IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

MATRIMONIAL APPEAL NO.23 OF 2020

(Arising from Ilemela District Court in Matrimonial Cause Civil No. 04 of 2018)

ELIZABETH NKWIMBA MASANJA ..... APPELLANT

VERSUS

COSMAS MICHAEL MACHIBYA ..... RESPONDENT

JUDGMENT

Date of last Order: 16.11.2020

Date of Judgment: 24.11.2020

A Z. MGEYEKWA, J

Cosmas Michael Machibya, the respondent, and Elizabeth Nkwimba Masanja, the appellant respectively, were husband and wife. Before I go into the determination of the appeal in earnest, I find it apt to briefly narrate the relevant factual background of the instant appeal. It goes thus: Cosmas Michael Machibya and Elizabeth Nkwimba

Masanja started to cohabit before they formally got married in 2012 then the two of them got married in 2016.

The couple were blessed with two issues; Caren Cosmas who is 5 years old and Kelvin Cosmas is three years old. It appears their marriage went on well all along until the year 2018 when the relationship started to go sour whereas, the respondent left the matrimonial house. In 2019, the respondent filed for divorce, division of property, and custody of children at Ilemela District Court. The trial court decided in favour of the respondent, custody of children was awarded to the respondent.

Undeterred, the appellant preferred this appeal in this Court. The appeal is predicated on four grounds of appeal as follows:-

1. *That, the Trial Magistrate erred in law and fact in concluding that the marriage has broken down irreparably thereby issuing a decree for divorce, while there was o concrete evidence to that fact.*

2. *That, without prejudice to the afore-stated ground above, the trial court erred both in law and fact for failure to consider the evidence of the appellant in respect of the house situated at Zembwela-Buswelu which*

was a matrimonial and jointly acquired, but the court did and divide it to spouses after dissolving the marriage.

3. *That, the trial Magistrate erred in law and fact by failing to take into account the provision of section 125(2) and (3) of the Law of Marriage Act and section 26(2) of the Law of the Civil Act when placing the custody order of the children to the respondent.*

4. *That, the Trial Magistrate erred in law and fact for failure to order division of the house situated at Nyegezi-Corner that was jointly acquired during the subsistence of their marriage.*

The appeal was argued before this court on 16TH November, 2020 whereas, Mr. Ally Zaid, learned advocate, and Mr. James Njelwa, learned, appeared for the appellant and respondent respectively.

Submitting on the first grounds of appeal, Mr. Ally Zaid argued that the District Court erred in law and fact in concluding that the marriage was broken down. He avers that on page 9 of the typed trial court proceedings the respondent claimed that the reason for divorce is adultery while on page 10 the issue of adultery was dropped.

Mr. Ally Zaid went on to state that cruelty and threatening were also among the grounds of appeal. He cited the case of **Charles Oaka v Dorina Kibonga** (1988) TLR 44 and stated that the court was in the same situation where the threat was involved but the court found that threat cannot amount to cruelty in accordance to section of 107 (2) (c) of the Law of Marriage Act, Cap.29 [R.E 2019] which requires a person who alleges cruelty must prove. Mr. Ally Zaid fortified his submission by referring this court to the case of **Julia Mazengo v Jackson Leganga** (1986) TLR 244. He went on to argue that the issue of securing a loan is not part of cruelty while the trial court decided that the ground of cruelty was a reason for dissolution of marriage.

As to the second ground, Mr. Ally Zaid argued that the appellant testified to the effect that both of parties constructed the house situated at Buswelu. She admitted that the plot belonged to her in-laws and the plot is in the respondent's name. Mr. Ally Zaid avers that the appellant expected the said house could have been subjected to division as per section 114 of the Law of Marriage Act.

In respect to the third ground, Mr. Ally Zaid faulted the trial Magistrate for failure to consider the provision of section 125 (2) & (3) of the Law of Marriage Act and section 26 (2) of the Law of the Child Act by placing the custody of children to the respondent. He added that the two children are below seven years old thus they are required to be placed in the hands of their mother. He stated that currently the children are under the care of their mother and she is the one who provides for the needs of the children.

On the fourth ground, Mr. Ally Zaid lamented that the trial Magistrate decided that the house situated at Nyegezi – Corner was jointly acquired during the subsistence of the marriage but the same was not divided. He referred this court to section 114 of the Law of Marriage Act and Article 7 of the Protocol of African Charter of Human and Peoples Rights regarding equitable shares.

On the strength of the above argumentation, Mr. Ally Zaid urged this court to quash the trial court decision and allow the appeal.

Responding, Mr. Njelwa strongly argued that the trial court decided rightly and considered the evidence of both sides. On the first ground,

Mr. Njelwa argued that the main cause for separation was cruelty as per section 107 of the Law of Marriage Act. He distinguished the cited case of **Charles** (supra) and argued that the same does not bind this court. He added that the trial Magistrate considered the act of the respondent and declared that it was cruelty. To bolster his argumentation he cited the case of **Said Mohamed v Zena Mohamed** (1985) TLR 13, the court dissolved the marriage because of cruelty.

He referred this court to page 10 of the trial court proceedings where the respondent complained that the appellant threatened the respondent with a bush knife and that she wanted to kill him. Mr. Njelwa went on to argue that the appellant complained that the two had a misunderstanding and the respondent abstained from making love with the appellant whereas the same was considered as a ground of divorce.

Submitting on the second ground of appeal, Mr. Njelwa valiantly argued that the house located at Buswelu was not a matrimonial house. He referred this court to pages 21 and 22 of the court proceedings, Michael Machibya testified to the effect that the house located at Buswelu does not belong to the parties. The learned counsel for the

respondent referred this court to Exh.P2 and argued that the trial Magistrate decided rightly by not including the said house in the division of matrimonial properties.

On the third ground of appeal, Mr. Njelwa admitted that it is a rebuttable presumption under section 125 (2) and (3) of the Law of Marriage Act state that a child below seven years is placed under the custody of their mother. He went on to state that on page 10 of the trial court proceedings the court analysed section 125 (2) and (3) of the Act. He added that it was the court findings that the appellant did not care for her children and the Street Chairman proved that the appellant was not at home since he found the children alone.

Mr. Njelwa did not end there, he stated that the Welfare Officer was involved and the welfare of the child was determined therefore the court ended to place the children under the care of their father, and the respondent was allowed to visit them.

Regarding the house located at Nyegezi corner, Mr. Njelwa argued that the house was not a matrimonial house. He added that the appellant had no any exhibit to prove the existence of the said house. It was Mr.

Njelwa's further submission that the trial Magistrate on page 15 of its judgment said that the house located at Nyegezi was not listed as matrimonial properties, the same was an afterthought.

On the strength of the above arguments, Mr. Njelwa beckoned upon this court to dismiss the appeal.

In his rejoinder, the appellant's Advocate reiterated his submission in chief and added that the learned counsel for the respondent also has cited a case of the High Court whereas its decision was delivered in 1998 while the case of **Said** (supra) cited by the counsel for the respondent was delivered in 1985. Mr. Ally Zaid valiantly argued that the father in law of the appellant testified in court while he had a misunderstanding with the appellant. He went on to state that PW3 and DW2 testified to the effect that the two were abusing each other, they used to quarrel. He strongly objected that the appellant did not threaten the respondent.

Mr. Ally Zaid continued to blame the father in law that he used his efforts to make sure that the house is not subjected to division. He also lamented that the Welfare Report was not admitted and the expert

opinion is persuasive, not binding. Regarding the house located at Nyegezi, he argued that there was no any objection from the respondent's counsel that the same was a matrimonial house.

In conclusion, Mr. Ally Zaid urged this court to quash the trial court decision and allow the appeal.

I have dispassionately considered the grounds of appeal in the light of the submissions of both learned counsels. Having done so, I proceed to determine the ground of appeal.

On the first ground of appeal, in determining this ground I wish to consider the most crucial question whether there had been a valid divorce from the respondent. Records reveal that the respondent testified to the effect that the two had a long misunderstanding whereas it reached a time when the appellant threatened the respondent with a bush knife. He also testified that the appellant hit him while at the police station. The respondent had to leave the matrimonial house. Then the respondent decided to file for a divorce. On her side the appellant testified that they had a misunderstanding but she disputed the divorce,

insisting that the respondent's parents are the ones who took their son away from her.

Other witnesses; PW2, PW3, PW4 also testified that the two had a misunderstanding and the appellant was using abusive language to her in-laws. PW3, the appellant's neighbor testified that the appellant beat her children every day. PW4 testified that the appellant hit the respondent with stones and the appellant did not object. DW2 also testified that the two had a misunderstanding.

Apart from the respondent and PW2 evidence that the respondent threatened the respondent. The respondent who had the onus to prove his claims reported the matter to the Street Chairman (PW4) but he did not call for other available evidence from the police to whom he claimed he was assaulted in front of the police officers. Section 107 (1) and (2) of the Law of Marriage Act, Cap.29 provides that:-

" 107.-(1) In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular, shall- (a)

unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and (b) have regard to the custom of the community to which the parties belong. (2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree-

(c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage.

Applying the above provision of law to the instant case, it is clear that PW1 failed to prove if the appellant threatened to kill him. Therefore, the trial court was required to reject the claim that the appellant threatened to kill the respondent. However, in my considered view, it was correct for the trial court to rule out that the reason for divorce was cruelty as per section 107 of the Law of Marriage Act, Cap.29 [R.E 2019] since it was proved that the appellant throw stones towards the respondent and that she beat her children.

Therefore, there was credible evidence of long stand misunderstanding between the appellant and the respondent. The appellant had no right to cohabit with her husband and enjoy the companionship of her husband, for no valid reason and the appellant used abusive language to her in-laws and street leaders which in my view this ground suffice to grant a divorce. The cited case of **Said** (supra) is a fit case since it is relevant to the case at hand. The District Magistrate proved that evidence on record sufficiently proved cruelty on the part of the appellant in terms of section 107 (2) (c) of the Law of Marriage Act, Cap.29 [R.E 2019] to the extent of warranting the dissolution of marriage.

On the second and fourth grounds which relates to division of matrimonial houses, the appellant is complaining that the court erred in law for failure to consider the evidence of the appellant in regard to the house located at Buswelu and Nyegezi Corner which were jointly acquired. It is clear that in the instant appeal apart from the issue of divorce the appeal revolves around the division of matrimonial house the issue falls under the Law of Marriage Act, Cap.29 [R.E 2019] which guides the Court in the division of matrimonial properties.

Section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019], clearly states that 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 division between the parties of the proceeds of the sale.

Expounding the requirement of section 114 of the Act, I find that there are some exceptions to section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (3) provides that:-

> *"114 (3) For the purposes of this section, 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****."* [Emphasis added].

From the provision of law section 114 (3) of the Law of Marriage Act, it is clear that property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally until proven otherwise. For property registered in the name of one spouse acquired

during the subsistence of the marriage, the law presumes that it is held in trust for the other spouse.

As for property held in their joint names, the presumption is that each of the spouses has an equal beneficial interest to the property. Therefore, in the division of such properties, each party has to prove his/her level of contribution, whether monetary or non-monetary. When these properties are substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution as stated in the case of **Anna Kanungha v Andrea Kanungha** 1996 TLR 195 HC.

Guided by the above provision of law and authority, the issue for determination is whether the appellant contributed towards the acquisition or developing the house located at Buswelu and Nyegezi – Corner. Starting with the house located Buswelu. The records reveal that the appellant testified to the effect that she and her husband acquired the house located at Buswelu and the respondent testified that the said house belonged to his father who allowed them to leave in the said house. However, the appellant's evidence was mere words she did

not tender any cogent evidence to prove that they have constructed the Buswelu house together with her husband.

The appellant did not tender any transfer of the disputed plot from PW2 name to the respondent's name. In short, the appellant did not prove that the said house was a matrimonial property.

Concerning the house located at Nyegezi, the appellant complained that the said house was jointly acquired but the same was not subjected to division. Examining the records of the trial court the appellant mentioned that the parties acquired a house located at Nyegezi Corner but she did not tender any document to prove the existence of the said house and she did not testify the extend of her contribution in constructing or developing the said house.

However, I have noted that PW2 did not tender any cogent evidence which proved that the said plot was on his name and even DW1 did not tender documentary evidence. The evidence given were mere words thus I am not moved to believe that the said houses belonged to the appellant and respondent.

The law clearly states that the burden of proof is always on the person who alleges. Who alleges must prove failure to that the court is not moved to decide on her favour. Section 110 (1) of the Law of Evidence Act, Cap.6 [R.E 2019] states categorically to whom the burden of proof lies as follows:-

> " *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".*

Applying the above provision of law and authority it is clear that the appellant is the one who asserts therefore she had a burden to prove her allegations. Therefore, for the above findings, I find no any reason to differ with the findings of the trial court. These grounds are demerit.

Addressing the third ground of appeal, that the trial Magistrate erred in placing the children under the custody of the respondent. The appellant is complaining that the trial Magistrate erred in placing the children under the custody of the respondent without considering the requirement of section 125 (2) and (3) of the Law of Marriage Act,

Cap.29 [R.E 2019] and section 26 (2) of the Law of the Child Act, No. 21 of 2009.

In determining the issue of custody of children, I have to say that what matters in the custody of a child is the best interest and welfare of the child. Children of tender years are kept under the custody of their mothers unless there is sufficient evidence to discredit the mother. Under section 125 of the Law of Marriage and section 26 (2) of the Law of the Child Act, No.21 of 2009 enables a woman to seek custody for a child who is below 7 years old.

Moreover, in deciding the issue of custody of a child, the court's paramount consideration is the welfare of the child more than anything else; see **Celestine Kilala and Halima Yusuf v Restituta Celestine Kilala** (1980) TLR 76 and section 125 of the Law of Marriage Act.

In addition, Tanzania has ratified the UN Convention on the Welfare of the Child, (CRC), 1989 and domesticated the same by enacting the Law of the Child Act, No. 21 of 2009. The main objective of this Act, among others, is to stipulate the rights of the child and promote, protect and maintain the welfare of a child to give effect to international and

regional conventions on the rights of the child. Section 4 (2) of the Law of the Child Act, (supra) provides that:-

> *" The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies."*

Being guided by the above principle and provisions of the law cited herein, and the fact that the children's age in 2019, the first born was 4 years and the second born 6 months, they are small children who need the care and love of their mother. In the instant case, the respondent testified at the trial court that the children are below 7 years old, and when he left the matrimonial house the children were under the care of their mother.

The respondent complained that the appellant was an alcoholic and was not taking care of their children as a result Caren failed to perform well in class. PW3, one of their neighbor testified to the effect that the appellant used to beat her children. PW4 also testified that he saw the children alone at night hours. In my view, the said allegations were not

proved to the extent to deprive the biological mother right to stay and care for her two infants.

I am saying so because the proceedings of the trial court was conducted without the presence of a Social Welfare Officer. In accordance with section 99 (1) (d) of the Law of the Child, Act, the presence of the Social Welfare Officer is mandatory. The Social Welfare Officer was supposed to testify in court and tender a Welfare Report. On the contrary, the Social Welfare Officer was not called to testify and the Welfare Report was also not tendered in court. Instead, the trial Magistrate quoted the same in her judgment without analyzing the same.

Therefore, in my considered view, the procedure in implementing the Social Welfare Report was not proper and infringed the appellant's right since she had no any chance cross-examine the Social Welfare Officer or to know what transpired in the said report. Taking to account that PW1 neither DW1 testified that the Social Welfare Officer proved that the children were mistreated by their mothe. I do not find it is

justifiable to place the infants in the hands of the respondent while their mother is alive.

Therefore, there is no special circumstance that would make this Court depart from the principle that the custody of children of tender years should be given to their mother. In my considered opinion, it will be in the best interests of the two infants to be placed in the appellant's custody. The respondent is required by the law to maintain the children and pay for their school fees as stated under section 129 (1) of the Law of Marriage Act, Cap.29 [R.E 2019], and section 26 of the Law of the Child Act, No.21 of 2009. Section 129 (1) of the Law of Marriage Act, Cap.29 the father is responsible to provide maintenance to his children. Section 129 (1) of the Act state that:-

> *"129 (1) Save where an agreement or order of court otherwise Duty to maintain 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, children 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."*

In pursuant to the above provisions of law, the respondent is ordered to provide for their children's maintenance which includes education, health, food, and clothing. The respondent is entitled and is accorded with the right to see, visit, and stay with his children during weekends and holidays. However, in case of changes of circumstances which render the appellant unfit to have the custody of the child, the respondent may move the court to rescind its order. Until such time the trial court order on the custody.

In the circumstances and for the foregoing reasons I partly allow the appeal and issue the following orders:-

1. The custody of children is placed under the appellant, the respondent is accorded right to visit his children unless such arrangement interferes with their school calendar.
2. The respondent to pay Tshs. 200,000/= per month for maintenance of his two children.
3. The respondent to provide necessities such as **shelter**, food, clothing, and medical care.

4. The respondent to continue to pay for school fees of his children as per section 129 of the Law of Marriage Act, Cap.29 [R.E 2019].

I make no order as to costs, each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 24th November, 2020.

A.Z.MGEYEKWA

JUDGE

24.11.2020

Judgment delivered on 24th November, 2020 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

24.11.2020

Right to appeal fully explained.