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TUMAINI UNIVERSITY

IRINGA UNIVERSITY COLLEGE

FAMILY LAW: LAW206

CLASS NOTES

Definitions

- ✓ The term Family is of a limited legal significant.
- ✓ **Lowe & Douglas** summarises the meaning of family to imply a basic social unit constituted by at least two people, whose relationship may fall into one of three categories [1];

  - o A relationship of husband and wife or two persons living together in a manner similar to spouses.
  - o It may be constituted by a parent living with one or more children.
  - o Brothers and sisters or other persons related by blood or marriage (affinity) may be regarded as forming a family.

[1] Lowe. N & Douglas. G, (2007),Bromley's Family Law, 10th Ed, p 1

✓ Other meanings

- Members of a household, including parents and children with perhaps other relations, lodgers and even servants. For lodgers and servants the relationship may not necessarily be considered as family rather their legal relationship may be considered as contractual[2].
- The Civil Partnership Act 2004 which came in force on 5th December 2005 creates a legal status equivalent to marriage, for same sex-partners otherwise called civil partners
- In **Fitzpatric v Sterling Housing Association** (1999) HL (Unreported) The House of Lords per Lords Slynn, Nicholls and Clyde and Lords Hutton and Hob Dissenting held that a gay man was entitled to take over the tenancy formerly held by his long-term male partner now deceased under the Housing Act. Lord

[2] Ibid

Slynn said that, ‘’the legislation could not be interpreted to allow P’s claim on the basis that he had been living ‘’as the husband or the wife’’ of the deceased... P could claim as ‘’a member of the family’’ living with the deceased at the time of his death. The term ‘’family’’ is used in many senses, some wider than others and if P could show(as on fact he could) the mutual inter-dependence, sharing of lives caring and love, commitment and support that are rebutably presumed to exist between married couples, that would be enough to establish a family relationship’’

- ✓ **Family may be classified under different types**
  - Nuclear family; this may consists of a father, mother and children
  - Extended family; this may consist of a father, mother, children and other relatives.

- Kinship; this consist of larger family groups related by blood and marriage.
- Households; a group of people sharing accommodation.

✓ Marriage may be regarded as forming a family.

❖ Marriage definition

✓ Marriage is defined under s 9(1) of the Law of marriage Act Cap 20 of 1971 (R.E 2002) LMA as a voluntary union between a man and a woman/ women intended to last for their joint lives.

✓ In the landmark case of **Hyde v Hyde** (1866) L.R 1 P&D 130,133 the court by Lord Penzance, was of the view that''...[M]marriage as understood in Christian dome may be defined as the voluntary union for life, of one

man and one woman to the exclusion of others''

- ✓ In Munro v Munro marriage is defined as a bond between two persons and does not recognise a third party.

- ✓ Under these definitions three elements can be adduced;

  - Marriage must be voluntary
  - It must be intended to last for life
  - It must be heterosexual i.e. between different sex (man and woman) **Cobert v Cobert** (1970) 2 All E.R. 33 marriage is between a man and a woman. Sex change will not entitle a man who was biologically born so to be a woman for the purpose of marriage Act.

Kinds of marriages

- ✓ Under s 10 the LMA marriage is of two kinds;

- **Monogamous** marriages or are intended to be monogamous; these are those marriages between one man and one woman. These are common and compulsory in marriages celebrated under Christian forms.
- **Polygamous** marriages or are potentially polygamous; these are marriages between one man and more than one woman.

  - **Polyandry**; this is where a woman is married to more than one man. In many jurisdictions polyandry is prohibited by law. It is an offence that is created by s 152 of LMA.

✓ There are forms under which marriages may be celebrated these include the following;

- **Christian marriages**; these are marriages that are celebrated in a church in the manner recognised by the Christian faith or by any denomination or sect of that

faith. This is provide under s 25(3) (b) of LMA.

- Christian marriages are registrable under s 43(2) of LMA, the marriages are monogamous and are intended to last for the joint lives of the couple i.e. no divorce is allowed.
- They can never be converted to polygamous marriage as long as the parties still profess Christianity s 11(5) LMA
- According to s 30 of LMA a Christian marriage may be celebrated according to Christian rites in any place habitually used as a place of public worship or a place of gathering by the followers of Christianity, by a minister who has been licensed in that behalf by the Registrar-General.

o **Islamic marriages**; these are marriages that are contracted in the manner recognised by Islam or by any school or sect of that faith s 25(3) (a) LMA.

- They are registrable under s 43(3) of LMA. These are marriages contracted between a man and a woman who profess Islam or Mohamedan law.
- It is intended to last for the joint lives of parties but divorce is recognised.
- Muta marriage is not recognised under the LMA, these are marriages for specific time.
- Marriage may be conducted by proxy, the wife need not be present during the marriage celebration, usually the brother of the bride will be present and the sheikh or Kadhi will ask the prospective husband if he agrees to marry the wife for a specified bride price. This is recognised by s 38(2) of the LMA.
- The bride price is the property of the woman and parents have no saying on it.
- Islamic marriage recognise polygamy however it limits the number of wives to only four.

- A minister who is licenced according to s 30 of LMA may celebrate this type of marriage.
- See **Adam Mtondo v Likuna Omari** (1968) HCD 289
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- **Hindu marriages;** these are marriages that are contracted between parties that are of Hindu beliefs.
  - The provisions that apply to Christianity and Islamic marriages also apply to these types of marriages.

- **Customary marriages;** these are the kind of marriages contracted between parties belonging to a community or to communities which follow customary law.
  - This type of marriage allows polygamy, parties must state during the first marriage whether the marriage is polygamous or potential polygamous.

- These marriages are registrable under s 43(5) of LMA
- See **Masero Mwita v Rioba Masero** (1969) HCD 199
  Kirisa Kitentera v Patiri Magesa (1968) HCD 254
- Marriages under customary form in most African states were used as a means to transfer property form one family to another through **bride price.**

o **Civil marriages**; these are the kind of marriages that are contracted in civil forms.

- They are supervised by either District Commissioner's office or District Registrar.
- They can be monogamous, polygamous or potential polygamous.
- If parties did not specify during the marriage contract, whether the marriage is polygamous or not, it will be presumed that the marriage is

polygamous until it is rebutted. This is provided under s 11 of LMA

- **Foreign marriages;** these fall under two categories;
  - Those contracted in Tanzanian embassies abroad s s34&37 LMA
  - Those contracted according to foreign laws s 36 LMA
- Where there is dispute between the parties to these marriages, the ***lex domicile*** will apply. i.e. the question of jurisdiction of court is bound to the domicile of the parties, in other words the applicable will be that of the place the parties reside.

Residence of parties after marriage

- **Uxilogical**; this is when a wife moves to her husband's family. It is common in patrilineal societies.
- **Matrilogical/Virilogical**; this is when a husband moves to a wife's family. It is

practices in matrilineal societies. Eg Zaramo, Makua, Mwera and Luguru

- ✓ **Other forms of marriages** (these were common under pre capitalist societies)

  - **Sororate marriages**; this happens when two sisters are married to the same man. This y be as a reward to an example nary son in law for a specific reason eg when the sister is barren.

  - **Levirate marriage**; this is wife inheritance. A brother takes a widow of the deceased brother.

    - Wife inheritance under rule 64 of GN 279 of 1963 is pointed out that, ‘’if the widow agrees to live as a wife of one of her deceased husband’s relatives and consent to has been obtained from the family council she becomes a legal wife of this relative’’.

- **Ghost marriages;** this is atypical case where a man dies before he reaches a marriage age or puberty or before attaining a wife, one of his brothers marries in the name of the deceased brother, the issues of the marriage will belong to the deceased brother and will bear his name.

- **Barren woman;** this is a traditional type of marriage. It happens when a woman who does not bare any children (barren). Children are the sign of prosperity especially for a woman who is rich. So a woman marries another woman in order to get children who are going to be hers (barren woman's). This may also happen to a woman who gets only female issues so she may get married to get male issues. This is different from lesbianism which is unnatural sexual practices between women. In **Spicer v Spicer** 1 WLR 1051, lesbianism was considered to amount to cruelty to a husband and it was

said in modern time it may amount to unreasonable behaviour and it may be a ground for divorce.

- This is very common in Kurya societies (in Tanzania), ibo(Nigeria) and Simbiti. This is what is known as ***Nyumba Intobhu*** in Mara Tanzania. When the barren woman marries she builds a house in her compound, from then she takes steps to get married, this will be by starting to look for a young woman who can bare children for her. Then she is going to look for a suitable partner for that young woman. The young girl has no say in choice of a partner. The barren woman will consider the young woman as her daughter in law.
- The issues will have a status of grandchildren. If a child is born and he is a boy he will get a bull (*Nzagamba*) and if it is a girl then she will get a calf.

- The only and important evidence that there exist a marriage is the marriage certificate which is issued by the registrar of marriage office.
  See **Ahmed Ismail v Juma Rajabu** [1985] TLR 204

Family Law

- ✓ Family Law is defined as the law regulating matters related to family relationships such as marriage, personal and property rights as between husband and wife, matters of succession, separation and divorce and other matrimonial reliefs. This is provided for in the preamble to the LMA.
- ✓ The Law that governs family matters in Tanzania is The Law of Marriage Act No. 5 CAP 29 of 1971 (the LMA)
- ✓ Prior to the enactment of the LMA there were number of piece of legislations that governed matters of family (i.e. marriage, separation, divorce, property rights e.t.c.)

- Customary marriages and matters incidental to it were governed by customary laws. This was provided for by s 11 of The Judicature and Application of Laws Ordinance (JALO- now JALA) Cap 358 No. 57 of 1961(R.E 2002] as amended by The Magistrate's Court Act of 1984.
- Islamic marriages were governed by Islamic Law especially the Quran
- Christian marriages were governed by the marriage Ordinance Cap 109 and the Matrimonial Causes Ordinance Cap 364.

✓ The coming into force of the LMA meant the repeal of the then existing laws governing family matters. S 163 of the LMA expressly provides that those legislations will no longer be applied especially to matters that are provided for by the LMA. The LMA provides for all the forms of marriages in other words the LMA harmonises all the types of marriages

- In the case of Mohamed Ndwata v Hamisi Omary [1988] TLR 137 s 3A of JALA. Was cited with approval that ‘’notwithstanding the provisions of this act the rule of customary law and Islamic law shall not apply in regard to any matter provided for in the law of marriage act 1971’’. The old laws are superseded in accordance with s 71 of the LMA

Functions of family Law

- ✓ **Definition and alteration of status**; this is said to be the historical role of family law[3]. Rights arise between men and women living together only if they are married. Their legal relationship depends largely on their status. No rights and duty with respect to children unless they are legitimate and children can be legitimate if parents are married, this is also with respect of citizenship of children. Status of parties may also be altered by the court by granting divorces and make adoption orders,

[3] Ibid p2-3

because a marriage can be dissolved and a child can be legally adopted only by judicial process.

- ✓ **Remedial role**

  - **Resolution of dispute;** disputes occur between members of a family example on an event of a break up of marriage differences may occur on matters of residence or upbringing of children or visiting rights and rights to occupy matrimonial home. Family law plays an important role in setting forums for resolving these disputes.

  - **Protection of weaker members of society;** family law will provide for protection of weaker members of society such as children from exploitation both physically and economically. **Physical** this raises the more urgent problems example the court may be required to give

protection to victims of domestic violence, through family law courts will make non-molestation orders or exclusion from living in matrimonial home or make orders for children to be taken care of by outsiders such as NGOs or social service, however this should be a last resort. Economically this assumes importance when family union ceases to exist for example during the death or separation or divorce courts will make orders for financial assistance mostly on the death of bread winner[4].

- ✓ **Property adjustment or division;** where it appears there is need for redistribution of family capital assets especially in the law of interstate succession cases and adjustment of asset during divorce or separation family law plays a great role. Example the case of **Bi Hawa Mohamed v Ally Sefu** 1983 TLR 32 (CA) where it was held that ‘’Since the welfare of the family is an essential

[4] Ibid p 4

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''. If a person dies interstate, his property will have to be distributed, and the law of interstate succession is essentially a part of family law, this law provides for the division and distribution of a deceased person's property amongst his heirs[5].

The pre-capitalist family

- ✓ Relationships and matters of marriage were under clans and heads of family. The societies applied customary law depending on the customs of a given society. Marriages were usually celebrated by elders or chiefs or heads of family. Families in pre-capitalist societies were mainly polygamous, there are various reasons that were advanced for this fact some

[5] Ibid

of these reasons are as follows; (importance of polygamous)

- **Provision of labour;** traditionally under polygamous marriages the new wife joined the husband's family, in this way the family's labour force increased. This was important mainly because the means of production were rudimentary.
- **Reproduction of labour power;** with many wives one was assured of large labour force because these wives could give him many children who added to the labour pool.
- **Family adjustment**; when one wife could not bare any children another wife could rescue the situation.
- **Biological necessity**; according to expertise some men are bestowed with high degree of virility than women, so if one woman falls sick the other could fill the gap.

- **Social status**; a man was respected for having many wives, so the number of wives was important than the marriage contract its self.
- **Political reasons**; polygamy was important to establish links with other ethnicities.

Constitutional category of family law

- ✓ Article 16(1) of the Constitution of The United Republic of Tanzania 1977 as amended from time to time provides for the right to privacy and personal security. This right includes the respect and protection of every person's family matrimonial life and residence.

- Article 18(1)(2) of the Charter of People and Human Rights provides that family shall be the natural unit and basis of society. Hence every state that is signatory to the chatter is

required to must protect this unit by taking care of physical health and morals. The state shall also have the duty to assist the family.

➢Marriage practices and procedures

❖ A contract to marry (engagement)

- Every marriage is preceded by **a contract to marry**. This is an agreement were parties in explicit words undertake a promise to get married in a near future. This is different from friendship between a man and a woman where there is no explicit of the intention to get married. There must be an unconditional agreement to marry.
- The proof that engagement took place includes;
  - The presence of evidence in writing.

- The presence of a gift of an engagement ring from one party of the agreement to the other in contemplation of their marriage.
- Evidence of a ceremony entered by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.

- At common law such agreements amounted to contracts provided that there was an intention to enter into legal relationship[6]. The position was changed by s 1 of The Law Reform (Miscellaneous Provisions) Act 1970which provided that no agreement to marry shall take effect as a legally enforceable contract and that no action shall lie in this country for breach of such agreement wherever it was made.
- The breach of contract to marry occurs when one of the parties does not

[6]Ibid Lowe N & Douglas p 43

implement what was intended (the marriage). The breach may occur even if the date was not fixed and it was just said that it will happen ‘’in the near future’’ it will be implied that means soon.

In **Richard Mugunda v Minzulayimu** (1965) the parties married in church, but a dispute arose before the ceremony, the groom insulted the bride’s sister. The bride replied ‘no’ to the priest’s when making vows. The groom sued the father in law for refusing his daughter. He claimed Tshs 2500 for damages and compensation for food and drinks he prepared. The court held that, both the bride and the groom knew that they had a right to say yes or no in front of the priest.

- There are legal consequences when a contract to marry is breached. A man may have done something geared to that intended objectives and they

woman family may have also incurred expenses in preparation for the intended wedding. So in case a promise to marry is broken the victim party is able to claim for those expenses. This is provided by s 69(1) LMA

- The section specifies that no action will lie against a party who was below eighteen when the promise was made.
- The damages paid will be to the actual loss suffered and no excess and no specific performance will be ordered.
- S 70 of LMA specifies that the action for breach of promise must be brought within one year after the date of the breach.
- S 71 of LMA a suit may be brought for the return of gift made in contemplation of marriage that

has not been contracted, this is after the court is satisfied that this gift was given with the intention on the part of the giver that it should be conditional on the marriage being contracted.

- In **Mohameid Seminyu v Sofia Msangi** (1975) Unreported the plaintiff was awarded Tshs 40,000/- as damages for breach of promise to marry, the High Court reduced the damages to Tshs. 20,000/-. The plaintiff claimed among other things; loss of employment due to pregnancy, injured feelings and diminished prospects for marriage.
- Promise to marry may be oral, written or by conduct.
- Parties must actually know that they are entering into the contract to marry. The doctrine of estoppel does not apply in these contracts.

- There are available defences for breach of contract to marry
  - Misrepresentation
  - Fraud
  - Mistake
  - Duress

❖ The contract of marriage

- This is the relationship existing between a man and a woman or women geared to fulfil particular needs to different societies.
- Marriage contract confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others[7].
- This contract creates a relationship of mutual and reciprocal

[7] Bromley's Family law, p 39

obligations typically involving the sharing of a common home and common domestic life and the right to enjoy each other's society comfort and assistance. This was stated by Munby J. in the case of **Re E (an alleged patient); Re Sheffield city Council v E and S** [2004] EWHC 2808.

- In English law marriage is an agreement between a man and a woman enter into a certain legal relationship with each other and which creates and imposes mutual rights and duties. It like any other form of contract affected by factor like form and capacity and it may be void or voidable.[8]
- However unlike commercial contracts a marriage contract is a ***sui generis*** in many respect and it

[8] Ibid

has some distinctive characteristics;

- The law relating to capacity to marry is different from ordinary contracts.
- Marriage is contracted only after special formalities are observed.
- Grounds for validity of marriage are different from other contracts. i.e grounds for marriages to be void or voidable
- A contract of marriage may not be discharge by agreement, frustration or breach. It can be discharged by death or by formal legal act pronounced by a court of competent jurisdiction.

- **Customary marriage**

- Capacity of parties is determined by puberty, and for male parties upon attainment of circumcision and circumcision of female in some societies.

    - Insanity and leprosy and other serious diseases normally are bar to marriage. Deformity was not a bar rather it reduces a person’s chances for marriage.

    - Prohibited degrees of consanguinity or kindred; marriage was only between persons outside blood relations. For some tribes prohibited degrees fall as close as second degree of blood relations. E.g. Tswana, Luvedu and Yako

- ✓ **In Fatuma Masudi v Ali Masatu** (1977) LRT 3 Kisanga J held that ‘’parties being members of the same clan or being cousins does not fall within prohibited relationships as per s 14 LMA’’. Read also **Michael Mangawe v Mang’ana Suluba** (1976) LRT 19

- Consent of parties; when marriage was arranged during the couple’s childhood their consent was not necessary. If marriage was arranged upon the parties reaching adolescence then their consent was necessary but where betrothal is made during the girl’s adolescence then only

the consent of parents was necessary

- Betrothal; this was the first formal agreement concluded both in patrilineal or matrilineal societies where marriage payment was customarily required. When marriage payment is done parties will not have the rights and obligations towards each other until marriage is concluded usually when parties reach marriage age. Example in Tswana after betrothal prospective couples would be allowed to start cohabiting until the beget a child when marriage would finally be arranged and marked with public ceremonies; no damages would accrue upon termination of betrothal by any

of the parties other than the return of the marriage payment that had been made .

- ✓ No betrothal will be paid in case of second or subsequent woman's marriage.
  - Read the case of **Masero Mwita v Rioba Masero** (1969) HCD 199

- Marriage payment; this is an important element before the conclusion of marriage. In patrineal societies this is almost an inevitable requirement and a requirement in some matrilineal societies.
  - ✓ It is connected with woman's fertility and rights over children, where

marriage payment is paid children acquire paternal lineage, among matrilineal societies marriage payment is usually not an important element, and in case of children they acquire maternal lineage.

- ✓ In case of woman's first marriage payment agreed could be settled either in full before the final marriage ceremony or handling over or by instalment. For second marriages or subsequent marriage payment has to be paid in full

- ✓ In most patrileneal societies the payment would go to the father whereas in matrilineal

societies it will go to the maternal uncles. In Islamic marriages the payment known as ‘’dower’’ will go to the bride herself.

- Handling-over; this is the final seal on the customary marriage. This is usually done on the wedding day, it is followed by cohabitation and consummation of the marriage.

❖ **Statutory (civil) and religious marriage**

- Practice and procedures for civil marriages and religious marriages are governed by The Law of Marriage Act.
- Before solemnization marriage. There are pre-requisites that are to be into account;

- **Parties must give notice of the intention to marry;** this notice must given 21 days before the day they propose to marry. This is provided for under s 18 of LMA
    - This notice is made to the registrar or registration office. This notice shall contain among other things, names and ages of the parties and their residence, names and residence of the parents, a statement on their status, a statement whether the marriage is intended to monogamous or polygamous.
    - The notice shall be signed by both parties
    - S 19 requires this notice to be published by the registrar or registration officer so that it may be known publically.

- S 20 provides that, anybody can give notice of objection of marriage on the ground that he is aware of facts which according to the provision of the act constitute impediments to the intended marriage. This notice may also be made to the Registrar-General as per s 24 of LMA
- If the intended husband is already married under polygamous marriage the wife or wives may bring notice of objections on the grounds that; s20(2) LMA
    - ✓ That the taking of another wife will result into hardship to existing wife/wives and children when taking into account the husband's means

- ✓ That the intended wife is of a notoriously bad character or is suffering from an infectious or communicable disease or is likely to introduce grave discord into the husband.

- S 21 provides for the procedure of taking care of the notice of objection. A person objecting may withdraw it at anytime, it should be in writing and signed by him.
- The registrar or registration officer who receives the notice of objection shall not celebrate the marriage, and shall take all lawful action to prevent it from being celebrated pending notification that the objection has been withdrawn or dismissed.

- After receiving notice of objection the court or the board will summon both the parties and the objector and witnesses if any and hear them for a just determination of the objection. S 22 LMA, then the court or the board is required to send a certified copy of its decision to the registrar or registration officer whom the notice of the intention to marry.
- The Registrar-General is empowered by s 23 of LMA to dispense with requirements of giving notice upon proving that;
    - ✓ That the parties are not within prohibited relationships.

- ✓ That there is no impediment of a subsisting marriage.
- ✓ That the parties are not below the minimum age of marriage.
- ✓ Consent has been obtained
- ✓ Any good and sufficient reasons
  - These may include accident victims, death bed marriage, when transferred to an employment where marriage is a must, when one party is going to war e.t.c

- **The presence of witnesses**
  - S 27 provides for requirement for every marriage to be

contracted in the presence of at least two witnesses.

- The witnesses must;
  - ✓ be above the age of 18 years
  - ✓ Not of unsound mind due to mental illness or intoxication
  - ✓ Understand the language in which the ceremony is conducted.
- Absence of witnesses is an offence as per s 154 of LMA

- **Marriage must be public**
  - It is a requirement of s 28 of LMA that marriage must be public
  - Any member of the public may attend marriage in civil form so far as the accommodation of

the office of the District registrar may permit.

- Any follower of the religion according to the rites which the marriage is celebrated may attend that marriage.
- Any member who is Islamic or belong to the customs to which the marriage is celebrated may attend the said ceremony.

- S 29 gives the procedure for marriage in civil form.
- S29(c) parties may state whether their marriage is going to be monogamous or polygamous.
- S 31 of LMA gives the power to the Registrar General to authorize marriage ceremonies to be conducted in places other than those permissible if he thinks there are sufficient and good reasons;

- For civil marriages in any other place other than the office of the district registrar.
- For religious marriage in any other place other than places habitually used for public worship or gathering.

- **Marriage certificate**
  - When marriage is contracted in any form then the person contracting that marriage must complete in duplicate a marriage certificate in the prescribed form and sign and cause the parties and the witnesses to sign and hand one copy to the parties and retain the other copy. This is provided by s 33 to the LMA.
  - When marriage is contracted before the registration officer

in he is required to fill a statement of particulars relating to the marriage and sign and cause the parties and the witnesses to sign and send to the Kadhi is marriage was contracted in Islamic form or to the District registrar if the marriage was contracted in customary form.

- ✓ Upon receipt of the statement of particulars of the marriage the district registrar or the Kadhi as the case may be shall register the marriage and issue a marriage certificate in duplicate, retain a copy and send the other to the registration officer for transmission to the parties.
- ✓ Every registrar is required to maintain marriage

register. S 42 of LMA and s 43 provides for the duty and procedure to register marriages.

- **Conversion of marriage**
  - A marriage may be converted from monogamous to potential polygamous or from potential polygamous to monogamous. This is by both the husband and the wife making a declaration as to their free will to make the conversion. S 11 of the LMA is to that effect.
    - ✓ This declaration shall be made in the presence of a judge, a resident magistrate or a district magistrate and shall be recorded in writing, signed by the husband and the wife and the person before whom it is made, at the

time of its making. And the copy of the declaration shall be transmitted to the Registrar-General.

- ✓ S 11(5) of LMA is to the effect that no marriage between two Christians which was celebrated in a church in Christian form may, for so long as both the parties continue to profess the Christian faith, be converted from monogamous to polygamous notwithstanding that the marriage was preceded or succeeded by a ceremony of marriage between the same parties in civil form or any other form.

- **Duration of marriage**

- According to s 12 of the LMA a marriage shall subsist 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; or
  - ✓ By an extra-judicial divorce outside Tanzania which is recognised in Tanzania under the provisions of section 92 of LMA.

❖ Presumption of Marriage

- If a man and a woman live together for a period of two years or more, as a manner of a husband and a wife and the hold themselves to be so and they have gained themselves a reputation of married couples, there will be a rebuttable presumption that they are married. This is provided for under s 160 of the LMA.
  - The burden of proving that they are not in fact married lies on the person who needs to rebut the presumption. In **Rafael v Mongula** [1975] LRT 42 the court was of the view that ’’where a man and a woman have lived together in the circumstances that leads the outside world to believe that they are husband and wife, the party denying that must come out with evidence’’.
  - S 160(2) When such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for

herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance.

- Upon application made either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of the LMA which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs.

- Under the common law this is known as ‘’common law wives’’
- This is normally applicable when there is a dispute, this presumption is said to protect the weaker members of the society i.e. the women and children viz upon the death of the husband or upon the breakdown of the marriage.
    - The court will look at various factors in considering the presumption.
        - ✓ Long-cohabitation; where the parties have lived long enough to the extent of them being considered by neighbours as husband and wife.
        - ✓ How the neighbours perceive the couples, things like attendance of social events and ceremonies e.t.c.
        - ✓ **Read: Francis Leo v Paskali Simon Maganga [1978] L.R.T. No. 22** in this case the Appellant

sued the Respondent and claimed from the Respondent the sum of Shs.2,400/= being payment to be paid by the Respondent for legitimation of the Respondent's five (5) children who were begotten by the Respondent with the Appellant's daughter called Magdalena. The appellant claimed the sum of Shs.2,400/= under the customs and usage of Wanyamwezi. It would appear that the Respondent and Magdalena had lived in concubinage for a period of over 2 years. The Hon. Justice Mfalila (as he then was) observed in his judgment on appeal thus: Being duly married means going through the forms and procedures as provided for under the provisions of Marrige (sic) Act. the Hon. Judge went on to observe thus: When the presumption has been

rebutted under the provisions of section 160 of the Marriage Act, the children of the presumed Marriage are illegitimate. The father of the illegitimate children may legitimate them according to Customary Law in order to bring them to the paternal side. The Respondent should have either surrendered the five children or taken legal steps to legitimate the 5 children to bring them to the paternal side.

Harubushi Seif v Amina Rajab [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:

(i) 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.

(ii) The children of such relationship become deemed legitimate children and they need no legitimization

Hoka Mbofu v Pastory Mwisage [1983] TLR 286 ; The appellant was appealing against the decision of the District Court of Magu which reversed the Nyaluhande Primary Court decision which awarded the appellant Shs. 5,900/= being her share of property acquired during her concubinage for 16 years with the Respondent. The District court purported to reverse the decision of the Primary Court on account that there could be no division of property between the parties if their presumed marriage had not been dissolved. The parties had not alleged presumption of marriage, hence this appeal.

Held: (i) Where there is no allegation of presumption of marriage, section 160 of the Law of Marriage Act, 1971 cannot be invoked merely on account of concubinage association;

(ii) rule 93 of the Customary Law (Declaration) Order, G.N. No. 279/1963 is applicable in the division of property acquired during concubinage association.

❖ Validity of marriage

- Certain consequences flow from marital status that being a case it is necessary to establish whether a valid marriage exist. There are two methods to be used when the question of validity of marriage arises, viz the grant of a declaration of the status and a decree of nullity[9].
  - **Declaration as to marital status**; s 94 of LMA confers power to the court at the application of any interested party to grant a declaratory decree as to;
    - ✓ The validity of the purported marriage.
    - ✓ The legitimacy of children. Whether the parents or grand-parents were married.
    - ✓ Presumption of death of a spouse.

[9] Bromley's Family law, p 67

- ✓ Whether the marriage was determined by Islamic or customary law.
  - o Any interested party may seek a declaratory order as to the validity of the marriage. Eg the trustees of a pension fund may wish to establish whether a woman is the widow of a former employee. The court must refuse to hear a case if it considers that the applicant does not have a sufficient that the applicant does not have sufficient interest in the outcome of the proceedings or the declaration would be manifestly contrary to public policy[10].
  - o A declaratory order is a judgment ***in rem*** and it binds everyone including the state

[10] Ibid

eg where an applicant is applying for citizenship.

- **Decree of nullity**; the decree for nullity is sought in order to clearly establish that the requirement for a valid marriage have not been satisfied. Two outcomes are possible under this circumstance, the marriage will either be ***''void or voidable''*** s 96 of LMA vest the power to the court to annual voidable marriages
  - ✓ According to s 97 of LMA only parties to the marriage may make application for annulment. Where the petition is founded on an allegation of facts of which one party was ignorant at the time of the marriage may only be brought by that party. If it is brought on the ground of wilful refusal to consummate by one of the party

only the other party can bring an action.

- **Void and voidable marriage**
  - Void marriage is one that in the eyes of the law has never existed whereas a voidable marriage is one that exist until it is has been annulled by the courts, and if it is never annulled it will be treated as valid. In **De Reneville v De Reneville** [1948] p 100 at 111, CA, Lord Greene MR pointed out the differences between a void and voidable marriage;

    ‘’ 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 annulling it: a voidable

marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.''

- There are various distinction between a void and voidable marriage;
  - ✓ Void marriages being void ab initio does not require a decree to annul it while voidable marriage in all respect is valid till a decree to annul it is issued. Hence if a party dies before a decree is granted, a voidable marriage must be treated as valid for all purposes and for all times[11]. On the other hand a party to a void marriage may contract another marriage without the need to annul the first marriage.

[11] Ibid Bromley's Family Law p 70

- ✓ In void marriage any person with interest may prove as a question of fact that there has never been a marriage at all whereas third party must treat a voidable marriage as valid unless a decree is issued to invalidate it.
- ✓ A decree for void marriages does not affect the status of the parties at all but in voidable marriages the decree affects the status of the parties.
- ✓ Lapse of time does not act as a bar to relief void marriage, whereas for voidable marriages time operates as a bar, time limit for application for relief. S 96(1)(a)(i) time limit is set to be one year.
- ✓ A child born out of void marriage would technically be illegitimate, unless at the time of the conception either parent

reasonably believed that they were validly married to the other parent.

- **Void marriages s 38 LMA**

  - ✓ This is the kind of marriage that will be regarded in every court in which the existence of marriage in issue, that it has never and can never and can so be treated by both parties.

  - ✓ It is one that is void *ab initio* (right from the beginning).

  - ✓ A decree of nullity is not necessary to dissolve void marriage, but it is useful because it gives the court jurisdiction to make finance and property orders equivalent to those which can be made on divorce[12]. The other importance of a decree in this

[12] Stabdley .K, (2008), Family Law, p 29

circumstance is clearance of doubts about the status of parties. The decree is a judgment in rem so no any other party that may claim that the marriage is valid.

- ✓ Any interested party may bring proceedings in respect of a void marriage.

  - **Grounds on which marriage will be void**

- ✓ **Prohibited degree of relationships s 14 LMA**

  Marriages between relatives related by blood or relatives by marriage (affinity) are prohibited. **Michael Mangare v Mang'ana** [1976] LRT 19 and **Fatma Massoud v Massoud** [1977] LRT 3

- ✓ **If either of the parties is under age s 13 LMA**.
  - Male 18 years, female 15 years
  - 14 years with the leave of the Court
  - **Alhaji Mohameid v Knott** [1968] 2 ALR

- ✓ **Marital Status s 15 LMA** (subsisting marriage) **-**: if either of the parties is already married at the time of the marriage in issue. **Hyde v Hyde** marriage is the union for life between one man and one woman to the exclusion of others. If a woman is married in Islamic form, the marriage will be void if she contracts another marriage before the expiry of the period of ***''Iddat''*.** The period of iddat is usually 3monts after the divorce or death of a husband s 38(j).

- ✓ **Sex (respectively male and female) Cobert v Cobert** [1970] WLR 1306 marriage is between a man and a woman. Sex change will not entitle a man who was biologically born so to be a woman for the purpose of marriage Act. In UK same sex marriages are not permitted but same sex partners may enter into a civil relationship

- A child born after a void marriage is treated as legitimate if at the time of conception (or at a time the marriage is celebrated) the parties or one of the parties reasonably believed the marriage is valid.

- **Voidable marriages s 39 LMA**
  - ✓ A voidable marriage is the one which is regarded by every court as a valid marriage until the decree of

annulment has been issued by the court having competent jurisdiction s 40 LMA.

- ✓ The court has the power to issue a decree to annul the marriage s 96 LMA.
- ✓ Only parties to voidable marriage can open proceedings for nullity.

- **Grounds on which marriage is voidable**

  - ✓ **Non-consummation/lack of consummation s 39 (a) (i) LMA**
    - o Consummation is the first act of intercourse after marriage. It must be 'ordinary and complete not partial and imperfect'[13].

    - o Lack of consummation may be either due to incapacity of either of the party or by wilful refusal of either of the parties.

[13] Standley, (2008) K, family law p, 31

S 39 (b) LMA. **Baxter v Baxter** [1947] 2 ALL 886 the wife did not allow husband to do sex without contraceptive sheath, because she did not want any children, a husband sought decree of nullity under the ground that marriage did not consummate. It was held that the use of sheath is by law the means of contraception in common use.

- ✓ **Wife has not attained the age of marriage and there is lack of capacity to consent according to s 17 LMA [s 39 (c) LMA]**

- ✓ **Lack of consent s 16 LMA**

  - The complainant must prove that his or her will has been overborne with the result that

her or his consent to the marriage had been vitiated and she was entitled to a decree. **Hirami v Hirami** (1983)4 FLR 232

- Lack of consent- mistake-: the mistake must be in respect of the identity of the other party (not his or her quality) or the nature of the ceremony.

✓ **Pregnant per alium s 39 (a) (iv) LMA**

- This is where the husband may petition for annulment if the respondent at the ceremony was pregnant by another person. **Stocker v Stocker** (1966) 2 ALL ER 147
- To establish this you may perform DNA test

- ✓ If either of the parties was subject to recurrent attacks of insanity or epilepsy or either party was suffering from venereal disease in a communicable form s 39 (a) (ii) & (iii)

  According to S 40 of LMA a voidable marriage is for all purposes a valid marriage until it is annulled by a decree of the court. The court has the power to issue the decree of nullity s 96 LMA

➢ Consummation of marriage

- Consummation is the first act of intercourse after marriage. It takes place after solemnization of marriage.

  - ✓ It takes place whether or not a condom is used **Baxter v Baxter** [1948] AC 274

  - ✓ It also takes place whether ejaculation took place or not **R vR**

- ✓ The marriage is said to have been consummated once the parties do have intercourse even though one or both parties are sterile.

- **Elements of consummation**

  - ✓ Physical ability to perform the act
  - ✓ Mental willingness to perform the act

- **Failure to consummate**
  - ✓ This comes in two forms; either importance of the husband or structural inability of a woman.
  - ✓ It can also be due to psychiatric or sexual evasion **Singh v Singh** [1971] 2 WLR 963

- **Wilful refusal to consummate s 39 (b) LMA**

- ✓ This can be expressed or inferred eg by refusing to go through religious ceremony where a civil ceremony is celebrated and either of the part refuses to consummate until religious marriage is celebrated **Kaur v Singh** [1972]1 WLR 105.

- ✓ **Dredge v Dredge** [1947] 1 ALL ER 29 a woman was pregnant by a man; when they finally got married the wife refused to consummate with the husband even when the kid was born, the husband petitioned for nullity on the ground that the marriage was not consummated the court held inter alia that ''the marriage had never been consummated and that non-consummation was due to wilful refusal of the wife thus the husband was entitled to relief

LEGAL EFFECT OF MARRIAGE

After a valid marriage is celebrated it creates some rights and duties among the parties to that marriage.

➢ RIGHTS AND DUTIES OF PARTIES TO MARRIAGE

- This is covered under part IV of the Marriage Act. It is a consortium of rights i.e a band of rights.
- The rights of the parties to marriage include the following-: right to cohabit, conjugal rights, love and respect, maintenance, protection and intimacy, companionship and consummation.

- **Right/ Duty to cohabitation**
  - ✓ A married person is entitled to cohabitation of his/her spouse unless they are judiciary separated or they have agreed to live apart. Cohabitation means Living together as husband and wife. This occurs even if parties are not married.

- ✓ The obligation to cohabit is not mandatory. S 140 LMA parties may not be compelled to cohabit. If it were it would negate consent and voluntariness.
  - **Ahmadi Saidi Kidevu v Sharifa Shamte** [1989] TLR 148, Maina J, the issue was whether the court could compel the respondent's wife to cohabit with the husband. The court held that; when difficulties arise in a marriage, and one spouse decides to live separately from the other, the court cannot compel them to live together. Parliament, in its wisdom, enacted section 140 of the Law of Marriage Act, which clearly provides that a court cannot compel one spouse to live with the other. The only remedy to a spouse who has been deserted is to commence divorce or separation proceedings.

- **Mwendwa Mtinangi v Juma Mahumbi** [1984] TLR 47, Lugakingira J (as he then was), in view of section 140 of the Law of Marriage Act, 1971 no court is empowered to compel cohabitation.

✓ S 111 LMA if a decree of separation is issued parties are relieved their duty to cohabit.

✓ S 67 LMA parties may by written agreement agree to live apart.

- **Maintenance right**
  - As a general rule a husband has a duty to maintain his wife.
  - S 63 provides that , it shall be the duty of every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life;
  - The principles of maintenance were laid down in the case of **Miss Gray**

Ltd v Cathcart (EARL) 1922 38 TLR 562, the wife has the power to contract for her husband. S 64 LMA

- If the Husband neglects to provide the actual necessity of life to the wife, the wife has the right pledge his credit for such necessity. However if the Husband fixes a suitable allowance to the standard of their domestic life, the wife may not pledge the credit for the matters covered by that allowance.

- This duty will shift to the wife if the wife has the means to do so, to provide in similar manner for her husband and if that husband is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health. This is provided for by s 63 (b) LMA
- The court has the power to order maintenance as per s 115 LMA

❖ **Other rights**

- Right to love and respect s 66 LMA no right to inflict corporal punishment
- Right to companionship and intimacy
- Right to sexual intercourse

❖ MATRIMONIAL LITIGATION/PROCEEDINGS

- Generally cohabitation is one of the major incidents of marriage. The law requires that spouses can only be permitted to live in separation or be divorced only where good causes exist.
  - Where problems occur in a marriage and the problems become so intense that the parties can no longer live together, either of the parties may petition for separation or divorce as the case may be.

- According to s 76 of the LMA Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court.

➢ **Separation and divorce**

➢ **Separation**

- This brings a marriage to an end for a specified period of time. It leaves the marriage intact and enables the couples to cool off, and give them ample time to settle their differences thus come into an amicable and lasting settlement of their dispute and prepares them to resume cohabitation.

- Sometimes conciliation fails and thus parties live for long periods of separation and may later result into divorce.

- During the period of separation the parties remain dully married to each other and there cannot be a perpetual separation.

- The orders for adoption may contain order for custody of children, maintenance of children and maintenance of spouse.

- According to s 113 the court shall set aside a decree of separation on the joint application of the parties or where there is misrepresentation or mistake of fact.

- There are two types of separation

  - **Voluntary separation-**: this is when parties voluntarily and privately agree to leave apart. Sometimes it is due to family intervention. This form does not require any court intervention.

According to s 67 of the LMA parties by a written agreement may agree to live apart.

- ✓ Voluntary separation may contain clauses such as non-molestation orders, i.e orders that prohibit acts of annoyance, disturbance or interference with other spouses.

- ✓ The separation agreement may be discharged by either breach when this happen desertion commences or by resuming cohabitation.

- **Judicial separation-**: this involves one of the parties going to the court of law to apply for a decree of separation for a specific period of time. S 99 LMA.

- Grounds for a decree of separation

- There is only one ground for the issuing of the decree of separation that is **the marriage has broken down.** S 107(2) LMA provides evidence to show that the marriage has broken down.

  - ✓ **Adultery-**: this is an act of sexual intercourse between a male and a female who are not married to each other when at least one of them is married to someone else and the intercourse is not by force.

    - S 72 LMA a husband or wife may bring a suit for damages against any person with whom his or her spouse has committed adultery. This proceeding may not lie where the aggrieved party has consented to or connived at the adultery or where damages

where in respect of the alleged adultery have been claimed in a petition for divorce.

- The court may dismiss the suit for claim of damages for adultery where the defendant satisfied the court that he or she did not know and could not, by the exercise of reasonable diligence, have known that the person with whom he or she committed the act of adultery was married s 72(2) LMA.

- According to s 74 of LMA Damages for adultery or enticement shall be in the discretion of the court but shall not include any exemplary or punitive element. Regard shall be to the question whether husband and wife were living together or apart.

- **Jumanne Jingi v Njoka Kiduda** 1984 TLR 51 (HC), [the respondent genuinely believed that he was taking a free woman] Lugakingira J, The appellant lost in the Primary Court and the District Court in an action for damages for adultery E and therefore appealed to the High Court. The court held that; A suit brought under section 72 of the Law of Marriage Act, 1971 shall be dismissed if the F 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.

- **Gai Ipenzule v Sumi Magoye** 1983 TLR 289 (HC); the Court held that it is not the law that direct evidence of persons caught in ***flagrante delicto*** is the only admissible evidence to prove adultery. Very rarely adultery is proved by direct evidence; the common practice is that adultery is proved by circumstantial evidence and that in assessing damages for adultery, the court shall have regard to any relevant custom of the community to which the parties belong.

- Read also; **Juma Misanya and Another v Lista Ndurumai [1983] TLR 245 (HC)** [special damages and mesne profits]**, Zacharia Lugendo v Shadrack Lumilang'omba [1987] TLR**

31 (HC) [Whether proof of marriage between parties necessary], **Mafuru Magabanya v Joseph Mulya [1987] TLR 22 (HC)** [Quantum of damages]

- ✓ **Cruelty-**: this is a conduct of such character as to have caused danger to life, limb or health. **Russel v Russel** [1952] 1 ALL ER 875 what is important is to amount to cruelty such a character must have caused danger to life health to give rise to a reasonable apprehension of danger (the act need not actually occur).

  - Cruelty can either be mental or bodily (physical). Physical cruelty is simple to identify it may be by battery or

chastising. Mental cruelty or psychological cruelty seems to be the most difficult to identify, in **Gollins v Gollins** (1963) 2 ALL ER 966, Lord Reid was of the view that ‘’ the findings of cruelty is a question of fact and degree and not prejudged by objective standards, the court must consider this man and this woman subjectively in case to case basis...’’

- The respondent’s acts need to be judged in relation to the surrounding circumstances such as physical and mental conditions, the capacity of endurance or peculiar susceptibility of the innocent spouse and the intention of the offending spouse and the offender’s knowledge of actual

or probable effects of his acts to the other. In **Jameson v Jameson** [1952] 1 ALL ER 875 it was held that ‘’ where it is sought to prove cruelty by evidence of a cause of conduct adopted by conduct adopted by one spouse with the deliberate intention of wounding and humiliation...[E]vidence may be proved by evidence of number of acts each of which is serious in itself, but it may be even more effectively proved by evidence of a long continued series of minor acts none of which could be regarded as serious if taken in isolation...[T]he intention need not be proved by direct evidence it can be referred from the whole facts and atmosphere by evidence.’’

- **Saidi Mohameid v Zena Ali** [1985] TLR 13 (husband beating up the wife and undressing her in front of other people). The court held that ‘’Cruelty means wilful 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’’ and further that ‘’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 considerable physical and mental torture to the respondent’’.

- **Barker v Barker** (1949) 1 ALL ER 247 ‘’there are certain injuries that speak for themselves and that one does not have to call a doctor to say that it has caused danger to health, limb or life’’.

- Various acts may constitute cruelty, e.g. beating, habitual misbehaviour such as excessive drinking and wife humiliation and unnatural sexual practices.

- **Mariam Tumbo v Harold Tumbo** [1983] TLR 293 (HC); the court held inter alia that 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; and further that 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.

- Read also; Julia Mazengo v Jackson Leganga [1986] TLR

244 (HC) (wear and tear), Charles Aoko v Dorina Gibonga 1988 TLR 44 (HC)

- ✓ **Desertion-:** this occurs where there is a cessation of the flow of matrimonial rights and obligations eg denial of conjugal rights without reasonable cause or not taking care of the family.
  - It is an unjustifiable withdrawal from cohabitation among other things without the consent of the other spouse and with the intention of remaining separated permanently i.e where there is no ***animus revetendi***

  - Various elements must exist for an act to amount to desertion;

- There must be a physical separation, however not every physical separation will amount to desertion. Desertion must be looked upon on the conducts of the parties rather than the actual physical separation.
- There must be established an intention to desert permanently i.e ***animus desserendi*** without ***animus revertendi.***
- It must be without reasonable cause if there is a reasonable cause such as studies or work purposes it may not amount to desertion.
- Lack of consent by the other party.

- Desertion may also mean withdrawal from a state of

things as a repulsive conduct which make the spouse run away from a matrimonial home eg refusal to have sexual intercourse or excessive demand of it.

- ✓ There are two forms of desertion;
  - **Physical / simple desertion-:** this is where someone clearly someone leaves the house and there is clearly lack of intention to come back (*animus revertendi*). It can happen by one spouse intentionally not communicating to the other (everything comes to a standstill)

  - **Constructive desertion-:** this happens when the party does not leave the house but he/she

behaves in a manner where the victim party leaves the house. **Barchler v Barchler** (1947) 1 ALL ER 319 [the H forced the wife to do sexual intercourse in an becoming manner] it was stated that; ‘’...While the conduct of the H no doubt caused the wife intense unhappiness and was such that no decent man would have been guilty of it, it did not justify her treating it as dismissal from consortium in leaving the matrimonial home. The W could have protected the H from slander and suspicion (of homosexuality) by staying at the matrimonial home and not by funning the fire of gossipy by her running away..’’

- Effect of decree of separation s 111 LMA
  - The parties shall be relieved of the duty to cohabit and to render each other help and companionship.

  - The parties shall be relieved of the duty to maintain each other, but shall not dissolve their marital status. However the court may order for maintenance

- Terms of separation
  - Maintenance s 115 LMA the husband may be ordered to maintain the wife during the time of separation
  - Custody, maintenance and access to children
  - Non-molestation clause s 139 LMA this is where there is an element of cruelty.

➢ Divorce

- This is a legal dissolution or termination of marriage. A marriage comes to an end by a decree of divorce issued by a court of law and not otherwise.
- Ground for divorce read s 107 of the LMA
  - ✓ The only ground that the court may issue the decree for divorce is that **the marriage has broken down irreparably**. S99 LMA any married person may petition for divorce.
    - According to s 107 of LMA the court is required to have regard to all relevant evidence regarding the conduct and circumstances of the parties.
    - The evidence to show that the marriage is broken down irreparably is the same as those

for separation what matters is the extent.

- When there is simply ‘’wear and tear’’ the marriage will not be said to have broken down irreparably. This is a simple misunderstanding which are said to be normal in marital relationships however before one rely on wear and tear principle he should consider the provisions of s 66 of LMA. **Read also; Julia Mazengo v Jackson Leganga [1986] TLR 244 (HC) (wear and tear), Charles Aoko v Dorina Gibonga 1988 TLR 44 (HC)**

✓ S 100 LMA provides for time limitation for lodging petition for divorce. It must be after 2 years of the marriage. However if the

petitioner can prove exception hardship then that time limit may be waived. **Mariam Tumbo v Harold Tumbo** [1983] TLR 293

- Prior-procedure before going to court
  - ✓ S 101 LMA provides for the requirement to refer the matter to Conciliator Board before referring the matter to the court of law.
  - ✓ The board has to certify that it has failed to resolve the matter by issuing a certificate setting out its findings.
  - ✓ In practice these boards include, religious institutions, ward tribunals, social welfare departments e.t.c s 102(2) LMA
- Dispensation with the conciliation board
  - ✓ The court may dispense the requirement for reference to

conciliation board s 101(a-f) LMA if it is of opinion that the circumstances are extraordinary which may make reference to the board impracticable.

- The effect of decree of divorce s 112 of the LMA
  - ✓ The decree dissolves the marital status of the parties 30 days after the decree is issued.
  - ✓ The dissolved marriage shall not be an impediment to subsequent marriage of either of the parties.
- S 105 of LMA no person shall be made a co-respondent to a petition of separation or divorce unless it is on the grounds of adultery.
- S 106 of LMA points out the contents of petition of separation and divorce.
- Once the court receives the petition of separation or divorce it shall deal with

it in the manner provided for under s 108 of LMA. After all the procedures are complete the court may grant a decree of divorce or separation as the case may be s 110 of the LMA.

- S 115 of the LMA the court is empowered to order maintenance of the wife or husband or former wife or husband. However where the marriage has been dissolved the wife shall not be entitled to maintenance unless there are special circumstances as the court may deem fit. The court has also the power to order security for maintenance in various circumstances s 117 LMA. According to s 120 this right to maintenance will cease upon the re-marriage of the spouse.

➢ Islamic divorce

- ✓ Islamic marriages are said to be characterised as category of contracts that are capable of unilateral termination without the terminating party being held to be in breach[14].
- ✓ The husband enjoys unfettered right to divorce his wife, however it is considered sinful for him to exercise this right without any justifiable cause.
- ✓ There are three conditions that must exist to prove that the marriage has broken down;
  - o Issuance of Talaq
  - o Marriage has been celebrated in Islamic form
  - o The conciliation board must issue a certificate to show that it has failed to reconcile

- **Forms of Islamic divorce**

[14] Chuwa, G, (2006), Islamic Family Law in Tanzania; Marriage and its Dissolution, a paper presented at a seminar for resident magistrates held at the Institute of Judicial Administration- Lushoto

- ✓ The talak may either be verbal or written.
  - It must be issued in the presence of 2 witnesses
  - It must not be issued out of anger
  - The marriage must be celebrated in Islamic way
  - No talak may be issued if the woman is in her menstruation or she is pregnant (until she delivers and stay 45 days)

- **Types of divorce**
  - **Talaq al –bida-** these are the types of divorces that are irrevocable, and more or less instantaneous (they become immediately effective upon pronouncement)
    - ✓ These are the most common among Muslims

and they can be in single pronunciation followed by an expression of finality or triple pronunciation (‘’talaka tatu’’).

- ✓ The wife has to observe her ***iddat*** after the pronunciation of talaq.

- **Talaq as sunna-** these are more meritorious and they allow an opportunity for revocation.

  - ✓ This is said to be the approved method of repudiation accepted by all sect.

  - ✓ There is a room for revocation and remarriage as between the parties.

  - ✓ It can either be talaq as sunna ***in ahsan*** form which is the single pronunciation

by the husband during the period when the woman is not in her menstruation period knowan as ***Tuhr*** period. If the husband wishes the talaq to be final he must not have sexual intercourse with the wife during the whole period of iddat that is three menstruation periods during which the husband may revoke the talaq. The revocation may be expressly example by resuming sexual intercourse or impliedly by touching affectionately manner.

- ✓ It can also be talaq as sunna in hasan form, this leads to greater finality. The husband pronounces three consecutive talaqs one in

each of the three consecutive ***Tuhr*** periods. As soon as he pronounces the third talaq it becomes irrevocable the marriage does not come to an end until the third pronouncement. The remarriage is no longer possible after this unless another marriage is celebrated and the wife immediately starts to observe ***iddat.***

Other types of talaq

- **Mubaarat divorce**
  - ✓ This is known as consent divorce. Both the parties agree to divorce amicably.
- **Khul Divorce**
  - ✓ The wife pays some compensation to the husband to buy her freedom

(kulai) **Mwinyi Hamisi v Zainab Bakari** [1985] TLR 217

- ✓ The wife must pronounce Kulah divorce 30 days before the husband pronounces the 3 talaks
- ✓ The court cannot fix the amount it is the husband that can fix the amount

- **Fashik divorce**
  - ✓ This is judicial divorce issued by Kadhi court. It is applicable only in Zanzibar.

- Bars to Divorce (3Cs)
  - **Connivance;** s 85 LMA Evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground of connivance by the aggrieved spouse but no person shall

be **entitled to any relief** by reason only of misconduct at which he or she has connived.

- **Richmond v Richmond** (1952) 1 ALL ER 838 the court held that the husband's adultery has been connived by the wife, the husband's conduct in leaving the wife and failing to pay her maintenance was not ''natural consequence'' of her connivance of his adultery and as her own adultery has been connived by the husband. She was entitled by an order for maintenance on the ground of desertion and wilful neglect to maintenance.

o **Condonation**; 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.

- **Collusion;** s 87 LMA provides that, the court may dismiss any petition or application or make such other order as it may think fit, including an order as to costs, in any case where it is satisfied that the petitioner or applicant has attempted to deceive the court in any material respect or has wilfully failed to make a full disclosure of all relevant facts.

    - **Noble v Noble& Ellis** (1964) 2 WLR 349 the issue was whether collusion alone taunted the husband's suit. The distinguishing feature of a collusive bargain was a corrupt intention or conduct of the suit and tending to pavade a cause of justice; that to determine whether or not the bargain was

collusive required a careful analysis of it, the bargaining being construed as any contract between the H and correspondent being without corrupt intention it was not collusive.

➢Property Rights, Liabilities and Status

- Couples acquire and posses properties either before or during the subsistence of marriage. Ownership has long been the problem especially when the marriage ceases to exist.
- According to s 56 of the LMA a married woman has the rights to acquire, hold and dispose of property be it movable or immovable she shall also have the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise..

- S 57 of LMA is to the effect that where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law.
- Under Common Law property right was historically connected to the duty of the husband to maintain the wife, that being the case once the woman was married she was required to surrender all her properties to her husband, the husband became the trustee of the wife's property. In 1882 an Act was enacted (In UK) which changed the position, the Act empowered married women to own properties obtained prior and during the subsistence of the marriage.
- The doctrine of separate property
    - ✓ According to s 58 of LMA a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the

husband or the wife from acquiring, holding and disposing of any property.

- ✓ That is to say, this section recognises the existence of separate personal property of the wife or of the husband. However parties may agree to the contrary.

- Joint property; these are properties that are acquired due to joint efforts of parties to marriage, matrimonial home is one of the examples of joint properties. S 2 of LMA defines Matrimonial home to mean the building or part of a building in which the husband and wife ordinarily reside together.

  - ✓ With regard to matrimonial home s 59 of LMA specify that while the marriage subsists and without the consent of the other spouse, one spouse shall not alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall

be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

- ✓ When either of the couples contravenes this requirement the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until, the marriage is dissolved; or the court on a decree for separation or an order for maintenance otherwise orders.
- ✓ The right of the other party will exist unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.

- ✓ Where the spouse that owns the estate or interest of the matrimonial home deserts the other spouse the deserted spouse shall not be liable to be evicted from the matrimonial home by or at the instance of the husband or the wife, as the case may be, or any person claiming through or under him or her.

- ✓ The exception to this is on the sale of the estate or interest by the court in execution of a decree against the husband or wife, as the case may be; or by a trustee in bankruptcy of the husband or wife, as the case may be.

- Property acquired during the subsistence of marriage; S 60 creates a rebuttable presumption as to properties that acquired during the subsistence of the marriage,

  - ✓ If the property is acquired in the name of the husband or of the wife, there shall be a rebuttable presumption

that the property belongs absolutely to that person, to the exclusion of his or her spouse.

- ✓ If it is acquired in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.
    - o **Bi. Hawa Mohameid V Ally Seif** [1983] TLR 62
- ✓ S 61 of LMA is to the effect that 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.

- Concerning liability of spouses s 65 expressly provides that;
    - ✓ No husband shall be liable for the torts of his wife by reason only of his being her husband;

- ✓ A husband and wife shall have the same liability in tort towards each other as if they were unmarried;
- ✓ Neither a husband nor a wife shall be entitled to claim damages, in an action arising out of any negligent act or breach of duty, in respect of the loss or impairment of consortium.

- Division of Matrimonial Property
  - ✓ S 114 LMA the court have to order division of matrimonial property taking in regard the contribution of each party in terms of money and property towards acquisition of matrimonial property. **Tumbo V Tumbo**
  - ✓ The Court may order the sale of any such asset and the division between the parties of the proceeds of sale.
- In deciding the distribution the court shall have regard to

- ✓ the customs of the community to which the parties belong
- ✓ the extent of the contributions made by each party in money, property or work towards the acquiring of the assets
- ✓ any debts owing by either party which were contracted for their joint benefit
- ✓ the needs of the infant children, if any, of the marriage,

- Housekeeping is a conjugal obligation hence it cannot be equated to physical participation in acquisition of assets. However in **Bi Hawa Mohameid v Ally Seif** [1983] TLR welfare of family is essential to the economy of the family, hence it is proper to consider welfare of the family a contribution towards acquisition of the matrimonial assets.

- References to assets acquired during the marriage include assets owned before the marriage by one party which have been

substantially improved during the marriage by the other party or by their joint efforts. S 114 (3)LMA.

➢ CHILD CUSTODY

- **Legitimate child**

  - ✓ A legitimate child is that born in wedlock, according to s 125 of LMA the court may by order after the marriage comes to an end place the child;

    - o In the custody of his or her father
    - o His or her mother
    - o Where there are exceptional circumstances making it undesirable that the infant be

entrusted to either parent, of any other relative of the infant

- Any association the objects of which include child welfare e.g. TULEANE or any other NGO

✓ In deciding custody the paramount consideration shall be the welfare of the infant this is known as ‘’the Welfare principle’’ 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; and
- The customs of the community to which the parties belong.

✓ S 135(3) LMA there is 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.

- ✓ When there is more than one child the welfare of each shall be decided separately.
- ✓ According to s 126 of LMA an order for custody may
  - 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

- Prohibit the person given custody from taking the infant out of Tanzania.

✓ The Court may make an order declaring either parent to be a person unfit to have the custody of the infant and may at any time rescind any such order. If such an order is made the parent named unfit will not have custody of the child even after the death of the other parent unless the court orders so. S 127 LMA

- This order may be made either when the court is granting an order for separation or divorce or

upon application of either of the parents or close relative on the death of one of the parents.

- ✓ The mother shall, in the absence of any agreement or order of court to the contrary, be entitled to the custody of the infant child who is deemed legitimate, if any, of the marriage that is annulled due to the fact that it is voidable s 128 LMA.
- ✓ S 129 of 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.
    - S 129(2) vests a duty to 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.

- S 130 of LMA The court may at any time order a man to pay maintenance for the benefit of his infant child–
  - If he has refused or neglected to adequately provide for him or her;
  - If he has deserted his wife and the infant is in her charge;
  - During the pendency of any matrimonial proceedings; or
  - When making or subsequent to the making of an order placing the infant in the custody of any other person.

✓ The order for custody shall expire on the attainment by the infant of the age of eighteen years. S 132 LMA.

❖ Illegitimate child

- ✓ This is the child that is born out of wedlock
- ✓ The affiliation Act was enacted to cover maintenance and custody of illegitimate children as well as their mothers.
- ✓ According to this Act the obligation towards the mother is only during her pregnancy and it ceases after delivery
- ✓ The obligation towards maintaining the child is only 100/- Tshs plus education expenses s 5 Affiliation Act but case law extend this to 1/3 of the putative father earnings
- ✓ The mother is required to apply to the district court for order of maintanence.
- ✓ Putative father is define under the Act as a man who is declared by the mother to be the father of the illegitimate child (Bastard)

➢ Adoption

- Read: Article; Rwezaura B.A & Wanitzek (1991), ‘’the Law relating to the adoption of children in Tanzania’’, E.A.L.R Vol 18 No 1 p 47.
- The history of adoption arises from 1942 where Tanganyika (now Tanzania) had adopted the English law of adoption of infant Act of 1926.
- This is a process by which a parent’s legal right and duties in respect of an

unmarried minor are transferred to another person or persons.

- ✓ Some of the parents' rights and duties include;
  - o To provide education
  - o Protection and love
  - o Good up-bringing
  - o Necessities of life (food, cloth and shelter)
  - o Reasonable chastisement
- ✓ Adoption is a legal process though there are traditional adoption processes. Before adoption is affected there must be an adoption order granted by the court under s 3 of the Act. The court may make this order upon application by an applicant, a mother, father or both spouses.

- Adopted child is the one who is a child in respect of which an adoption order is made. The process must be transparent the minor should be aware of the order i.e. that s/he is adopted.
    - IN THE MATTER OF ADOPTION ORDINANCE CAP 335 & IN THE MAATER OF MASTER AYAZ &2 OTHERS (1978) LRT NO. 25 Lugakingira J held that'' in considering the welfare of the infant , it is not enough to look at the material and social gains that are open to the infant, but that it is also essential to access the attitude of the infant towards the prospective adopter''.
- There are necessary conditions that are necessary before an adoption order is made;

- S 7 of adoption Act there should be no consideration whatsoever between the applicant and the parents of the child. It must be for the welfare of the child. The parents must understand that they will permanently lose all rights on the child. This is in respect of the International Convention on Prevention of human Trafficking.
- The application is only made in the High Court. It is taken care by the welfare department.
- No sole male applicant can apply to adopt a female child. Unless special circumstances exist (example the adopting person being a relative of the child) s 4(2) Adoption of Children Act.
- The resident where adopted child is going to live must be known and the details of the social

welfare officer where the child will be residing must be known and be satisfactory.

- If the applicants are married couple a marriage certificate must be produced s 45.
- No adoption order will be made with respect of any child unless the child has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order.
- S 11(2) the court will appoint the guardian '***ad litem'*** whose duty is to ascertain whether statements in the petition are true and whether the provisions of the Act prohibiting the parents from receiving rewards or payment in consideration for adoption have not been contravened.

- The guardian will also investigate the petitioner's means and status in life and his ability to maintain and bring up the child properly and the child's rights or interests in property.

✓ Who can adopt?

- S 4(1) the applicant must be twenty-five years and is at least twenty-one years older than the child.
- If it is spousal application one of the spouses must be 25 years.
- If applicant attained the age of twenty-one and is a relative of the child
- The mother or father of the child (no age limit for biological parents).

- An adoption order shall not be made in favour of any applicant who is not resident in Tanzania or in respect of any child who is not resident within East Africa.

✓ Who can be adopted?

- A child who is under 21 years.
- Has never been married.

✓ If one spouse applies solo the consent of the other spouse must be sought and obtained before the application is granted s 5(2).

✓ S 3(3) adoption of child by a mother or father. This is a legal bond between illegitimate child with the mother or the father. Relatives other than mother and father can adopt, under s 2(1)

✓ Residence; the applicant must be a resident of East Africa

✓ Consent

- No order shall be made unless the parents have given their consent to adoption s 4(4).
    - The consent must be in writing s 5(4) and must be witnessed administrative officer or a minister of religion who shall certify that he/she has explained the meaning and legal effects of the consent of consenting parties.
    - The court may dispense with the requirement of consent if the parents have abandoned the child, neglected it, or persistently mistreated the child or a parent cannot be found or incapable of giving consent (eg lunatic) s 5

- Legal effect of adoption
  - The parents are deprived of parental rights permanently. The adopting parents assume full parental rights over the child s 12(3)
  - The adopted child and the adopting parents fall under the degree of prohibited relationships s 12(3) as per s 14(4) of LMA. The relationship of consangulity continues to operate even if the child is re-adopted by another person.
  - The adopted child has the same rights of interstate succession as if they were legitimate
- Motive of adoption
  - Family centred e.g. barren parents

- Child centred- children need family to care for them
- As a means of strengthening filialities e.g. a woman or man married while having children already.

➢ Matrimonial offences

- These are covered by part vii of the LMA the Penal code covers some of the offences
  - S 145 of LMA makes it an offence for any person making false statements when giving notice of intention to marry, or notice of objection to an intended marriage.
    - ✓ Any person found guilty shall be liable on conviction to imprisonment for a term not exceeding three years, and it shall not be a defence to claim that the offender had reasonable

grounds for believing the statement to be true.

- S 146 of LMA makes failure to attend conciliation board an offence, verbatim the section states that, Any person who, having been required to attend before a Board, refuses or neglects to do so without reasonable excuse shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred shillings.
- S 147 makes it an offence to give false statements, fabricating evidence or making use of fabricated evidence, destroying, mutilating or concealing any documentary evidence attempting to influence any witness, and the penalty for this offence is imprisonment for a term not exceeding two years.
- S 148 makes it an offence to participate in a marriage while aware that either of the party is below the minimum age. And the penalty is three years imprisonment for the party to the

marriage and two years for the person participating the ceremony.

- S 149 makes it is an offence to be a party or to participate a ceremony purported to be a marriage while aware that the parties fall under the degree of prohibited relationship, the penalty is two years imprisonment. It is a good defence that the party did not know and could not reasonably have discovered the relationship.
- According to s 150 any person who is a party to a ceremony purporting to be a marriage, knowing that the intended marriage has been prohibited by order of the court or of a Board, shall be guilty of an offence and liable on conviction to imprisonment for three years. Any person who participates in any such ceremony knowing that the intended marriage has been so prohibited shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years.

- Other offences include being a part to or participating to ceremony in which the parties consent was obtained by coercion or fraud, polyandry, absence of witnesses, irregular marriages and participating or being a party to ceremonies performed by unauthorized officials and failure to register the marriage within the prescribed time.
  - ✓ S 156 LMA Participation means to officiate thereat; to give consent thereto under section 17; or to act as a witness thereto.
- S 158 any person who unlawfully attempts to prevent parties to an intended marriage to get married shall be guilty of an offence.

  - ✓ Any person who with the intention to disturb or delay the celebration of any marriage, or with the intention of embarrassing the intended parties or any other person present at the place where a marriage ceremony is being,

or is about to be, or has been, performed, causes a disturbance in, at or near such place shall be guilty of an offence.

- ✓ Any person guilty of an offence under this section shall be liable on conviction to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months or both.