 1971.
- ✓ On the evidence on record the marriage was not irreparably broken down.

The test must be tested so as to prove the marriage irreparably and those tests fall under the following factors.

- ✓ Take the context of each matrimonial problems.
- ✓ Take the character and conduct of parties.

- ✓ It is very important to the weight in distinguishing from normal fear which embarrassing the marriage, way of marriage and seriously conduct in which marriage are broken irreparably, tear and ordinary are tolerable. So the court need to be sensitive and compassion in dealing with matrimonial problem.

III. DESERTION, SECTION 107(2)e OF THE LMA

What we consider in Tanzania the evidences for the marriage of breaking down is the ground of divorce in Kenya, Uganda and Zanzibar.

TYPES OF DESERTION

A. Simple desertion

It is simple and easy to prove.

B. Constructive desertion {Behavior desertion }

This is where the spouse in the matrimonial couple but his or her conduct amounts to desertion. For example absence of communication between the two although still living in the same room.

ELEMENTS OF DESERTION

- ✓ Physical separation (This is about simple desertion which means one separate him or herself from other.)
- ✓ Intention to separate permanently.
- ✓ Without reasonable cause if there is a reasonable cause there is desertion.
- ✓ Lack of consent by the injured party.
- Continuance cohabitation.
- Intermittent or periodic cohabitation.

Other evidences for granting divorce is as follows:

- IV. Imprisonment of the respondent for life 107(2)g of the LMA.
- V. Separation as per section 107(2)f of the LMA.
- VI. Mental illness of the respondent. 107(2)h of the LMA.
- VII. Change of the religion of the respondent as 107(2)i of the LMA.

BARS TO DIVORCE

- I. Connivance as per section 85 of the LMA.
- II. Condonation as per section 86 of the LMA.
- III. Collusion as per section 87 of the LMA.

I. COLLUSION, SECTION 87 OF THE LMA

Collusion means parties by agreement may institute a suit for divorce. They agree on who will say that and one who will not say what. They agree to the types of a certain information before the court and how to prevent that information from court.

II. CONDONATION, SECTION 86 OF THE LMA

The term condonation originated from London which simply means to forgive or to re-meet all the material facts are well known by other party.

Condonation has three elements namely:

- ✓ Knowledge of matrimonial offence committed.
- ✓ Forgiveness. This may be in express or implied.

PRIVING FOR GIVERNESS

- ✓ By cohabitation.
- ✓ Resumption of communication.
- ✓ Presumption of carnal knowledge.
- ✓ Both parties must be aware of intention of each other party forgive.

III.CONNIVANCE, SECTION 85 OF THE LMA

Evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground that the misconduct was condoned by the aggrieved spouse.

ELEMENTS OF CONNIVANCE

- ✓ Mere negligence (lack of attention).
- ✓ Active pushing your wife and go and committing adultery.
- ✓ Passive action.
- ✓ Over confidence (My wife or husband can't love another man or woman)

Refer the case of **RICHMOND V RICHMOND 1952 VOL 1 ALL ER 138**

- ✓ Approving adultery .

ISLAMIC DIVORCE

The LMA unify and comprises the existence of personal laws. LMA didn't abolish Islamic divorce but again it didn't adapt it without qualifications. It is only the court which is empowered to grant divorce.

STATUS OF ISLAMIC DIVORCE

Islamic divorce is recognized under the LMA as evidences to show that the marriage has broken down. This evidences as been provided under section 107(2) of the LMA.

PROCEDURES OF ISLAMIC DIVORCE

This procedure of Islamic divorce is provided under section 107(2) of the LMA. So those elements & procedures for Islamic divorce as follows:

- ✓ The marriage should be contracted in Islamic form.

- ✓ Marriage Conciliation Board should have failed to reconcile the parties(Certificate of Marriage Re-conciliation Board must be filled to reconcile the parties).
- ✓ Marriage has to be dissolved or terminated in Islamic law or forms.

Also this procedures has been explained through case law as seen in the case of

BIBIE MAURIDI v MOHAMED IBRAHIMU 1989 TLR 162

The parties were married under Islamic Law in 1979. In 1986 the respondent issued talaka in accordance with Islamic Law. Their dispute had been referred to a Marriage Conciliation Board which certified that it had failed to reconcile the spouses and the Primary Court granted a decree of divorce.

On appeal to a District Court, at the instance of the husband it was held that there was no evidence that the marriage had broken down irreparably and the decree of divorce and the order of division of matrimonial assets was set aside. Appellant now appeals to High Court.

Held:

- ✓ The Principal District Magistrate had apparently overlooked the provisions of section 107(3) of the Law of Marriage Act 1971.
- ✓ Once the Marriage Conciliation Board has certified that it has failed to reconcile the spouses, and a talaka has been issued, then the court has to find that the marriage has irreparably broken.
- ✓ There must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets.
- ✓ Performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%.

DIFFERENT MECHANISM OF TERMINATING MARRIAGE UNDER ISLAMIC FORMS

I. Khula divorce

This is where by a wife pays something to acquire divorce that is require freedom (buying freedom). This is followed by permanent talakis by man.

II. Divorce Mubarak (Consent divorce)

Parties agree together to divorce each other after they have settled some pertinent issue.

III. Conditional divorce

This is based on a specific occurrence for example I will divorce you if something occurred.

IV. ILa divorce

This happens when the husband affirms that he shall not have sexual intercourse for (4) months or more and suspends all material life for all that period. The husband is succumbs the way he has to pay Kafara for withdraw of affirmation.

V. Faskh

This is a judicial divorce given by sheikh sitting in court or kadhi in court.

EFFECTS OF DIVORCE, SECTION 112 OF THE LMA

- ✓ Determination of the marriage.
- ✓ End of cohabitation.
- ✓ End of the duty of confidentiality.

REMEDIES AFTER DIVORCE AND SEPARATION

These remedies are mainly three as follows:

- ✓ Maintenance as per section 63 of the LMA.
- ✓ Custody of children as per section 125 of the LMA.
- ✓ Division of matrimonial or joint properties as per section 114 of the LMA.

I.MAINTENANCE, SECTION 63 OF THE LMA

As provided under section 63 of the LMA explains that it is the duty of the husband to maintain the wife such as food, clothes and accommodation. Quality and quality depends on the life standard they have. Failure to maintain the wife then the wife is entitled to take anything under the absence of her husband or (wife's authority to pledge her husband's credit) as per section 64 of the LMA.

NB: Maintenance after separation and divorce is ordering by the court.

POWERS OF THE COURT TO GRANT MAINTERNANCE

This is provided under section 115-125 of the LMA.

Presumption of death as provided under section 161 of the LMA that where in any proceeding, whether civil, matrimonial or criminal, under this Act it is proved that a person has not been heard of for five years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.

But if the presumption of death arises the other party to the marriage shall not be entitled to contract another marriage unless such other party obtains or has obtained a decree of dissolution of the marriage from the court on the ground of desertion or obtains a declaratory decree under section 94 and the provisions of section 95 apply:

Provided that this subsection shall not apply where the parties were married under a polygamous marriage and the presumption of death arises in relation to the wife.

NOTE: If the husband appear can apply for maintenance though there is no marriage at all.

Also under section 138 of the LMA the court has a power to control unfair disposition intended to defeat maintenance.

II. CUSTODY OF CHILDREN, SECTION 125 OF THE LMA

Under section 4 of the Law of Child Act provides the general principle of the interest of the children. An organ concerning with marriage either private or public shall be entitled to look the best interest of the child as mandatory. Also read section 125 of the LMA.

NB: Amendment from the LMA is covered under party 13A(1) so section 2 of LMA is amended to the Child Act, section 17, 39(c), 64(1), 67, of LMA has been amended also.

Generally as provided under section 129 of the LMA provides that it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.

But on the other hand it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

Also as the general presumption that it is for the good of an infant 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 infant by changes of custody as per section 125(50) of the LMA.

The case of **PETER MOHAMED AT PAGE 18** provides the criteria on which the court can consider when awarding maintenance as follows:

- ✓ The means for the person to pay for the maintenance.
- ✓ The needs of the one to pay or to be paid.
- ✓ Parties degree of responsibility for the breakup of marriage.
- ✓ The customs of the community in which the parties belongs.

Also the case of **KHARIFA MAULID RUPEA V K. OMARY.**

In this case parties were under engagement but the magistrates proceed to issue divorce and the maintenance of the matrimonial properties. The magistrates also decided on the favour of maintenance of fiancée although through this magistrate was wrong. But the point to note is that the magistrate should seek on the maintenance of matrimonial properties.

SADIK J In discussing among division or sharing joint properties.

According to this case the parties may share the properties occurred jointly although the marriage was invalid they well share joint properties but not matrimonial properties since they were no marriage at all. Procedure to be followed in adoption in this matrimonial proceeding two issues were addressed as follows:

- ✓ Whether divorce or separation.

- ✓ You must address the issue of maintenance of children (Division of Matrimonial Properties) acquired jointly and the way to share this properties.

DIVISION OF MATRIMONIAL PROPERTIES ACQUIRED BY JOINT EFFORTS

Specifically this part is covered through section 114 of the LMA and also the case of

BI HAWA MOHAMED v ALLY SEFU 1983 TLR 32

The appellant and respondent were wife and husband respectively until the dissolution of their marriage by a court decree of the Primary Court of Ilala District at Kariakoo, Dar es Salaam in 1980. In subsequent proceedings the Primary Court held that the appellant was not entitled to any share in the matrimonial assets as she was a mere wife and that the house was bought by the husband's money. On appeal to the High Court, the Primary Court's decision was substantially upheld. This is a second appeal.

Held

- ✓ Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets;
- ✓ "Joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts" or "work" of husband and wife;
- ✓ Where a spouse commits a matrimonial mis-conduct which reduced to nothing her contribution towards the welfare of the family and consequential acquisition of matrimonial or family assets she or he would not be entitled to a share in the property.

But the interpretation of section 114 of the LMA provides two schools of thoughts as follows:

I. The narrow or conservative school of thought.

Under this school of thought they say that in division of matrimonial asserts the court must consider the contribution of the asserts. That what has been contributed by each party which can be assessed by simple contribution so as to reach the conclusion of the matter in issue. This school of thought is constructing the section in literally (Literal meaning as the way it is)

II. The broad view or liberal school of thought.

This school it was going beyond on what has been provided in the statute which means it was going against the literal meaning of the statute. The court of appeal in the case of “BI HAWA” as referred early rejected the first school of thought and used the second school of thought which show that the court of appeal didn’t adapt the literal meaning.

Misconduct as the reason for divorce as well as separation . A court when granting a divorce the court shouldn’t put interest with the misconduct of the parties that who is right or wrong. Generally the court is interested with that the marriage has broken down beyond repair. However the court is interested with the division of matrimonial asserts then misconduct is irrelevant.

According to the Court of Appeal. The court’s power to divide matrimonial or family asserts as provided under section 114 of the LMA will be exercised only when the following conditions exists:

- ✓ When the court has granted or is granting a degree of divorce or separation.

- ✓ When their assets acquired by parties during their marriage.
- ✓ When the acquisition of such assets was brought about by the joint efforts of the parties.

REASONS FOR THE BROAD OR LIBERALISM OF THE COURT OF APPEAL

I. Because of modern philosophy and spirits.

Women have no right to vote previously but come to have this right in 20th century.

Women previously have no right to acquire his own property.

II. Domestic work may be more valuable to a family than of the wife with self aiming.

III. The husband can hardly conduct businesses if his wife doesn't cooked the dinner and mind the children.

IV. Wife may have sacrifice her carrier at the expenses of the matrimonial life.

V. The wise or wisdom of the wife may boost the husband to colony.

CHALLENGES BETWEEN LIBERALISM TOGETHER WITH NARROW MEANING

- ✓ Whether the broad view or liberalism doesn't amount into judicial legislation.
- ✓ Whether the broad view or liberalism by the court is consonant with obligation of the man to maintain his wife.

NOTE:

- ✓ The ambiguity on division of matrimonial assets was not dissolved completely.
- ✓ Division of matrimonial assets is not compensatory but contribution of the parties.

- ✓ Although each party is entitled to share what was acquired by joint this doesn't necessary mean that the share must be divided fifty by fifty (which means equally). But how much to share depends on the contribution of each party to matrimonial asserts.

CHILD STATUS IN BRIEF

There are two types of child namely:

- ✓ Legitimate child.
- ✓ Illegitimate child.

The LMA doesn't specifically explained about legitimate and illegitimate of child but come to assist the children. The LMA doesn't deal with status of children apart from section 98(1) because the same is covering the benefits of the child but if the child attained the age of 18 years the mandatory principles of parents seized.

POSITION ON TANZANIA ABOUT CHILD STATUS

Customary Law Declaration Order GN No. 63 chapter 4 is dealing with status of child.

There are two mechanisms of legitimizing child when the father of the child is known as follows:

- ✓ By marrying or contracting marriage with the mother of the child at any time.
- ✓ By legitimizing a child before weaning through payment of 100Tshs.

It should be the person mentioned by the mother during the birth as father of the born child. You must obliged to maintain the children even if that a particular child is illegitimate.

SARAH MALOGO V WILLIAM VAHAYE 1983 TLR 217

The respondent sued in the Primary Court for paternity and custody of a female child born to the appellant on 8th June, 1976. He was successful. The appellant's first appeal to the District Court was dismissed and she further appealed.

LUGAKINGIRA J Held as follows:

- (i) Giving the law its true intentions, once a woman declares a particular man to be responsible for her pregnancy, she cannot afterwards be heard to represent otherwise.
- (ii) Where the intransigence of the mother makes the putative father unable to legitimate a child before it was weaned, the father should be allowed to legitimate the child even after it has been weaned.

BEATRICE NJOWOKA V EVARISTUS NAMBUNGA 1988 TLR 67

The respondent unsuccessfully sued the appellant for custody of a child in the Primary Court, but his appeal was allowed in the District Court. Aggrieved, the appellant appealed to the High Court. The Appellant and respondent were friends and it was during that relationship that the appellant got pregnant and a child, now in dispute, was born.

Their intention had been to marry, but the appellant changed her mind. Hence the dispute over the child. The Primary Court applied the Law of Persons in dismissing the respondent's claim on grounds of respondent's non-compliance with the customary Rules embodied in G.N. 279/63. The District Court held that the respondent complied with s. 181 of the G.N. 279/63.

That court based its decision on s.160 of the Law of Marriage Act, 1971. The appellant's appeal revolved around s. 181 of the Law of Persons and she contended that the purported payment by the

respondent was ineffectual because it was made after the child had weaning.

KAZIMOTO J Held as follows:

(i) Section 160 of the Law of Marriage Act, 1971 does not deal with status of children.

(ii) Under section 181 of the Law of Persons, payment of money to legitimize a child must be made before the child has weaned.

(iii) Sections 183 and 184 of the Law of Person G.N. 279/63 give the woman final say to name the father of the child.

HARUBUSHI SEIF V AMINA RAJABU 1986 TLR 221

The respondent petitioned before a Primary Court for separation between her and the appellant to whom she purported to have been legally married. The Court found that the parties had cohabited for fifteen years and four children were born out of their union.

The Court was satisfied that the presumption under s.160(1) of the Law of Marriage Act, 1971, had not been rebutted and granted the petition for separation. The District Court on appeal, agreed with the decision of the Primary Court. The High Court found that the presumption of marriage was rebutted and examined the effect of such rebuttal on the status and rights of the woman and children of a rebutted marriage.

Held:

- ✓ If the presumption of marriage under s.160(1) of the Marriage Act has been rebutted then under s. 160(2) the woman becomes a deemed legal wife devoid only of the legal right to petition for divorce and separation.

- ✓ The children of such relationship become deemed legitimate children and they need no legitimization.

ZAINA ISMAIL V SAIDI MKONDO 1985 TLR 239

The parties never contracted a marriage but they lived together in cohabitation for five years, out of which a child was born. The respondent claimed custody of the child. He lost in the Primary Court but won when he appealed to the District Court, on the basis that the parties had lived together for five years and therefore, the court held, they were to be treated as duly married. The appellant appealed to the High Court.

Held:

- ✓ Under s. 160 of the Law of Marriage Act, 1971, parties can raise a presumption of marriage if they have stayed together for a period of over two years; but the presumption is rebuttable and the intention of s. 160(1) is not to create an alternative procedure of contracting a valid marriage.
- ✓ Because the parties were never married, the child born to the appellant is an illegitimate child and the respondent cannot claim it now as he never legitimized it in time by application through the Law of Persons, G.N. 279 of 1963.

So **ZAINA 'S** case agree with the case of **BEATRICE NJOKA**, this cases contravenes each other. So the principle of statutory interpretation is considered. Again the LMA doesn't deal specifically with the status of children. So the case of **HARUBUSHI SEIF** was decided wrongly since the case was decided referring to the LMA.

Under section 128 of the LMA provides once a child is illegitimate the custody of children will be upon the woman.

