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

MATRIMONIAL APPEAL NO.5 OF 2020

(Arising from the Decision of District Court of Nyamagana in Matrimonial Appeal No.14 of 2020, Originated from Mkuyuni Primary Court in Civil Case No.27 of 2020)

MSANGI HEMEDI MSANGI ..... APPELLANT

VERSUS

DOMINA CALIST ..... RESPONDENT

JUDGMENT

Date of last Order: 10.06.2021

Date of Judgment: 14.06.2021

A Z. MGEYEKWA, J

Msangi Hemed, the appellant has lodged the instant appeal after being dissatisfied by the decision of the District Court of Nyamagana. 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: it is alleged by Msangi Hemedy Msangi, the appellant that he and

Domina Calist, the respondent contracted a customary marriage. They are blessed with one child aged 4 years old.

At the trial court, the appellant filed for divorce, division of properties, and custody of a child. The appellant testified to the effect that he paid the bride price in a tune of Tshs. 700,000/=. The appellant claimed that the marriage started to get sour when the respondent had an affair with other men. The respondent claimed that the appellant is his partner and they have one child. She stated that she bought a plot and constructed a house therein while the appellant's contribution was minimal. In 2020, the appellant filed for divorce at Nyamagana Primary Court in Nyamagana District, Mwanza Region. The trial court determined the matter and issued a divorce, matrimonial properties were divided among the couple, and child was placed in the custody of the respondent, the appellant was ordered to provide maintenance to a tune of Tshs. 50,000/=.

Aggrieved, the respondent filed an appeal at Nyamagana District Court claiming that there was no a recognized marriage between the parties. The respondent also complained that she contributed more in constructing the matrimonial house compared to the appellant. The District Court decided the matter in favour of the respondent.

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

1. *That the appellate court erred in law and fact to order that the case was a nullity and be tried de novo knowing that there was a presumption of marriage.*
2. *That the appellate court erred in law to order the matter be tried de novo while it declared that there was no marriage between the parties.*
3. *That the appellate court erred in fact and law for failure to consider that since there is a presumption of marriage thus it should have proceeded determining other grounds.*

When the matter was called for hearing on 10th June, 2021, the appellant enjoyed the legal service of Mr. Innocent Michael, learned counsel and the respondent had the legal service of Ms. Hidaya Haruna, learned counsel for the respondent.

It was Mr. Innocent, learned counsel who was the first one to kick the ball rolling. He opted to combine and argue the first and second grounds of appeal together. The learned counsel contended that the first appellate court nullified the trial court decision and ordered the matter to be tried de novo. He referred this court to page 10 of the trial court Judgment and contended that the trial court stated that it was a

presumption of marriage, however, he went on to declare the trial court nullity. To bolster his submission, he cited section 160 of the Law of Marriage and the case of **Hemed S.Tamin v Renature Mashayo** (1994) TLR 197. He valiantly argued that the act of the first appellate court to declare that there was a presumption of marriage means the parties had no capacity to file a fresh matrimonial cause. Thus, the first appellate court was required to determine other grounds of appeal on merit.

In his view, the order for retrial was improper because the marriage did not exist. Fortifying his submission he referred this court to the case of **Fatehali Maghi v Republic** [1966] EA 344. Insisting, he contended that retrial is ordered only when the original trial was illegal and not when the trial was on insufficient evidence. He added that parties must have *locus standi*. In his view, since the parties had no capacity means there were no any triable issues to be determined by the court.

Mr. Innocent continued to submit that the respondent testified that she was not married but did not dispute that the appellant paid the bride price. Thus, he urged this court to find that the existence of customary marriage was proved by both parties.

Arguing for the third ground, the learned counsel for the appellant simply stated that the trial court after considering that there was a

presumption of marriage, was supposed to proceed to determine the matter on merit. To support his position he referred this court to the case of **Hemed** (supra).

On the strength of the above argumentation, Mr. Innocent beckoned upon this court to allow the appeal with costs and quash and set aside the judgment and order of the first appellate court.

Responding, the respondent's Advocate opted to combine the first and second grounds of appeal because they are intertwined. Ms. Hidaya stated that the first appellate was right to order a retrial. She valiantly contended that it is not true that the appellant paid the bride price. She went on to state that the respondent at the trial court testified to the effect that the respondent did not pay any bride price, and was not living together instead they had a parenting relationship. Ms. Hidaya spiritedly contended that the appellant did not prove the existence of customary marriage. She claimed that the respondent's relatives did not recognize the appellant as husband and wife.

Ms. Hidaya further stated that the first appellate court in its Judgment specifically on page 10 stated that the bride price was not paid neither the presumption of marriage was not proved. She claimed that after noting that the parties were not married, the marriage was declared void.

She argued that there is an issue of illegality since the divorce was issued while there was no marriage. She added that the trial court had jurisdiction to determine customary and Islamic marriages therefore failure to prove whether there was an existence of customary marriage means the issue of divorce cannot be determined.

On the third ground, Ms. Hidaya strappingly contended that the first appellate court did not misdirect itself instead it determined the appeal and found that there was no any marriage which was proved by parties. Thus, in her view the main issue for determination, in this case, was whether their marriage was proved.

In his brief rejoinder, Mr. Innocent reiterated his submission in chief and contended that the trial court records reveal that the parties narrated how they started to live together. He claimed that the respondent testified that the appellant was not caring for their child and was torturing her. Mr. Innocent went on to submit that the trial court issued divorce after noting that there was a customary marriage and the first appellate court referred the trial court records and found that there was a presumption of marriage. Stressing, he argued that the appellate court was required to proceed to determine the grounds of appeal instead of ordering a retrial.

In conclusion, the learned counsel for the appellant beckoned upon this court to allow 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 all three grounds of appeal because they are intertwined and argue them together.

All three grounds are centered in a customary marriage, the appellant is complaining that a customary marriage was proved as he paid the bride price, on the other hand, the respondent disputed that the two of them were not married instead they had a child together. 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 the trial court proceedings, both parties testified before the trial court, the appellant claimed that he paid bride price in a tune of Tshs. 700,000/=. The respondent testified to the effect that she started to stay with the appellant in December, 2014, the appellant was staying with the respondent for a while. The appellant did not dispute that the respondent paid the bride price. In such a situation, the trial court found that the two had contracted a customary marriage, thus, it decided to dissolve the marriage.

The first appellate court, its findings decided that the customary marriage was not proved. However, the records revealed that there was a presumption of marriage in accordance with section 160 of the Law of Marriage Act, Cap. 29 [R.E 2019]. In my considered view, I am in accord with the first appellate court's findings that the customary marriage was not proved.

In order to prove that a customary marriage existed, the complainant had to prove that a traditional marriage took place and parties are required to register their marriage to prove that a marriage took place. There is no dispute that the respondent paid the bride price. However, paying the bride price is an early procedure toward marriage, the same cannot prove that a customary marriage was contracted.

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 the parties were required to register their alleged customary marriage within 30 days after their marriage but this requirement was not fulfilled. The same was also observed by this court in the cases of **Leonard Reed Harrison and Kwigema Samson Gabba** [1995] TZHC 8 and **Watson Solo v Taines Mbwiga**, PC. Matrimonial Appeal No. 15 of 2018 (unreported).

Addressing the third ground that the appellate court failed to consider that since there is a presumption of marriage, it was supposed to proceed to determine other grounds of appeal. Although the customary marriage was not proved, the two of them acquired several matrimonial properties together. The trial court determined the issue of divorce, division of properties, and custody and maintenance of the child. Therefore, I am in accord with Mr. Innocent that the first appellate court after observing that there was a presumption of marriage, it was supposed to proceed to determine the remaining grounds of appeal.

Consequently, I differ with Ms. Hidaya's contentions that the first appellate court was right to nullify the judgment and proceedings of the trial court and remit the file to the trial court. In my respectful opinion,

the presumption of marriage entitled parties to divide the properties acquired together, and the custody and maintenance of the child was required to be determined as well. Ordering trial de novo was not right as the issue of division of properties and custody of the child was already been determined by the trial court and the same matters were grounds of appeal at the first appellate court, therefore, the first appellate court was supposed to address all grounds of appeal.

The records reveal that the trial court issued a divorce while the parties were not officially married the same means customary marriage was not prove. Therefore, the proper remedy was to quash the decision of the trial court instead of ordering a retrial. Since the defects in the trial court proceeding were out of the parties' control, the parties cannot be punished by an error of the court. As rightly pointed out by Mr. Innocent the remedy of retrial is normally issued when there are irregularities singularly and cumulatively which vitiated the trial occasioning a miscarriage of justice. In the case of **Ahamed Ali Dharamsi Sumar versus R** (1964) E.A. 481 in which the appellant challenged a retrial order issued by the High Court. The Court of Appeal of East Africa held that:-

"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only

be made when the interests of justice require it and where it is likely not to cause injustice to an accused".

Applying the above authority in the circumstances of this case, I am of a considered view that, a retrial is not applicable.

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 the District Court Nyamagana and I partly allow the trial court decision in regard to the division of properties and custody of the child. Each party to shoulder her/his own costs.

Order accordingly.

Dated at Mwanza this date 14th June, 2021.

A.Z.MGEYEKWA

JUDGE

14.06.2021

Judgment delivered on 14th June, 2021 in the presence of Mr. Innocent Michael, learned counsel for appellant and Ms. Hidaya, learned counsel for the respondent.

A.Z.MGEYEKWA

JUDGE

14.06.2021