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

MATRIMONIAL APPEAL NO.07 OF 2020

(Arising from Matrimonial Appeal No. 05 of 2020, Originating from Civil Case No. 10 of 2020 Kwimba Primary)

JOYCE PETER ..... APPELLANT

VERSUS

LEONARD FAUSTINE ..... RESPONDENT

JUDGMENT

Date of last Order: 17.05.2021

Date of Judgment: 21.05.2021

A Z. MGEYEKWA, J

Joyce Peter, the appellant, and Leonard Faustine, the respondent 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: Leonard Faustine, and Joyce Peter in 2017 contracted a customary marriage.

The respondent testified to the effect that he paid the bride price; 8 cows out of 10 cows. Then they traveled to Morogoro. After a while, the respondent went back to Moshi and left behind the appellant. In 2018, the respondent realized that the appellant was remarried and returned to Mwanza. In 2019, the respondent filed for divorce at Buyogo Primary Court at Kwimba District, Mwanza Region. The trial court granted a divorce.

Aggrieved, the appellant filed an appeal at Kwimba District Court claiming that there was no recognized marriage between the parties. The District Court dismissed the appellant's appeal and uphold the trial court decision.

Undeterred, the appellant preferred this appeal in this Court. The appeal is predicated on two grounds of appeal namely:-

1. *That the first Appellate court erred both in law and fact by upholding the Decision of the trial court on the existence of cognizable legal marriage between the parties.*
2. *That the District Court of Kwimba erred in law and facts to make a findings on existence of the marriage and failure to consider the defect in the bride price as the key requirement in the nature of the dispute marriage.*

When the matter was called for hearing on 13th April, 2021, the appellant enjoyed the legal service of Mr. Sakila, learned counsel and the respondent appeared in person, unrepresented. By the court order, the appeal was argued by way of written submission whereas, the appellant filed his submission in chief on 15th April, 2021 and the respondent filed his reply on 03rd May, 2021. Mention was scheduled on 13th May, 2021 and judgment was scheduled on 21st April, 2021.

It was Mr. Sakila, learned counsel who kicked the ball rolling. He opted to combine and argue both grounds of appeal together. The learned counsel stated that the respondent appeared at the trial court seeking divorce with the mentality that there was a marriage between him and the appellant while the same was full illegality for the appellant's consent was obtained fraudulently. He added that the contented marriage lasted only for three days.

Mr. Sakila continued to argue that the Primary Court of Kwimba and misdirected itself for granting a decree of divorce for the reason that a customary marriage took place. He valiantly contended that there was no valid marriage between the parties since the certificate of marriage

was not issued. To support his submission he referred this court to section 33 (2) and (3) of the Law of Marriage Act, Cap. 29 [R.E 2019]. Mr. Sakila also cited the case of **Mahundya Mburumatare v Mugendi Nyakangara** (1969) HCD 7, this court held that a customary marriage is legalized by the issuance of a marriage certificate and the traditional ceremonies have no legal force.

It was Mr. Sakila's further submission that in the absence of the marriage certificate it was improper for both lower courts to conclude that there was a marriage between the parties. He went on to state that the payment of dowry has nothing to do with the legality of marriage. Mr. Sakila fortified his submission by referring this court to section 41 (a) of the Law of Marriage Act, Cap.29 [R.E 2019].

The learned counsel for the appellant continued to state that the only way which had remained to determine the validity of such marriage was by invoking the provisions of section 160 (1) of the Law of Marriage Act, Cap. 29 [R.E 2019]. He went on to state that the court had to examine whether parties qualified to be termed as husband and wife by living together for a period of not less than 2 years. He stated that the

respondent testified to the effect that the two lived together for one (1) week only and the appellant testified that she lived with the respondent for three days in Morogoro and Kilimanjaro. In his view, the marriage between the two did not qualify to be a presumption of marriage.

Mr. Sakila did not end there he argued that the evidence on record reveals that the respondent was incompetent to marry because of the existing marriage. To bolster his argumentation, he referred this court to page 3 of the trial court's judgment that the respondent had other valid marriage. He added that the respondent had to send the appellant to Morogoro to avoid confrontation by his first wife and later deserted the appellant. In his view, the respondent concealed purposely with the intent to deceive the appellant contrary to section 38 (1) (c) of the Law of Marriage Act, Cap. 29 [R.E 2019].

On the strength of the above argumentation, Mr. Sakila beckoned upon this court to allow the appeal with costs and quash and set aside the judgment and proceedings of the trial court and the first appellate and declare that there was no legally recognized marriage.

Responding, the respondent Advocate argued that both parties admitted that there was no dispute that in 2017 the respondent paid a bride price to the appellant's father as a prerequisite for marriage in accordance with Sukuma customs and tradition thereafter he was handed over the appellant as a wife. He went on to state that after their marriage the parties traveled from Kwimba to Moshi where they lived as husband and wife. In his view, the appellant and the respondent lived together thus marriage was contracted. The learned counsel distinguished the cited case of **Mahundwa Mburumate** (supra) that the circumstances of the instant case is different from the cited case of **Mahundwa Mburumate** (supra).

Mr. Njelwa continued to state that marriage is defined under section 9 (1) of the Law of Marriage Act, Cap. 29 [R.E 2019] to mean "...the voluntary union of a man and a woman intended to last for their joint lives." To bolster his submission he cited the case of **Ramadhani Said v Mohamed Kilu** (1983). Mr. Njelwa insisted that the elders and other witnesses; PW2 and PW3 testified at the trial the parties intimated to create a relationship of a husband and wife who intended to live jointly for lives. The learned counsel went on to state that the assessor opined

that in accordance to Sukuma traditions the parties were married because the appellant's parents were paid dowry in terms of 8 cows. Insisting, Mr. Njelwa stated that the marriage was contracted. To support his submission he referred this court to the case of **Kidukila D/O Alli v Rashid S/O Rashi** (1967) HCD 164 and **Maagwi Kimito v Gibeno Werema** (1985) TLR 132.

Regarding the issue of marriage certificate, Mr. Njelwa reiterated his position that it is not the only and fast rule and the same does not apply in all circumstances since each case has to be decided in accordance with its own facts. He spiritedly contended that it is not always that every customary marriage which is contracted in Tanzania has to be proved by the production of a certificate of marriage rather it is only those marriages that are contracted in the presence of a registration officer. He added that the rest can only be proved in accordance with the standard and rules of a particular customer. To bolster his submission he referred this court to the case of **Adam Kharid v Amina Rajab** (1968) HCD 405. He valiantly insisted that the parties did not contract a formal before the Registration Officer or a District Registrar for them to call for issuance of a certificate of marriage.

The learned counsel did not end there he argued that the issue of presumption of marriage was not raised at the trial court nor at the first appellate court. He went on to insist that the interpretation of the parties' relationship was a marriage that was contracted by following the customs available under the Sukuma tribe and nothing else. He urged this court to ignore the issue of presumption of marriage.

On the strength of the above, the learned counsel for the respondent beckoned upon this court to uphold the lower courts' decision and dismiss the appeal with costs.

Having summarized the submissions and arguments by both sides, I am now in the position to determine the grounds of appeal before me. In my determination, I will consolidate both grounds of appeal because they are intertwined.

The appellant is complaining that there was no any legal marriage between the parties and that the bride price was defective. In answering these grounds of appeal first, I will determine *whether the parties have contracted marriage according to the customary rite.*

After a cursory perusal on both lower court proceedings, I have noted that the trial court concluded that a customary marriage existed since the respondent paid the bride price, therefore, the trial court proceeded to dissolve the marriage. The law states clearly that a marriage can be contracted in Civil form, Christian form, Islamic form, or Customary form. The records reveal that the respondent and the appellant testified to the effect that they were married in 2017 and after a while, the appellant left to Morogoro then Mwanza. The appellant complained that the two had no any communication until 2018 when the respondent realized that the appellant was remarried.

In normal circumstances, parties are required to register their marriage to prove that a marriage took place. Now the question for determination is whether the parties' customary marriage was legally proved? As rightly stated by Mr. Njelwa that there is no dispute that the respondent paid the bride price. The same was stated by the respondent's witnesses and the court assessors that in accordance with Sukuma traditions as long as the respondent paid the bride price means that the parties contracted a customary marriage. However, paying the

bride price is an early procedure toward marriage, the same cannot prove that a marriage was contracted.

In order to prove that a valid marriage was contracted, parties are required to register their marriage. I have scrutinized the court records and noted that the appellant and the respondent did not register their marriage as required by the law. Section 43 (5) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 43 (5) of the Act provides that:-

> *" 43 (5) When a marriage is contracted according to customary law rites and there is no registration officer present, it shall be the duty of the parties to apply for registration, within thirty days after the marriage, to the registrar or registration officer to whom they gave notice of intention to marry."*

Applying the above provision of law means that a valid marriage must be registered. In the instant appeal, the parties were required to register their marriage within 30 days after their marriage but this requirement was not fulfilled. The law is clear that it is the duty of parties to register the customary marriage within 30 days. Therefore, the Sukuma customary law rites should be registered accordingly to the law

so that they may be termed or known as spouse. The same was also observed by this court in the cases of **Leornard Reed Harrison and Kwigema Samson Gabba** [1995] TZHC 8 and **Watson Solo v Taines Mbwiga**, PC. Matrimonial Appeal No. 15 of 2018 (unreported).

Consequently, I differ with Mr. Njelwa's contentions that not every customary marriage is required to be proved by the production of a certificate of marriage, the law does not provide any exceptions to the rule.

In my considered view, I find that in the absence of any recognized valid marriage, the respondent had no right to petition for divorce and the trial court was not in a position to order divorce. The same was also observed by this court in the cases of **Leornard Reed Harrison and Kwigema Samson Gabba** [1995] TZHC 8. Therefore I hold that both lower courts misdirected themselves in holding that the parties have contracted a valid marriage recognized by the law while the parties have failed to comply with Section 43(5) of the Law of Marriage Act, Cap. 29 [R.E 2019].

For the avoidance of doubt, I have read the cases cited by Mr. Njelwa, learned counsel; **Kidukila Ali** (supra) and **Maagwi Kimito** (supra) these two cases are irrelevant to the case at hand they are related to the inheritance of property. The case of **Adam Kharid** (supra) the issue for discussion was based on nonpayment of bride price that it does not invalidate a marriage. The Judge did not discuss whether the parties registered their marriage. In the instant case, unlike the cited case the bride price was paid but parties did not register their customary marriage.

For reasons canvassed above, I find the appeal before this court has merit. Therefore I proceed to quash and set aside the decision and judgments of both lower courts. Each party to shoulder her/his own costs.

Order accordingly.

Dated at Mwanza this date 21st May, 2021.

A.Z.MGEYEKWA

JUDGE

21.05.2021

Ruling delivered on 21st May, 2021 via audio teleconference, whereas Mr. Njelwa, learned counsel for respondent and Mr. Sakila, learned counsel for the appellant were remotely present.

A.Z.MGEYEKWA

JUDGE

21.05.2021