IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
CIVIL APPEAL NUMBER 96 of 2011

(Originating from Matrimonial Cause No. 40 of 2009, C. Kiliwa-RM)

CHRISTOPHER KIMARIO.....APPELLANT

VS

MARIA JOSEPH..... RESPONDENT

Last Order: 13-12-2011
Judgment: 27-02-2012

JUDGMENT

JUMA, J.

This appeal arises from the judgment and orders of the District Court of Temeke (C. Killiwa-RM) dated 4th July 2011. The learned trial Resident Magistrate found the marriage between the appellant and respondent had irreparably broken down. That was not all: The trial court ordered equal division of matrimonial assets between them. Custody of Devota was awarded to her aunt (appellant' s sister), while the custody of Emmanuel went to the respondent. Appellant was ordered to pay

TZS 50,000/= per month towards the two children's education and medical expenses.

The background to this present appeal can be traced back to a Petition for Divorce the Respondent Maria Joseph (Plaintiff in lower court) filed on 1st September 2009 in the District Court of Temeke. Respondent petitioned the subordinate court to dissolve her marriage to the appellant Christopher Kimario. Cohabiting as husband and wife in 1996, the couple contracted a Christian marriage in 2004. Two children, Devota and Emmanuel were born out of that marriage. In her petition, the respondent accused her husband, Christopher Kimario, of using abusive language, cruelty and maintaining affairs with other women.

Apart from divorce decree, respondent wanted the trial court to order equal division of their matrimonial assets and to grant her full custody of the two issues of her marriage to Christopher Kimaro. Respondent in addition wanted the appellant to provide school expenses, medical expenses and TZS 100,000/= as monthly maintenance to the issues of their marriage.

In his reply to the petition for divorce at the district court, appellant denied that he and respondent had jointly acquired matrimonial assets which the respondent had itemised in her petition. Appellant also denied that his marriage to the respondent had irretrievably broken down and he asked the trial court to order his wife back to her matrimonial home.

Against the judgment and decree of the trial district court, the appellant filed this appeal containing four main grounds. In his first ground, appellant contends that evidence was not sufficient to enable the trial court to conclude that his marriage to the respondent had irreparably broken down. Appellant does not believe that respondent was entitled to equal division of the assets contending also that since the couple had two issues from their marriage, the trial court should not have ordered the sale of the house to realize equal division thereof. The award of custody of one issue of their marriage is another ground of appeal. Appellant contends that the trial court should not have awarded custody of Devota to her aunt who is described by the appellant to be a stranger. Finally, appellant is

dissatisfied with the order requiring him to remit TZS 50,000/= per month towards the two children's education and medical expenses.

This appeal was heard by way of written submissions. Appellant submitted that misunderstandings between himself and respondent were minor and there was no evidence before the trial court to support the conclusion that their marriage had failed. Turning on the order of the trial court directing equal division of the house, appellant submitted that he alone had built the only house subject of the order of equal division. Appellant further submitted since that both he and respondent are unemployed, the sale of the house to realize equal division thereof will deny their children a house to live in. Appellant would like this court to overturn the decision to award custody of one of the child to her aunt. On monthly remittances, appellant submitted that he is unemployed with poor educational background. His work as a casual labour is not sufficient to maintain himself and remit the monthly allowances.

In her responding submissions filed on her behalf by Women's Legal Aid Centre, respondent supported the

conclusion reached by the trial magistrate that the marriage between the appellant and respondent had irreparably broken down. Respondent cited the two marriage reconciliation boards the couple had to go through before she filed for divorce in the district court. With regard to the house, it was submitted for the respondent that it is a matrimonial house they acquired jointly and should be divided equally.

In her submissions respondent supported the decision of the trial court to grant custody of their first born child to her aunt. Respondent submitted further that trial court's decision on custody of their first-born child was based on welfare of the child because it is the respondent and the child's aunt who have been taking care of the children since 2007. On maintenance, it was submitted for the respondent that it is now the time for the appellant to share in the maintenance by paying the TZS 50,000/= per month as ordered by the trial court in terms of section 129 (1) of the **Law of Marriage Act**.

I have given considerable weight to the submissions advanced by the opposing sides. In my re-evaluation of evidence my decision shall consider breakup of

marriage, division of matrimonial assets, custody of the two children of the marriage and maintenance orders issued by the trial court.

My re-evaluation of evidence leaves me in no doubt that the learned trial magistrate reached a correct conclusion that the marriage between the appellant and respondent had irretrievably broken down. There is evidence on record that sometime in 2002 appellant exiled the respondent to her in laws where respondent remained for two years. Respondent worked hard, so much so that her in-laws prevailed upon their son- the appellant to bless his customary marriage with respondent with a Christian marriage in church.

The Christian marriage took place at Rombo Kiraeni Church. There is evidence also that in 2006 respondent had conceived their still-born child, only for the appellant to deny paternity. In 2008, appellant assaulted the respondent and the incident was reported to police. Respondent forgave her husband and withdrew the criminal complaint.

It was appellant' s own sister who testified that she advised the respondent to report their domestic

problems to their parish priest. When cross examined by the appellant, respondent retorted that appellant invariably beat her up without any reason late at night. Respondent was adamant in her testimony that she was not ready to live with the respondent any more. With respect, presented with such evidence on irreconcilability of the couple, the learned trial magistrate was fully entitled to reach the conclusion to dissolve the marriage. The first ground of appeal is dismissed.

With regard to the second ground of appeal disputing the division of matrimonial assets, the learned trial magistrate derived his power to divide matrimonial assets of the appellant and respondent from section 114-(1) of the **Law of Marriage Act, 1971**. This provision states:

> *114. (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*

In my re-evaluation of evidence from the perspective of the above-cited section 114 (1), I will want to establish whether the trial court took the initial step of identifying assets that were acquired by the divorcing appellant and respondent during the subsistence of their marriage. It is after this identification of the assets, when the trial court can proceed to order division thereof between the parties. On page 3, the learned trial magistrate stated:

> *"The 2nd issue as to whether there are any matrimonial assets jointly acquired during the subsistence of their marriage can be analysed as follows that, petitioner submitted in her oral evidence to rent a house at Mbagala area and then respondent built a house there and they shifted in that house. Nevertheless respondent agreed that he built the house during the subsistence of their marriage although he denied that the petitioner contributed towards acquisition of that house."*

In my view the foregoing excerpts from the judgment of the trial court confirm that indeed the learned trial magistrate took the important step to identify the matrimonial assets which were jointly acquired by the appellant and respondent, and

determined the nature of contribution made by the appellant and respondent. In the words of the learned trial magistrate on page 3 of the judgment:

> *"..The law of marriage is clear on the issue of division of matrimonial assets jointly acquired together by husband and wife. There should be either domestic contribution or financial contribution towards the acquisition of the said asset. In the matter before us, petitioner did have her contribution to the said house non-financially...* ***[in the form of]*** *domestic contribution in the* ***[acts]*** *of cooking, looking after her husband, children and the surroundings of their households. Therefore the house located at Mbagala Kibondemaji is considered as a matrimonial house and therefore it should be sold and divided equally between the parties."* **[emphasis added]**

In my own re-evaluation, from the evidence on the record of the trial court, the learned trial magistrate was correct to conclude that the respondent had contributed to the acquisition of the matrimonial assets and was entitled to equal division of those assets. I hereby find that the second ground of appeal is without merit and is hereby dismiss it.

In his third ground of appeal, appellant objects the way the trial court dealt with the issue of custody of children. The issue arising from this third ground is whether trial court considered the question of custody in light of the welfare principle under section 125-(1) of the Law of Marriage Act, 1971. This section provides,

> *125-(1) The court may, at any time, by order, place an infant in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.*
>
> *(2) 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–*
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> *(a) the wishes of the parents of the infant;*
>
> *(b) the wishes of the infant, where he or she is of an age to express an independent opinion; and*
>
> *(c) the customs of the community to which the parties belong.*

(3) 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.

(4) 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.

From my reading of the above-cited sub section (2), (3) and (4) of section 125, I can gather the factors which courts consider before granting custody of children. The issue for my determination here is whether the learned trial magistrate was guided by these factors before reaching the decision on custody. Unfortunately, in the three paged judgment dated 4th July 2011, the learned trial magistrate compressed the two important issues of custody and maintenance in a perfunctory manner by stating:

"The last issue of the custody of the children should be analyzed that the two children

Devotha and Emmanuel should be as follows: Devotha to continue living with her aunt DW2, whom until now is taking care of the child. Therefore custody of that child should remain with DW2, whom until now is taking care of the child. Therefore custody of that child should remain with DW2 (Constansia Victory Kimaro). Emanuel who now under the custody of her mother, to continue living with her mother, the father to provide maintenance at the tune of Tshs 50,000/- per month, plus medical and education expenses."

Factors regarding the custody of children which the learned trial magistrate failed to consider include wishes of the parents of the infant: 125.-(2) (a), the wishes of the infant, where he or she is of an age to express an independent opinion: 125.-(2) (b); and the customs of the community to which the parties belong: 125.-(2) (c).

The trial court was also expected to be guided by the 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 cases: 125.-(3). The custody of children provisions expected the trial court to have regard to the undesirability of disturbing the life of the

infant by changes of custody: 125.-(3), 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 child independently: 125.-(4).

In his fourth ground of appeal, appellant is aggrieved with the order requiring him to remit TZS 50,000/= per month towards the two children's education and medical expenses. Sections 129 and 130 of the **Law of Marriage Act** prescribe very detailed provisions governing duty to maintain children and power of courts to order maintenance of children. The relevant sections 129 and 130 state:

> *129.-(1) Save where an agreement or order of court otherwise provides, 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.*
>
> *(2) Subject to the provisions of subsection (1), 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.

130. (1) The court may at any time order a man to pay maintenance for the benefit of his infant child–

(a) if he has refused or neglected to adequately provide for him or her;

(b) if he has deserted his wife and the infant is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the infant in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her infant child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under subsection (1) or subsection (2) may direct payment to the person having custody or care and control of the infant or to the trustees for the infant.

It is clear from the above-cited sections 129 and 130, the trial magistrate was required to among other things, to pay due regard to the appellant's station of life and whether he is able to pay up the monthly rates the court ordered. The trial court should also have considered the ability of respondent to pay or contribute towards the maintenance of her own children. There is nothing in the brief judgment of the trial court where the possibility that appellant may not be in a position to pay the monthly maintenance is considered.

From the foregoing, the issues regarding custody of children and maintenance were very important points for determination by the trial court. By failing to consider their respective prescribed statutory factors, the trial learned trial magistrate cannot be regarded to have reached correct decisions on custody of children and

on their maintenance. I hereby find the third and fourth grounds of appeal to have merit and the order of the learned trial magistrate on custody and maintenance are hereby quashed and set aside.

From the foregoing the appeal partly succeeds in grounds three and four but fails in ground one and two. The trial court is directed to hear and determine the issue of custody and maintenance in accordance with the statutory guidance. Under the circumstances each side in this appeal shall meet own costs.

DATED at DAR ES SALAAM this 27th day of February, 2012

I.H. Juma
JUDGE