IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

PC CIVIL APPEAL NO. 24 OF 2020

(C/f the District Court of Arusha in Civil Appeal No. 2 of 2019, Originating from Arusha Urban Primary Court, Matrimonial Cause No. 74 of 2019)

DAUDI MEVAHASHI ..... APPELLANT

Versus

PENINA DAUDI ..... RESPONDENT

JUDGMENT

18th February & 19th March, 2021

Masara, J.

The Respondent herein petitioned against the Applicant for divorce, division of matrimonial properties and custody of their three children at the Arusha Urban Primary Court (the trial Court). After hearing evidence from both parties, the trial Court found out that the two had lived together as husband and wife for more than two years; therefore, they were presumed married under section 160 of the Law of Marriage Act, Cap. 29 [R.E 2019]. The trial Court held that divorce could not be issued since there was no proof of legal marriage. In the same vein, the trial Court made division of the properties jointly acquired; such as a three-bedroom house, a 10-room house rented to tenants and a ¼ acre farm. The distribution was made at a rate of 60% by 40% to the Appellant and Respondent respectively. Custody of the tree children was vested on the Respondent, whereby the Appellant was ordered to pay Tshs. 150,000/= monthly as maintenance of the children in addition to ensuring that the said children access all basic needs. The Appellant was not pleased by that decision; he appealed to the District Court of Arusha (the first

Appellate Court). The first Appellate Court dismissed the appeal. Still discontented, the Appellant has preferred this second appeal on the following grounds:

(a) *That, the Appellate Court erred both in law and in fact by not considering the fact that the trial Court did not evaluate the evidence before it concerning the matrimonial properties to be divided between the parties;*
(b) *That, the learned Primary Court Magistrate erred both in law and fact in granting custody to the Respondent herein;*
(c) *That, the learned Primary Court Magistrate erred in law and in fact by distributing the properties which were not matrimonial properties and or not obtained by joint efforts of the parties; and*
(d) *That, the learned Primary Court Magistrate erred in law by ordering the Appellant to pay to the Respondent Tshs. 150,000/= per month or maintenance without considering at all the Appellant's income.*

The Appellant prays that this appeal be allowed by quashing and setting aside the orders of the subordinate Courts, order for re-division of matrimonial properties, grant custody of the children to the Appellant and any other relief the Court deems fit and just to grant.

At the hearing of this appeal, the Appellant was represented by Mr. Prince Mwailwa, learned advocate, while the Respondent appeared in Court unrepresented, and fended for herself. The appeal was heard through filing of written submission. Before dealing with the submissions, a prologue of events is deemed necessary.

From the record made available to this Court, the Appellant and the Respondent lived as husband and wife since 2003, whereas the Appellant paid bride price amounting to Tshs. 430,000/= in 2007. They had a happy life and they were blessed with three issues; namely, Amani Daudi 15yrs,

Mary Daudi 9yrs and Godwin Daudi 4 yrs. In 2006, the Appellant married another woman from whom he also got three children. Life between the two became mystified after the Appellant married a second wife as that did not please the Respondent. The turning point was in 2014 whereby the Respondent was subjected to frequent beatings. Also, the second wife started to trespass into the farm which was given to the parties herein and started cultivating it.

According to the Respondent, when she started living with the Appellant, the Appellant was living in a one roomed house. They managed to finalize a three bed room house, which the Appellant had constructed to the lintel stage. In their joint efforts, they also built a ten-room house which is leased to tenants. They bought a welding machine and in 2007 they were given ¼ acre shamba by the Appellant's father. On his part, the Appellant told the trial Court that there is nothing he is owed by the Respondent since he has distributed all the matrimonial properties to both the Respondent and the other wife. The Respondent was given a house and a plot in the shamba that was given to them by the Appellant's father.

Their dispute was referred to various family and institutional meetings in an effort to resolve their differences amicably. At the family level, the Appellant's father tried to settle but he failed. They went to the Village Government, the conciliation board and the Legal and Human Rights Centre but in vain. In 2017, the Appellant vacated the matrimonial house and went to live with the other wife. The respondent then filed the dispute as forestated.

Submitting in support of the first ground of appeal, Mr Mwailwa contended that the trial Court's judgment was not signed by the assessors as provided for under Rule 3(1)(2) and (3) of the Magistrates' Courts (Primary Courts) (Judgment of the Court) Rules, 1987 G.N No. 2 of 1988. He therefore maintained that the assessors did not participate in the final verdict something that renders the entire trial null and void. He backed his position with the decision of this Court in ***Crospery Kybona Vs. Deus Nyamukana***, Civil Appeal No. 4 of 2018 and ***Neli Manase Foya Vs. Damian Mlinga*** [2005] TLR 167.

Submitting on the second ground of appeal, Mr. Mwailwa stated that the trial Court erred in granting custody to the Respondent without considering the wishes of the children, citing the case of ***Gladness Jackson Mujinja Vs. Sosper Crispine Makene*** [2017] TLR 217 to support his argument. He maintained that since two of the children had attained the age (above seven years) which they could express their wishes, it was wrong for the trial Court to grant custody to the Respondent without taking into consideration the wishes of those children.

Regarding the third ground of appeal, the learned counsel for the Appellant stated that the trial Court awarded maintenance to the tune of Tshs. 150,000/= without considering the income, impairment of earning capacity and financial responsibility of the Appellant, costs of living and rights of the children. He argued that the order was in contravention of section 44 of the Law of the Child Act, Cap. 13 [R.E 2019.]

Although it was not specifically stated, Mr. Mwailwa decided to drop the fourth ground and, instead, added a new ground of appeal which faults the judgment of the first Appellate Court. He fortified that the first Appellate Court Magistrate framed issues and determined them but she never gave the reasons for the decision as stipulated under Order XX Rule 4 of the Civil Procedure code, Cap 33 [R.E 2002].

Contesting the appeal, the Respondent, in response to the first ground of appeal, faulted the Appellant's submission stating that what has been submitted in the written submission does not reflect his first ground of appeal as reflected in the memorandum of appeal. However, responding to what has been submitted by the Appellant as the first ground, the Respondent stated that the trial court record shows at pages 9 and 10 of the typed judgment that on 28/10/2019 when the judgment was pronounced the Court was presided over by two assessors, Rogath Marcos and Tabu Simile and both signed.

Contesting the second ground of appeal, the Respondent contended that since 2017 the Appellant refrained from supplying his children with their basic needs. She argued further that she is in good health and mind therefore capable of taking care of the children. The Respondent added that the Appellant has already married another wife who is not in good terms with the Respondent. She urged the Court to hold that the Appellant has not disclosed good reasons why the children should not be in the Respondent's custody. She referred to section 26(1)(a)(b) and (c) of the Law of the Child, stating that the trial Court considered the needs of the children in granting custody to her.

Responding to the third ground of appeal, the Respondent fortified that the Appellant generates income from the welding machine which was purchased by their joint efforts. She further stated that their ten room house which is rented to tenants at the rate of Tshs 35,000/= per room in each month makes him capable of meeting maintenance costs as ordered by the trial Court.

Regarding the additional ground, the Respondent was of the view that the Appellant contravened the procedure by raising a new ground which was not part of the grounds of appeal raised in the memorandum of appeal without even notice to the Court. She therefore prays that the new raised ground of appeal be dismissed. On the totality, the Respondent prays that the Appellant's appeal be dismissed with costs for being devoid of merits.

I have given a deserving weight to the grounds of appeal and the rival submissions of the advocate for Appellant and that of the Respondent. I will determine the grounds of appeal as presented and in the course adopted by the parties.

Having outlined the facts and the rival submissions from the parties, I find it appropriate to deal with the appeal in the same manner as was presented by the parties in their written submissions. To begin with, the memorandum of appeal, particularly in what was reflected as the first ground of appeal, the Appellant is faulting the evaluation of evidence by the trial Court in distributing the matrimonial properties. However, what was submitted by the Appellant's counsel in his submissions regarding the first ground is a complete turnaround. His submission revolved on the

involvement of assessors in the trial Court judgment. This Court is at a limbo whether the first ground was abandoned or otherwise. The same applies to the third ground of appeal in the memorandum of appeal which was as well dropped silently.

If that was not enough mishap, as pointed out by the Respondent, the Appellant's counsel raised a new ground in his written submissions which was not canvassed in the memorandum of appeal and without notifying both the Court and the Respondent. The Respondent considered such act to be contrary to law but she did not come forth with the law that is said to have been contravened. Procedurally, the Appellant ought to have asked the Court to allow him to add a new ground of appeal. However, as the Respondent had a chance to counter that ground in her reply submissions, there is no prejudice suffered on the part of the Respondent. What is irking however is the fact that the Appellant who was dully represented by an advocate decided to abrogate a procedure that he ought to have known.

It is also disturbing to note that the Applicant's counsel did not offer any explanations on the issue of coming up with a completely new ground and which was contested by the Respondent. I expected the Appellant to clarify the same in his rejoinder submissions but the Appellant's counsel opted to remain mute on the same. The Appellant's counsel, as an officer of the Court, has a duty to assist the Court and not to confuse it. I ascribe to what my learned sister Madam Maghimbi, J. held in this regard in the case of ***Said Salim Vs. Ramadhan Kengia***, Misc. Land Application No. 294 of 2017 H.C Land Div. (unreported), where it was held:

"Until he is certain and settled in mind, he should not come to court corridors to confuse the court and expect the court to assume that which he wants."

The same applies to the Appellant's advocate. Nevertheless, since what was submitted by the Appellant as the new first and last grounds are legal points, I am bound to determine them so as to have the record cleared.

I will start with the issue relating to involvement of assessors. I have carefully revisited the trial Court records, I note that on the first page of the trial Court judgment, the quorum reads:

"Tarehe: 28/10/2019
Mbele ya G. J. MBOWE – Hakimu
Karani: Aisha Msangi
Washauri: 1. ***Rogath Marcos***
2. Tabu Simile" (emphasis added)

The said judgment also shows at page 9 that both the trial Magistrate and the assessors signed it after the final orders. Further, the three also signed after the right of appeal was explained to the parties. At page 10, after showing that the judgment was read in the presence of the parties, the trial Magistrate and the assessors also signed. That part reads:

"Mahakama: Hukumu imesomwa mbele ya pande zote mbili leo tarehe 28/10/2019
Washauri: 1. Rogath Marcos – sgd *sgd: G. J. Mbowe - RM*
2. Tabu Simile – sgd *28/10/2019"*
(emphasis added)

From the above extract, it is apparent that the judgment was read by both the trial Magistrate and the assessors. The record shows from the quorum that the assessors participated in the judgment, and at the end as shown above, right after their names is shows they signed (sgd). Quite

unfortunately, there seems to be no original judgment or proceedings of the last day in the trial court file. That apart, it may not have been possible for the assessors to sign in the typed judgment, but since they participated at the time the judgment was delivered, it suffices to say that they signed as indicated in the typed records. That is the requirement under Rule 3 of G.N No. 2 of 1988 cited by the Appellant's counsel. Therefore, Mr. Mwailwa's contention that the trial Court judgment was without involvement of the assessors is without proof. This Court is at one with the Respondent that the trial Court judgment was proper. The first ground of appeal is found to be devoid of merits.

I now turn to the second ground of appeal which faults the trial Court's decision of granting custody to the Respondent in the absence of the express wishes of the said children. Notably, after dissolving a marriage, the order of custody of the issues of marriage normally follows. In granting custody of the children, the governing provision is section 125 of the Law of Marriage Act, Cap. 29 [R.E 2019]. The relevant provision reads:

> *"125:- (1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare.*
> ***(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-***
> ***(a) the wishes of the parents of the child;***
> ***(b) the wishes of the child, 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 a child 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 child 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" (emphasis added)

The provision is self-explanatory that what is paramount in granting custody of the marital children is the welfare of the children. That is also the spirit of the enactment of the Law of the Child Act in 2009. In ***Ramesh Rajput Vs. Mrs Sunanda Rajput*** [1988] TLR 96 the Court held:

"The most important factor in custody proceedings is the welfare of the child."

Further, the wishes of the parents of the children and the wishes of the children are also taken into account. In granting custody to the said children, the trial Magistrate vested the same on the Respondent because she is their mother. I support the decision of the trial Court for the following reasons: First, the Appellant has not shown reasons as to why he does not condone that custody be vested on the Respondent. In the absence of serious issues that may impact the welfare of the children, this Court finds no good grounds to reverse the trial court finding.

Second, it is on record that the Appellant deserted the Respondent two years back, leaving her with the said children. Since all that time the children were in the custody of the Respondent and since there was no complaints from either the Appellant or the children themselves, it is desirable for such children to continue living with their mother. Third, the major reason for the Appellant and the Respondent to separate leading to the petition is the fact that the Appellant married another wife. It is

also on record that the Respondent and the new wife were not in good terms. Therefore, granting custody to the Appellant would inevitably mean that the said children will have to stay with the Appellant's second wife whose relationship with the Respondent is sour. That may not be in the best interest of the children.

It is noted further that the Appellant's main complaint is that the children's wishes, especially the first and second children who were above seven years old, were not solicited by the trial Court. The answer to this is obvious, the court is not bound by the wishes of the children. Parents have paramount consideration as it was held in ***Festina Kibutu Vs. Mbaya Ngajimba*** [1985] TLR 44, where the Court stated:

> *"The wishes of a child of tender age should not be permitted to subvert the whole law of the family or to prevail against the desire and authority of a parent unless the welfare of the child cannot otherwise be secured."*

Furthermore, as intimated earlier on, the Appellant had deserted the Respondent who was living with the children for two years, therefore this will justify the wishes of the Respondent to continue taking care of her children. In the case of ***Amina Bakari Vs. Ramadhani Rajabu*** [1984] TLR 41, it was held:

> *"As stated earlier the respondent is the father of the child Juma and I uphold the District Court's declaration on the issue. I also think that the issue of custody was rightly decided although for different reasons.* ***Juma is now seven years of age and has throughout been in the custody of the appellant. It would not be in his interests to disturb him by placing him in the custody of the respondent, a person he probably does not know.*** *In fact the respondent never appealed against the order denying him custody and had adduced no*

evidence as to how he could better secure the child's welfare." (emphasis added)

Another reason is that it was for the best interest of the three children to be brought up by the same parent. Having so scrutinized, I do not see any reason to fault the trial Court decision on this aspect. This ground is likewise dismissed.

Regarding the third ground, the main complaint is on the awarding of maintenance at the tune of Tshs 150,000/= per month without considering the Appellant's income. From the testimony of the Appellant, particularly while being questioned by one of the assessors, Tabu Simile, he admitted that the minimum amount he was giving the Respondent for maintaining his children was Tshs. 5000/= per day. Multiplying Tshs 5000/= by 30 days one gets Tshs 150,000/= which is the amount that the trial Court awarded as maintenance. Further, when cross examined by the Respondent in the trial Court, the Appellant stated that the he was the one receiving rent from the tenants in the rented rooms, and that was for the children's food. When queried by the trial Magistrate, the Appellant admitted that he is a welding mechanic, implying that he earns money from that activity. Therefore, his complaint that his income was not taken into consideration seems to be an afterthought. It is the finding of this Court that the trial Court took into consideration the Appellant's ability to pay and what he had been paying before in arriving at the compensation rate. He was ordered to pay the same amount he used to pay, only that the paying mode changed from paying on a daily basis to a monthly basis. For the above reasons, this ground also fails.

Regarding the introduced ground, I find no merits on it. The judgment of the first Appellate Magistrate was in compliance with Order XX Rule 4 of the Civil Procedure Code as cited by the Appellant. His contention that the first Appellate Magistrate did not give reasons for the judgment is not backed by any proof. The reason for the decision is given at page 3 of the typed judgment. The relevant part reads:

> *"In answering the above issue, this Court passed on the records (sic) of the trial court and being satisfied that the trial court made a proper decision. The evidence show (sic) that the respondent made her contribution in different ways financially and also in physical support by fetching water and cooking food during the construction of the houses."*

The first Appellate Magistrate then cited the case of ***Bi Hawa Mohamed Vs. Ally Sefu*** [1983] TLR 32 in assessing the Respondent's contribution in acquiring the assets. For the reasons she assigned above, the first Appellate magistrate found it proper to dismiss the appeal. Therefore, the contention that the first Appellate Court judgment did not contain reasons for the decision is without basis. That ground is as well dismissed.

Consequently, and for the reasons above stated, the appeal is devoid of merits. It stands dismissed in its entirety. The decisions of the two lower Courts remain unaltered. Considering this to be a matrimonial dispute, I hereby order that each party shall bear their own costs.

Order accordingly.

THE HIGH COURT OF TANZANIA

Y. B. Masara
JUDGE
19th March, 2021.