IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 11 OF 2020

(Originating from the District Court of Moshi, Matrimonial Appeal No. 1 of 2019, original Moshi Urban Primary Court in Matrimonial Case No. 22 of 2015)

SILAS GODSON MINJA ---------- APPELLANT

VERSUS

ROSE BONIFACE SHAYO ---------- RESPONDENT

JUDGMENT

MUTUNGI .J.

Dissatisfied with the judgment and the decree of the District Court of Moshi in Appeal No. 1 of 2019 the Appellant has preferred the second appeal in this court on the following grounds: -

(1) That, both the learned trial Court Magistrate and the first appellant court's Magistrates erred in law for admitting hearsay evidence and decided the case

before them in favour of the respondent, something which rendered injustice on the part of the Appellant.

(2) That, the trial court and first Appellate Court Magistrates erred in law for failing to apprehend that the trial Magistrate denied justice to the appellant when she denied the appellant herein and his witnesses an opportunity to challenge the evidence adduced by the respondent and her witnesses by cross-examination, something which rendered injustice to the appellant herein.

(3) That, the first Appellate Court Magistrate erred in law for holding that the marriage Conciliatory Board certificate was issued to the trial court while the record does not clearly show this fact, something which rendered injustice.

(4) The trial Court Magistrate was biased by becoming reluctant to record properly evidence adduced by the appellant herein and his witnesses and denied him his right of cross-examination on the adverse party's evidence during the hearing something which occasioned injustice on the part of the appellant herein.

In view of the foregoing, the appellant prayed the court does allow the appeal in his favour, quash the judgment and decrees of both the lower court magistrates and order the marriage to resume.

At the hearing of the appeal the appellant was represented by Mr. Jacob Maliki and on the other hand the appellant was unrepresented. In support of the appeal, the appellant's counsel argued that the respondent's witnesses (SM2 and SM3), were not eye witnesses. All that they testified was hearsay. It was only the respondent who could account for that which was transpiring in the estranged marriage. The two witnesses had no domain in the life of the two spouses. It was therefore wrong for both the trial courts not to inquire into the source of the testimony adduced by the two witnesses. Surprising the first appellate court proceeded to bless the trial court's findings.

Further, the learned counsel strongly averred that, each litigant has a right of cross-examination which is embodied in the National Constitution. The same is purposely propagated to allow one to shake the witness's credibility and the velocity of the evidence. In support therefore the learned advocate

invited the court to the case of **Geoffrey Kisha vs. Republic, Criminal Appeal No. 96/2015 (unreported)**. In his settled opinion, once the appellant was denied the right to cross-examine SM1, SM2 and SM3, the first appellate court had a duty to attend to this anomaly and proceed to dismiss the appeal before it.

Reacting to the legal requirement as envisaged by **Section 101 of the law of Marriage Act, 1971 Cap 29 R.E. 2019**, which the first appellate court ignored, the respondent was supposed to tender in evidence a certificate from the Conciliation Board. It is on record that the same was not tendered as Exhibit yet the appellate court proceeded to find that this was not a requirement of law.

Lastly, the appellant's advocate, commented that the trial Magistrate was biased. The appellant had noted during the hearing, the trial Magistrate was not writing all that he testified but was very busy noting down all that the respondent said. He even went at length to inquire for elaborations in the respondent's case. At some time to make matters worse, the trial Magistrate went to the extent of scolding and throwing harsh words at the appellant. The trial

Magistrate's actions were contrary to Article 13 (3) of the land's National Constitution. In conclusion, the appellant's counsel prayed, the court does find the grounds of appeal meritorious and proceed to allow the appeal and let the two to live together and enjoy their old age.

On the other side, the respondent submitted she followed all the procedures required in the case of a divorce which included passing through the Conciliation Board. The appellant did not show interest in the reconciliation process and as a result, the respondent was issued with Form No. 3. In her settled view, all that the appellant is interested in, is the matrimonial assets, specifically the house they had acquired during the subsistence of their marriage.

She called upon the court to do away with the idea of the two coming together after more than twelve years separation. The appellant was never taking care of the respondent, surprising out of the blues he has become kind hearted. She contended, they had lived for 40 years and the appellant has sold most of the matrimonial assets. The appellant is the cause of the breakdown of their marriage. He had involved himself in adultery, and the outcome was a

child born out of wedlock. The respondent prayed the court should look into the life they lived and find, the only way-out is for her to get that which she deserves and each should move on with their lives.

In rejoinder, the appellant's counsel responded, the major concern in this appeal is the procedure followed in the lower courts. The appellant still has hopes that the two will get back to each other, but the respondent seems to be less interested in the idea. Her only interest is the matrimonial assets. It has become very difficult for the appellant to get in touch with the respondent. In the event they get back together, the appellant will be able to maintain the children and the respondent. This is the reason they are now before this court, to have the lower court's judgments quashed and set aside.

Having summarized the respective submissions it is an opportune moment to flash back and find out what exactly had transpired. Upon a reflection on the adduced evidence on record, the respondent had approached the trial court seeking for divorce and division of the matrimonial assets. It was her version of story that, they celebrated their marriage in 1983 and were blessed with four issues. Fate had it that they

lost one child thereafter. As regards the properties acquired during the subsistence of the marriage, these were two houses. The first one was of three rooms and the second one was of 22 rooms which they rented out to tenants. In 1991, they managed through joint efforts to buy a car, make pickup. All was a bed of roses till 2004 when the respondent started experiencing changes in their marriage. She succumbed to insults, violence, cruelty and the appellant engaged himself in adultery by sleeping around with women. The appellant stopped maintaining the family and went to the extent of chasing away the respondent from the matrimonial home. The appellant went to the extent of denying the respondent her conjugal rights and the money received from the rented house. To add salt to the wound, the appellant despite being notified of their child's sickness while he was away, he never paid the said child a visit nor paid for the medical expenses till the death of their beloved child.

After things got serious, the appellant sought the help of the church, relatives and social welfare but all in vain. She then resorted to filing a divorce which was granted but the matter having gone on appeal to the District Court and eventually

to the High Court, it was ordered that, the same starts de-novo due to illegalities in the procedure. After 13 years of sleeping in different rooms and a lot of suffering, the respondent once again knocked at the doors of the trial court which once again granted her the divorce and ordered the division of the matrimonial assets to the extent that she be given 10 rooms out of the 22 rooms rented, two beds plus their mattresses and one table with its corresponding chairs.

In support thereof the respondent had brought SM2 and SM3 in evidence who witnessed the growth of the said marriage to the time the respondent had started problems which led to the breakdown of the said marriage.

On the other side, the respondent informed the court that he had acquired all the matrimonial properties through his own efforts. He denied having beaten the appellant or insulted her. In fact the one who created all the problems was the respondent. His witnesses SU2 and SU3 simply explained of how one was a witness to the payment of the dowry and the other to the marriage ceremony itself (best man).

The appellant was aggrieved and went through the window of appeal (No. 1 of 2019) to the District Court which found that, the various efforts put to reconcile the parties had proved futile. Further the parties had been for almost ten years engaged in endless litigations which had created hatred between the two. In such given circumstances the trial court had no option but to grant the order for divorce. The court did not interfere with the division of the matrimonial assets since none had raised the same on appeal. Having been dissatisfied with the first appellate court's decision the appellant is seen before this court on a second bite.

Turning back to the grounds of appeal the same will be answered generally. The appellant has faltered the document referred to by the trial court purporting to be a certificate from the Conciliation Board. He alleges the same was not tendered as Exhibit but as an annexture to the petition. The court is alive with the legal requirement of law, that before a court entertains a matrimonial proceeding, a certificate of the Board setting out its findings should be produced in court as provided for under **Section 101, 104 (1), (2), (3) and (4) of the law of Marriage Act, No. 5 of 1971 R.E. 2019**. In the settled opinion of the court like, the one held by

the first appellate court, that before a trial court proceeds with the trial it should be satisfied that a certificate from the Marriage Conciliation Board does exist. In other words the same should have accompanied the petition filed. Apparently, the matrimonial squabbles started way back in 2020 and the respondent had petitioned for divorce (No. 9/2020) and the matter had gone up to the High Court which ordered for a re-trial. This was a second attempt by the respondent to have an order for divorce granted. As she petitioned for divorce in Petition No. 22/2015 she had filed the petition which was dully accompanied by a certificate from the Conciliation Board dated 9/7/2015. The same has met all the requirement of what entails Form No. 3. The court is further mindful of the fact that the procedures of trials in the Primary Court do not have fast and hard rules. In line with the foregoing analysis I find no merit in the ground that, the certificate from the Conciliation Board ought to have been tendered in evidence.

There is also the question of the evidence of the respondent's witnesses (SM2 and SM3). These did come before the trial court to collaborate the respondent's testimony. All that they testified is that which had come to their knowledge and the

life style the two were living. SM3 did witness the two buying a plot from them. It is far from saying the witness's testimonies were hearsay.

The appellant has complained that he was not given an opportunity to cross-examine the witnesses during the trial. Examination and cross-examination of witnesses is regulated under **section 146 of the Evidence Act, Cap 6 R.E. 2019** which states: -

> *"(1) The examination of a witness by a party who calls him is called his examination-in-chief.*
>
> *(2) The examination of a witness by the adverse party is called his cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called his re-examination."*

The court has gone through the proceedings and noted that the appellant had been given an opportunity to cross-examine the witnesses but most of the time he had no questions put before them.

Lastly, the appellant touched on the way the trial Magistrate was taking evidence. I have perused through the record and found this is the first time the same is raised. This being the second appellate court cannot intervene as this is a matter of fact which should have been raised before the trial court. In that regard I leave it at that.

In the final analysis the court finds no merit in the appeal and proceeds to dismiss the same. Given the nature of the parties involved, I make no orders for costs.

B. R. MUTUNGI
JUDGE
20/11/2020

Judgment read this day of 20/11/2020 in presence of both parties.

B. R. MUTUNGI
JUDGE
20/11/2020

RIGHT OF APPEAL EXPLAINED.