**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MWANZA DISTRICT REGISTRY)**

**AT MWANZA**

**PC. MATRIMONIAL APPEAL NO.06 OF 2020**

**JOSEPHAT BYENOBI ..... APPELLANT**

**VERSUS**

**CONSOLATA CONSTANTINE ..... RESPONDENT**

**JUDGMENT**

*8th April, & 25th June, 2021*

**ISMAIL, J.**

This a judgment on an appeal from the decision of the District Court of Nyamagana at Nyamagana. The court sat on appeal against the decision of the Primary Court of Nyamagana at Mkuyuni at which a claim of matrimonial assets and maintenance of the children was dismissed. The view taken by the trial court was that the respondent neither proved that she was married to the appellant nor did she satisfy the court that she contributed towards the acquisition of the assets in respect of which division was sought.

The trial court's decision bemused the respondent. She, in turn, instituted an appeal to the District Court (1st appellate Court), raising five

grounds of appeal. Invoking the presumption of marriage, the 1st appellate court concluded that the parties hereto were husband and wife, and that the respondent was entitled to an even distribution of the matrimonial assets. Besides that, the 1st appellate court ordered that the appellant should maintain the children. It is this decision that triggered the appellant's decision to mount a challenge to this Court. The petition of appeal has five grounds of appeal, reproduced in verbatim as hereunder:

1. *That the first appellate court erred in law and in fact for failure to appreciate and uphold the decision of the trial court which was founded on the unshaken evidence on records which proved that there was no valid marriage the parties.*

2. *That the first appellate court was in error of law when it proceeded ahead to order for division of matrimonial assets without first issuing an order of divorce as that was important and a necessary prerequisite.*

3. *That the lower appellate court erred in law in deciding that the parties were entitled to an equal distribution of matrimonial assets without clearly identifying the said assets.*

4. *That the first appellate court erred in law in ordering for an equal distribution of the matrimonial assets without regard to the extent of contribution of each party in the procurement of the same.*

5. *That in general the judgment of the lower court was against law and evidence on records.*

Before we get to the heart of the instant proceedings, it is apposite that brief facts of the case be brought up. They are to the effect that the appellant and the respondent were two love birds whose intimacy lasted for about a decade and were blessed with two sons, Joel and Joshua. At some point in their life, and for varied reasons, their relationship turned sour. Their differences grew bigger and irreconcilable, necessitating parting of the ways.

Feeling that she is entitled to a slice in the assets falling in the appellant's possession, the respondent enlisted the trial court's assistance, by instituting a matter (PC. Matrimonial Cause No. 7 of 2020). The respondent's claims were for divorce, division of matrimonial assets and maintenance of the children. As stated earlier on, the ending was acrimonious and far from happy for the respondent. The trial court rejected her substantive claim of division of assets while the prayer for maintenance of the children was acceded to. Aggrieved by this decision, the respondent took a ladder up, to the 1st appellate court where her claims were entertained. The trial court's decision was reversed and an equal distribution was ordered, much to the appellant's utter displeasure, hence the instant appeal.

Hearing of the appeal took the form of written submissions, preferred consistent with the schedule for filing drawn with the counsel's concurrence.

Throwing the first jab was Mr. Njelwa, learned counsel for the appellant. With respect to ground one, the counsel's contention is that the 1st appellate court failed to appreciate and uphold the decision of the trial court that was founded on unshaken evidence, which proved that there was no valid marriage between the parties. It was his view that no evidence had been adduced to prove that they lived together for 11 years during which they acquired the status of husband and wife, as contended by the respondent. Mr. Njelwa further argued that the moment the appellant rebutted against the presumption, the duty was cast on the respondent to lead in evidence to prove that the parties were indeed married. The counsel held the view that the respondent failed to prove that. It meant that the leeway given by section 160 of the Law of Marriage Act, Cap. 29 R.E. 2019, was not triggered.

Submitting on ground two of the appeal, the appellant's counsel argued that the central question for determination is whether a marriage existed between the parties. The contention by Mr. Njelwa is that this was not proved and that distribution of the assets was ordered before the assumed marriage was dissolved. He took the view that the 1st appellate court's decision contravened section 114 (1) of Cap. 29 which requires that grant of divorce must precede an order for division of matrimonial assets. To fortify his contention, the counsel cited the Court of Appeal's decision ***in***

***Richard Majenga v. Specioza Sylvester***, CAT-Civil Appeal No. 208 of 2018 (unreported) part of which stated as follows:

> *"... we are in agreement with both counsel that it was not correct for the trial court to proceed with the matter as a matrimonial dispute and divide the alleged matrimonial properties without first considering the issue of presumption of marriage between the parties .... In the circumstances, we are in agreement with the learned counsel for the partied that it was improper for the trial court to resort into granting the subsequent reliefs proved, before satisfying itself on the existence of the presumed marriage."*

Since this imperative requirement was not observed, the counsel contended, such non-observance is erroneous, making the 1st appellate court's decision a sham, liable to dismissal by the Court.

The respondent's rebuttal was equally forceful. The respondent's contention is that the 1st appellate court's decision was quite spot on. With respect to ground one, Ms. Hidaya Haruna, the appellant's counsel, argued that the testimony adduced was so strong on the parties' cohabitation. This means that evidence in proof of the claims of cohabitation for more than two years elevated the duo to the status of husband and wife in line with section 160 of Cap. 29. She argued that section 160 (1) of Cap. 29 was created to protect the rights of cohabitants where division of matrimonial assets jointly

acquired arises. While acknowledging that the parties were not legally married, the counsel argued that all elements calling for the application of the presumption exist, including having two children.

On why the decree of divorce was not issued, Ms. Haruna contended that a divorce order cannot be granted where no legal marriage exists. She further asserted that in the trial proceedings, the respondent's prayer was for divorce and not separation, adding that the court could not grant what was not prayed for. On this, the counsel referred me to the decision of ***Lever Brothers v. Bell*** [1931] 1 KB557 at 583, in which it was held that the practice of the court is to consider and deal with legal result of pleaded facts, although the particular legal result is not stated in the pleading.

With respect to division of matrimonial assets, the respondent's argument is that, having established the presumption of marriage, division of the assets was an inevitable reality, and in this case, the respondent had established that she was a businesswoman and a farmer who contributed to the acquisition of the assets. The counsel contended that this is a fact which was not controverted by the appellant, arguing that his failure to cross-examine on that particular point was an acceptance of that fact. The respondent's counsel cited the case of ***Hamisi Mohamed v. Republic***, CAT-Criminal Appeal No. 297 of 2011 (unreported). Expounding on the

spousal contribution, Ms. Haruna urged the Court to give a wider interpretation to it by factoring in domestic efforts, in line with what was decided in ***Bibi Maulid v. Mohamed Brahim*** [1989] TLR 162. The counsel submitted that during their 11-year stay, the respondent had expended her effort, love and money for the welfare of the family, only to end up in frustration. She urged the Court to dismiss the appeal with costs.

In his rejoinder submission, Mr. Njelwa reiterated what he stated in his submission in chief. He insisted that section 114 (1) of Cap. 29 cannot come into play unless an order for dissolution of the marriage is granted. He argued that, in the instant case, the respondent has not been able to tell where and when exactly the said marriage was dissolved. The counsel contended that this is a view which was propounded in ***Richard Majenga v. Specioza Sylvester*** (supra) which was not challenged by the respondent's counsel. He reiterated his rallying call that the 1st appellate court strayed into error when it ordered division of the matrimonial assets.

From the totality of these submissions, three key questions arise. These are whether the parties were husband and wife; whether division of matrimonial assets can be ordered before dissolution of the marriage; and, whether the respondent is entitled to a portion of the assets and, if so, to what extent or proportion.

Gathering from the submissions, it is undisputed that the appellant and the respondent indulged in a love affair that culminated into having two children. It is also clear that the pair did not go into any formal engagement or ceremony which would solemnize their relationship. While the respondent argues that their association lasted for 11 years, the appellant's account of facts is that such relationship did not last for all that long. There is also a divergence on the cohabitation that the respondent clings on as the basis for invoking the presumption of marriage.

As unanimously submitted by the counsel, section 160 of Cap. 29 allows a party to invoke the presumption of marriage where the parties lived together for two or more years and the circumstances of their cohabitation were such that the pair acquired the reputation of being a husband and a wife and that they were duly married. The presumption is rebuttable and the status may tilt the balance with weightier evidence. The legal holdings guide that courts should, as far as possible, construe the position in favour of the union unless there are very good reasons to disturb it (See: ***Ally Mfaume Issa v. Fatuma Mohamed Alkamu*** [1974] LRT n. 67; and ***Raphael Debugo v. Frablances Wambura*** [1975] LRT n. 42. In ***Francis s/o Leo v. Paschal Simon Maganga*** [1978] LRT n. 22, the Court threw the following caution:

*"Section 160 (1) does not automatically convert concubines into wives at the end of two years or more of cohabitation. All that this section does is to provide for a presumption which is rebuttable that such people were duly married and this must refer to the forms and procedures for marriage provided for under the Law of Marriage Act."*

Gauging the testimony adduced by the parties, I take the view that the appellant has ably demonstrated that though the parties were in intimacy and had children, their cohabitation was in a couple of short spells which lasted for few months, not even a year. The appellant's own testimony, which was not controverted by the respondent is that what is alleged to be a cohabitation was not as long as it was contended. I align myself with this line of argument. While I appreciate that a couple of other witnesses testified for the respondent, I am hardly convinced that their testimony was cogent enough to support the respondent's case. It lacked any material particularity which would give the much-needed credence to the respondent's testimony. In my humble contention, their testimony was wanting, and the only remaining and credible testimony on cohabitation is that of the appellant which demonstrated that the period of cohabitation fell below the threshold for which the presumption of marriage under section 160 (1) of Cap. 29 may be invoked. It is my conclusion that circumstances of this case do not allow

the application of the presumption of marriage and the trial court was quite spot on in its evaluation and conclusion. I hold that the 1st appellate court erred when it drifted from the position set by the trial court.

The next issue requires the Court to rule on the propriety or otherwise of the 1st appellate court's decision to order division of matrimonial properties before dissolution of the marriage between the parties. The view held by the appellant's counsel is that such conduct was nothing short of an irregularity. The respondent's counsel saw nothing wrong with that. As rightly contended by Mr. Njelwa, division of matrimonial assets is a consequential step after the declaration, by a court, that the marriage between the disputants has broken down beyond repair. This position is aptly supported by the decision in ***Richard Majenga v. Specioza Sylvester*** (supra). What is apparent in this case is that such declaration was not made and the reason is not hard to discern. It is solely because the trial court was not convinced that the parties' cohabitation graduated to a level where the presumption of marriage would be invoked. The court simply rejected it out of hand, only to be resurrected by the 1st appellate court when it ordered distribution of the properties. I take the view that, if the 1st appellate magistrate was convinced that this was a fit case in which the presumption applies, he ought to have first pronounced himself on the status of the marriage before moving onto

the next stage of the proceedings. This he did not do, and I agree with Mr. Njelwa that such failure was anomalous, and I find ground two of the appeal meritorious and I allow it.

The next battleground area relates to the distribution of the assets, allegedly acquired in the subsistence of the marriage. This covers grounds three and four of the petition of appeal. In these grounds, the contention by the appellant is that distribution was ordered without first identifying them and without proving the extent of contribution by the respondent. The respondent's argument is that she was actively involved in the acquisition through domestic duties, as well as monetary contribution that came from the proceeds of business and agriculture. The respondent's counsel contended that the appellant's failure to cross examine on the testimony adduced by the respondent on this point was an admission of the truthfulness of the said testimony.

Before I delve into the heart of the contention in these grounds, it behooves me to say a word or two on Ms. Haruna's argument on the appellant's failure to cross-examine the respondent during her testimony in the trial proceedings. As she rightly argued, the generally accepted position is that failure to cross-examine a witness on a certain fact is considered to be an admission. The holding in ***Nyerere Nyegue v. Republic***, CAT-

Criminal Appeal No. 67 of 2010 (unreported) is the case in point. While this is the general rule, as stated earlier on, the recent decision of the Court of Appeal in ***Zakaria Jackson Magayo v. Republic***, CAT-Criminal Appeal No. 411 of 2018 (DSM-unreported), has introduced a dimension that removes the absoluteness of the rule cited by the respondent. The upper Bench held:

> *"It appears to us to be clear that the rule is not absolute. Our understanding of it is that it focuses on the material evidence adverse to the other party excluding incredible evidence."*

The foregoing position is a leaf which was borrowed from this Court's decision in ***Kwiga Masa v. Samweli Mtubatwa*** [1989] TLR 103, in which Samatta, J. (as he then was) held as hereunder:

> *"A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness,*

*was not making a concession that the evidence of the witness was true."*

The message conveyed by the cited decisions is that the assumption stated by the respondent's counsel and, as laid down by the respondent's counsel, works out well where the unchallenged testimony is not improbable, vague or contradictory, and it is not incredible. My assessment of the respondent's testimony gives me the impression that the respondent's testimony carried all the hallmarks of the negative credentials stated above, making the general rule advocated by the respondent's counsel inapplicable.

With respect to division of matrimonial properties, the applicable provision is section 114 (1) of the Law of Marriage Act, Cap. 29 R.E. 2019, which sets out conditions under which an order for division of such properties may be ordered. In granting such order, the questions that guide the courts are: whether the assets were acquired in the subsistence of the marriage; and, if so, what is the extent of contribution of the parties. In its broad form, the said provision states as follows:

*"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 proceeds of sale."*

The cited provision has been considered in a multitude of court decisions, epic among them being the ground-breaking decision in ***Bi Hawa Mohamed v. Ally Sefu*** [1983] TLR 32, in which it was held that an order for division of matrimonial or family assets is grantable in the following circumstances:

> *"When the court has granted or is granting a decree of divorce or separation; and*
>
> *(i) When there are matrimonial or family assets which were acquired by the parties during the marriage; and*
>
> *(ii) When the acquisition of such assets was brought about by the joint efforts of the parties."*

See also: ***Mohamed Abdallah v. Halima Lisangwe*** [1988] TLR 197; and ***Pulcheria Pundugu v. Samwel Huma Pundugu*** [1985] TLR 7

In the instant case, the scenario is substantially different. From the discussion above, it is clear that the parties were adjudged to be mere friends, whose relationship did not crystalize into one in which marriage would be presumed. Absence of the marital relationship between them rules out the possibility of joint acquisition of properties which would be subjected to division as matrimonial properties, the way the 1st appellate court did. Thus, the talk of how much a party contributed or which proportion a party

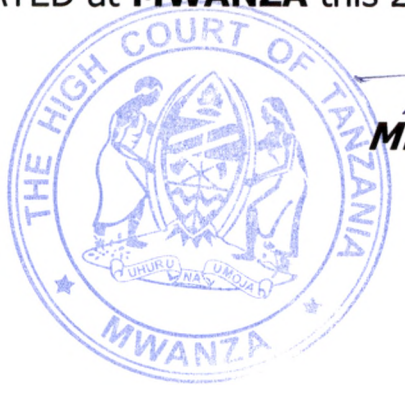
is entitled to is a subject which can be addressed in some other matters and not in matrimonial proceedings. In this connection, I take the view that the 1st appellate court's stance on the aspect was faulty and unsupportable. I, therefore, allow these grounds of appeal.

In the upshot of all this, I find this appeal meritorious and I allow it. I set aside the 1st appellate court's decision, and restore and uphold that of the trial court. I make no order as to costs knowing that this is a matrimonial cause.

Order accordingly.

Right of appeal duly explained.

DATED at **MWANZA** this 25th day of June, 2021.




***M.K. ISMAIL***

***JUDGE***

**Date:** 25/06/2021

**Coram:** Hon. M. K. Ismail, J

**Appellant:** Mr. Njelwa James, Advocate

**Respondent:** Ms. Hidaya Haruna, Advocate

**B/C:** J. Mhina

**Court:**

Judgment delivered in chamber, in the virtual attendance of Mr. James Njelwa and Ms. Hidaya Haruna, learned Counsel for the appellant and respondent, respectively, this 25th day of June, 2021.

***M. K. Ismail***

***JUDGE***

***At Mwanza***

***25th June, 2021***