IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MATRIMONIAL APPEAL NO. 21 OF 2020

(Original Matrimonial Cause No 11 of 2020 from Moshi Urban Primary Court and Arising from Matrimonial Appeal No.4 of 2020 from District Court of Moshi at Moshi)

VALENCE PAUL SHAYO ..... APPELLANT

VERSUS

JACKLINE WILSON KIMARO .....RESPONDENT

JUDGMENT

MUTUNGI .J.

The matrimonial dispute originates from Moshi Urban Primary court (the trial court) in Matrimonial cause No 11 of 2020. In the said court the respondent successfully petitioned for divorce, division of matrimonial assets and custody of the two issues namely Meshack Valence Shayo 6 and Shedrack Valence Shayo 5 years old respectively.

Briefly, Jackline Wilson Kimaro and Valence Paul Shayo were husband and wife having celebrated their marriage under a Christian marriage on 7th of July 2012 and were blessed with two issues as mentioned before.

Before the trial court the respondent herein petitioned for divorce on the grounds premised on, cruelty, adultery and alcoholism. She also prayed for division of matrimonial properties which essentially were listed as, three fish ponds at Rombo, one house at Rombo and a motor vehicle T.791 DDV Nissan caravan which she claimed to have bought from a loan. In the end the trial Magistrate granted the divorce and awarded the respondent the said motor vehicle. Further the house was allocated to the appellant having been established was not a matrimonial property acquired jointly during the subsistence of the marriage. The three fish ponds were ordered be divided equally to the parties. Lastly the two children were placed under the custody of the respondent and the appellant to provide their maintenance.

The appellant was aggrieved by the decision of the trial court, he however, unsuccessfully appealed to the Moshi District Court. He has once again come on appeal to this court through the window of appeal on the following grounds: -

1. That, the trial Magistrate grossly erred in law and fact by not considering the appellant's grounds of appeal as the matter was entertained without a

valid Marriage Certificate from a Marriage or proper Conciliation Board contrary to the law.

2. That, the trial Magistrate grossly erred both in law and fact by upholding the Primary Court's Judgment without considering that the decision was reached without the opinion of Court Assessors which is bad in law.
3. That, the trial court erred in law and fact by upholding the Primary Court's decision without inquiring as to whether the marriage had broken down irreparably as per the mandatory requirement of law.
4. That, the trial Magistrate grossly erred both in fact and law by deciding the matter in the respondent's favour despite of inconsistent and contradictory evidence.
5. That, the trial Magistrate grossly erred both in law and fact by upholding the division of the motor vehicle in dispute (Nissan Caravan, T 791 DDV) which was not jointly acquired and hence ordered equal division of the same, from the bought piece of TZ shillings 14,000,000/= without even considering its depreciation of price due to time and usage.

6. That, the trial Court seriously erred in law and fact by upholding the custody of children to the respondent as illegally decided by Moshi Urban Primary Court without considering the welfare and best interest of the children.

The appellant was unrepresented whereas the respondent was represented by Mr. Baraka Massawe learned advocate. Both parties agreed to proceed by way of Written Submissions.

Submitting on the first ground of appeal contesting the absence of a valid marriage certificate, the Appellant submitted the certificate from a marriage conciliation Board is the key legal requirement in order to institute a matrimonial cause in a court of law as per section 161 of the Law of Marriage Act. Failure to furnish the same renders the whole proceeding a nullity. It was the Appellant's submission that, the first appellate court ignored this legal requirement, ending up failing to nullify the whole proceedings. There was vividly no valid marriage certificate from the marriage conciliation Board acknowledging to have failed to reconcile the parties.

In reply to this first ground of appeal, the respondent submitted that this ground is devoid of merit as the parties referred the matter to the marriage conciliation Board which is Kilimanjaro ward Marriage conciliation Board before filing the petition for divorce.

On the second ground of appeal, on non-consideration of court assessors' opinions, the Appellant submitted, the first appellant court upheld the primary court judgment without considering that the decision was reached without considering the opinions of the court assessors in line with **section 7(1) of the Magistrate's Court Act, cap 11 R.E 2002**. Neither was it shown that, such opinions were read in presence of parties before the judgment was composed. To support his stance, he cited the case of **Edna Adam Kibona vs. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017 (CAT)** and of **Anna Ndunguru and John Mashamu vs. Mary Kirway, Land Appeal No. 120 of 2018 High Court of Tanzania (Land Division)**.

In reply to this ground, the respondent submitted, the proceedings of the trial primary court reveal the opinions of assessors were well considered at page 32 and 26 of the typed judgement. Further at page 36 of the typed judgment the names of the sitting assessors were

mentioned. It is thus wrong to rule out that the opinions of the assessors were never considered by the trial Magistrate

As regards the third ground of appeal on whether the trial court erred in upholding the primary court decision without inquiring whether the marriage had broken down irreparably the appellant submitted, the court has to satisfy itself as to whether the marriage has broken down irreparably as provided for under section 107of the Law of Marriage Act. The same is wanting in the matter at hand, more so the marriage conciliation Board did not reconcile the parties to the effect that no certificate certifying the marriage had irreparably broken down. Lack of such inquiry as provided for by law, the first Appellate Court was thus wrong to uphold the decision by the trial court.

In reply to the third ground of appeal, the respondent submitted. The major complaints were the Appellant's adulterous behaviour, mental and physical cruelty as envisaged by **section 107(2)(a) and (c) of the Law of Marriage Act**. There was further evidence of absence of love between the two conflicting sides. In view thereof since the two were not willing to live together, this was a clear testimony the marriage had irreparably broken

down. There was no way the court could have forced them to live together.

Submitting to the fourth ground of appeal the appellant contended that, the respondent's evidence was inconsistent and contradictory hence was wrong to decide in favour of the respondent.

In reply thereof, the respondent submitted, the same lacks merits since the appellant had failed to point out the evidence which was inconsistent and contradictory. It was submitted the matter was so decided in favour of the respondent after proper evaluation of the evidence from both parties.

Regarding the fifth ground of appeal, the Appellant complained against the first appellate court upholding the division of the vehicle which was not jointly acquired. There was no evidence tendered to show that, the respondent had secured a loan and bought the disputed vehicle but simply relied on mere words. To the contrary he had demonstrated evidence showing how he got a loan and called in evidence the one who borrowed him the money. It was evidenced that the said motor vehicle solely

belonged to the Appellant and the motor vehicle registration card bears his name.

In reply thereto, it was submitted by the respondent that, the first appellate court was correct to uphold the decision of the primary court concerning the motor vehicle. There was undisputed evidence of the loan certificate from her employer (International School Moshi) where she secured the said loan.

On the sixth ground of appeal, the appellant complained about the custody of the children. He submitted the best interest and welfare of a child is the paramount consideration in determining the custody of the child. These were never considered by the trial court. He further submitted that, the **Law of Marriage Act 1971**, underscores this laid down principle in granting custody of any child. It follows the first Appellate Court erred in law by upholding the trial court's decision which did not adhere to the principle laid down in law.

Submitting on the above sixth ground of appeal, it was contended by the respondent that, the court has to consider the best interest and welfare of the child under **section 125 (1)** and **125 (3) (b) of the Law of Marriage Act**.

What the trial court did consider was the age and sex of the children. She submitted that, since the children are under age, it was important that they live with their mother as decided by the trial court. She has a permanent job (nurse) and was all along catering for the children. It was thus in the best interest of the children that she was granted custody.

Lastly on the seventh ground, the appellant complained of the mobile messages tendered by the respondent without considering its genuinely and authenticity. To make matters worse Rules of Evidence in Primary Courts do not provide for electronic Evidence.

On the other hand the respondent responded that, be as it may the electronic evidence was not relevant in this appeal neither did the trial court solely lie on the same.

Before entertaining this appeal, let me on the offset state the legal position that, an Appellate Court cannot interfere with concurrent findings of the lower courts only if there is misapprehension of the evidence, miscarriage of justice or violation of principles of law. See the case of **Amratlal D.M.Zanzibar Silk Stores vs A.H Jariwale Zanzibar Hotel 1980 TLR**.

I have thoroughly passed through the submissions made by the parties, and perused both lower court files and found, the following issues need to be determined by this court.

1. Whether there was a certificate issued by the conciliation Board.
2. Whether the opinions of assessors were considered in the judgment.
3. Whether there was sufficient evidence to show that the marriage had irreparably broken down.
4. Whether the respondent was entitled to the custody of the children.
5. Whether there was a proper division of matrimonial properties acquired jointly during the subsistence of the marriage.

Starting with the first issue which makes reference to the validity of the certificate from the conciliation Board. In principle the appellant complained the matter was not referred to the Board as required by law. He submitted there was no valid or proper certificate from the conciliation Board and so the matter before the primary court was pre-maturely filed.

The court is alive with the mandatory requirement of the conciliation Board certificate before instituting a petition

for divorce, lack of which renders the whole proceeding a nullity. See the case of **Hassan Ally Sandali vs Asha Ally Civil Appeal No 246 of 2019 (unreported)**. The law is loud under **section 101 of LMA. Rule 9(2) of GN 240 of 1971** which provides: -

> *''Where the dispute is between a husband and his wife and relates to the breakdown of the marriage or an anticipated breakdown of the marriage, and the Board fails to reconcile the parties, the board shall issue a certificate in the prescribed form.''*

In terms of section **104(5) of Law of Marriage Act**, the certificate has to reflect the board's findings. I took trouble to peruse through the Primary Court file and found Form No. 3 written in Swahili and paragraph 2 states: -

> *''Baraza hili limeshindwa kuwasuluhisha kwani mlalamikaji amebaki na msimamo wa kuvunja ndoa.''*

The question would be whether the form was included at the institution of the petition. The first appellate court was of the view that, the certificate from the board was attached certifying that it failed to reconcile the parties.

For this I uphold the findings of the first Appellate Court that, the parties referred their matter to the conciliation Board of Kilimanjaro Ward which certified that it failed to reconcile the parties. The ground consequently fails.

Coming up to the issue of assessors as submitted under the second ground of appeal; the law is very clear specifically **Section 7 of the Magistrates Courts Act, Cap. 11 R.E 2019** and **Rule 3(1) of the Magistrates Courts** (Primary Courts) (Judgment of Court) **Rules G.N. No 2 of 1988** reads: -

> *"7 (1) in every proceeding in the primary court including a finding* ***the court shall sit with not less than two assessors.***
>
> *(2) All matters in the primary court including a finding in any issue the question of adjourning the hearing an application for bail a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever,* ***shall*** *in the event of a difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the Magistrates and assessors present and in the event of an equality of votes the Magistrate shall*

have the casting vote in addition to his deliberative vote."

The trial Magistrate was required to deliberate with the assessors in reaching a decision of the court. Under **Rule 3 of the Magistrates' Courts** (Primary Courts) (Judgment of Court) **Rules G.N. No. 2 of 1988**, provides: -

3. (1) where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the Magistrate shall proceed to consult with the assessors present with the View of reaching a decision of the court.

(2) If all the members of the court agree on one decision, ***the Magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.***

(3) For the avoidance of doubt a magistrate shall not; in lieu of or in addition to the consultations referred to in sub rule (1) of this Rule be entitled to sum up to the other members of the court that the primary court has to sit with at least to assessors. (Emphasis added).

As per the above provisions of law, it is mandatory for a Primary Court Magistrate to sit with two assessors. The question then will be whether the trial Magistrate did abide by this law. Upon perusal of the first appellate court's judgement the Magistrate found the trial Magistrate sat with two assessors who signed the judgement and the trial court used the words ***"Mahakama hii kwa kauli ya pamoja"***.

This court took pains to perusal through the proceedings and judgement of the trial court, the record shows, two assessors **Josephine Kimaro** and **Lucresia Mambo** signed not only the judgement but also the proceedings. In the judgement the trial Magistrate used the words *''Mahakama hii kwa kauli ya pamoja''* which is a clear testimony that not only did the trial Magistrate reach to a decision, but it was reached anonymously by both the assessors and trial Magistrate. On the same footing the ground collapses.

Coming to the issue of ***whether there was enough evidence to prove that the marriage had broken down irreparably*** in support of the third and fourth grounds of appeal. The appellant submitted there was no such evidence. The first Appellate Court found, there was proof

that the marriage had broken down irreparably upon considering the testimony of the respondent regarding her marriage life with the appellant which was collaborated by her witnesses. The first Appellate Magistrate took note that the trial court was satisfied that the marriage had broken down beyond repair due to cruelty, adultery, alcoholism, desertion of the family and misuse of the family money. To cap it all there was no love between the parties.

The court is alive with the requirement of the law that, the court has to satisfy itself that the marriage has broken down beyond repair in order to issue a divorce order. Under **section 110(1) (a) of the Law of Marriage Act 1971** which for ease of reference I wish to quote as hereunder: -

> *"At the conclusion of the hearing of a petition for separation or divorce, the court may;*
>
> *a) If satisfied that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce, as the case may be, together with any ancillary relief"*

Considering the glaring evidence tendered, it is far from proposing that there was no evidence to prove the marriage had irreparably broken down. This court is in all

fours with both the lower court's decisions hence this ground lacks merits and is dismissed.

On the ***issue of division of matrimonial properties*** which covers the fifth ground of appeal, the law is explicit under **Section 114 of the Law of Marriage Act, Cap 29, R.E. 2019** that: -

> *"114. - (1) 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 the division between the parties of the proceeds of sale.*
>
> *(2) In exercising the power conferred by subsection (1), the court shall have regard to -*
>
> *(a) The customs of the community to which the parties belong;*
>
> *(b) The extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
>
> *(c) Any debts owing by either party which were contracted for their joint benefit and*

(d) The needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(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."

In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo Civil Appeal No. 102 of 2018** matrimonial properties have been defined to mean those properties acquired by one or both spouse before or during their marriage with the intention that there should be continuing provisions for them and their children during their joint lives. Also, in the case of **Yesse Mrisho vs. Sania Abdu Civil Appeal No 147 of 2016 (unreported)** the Court of Appeal had this to say: -

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets"

The property in controversy is the car Nissan Caravan with Reg. No. T 791 DDV which each party claims to be theirs. The first appellate court upheld the division done by the trial primary court that granted the same to the Respondent or in the alternative the appellant to refund her the money equivalent of the value of the vehicle. Having painstakingly perused the trial record it shows, the reason given for such division was that, the respondent had a loan certificate unlike the appellant whose evidence was inconsistent. The law as provided under **section 110 (1) of the Evidence Act, Cap 11 R.E 2019** states that: -

> *"110.-(1) 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."*

To quote the words of the trial court magistrate at page 34-35 of the typed judgement states: -

> *'' Mahakama iliona Ushahidi wa mdai ni mzito kuliko mdaiwa kwani pamoja na kuwa yeye anasema alikopa lakini mazingira anayodai kukopeshwa hizo Tshs. 13,000,000/= ni tofauti na hayo anayosema huyo mkopeshaji kwani wakati mdaiwa anaeleza kuwa alikopeshwa pesa hizo*

huko mbwaruki yeye SM3 ambaye ndiye mkopeshaji alieleza kuwa pesa hizo alimkopesha mdaiwa wakiwa Moshi mjini double road na mahakama inalichukulia hilo kwa uzito unaostahili kwamba kama ni kweli kulikuwa na mkopo huo kusingekuwa na tofauti hizo ikizingatiwa aliyekopesha ni fundi ujenzi na alieleza hiyo ilikuwa akiba yake nyumbani ambako alidai kuwa anaishi Majengo fire.''

In light of the above, it is crystal clear that the respondent was able to prove the fact that she used the loaned money to buy the said car and for that it was property acquired through her personal efforts, unlike the appellant who claimed to buy the car under the inconsistent evidence. It follows this ground is devoid of merits.

Regarding the issue of ***custody of the children as complained*** under the sixth ground of appeal, it is undisputed that the spouses were blessed with two issues who were placed under the custody of the respondent (mother). The appellant complained, the subordinate courts failed to consider the best interest of the children as well as their welfare.

It is well known that the best interest and welfare of the child is paramount when granting custody of the child. This is under **section 125(2)(a) (b) of the Law of Marriage Act, 1971** which I wish to quote: -

"In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant."

It is also important to consider the issue of disturbing the life of an infant by changing the custody under section 39(1) of the Law of the Child Act this too mandates the court to give due consideration to the best interest of the child when determining the issue of custody. See the case of **Ramesh Rajput vs. Mrs S Rajput (1988) C.A TLR 96.**

The question is whether the trial court considered this principle. After going through the judgment of the trial court at page 28 of the typed judgement while considering **sections 125(1) and 129 of the law of marriage Act** had this to say, which I wish to quote for ease of reference: -

> *"...Mahakama hii kwa kauli ya pamoja inaamuru kuwa Watoto hao waendelee kuishi na mdai kulingana na umri wao na kwa ajili ya ustawi wao..."*

Basing on the quoted paragraph it is true that the trial magistrate considered the best interest of the children and rightly so the same was supported by the first Appellate Court by awarding the custody to the respondent. This ground fails.

Last but not the least, was the question of electronic evidence, to be precise the mobile messages tendered by the respondent. This need not task my mind, since it is an obvious fact that Primary Courts are not mandated in law with electronic evidence. Even through the first Appellate Court did expunge this piece of evidence and rightly so as I accordingly proceed to do, I find the rest of the evidence did paint a clear picture that the two could no longer live together. Without love the marriage had irreparably broken down.

In the final analysis I am of the considered view, the first Appellate Court did well consider the grounds of appeal raised and had come to a proper decision of upholding the trial court's decision. In that regard the appeal is dismissed and considering the nature of the matter, I make no order for costs.

B. R. MUTUNGI
JUDGE
18/3/2021

Judgment read this day of 18/3/2021 in presence of both parties.

B. R. MUTUNGI
JUDGE
18/3/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
18/3/2021