THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

MATRIMONIAL APPEAL NO. 05 OF 2019

(Appeal from the District Court of Mbeya at Mbeya in Matrimonial Appeal No. 33 of 2018. Originating from Urban Primary Court in Matrimonial Cause No. 68 of 2018)

EMMANUEL BURTON MWAKISAMBWE.....APPELLANT

VERSUS

ASA SALIFU KIBALE.....RESPONDENT

JUDGEMENT

Date of Last Order: 04/06/2020
Date of Judgment: 15/07/2020

MONGELLA, J.

Unsatisfied with the decision of the District Court of Mbeya in Matrimonial Appeal No. 33 of 2018, the appellant herein has preferred this second appeal to this Court. The appeal is brought under two grounds to wit:

1. *That the Honourable Magistrate erred in law and fact to hold that the marriage of the parties herein is broken down irreparably without proof of the same.*

2. *That the Honourable Magistrate erred in law and fact to order that the case file be taken back to the primary court of Mbeya urban to take additional evidence of acquisition of the matrimonial house while the evidence of the parties on the issue was already adduced, recorded and admitted.*

The facts of this case are briefly to the effect that, the parties were husband and wife having celebrated a Christian marriage in 2008. Their union was however, not blessed with any issues. Then matrimonial squabbles ensued to the extent of the respondent filing for divorce in the Urban primary court on ground of cruelty. The trial primary court granted the divorce, but ruled that there was no matrimonial property subject for division between the parties. The respondent appealed to the District court challenging the findings of the trial court on the ground that there was no evidence of cruelty alleged by the respondent and thus no proof that the marriage was broken down irreparably. He as well challenged the trial court's finding that there were matrimonial properties to be divided between the parties arguing that there was a house jointly built by both of them. The District Court endorsed the grant of divorce by the primary court, but ordered the case file to be remitted back to the primary court for it to take evidence regarding acquisition of the matrimonial property and decide on division accordingly. Aggrieved by this decision, the appellant has appealed to this Court on the grounds stated above.

The appellant enjoyed legal services from Mr. Omary Issa Ndamungu, learned advocate while the respondent appeared in person. The parties

prayed to argue the appeal by written submissions. The prayer was granted by this Court and both parties complied with the scheduled orders in filing their submissions.

Submitting on the first ground, the Mr. Ndamungu argued that both lower courts failed to analyse the evidence adduced during trial in proving that the marriage between the parties had broken down irreparably. He said that the respondent alleged cruelty and adultery on the part of the appellant, but there was no proof on the allegation. He was of the view that the respondent only raised mere allegations thus the lower courts were wrong in granting divorce on those allegations. He argued further that it is trite law that courts of law must decide on matters basing on the evidence adduced and that according to section 110 and 111 of the Evidence Act, Cap 6 R.E. 2019, the one who alleges must prove. He said that the respondent failed to prove on balance of probability the allegations of cruelty and adultery she raised. Mr. Ndamungu in an argument, which I find rather absurd, argued that the appellant is a Pastor, thus there is no way he could commit such acts of cruelty and adultery because the said acts are among very formidable sins which pastors abhor much.

In reply to this ground, the respondent argued that the appeal lacks merit because there was proof that the marriage was broken down irreparably. She said that the trial Magistrate clearly narrated in the judgment that the Reconciliation Board failed to settle the dispute between the parties and referred the matter to the trial court for further action according to the laid down procedures. She argued that during the hearing, the

ondent adduced evidence to the effect that there was separation veen the parties whereby she had to abandon her own house and t to live with her relatives following cruelty from the appellant. That the ellant mistreated her telling her that she was too old and was not able of giving birth to a child. That the appellant restricted her ives, who built the house they used to reside in, from visiting her. She that these facts were not disputed during the hearing.

the second ground, Mr. Ndamungu argued that the appellate istrate unjustifiably and improperly ordered that the case file be ned back to the primary court for the trial Magistrate to hear ence on contribution of each spouse to the acquisition of the imonial house. He argued that the first appellate court erred because rial court heard the parties and determined the matter on merits. He that both parties adduced their evidences regarding the acquisition ie matrimonial house. He added that both parties called witnesses tendered evidence including documentary evidence. He ended that if there is anything missing in the record regarding the ence it is because the parties never wanted to prove the same or e was nothing to prove at all. He was of the view that, under the umstances, ordering for the case file to be taken back to the trial t for additional evidence to be taken shall create a loophole for the es to cook evidence or to adduce evidence which is afterthought by g advantage of knowing the weakness of the other side's case. He cluded that the first appellate court was supposed to decide on the er by considering the evidence already on record.

On this ground, the respondent made a short reply to the effect that the appellant's counsel has failed to demonstrate how the first appellate court erred in ordering the case file to be remitted back to the trial court for taking of additional evidence. She averred that the appellant's counsel did not cite any law which the trial Magistrate offended by giving the said order. She prayed for this Court to invoke its inherent powers and struck out the appeal.

The submissions of both parties lead me into concluding that the issues to be determined by this court are: 1. Whether the marriage between the parties was proved to have been irreparably broken down; and 2. Whether the first appellate court justifiably ordered the taking of additional evidence at the trial court.

Regarding the first issue, Mr. Ndamungu argued that no evidence of cruelty or adultery was adduced by the respondent to warrant grant of divorce. I have gone through the lower courts' record, especially that of the trial primary court. The question of adultery was in fact not raised as claimed by the appellant. The record indicates that the respondent claimed cruelty, mental and physical, whereby the appellant used to beat her, utter to her painful words that she was old and could not bear children and that the appellant did not take care of her in her sickness. The respondent also claimed sexual perversion on the part of the appellant for a period of three years. Both parties mounted several witnesses. While the appellant's witnesses claimed that there no any cruelty committed by the appellant, the respondent's witnesses claimed

that the respondent had told them that the appellant used to beat her up and tell her she was old and could not bear any children.

In my view, the evidence as it stands on record does not clearly prove existence of cruelty as none of the witnesses saw the appellant committing all the alleged cruel acts to the respondent. In fact, the trial primary court took note of that when it stated that it was difficult for it to rule on the issue of cruelty as there was no concrete proof. However, on a reasoning that I subscribe to, the trial primary court went ahead and ruled that the marriage was irreparably broken down basing on the claim of sexual perversion by the respondent. The trial court ruled that there was no way that witnesses could testify on this fact as it is something totally private to the parties. The law is in fact settled to the effect that every witness is entitled to credence unless there are reasons to doubt the witness. In ***Goodluck Kyando v. The Republic***, Criminal Appeal No. 118 of 2003 (CAT, unreported) it was held:

> *"...it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In its assessment of the respondent's testimony on the issue of sexual perversion, the trial court believed the respondent on the ground that it saw no reason for the respondent to bring the matter up if the same was not true. Like I pointed out, I agree with the finding of the trial court because the record does not indicate the appellant cross examining on this fact or challenging the same during his defence case. The law is

clearly settled to the effect that facts not cross examined are taken to have been accepted by the party affected. In ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 at page 11 the Court of Appeal held:

> *"It is now settled law in this jurisdiction that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect."*

See also: ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported) and ***Emmanuel Talali v. Coca Cola Kwanza Ltd.***, Revision No. 24 of 2019 (HC at Mbeya, unreported).

It is also trite law that the trial court is better placed at assessing the evidence of witnesses than an appellate court. As such an appellate court is precluded from interfering with the assessment of evidence by the trial court unless where there are compelling circumstances or reasons to do so. These could be where there are material contradictions in the testimony of witnesses, or where there are mis-directions, non-directions, mis-apprehensions, or miscarriage of justice. See: ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 (unreported); ***Ally Mpalagana v. Republic***, Criminal Appeal No. 213 of 2016 (unreported); ***Jaffari Mfaume Kawawa v. Republic*** [1981] TLR 149; ***Mussa Mwaikunda v. Republic***, Criminal Appeal No. 174 of 2006 (unreported) and ***Michael Alias v. Republic***, Criminal Appeal No. 243 of 2009 (unreported).

In the case at hand I do not see such mis-directions, non-directions, mis-apprehensions or miscarriage of justice to warrant interference on the findings of the trial court. Failure to cross examine the respondent on the claim of sexual perversion renders the respondent's testimony on this issue credible. The trial primary court also took note of section 140 of the Law of Marriage Act, Cap 20 R.E. 2002 prohibiting proceedings to compel spouses to cohabit. The District court endorsed the findings of the trial court that the marriage was irreparably broken down by considering the evidence of the parties as a whole and the fact that the respondent no longer wished to continue with the marriage under the given circumstances. I see no reason to interfere with the findings of both lower courts that the marriage was proved to be irreparably broken down.

On the second issue, the trial court ruled that there was no any matrimonial property subject to division by the parties. The District court faulted the findings of the trial court on this issue taking into account that both parties had claimed ownership to the house in dispute. It took consideration of the fact that, while the respondent and his witnesses claimed that the house was a family house, the appellant claimed to have built the house. The District court also found that it could not be possible for spouses who have lived together from 2008 not to have joint properties including housewares. The District court thus ordered the case file to be placed before another magistrate for evidence to be recorded on the same and necessary orders to be given. I in fact agree with the findings and orders of the District court. It does not make sense at all that a couple that had stayed together for eight good years not to have any property to be divided between them upon dissolution of their marriage,

even home appliances or crockeries. The Marriage Conciliation Board endorsed in its certificate that the matrimonial properties were a house at Nkoyo Street, Iganzo Ward and home utensils whereby no amount was mentioned. The record does not show the parties proving contribution to the acquisition of these properties and even the amount of the household utensils and crockeries.

Section 114 (1) and (2) (b) of the Law of Marriage Act, empowers the courts to divide matrimonial assets between the parties by considering the extent of the contribution made by each party in money, property or work towards the acquisition of the assets. This provision has also been underscored in a number of cases by this Court and the Court of Appeal. In ***Gabriel Nimrod Kurwijila v. Theresia Hassani Mallongo***, Civil Appeal No. 102 of 2018 for instance, the CAT insisted that the extent of contribution by a party in matrimonial proceeding is a question of evidence, thus evidence to that effect must be provided. See also: ***Yesse Mrisho v. Sania Abdu***, Civil Appeal No. 147 of 2016 (CAT, unreported). Again in ***Cleophas M. Matibaro v. Sophia Washusa***, Civil Application No. 13 of 2011 the CAT also held that there must be a link between the accumulation of wealth and the responsibility of the couple during such accumulation. See also: ***Bibie Mauridi v. Mohamed Ibrahim*** [1989] TLR 162.

Considering the above authorities, it is my view that it was incorrect for the trial court to rule out that there were no properties to be divided between the parties simply because the respondent claimed so. The fact that the appellant claimed to have jointly built the house they used to live as a

couple with the respondent, should have made it necessary for the trial court to order proof of contribution before deciding as it did.

The appellant and his advocate challenged the order by the District court for the primary court to take additional evidence. They argued that the same shall create a loop hole for the parties to cook evidence. With all due respect, I do not subscribe to their line of argument. The law, under section 21 (1) (a) of the Magistrates' Courts Act, Cap 11 R.E. 2019 empowers the District court in the exercise of its appellate jurisdiction to order the primary court to take additional evidence. It specifically states:

> *"21 (1) In the exercise of its appellate jurisdiction, a district court shall have power-*
> *(a) To direct the primary court to take additional evidence and to certify the same to the district court or, for reasons to be recorded in writing, to hear additional evidence itself."*

Like I hinted earlier, the trial court record does not contain evidence from either of the parties on acquisition of the properties. There are only mere assertions from the appellant that he jointly owned the property (the house), but did not state his extent of contribution in acquiring the same. The respondent together with DW3 also claimed the house to belong to her family, but there is no evidence as to how the same was acquired. The Marriage Conciliation Board indicated in its certificate, that the parties owned home utensils, but there is no evidence in the trial court record as to the number and kind of utensils the parties jointly owned. Under the circumstances, I agree with the decision of the District appellate court that additional evidence is needed to resolve the issue of

acquisition of matrimonial properties. However, I do not agree with the order that the trial primary court should make orders after taking additional evidence. Section 21 (1) (b) requires the District court to make decision whether or not additional evidence is taken. Thus it was for the District court to decide on the matter after additional evidence was taken by the trial primary court or by itself in terms of section 21 (1) (a) of the Magistrates' Courts Act.

Having said all, and considering the interest of justice to the parties, particularly in issuing timely justice, I order the District appellate court to take the additional evidence itself as empowered under section 21 (1) (a) of the Magistrates' Courts Act and to decide on the division of matrimonial properties accordingly as empowered under section 21 (1) (b) of the Magistrates' Courts Act. The decision of the District court is therefore varied to the extent stated herein. The matter being a matrimonial dispute, I make no orders as to costs.

Appeal dismissed.

Dated at Mbeya on this 15th day of July 2020

L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers this 15th day of July 2020 in the presence of both parties.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE