

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 98 OF 2019

*(Arising from Civil Appeal No. 92 of 2018, Decision of the District Court of Ilala, (Hon. F. Haule Esq-
RM)*

CYPRIAN JOSEPH..... APPELLANT

VERSUS

VAILETH KISIWA.....RESPONDENT

JUDGEMENT

26th February & 23rd March 2020

ACK. Rwizile, J

This appeal emanates from the decision of the District Court of Ilala. The appellant is challenging the decision of the Court on four grounds;

- i. That the honourable Magistrate erred in law and in fact to uphold that the Primary Court had jurisdiction as the matter was not preferred to the Marriage Conciliation Board.

- ii. That the honourable Magistrate erred in law and in fact by upholding the findings of the Primary Court basing on testimony of the Children of tender years without test of *verum dicere* or without any promise from the child that he/she will tell the truth.
- iii. That the Honourable Magistrate erred in law and in fact to uphold the decision of Primary Court based on illegal evidence and unlawful manner of tendering evidence.
- iv. That the Honourable Magistrate erred in law and in fact by upholding the findings that the appellant contributed less in building of the Matrimonial house and premises.

Before delving into the merits of the appeal, it is important, albeit brief, to show the background of this appeal. The appellant was married to the respondent in 2009. Although their marriage was blessed with one child. As well as one property, a house at Chanika, but it was not that happy.

In 2017, it sustained damages, since the conflict between the parties arose. It later appeared to the respondent that their marriage could not do any more, and so successfully petitioned for divorce, custody of their only child who was 9 years and division of their matrimonial house.

After the judgment, the appellant was aggrieved by the decision of the Primary Court. He appealed to the District Court of Ilala District. The District Court dismissed his appeal. He has now come to this court with four grounds of appeal as shown above.

Mr. Gideon learned advocate stood for the appellant, while the respondent was represented by Mr. Malindi learned advocate. In his oral argument Mr. Gideon in support of the first ground of appeal, submitted that the case was unmaintainable because it did comply with section 101 of the Law of Marriage Act. He argued that it was not shown in the proceedings or judgement that their dispute went through the conciliation board. According to him, in the absence of the finding that the matter passed through the board and the certificate issued, it cannot be properly before the court. He cited the cases of **Shillo Mzee vs Fatuma Hamad** [1984] TLR 112 and **Athanase Makungwa vs Darini Hassan** [1983] TLR 132

To further support his argument, the learned counsel was of the view that, the presence of the certificate first featured in the judgment of the District Court. And what is stated in the alleged certificate does not match the prayers made in the petition. Accordingly, he submitted that, it implies that there was no certificate issued by the board. He asked this court to hold so.

On the second ground, the learned counsel submitted that the evidence relied upon by the trial court was taken from the child of tender age without a voire dire test or promise to tell the truth. It was his submission that, the two children Pw2 (SM2) and Pw3 (SM3) had evidence that raised serious issues that needed a report from the police. There is no indication, according to him, that the same had their evidence corroborated. As well, the fact that the respondent did not personally complain on the issue, means the evidence was fabricated, Mr. Gideon submitted.

On the third ground, it was his submission that the evidence of the salary slip was relied upon without being admitted in evidence by the trial court. He submitted that any finding basing on such evidence, was dealing with evidence illegally obtained.

Lastly, it was submitted that the evidence as to division of the house, without considering the salary slip, shows the same was built by their joint effort. According to him, parties equally contributed and so deserve an equal share under section 106(b) (c) and (d) of the Law of Marriage Act. He asked this court to allow this appeal.

On his part, Mr. Malindi learned advocate for the respondent submitted that most of the submission of the appellant is an additional evidence. He argued, it contradicts order XXXIX. R. 29 of the CPC, since there is no leave to do so. According to him, although the learned advocate said there is no certificate, he concluded by referring to the same. This means, there is a certificate and this point is baseless.

Replying on the second ground of appeal, the learned advocate was of the view that, there is no law that require a witness of tender age to undergo a voire dire test before giving evidence. He submitted that the existing law requires that a promise to tell the truth and not to tell lies be made.

Lastly he submitted that the trial court dealt with the evidence and made a finding that was correct. He said, the decision of the trial court was confirmed by the District Court and asked this court to dismiss this appeal.

In his brief rejoinder, Mr. Gideon was of the view that he did not submit any new evidence but rather expounded on grounds of appeal. He was not therefore contravening any law, he submitted. He said, the evidence of the child of tender age was to be corroborated, which was not. And that since division of the matrimonial house based on the salary slip, the same was not

properly founded. He asked this court to find in favour of the appellant in all grounds.

After hearing both parties, it is important to deal with grounds of appeal as they have been preferred. For the first ground of appeal, it was submitted, there was no certificate from the board showing it failed to reconcile the parties. There is no dispute that it is a legal requirement that there can be no petition of divorce without going through the conciliation board, unless by exceptions stated under section 101 (a) - (e) of the Law of Marriage Act. It is also true that the trial court did not indicate in its judgment that the board failed to reconcile the parties. It is also true that the District Court stated that the certificate was present in the court record and that is why it dismissed this point as baseless.

It is clear that although the trial court did not say anything about presence of the certificate, but my perusal in the record shows, the petition was filed on 28th March 2018. There is also form No. 3, by the Chanika Ward tribunal issued on 26th March 2018. This means, the alleged certificate was in the record then, as it is now. It is not therefore true, that there was no certificate, since there is no evidence suggesting that the same was brought later after the matter had gone to the District Court for appeal. I have no

reason to think as Mr. Gideon thought, that the same was fabricated. After all there is no evidence that the same was fabricated. It is important to note that what is in the record is the certificate in form No 3 as the law requires. This is therefore to say, the two cases of **Shillo Mzee** and **Athanase Makungwa (supra)** are distinguishable.

The next question would be, if indeed what exists is the valid certificate or not. Under section 104(5) of the Law Marriage Act, read with, the Marriage Conciliatory Boards (Procedure) Regulations 1971, GN No. 240 of 1971, it is clear that the certificate should reflect the board's findings. The certificate has shown that the parties appeared before it and failed to have them reconciled thereby opining that the same should separate. Taking that from the record in form No. 3. I am of the view that the first ground of appeal has no merit. It should be dismissed.

The second and third grounds of appeal will be dealt together as they have two related issues. One is about evidence of the two children (PW2 and Pw3) that was obtained without a promise to tell the true because of their age. And second, the evidence obtained from a salary slip which was not admitted in evidence but used to prove that the respondent contributed more than the appellant in building the matrimonial house subject of this case.

On the issue of Pw2 and Pw3 who were 12 and 9 years respectively, their evidence was taken after a voire dire test was conducted. It was on 12th April 2018. Indeed, as the first appellate Court held, the trial Magistrate was trading in an illegal commodity. The law had changed from voire dire test to promise to tell the truth before a tender age witness gives evidence under section 127 (2) of the Evidence Act, as was amended vide Written Laws Miscellaneous Amendment Act No.4 of 2016. Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies. This is lacking in the proceedings of the trial court. It was submitted by the appellant that it was not conducted. I agree in part that although what was conducted was a voire dire test but that does not support the position of the current law.

I am aware that evidence of the witnesses of tender age illegally obtained may vitiate the proceedings on appeal if not corroborated. But in my view, that may happen if it is the only evidence relied upon by the trial court to make its finding. Materially, the evidence of the two children was used by the trial court to support the evidence of the respondent.

In as much as the learned advocate's submission on this point is correct, and their evidence may be disregarded, still, the evidence of the respondent

taken singly, has merit. The trial court which was in the position to assess it as it was given, did not consider the same wanting.

On the second point, I agree with the appellant also that at page 5 of the typed trial court's judgment, the finding was made basing on the evidence of the salary slip. It is clear also that the same slip is not marked and endorsed to form part of the evidence. This view was also shared by the District Court. But its finding did not change the decision of the trial court.

The point of law for consideration here is whether this matrimonial property is subject to division between the parties under the provisions of section 114(1). The Court's power to divide matrimonial assets under section 114(1) may be invoked only when the following conditions exist:

- (i) When the Court has granted or is granting a decree of divorce or separation; and
- (ii) (ii) When there are matrimonial assets which were acquired by the parties during the marriage; and,
- (iii) (iii) When the property was acquired by the joint efforts of the spouses.

The controversy here is whether the matrimonial asset was acquired by the joint efforts of the parties. It has been admitted by the parties, the same was acquired during their marriage. The appellant claiming equal share as the respondent. As I have said, the record does not clearly show who had contributed more than the other. But the allegation levelled against the appellant is that he had no means to contribute enough to be entitled to the share he is claiming. The other allegation leading to their divorce, in no uncertain terms, was due to bad behaviour and miss-conduct on his part, against the respondent.

This means even after disregarding all evidence illegally obtained, that is to say, evidence of the salary slip and that of Pw2 and Pw3. That done and said, I don't still see the reason not to believe in the evidence of the respondent given at the trial. Her case was strong but not to the extent of a share given by the two courts below.

In all fairness, I think, 70% to 30 % share given is not supportable. It is not backed by evidence. I therefore, reduce it to 60% on the respondent and 40% to the appellant. Otherwise this appeal is partly allowed to the extent explained.



ACK. Rwizile, J

23.03.2020

Delivered in the presence in the presence of Mr. Malindi advocate for the respondent, Mr. Gideon advocate for the appellant is absence, this 23rd day of March 2020. Both appellant and respondent are present



ACK. Rwizile, J

23.03.2020

