IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MATRIMONIAL APPEAL NO. 4 OF 2020

(Appeal from the judgment of the District Court of Nyamagana at Mwanza (Sumaye, SRM) in DC Civil Appeal No. of 2020 dated 25th of September, 2020)

SHARIFU SAIMONI ..... APPELLANT

VERSUS

MADINA ABASI ..... RESPONDENT

JUDGMENT

17th June, & 29th July, 2021

ISMAIL, J.

This appeal seeks to challenge the decision of the District Court of Nyamagana that sat on appeal which originated from PC. Matrimonial Cause No. 56 of 2018, instituted in the Primary Court of Nyamagana at Mkuyuni. The proceedings in the trial court were commenced by the respondent, the appellant's spouse, for a divorce of their marriage, custody and maintenance of the children, and division of matrimonial properties. The respondent's decision was informed by what she considered as acts of cruelty.

At the end of the trial proceedings, the trial court declared that the parties' marriage had irreparably broken down. It consequently issued a decree of divorce, simultaneous with granting custody of the twin children, with an order that the appellant should provide maintenance, in the sum of TZS. 60,000/- per month. Further to that, the appellant was ordered to pay arrears of the monthly payments that accrued prior to unsuccessful appeals, at the rate of TZS. 50,000/-. The arrears worked out to TZS. 2,880,000/-.

This trial Court's decision was not well received by the appellant. He appealed against it. The District Court of Nyamagana (1st appellate court) in which the appeal was instituted found no merit in the matter. It shrugged off the appellant's argument that maintenance ought not to have been ordered because the respondent had been given a shop which was specifically set up in order to meet costs of maintenance of the children. Equally unsuccessful, was the appellant's quest to have custody of the children because they were 10 years old and able to be under his custody.

Undeterred by the 1st appellate court's decision, the appellant preferred the instant appeal. The petition of appeal has raised four grounds of appeal. These are: ***One***, that the 1st appellate court erred in law and fact in dismissing the appeal with costs. ***Two***, that the 1st appellate court erred in law and fact by holding that there was no evidence to prove that the

appellant set up a shop, valued TZS. 1,500,000/- and whose proceeds were to be used for maintenance of the children. ***Three***, that the 1st appellate court erred in law and fact by failing to consider the fact that the respondent admitted that the appellant handed her TZS. 1,500,000/-, enough to set up a retail shop that would help in the maintenance of the children. ***Four***, the 1st appellate court erred in law and fact by failing to order that the children, who were 10 years of age, be placed under the custody of the appellant, their biological father.

Hearing of the appeal took the form of written submissions, pursuant to the order of the Court, passed on 17th June, 2021. In terms of the said order, the respondent was due for filing her submission on or before 8th July, 2021. By the close of business of the day and until now, nothing has been heard from the respondent. This necessitated the need for invoking the known position, enunciated in a number of court decisions. This is to the effect that failure to file submissions, when ordered to do so, is tantamount to defaulting in appearance on the date set for the hearing. This is in terms of the decisions in ***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007 (DSM-unreported); and ***P3525 LT Idahya Maganga Gregory v. Judge Advocate General***, Court Martial Criminal Appeal No. 2 of 2002

(unreported). Inspired by these decisions, I treat the appellant's submission as uncontested.

The appellant's submission in support of the appeal was laconic. With respect to ground one of the appeal, the argument is that there was no need for dismissing the appeal. Submitting on grounds 2 and 3, the contention by the appellant is that the 1st appellate court was erroneous in its decision. He argued that the investment in the shop was enough to maintain the children, and that the order for payment of the sum of TZS. 60,000/- per month, and the sum of TZS. 2,880,000/- in arrears was erroneous. This is in view of the fact that the respondent did not dispute that the said shop was set up for the purpose.

Regarding ground 4 of the appeal, the appellant's argument is that it was legally wrong for the 1st appellate court not to accede to the appellant's prayer for placement of custody of the children under the appellant, while knowing that the said children were above seven years of age. He argued that the children are 11 years of age now.

The appellant urged the Court to grant this prayer, simultaneous with allowing the appeal by quashing and setting aside the maintenance orders.

As I move on to determine this appeal, the critical question to be determined is whether the concurrent findings of the lower courts were erroneous.

I will tackle this issue by restating the known legal position which is to the effect that, where the lower courts make a concurrent finding on a factual issue, such finding cannot be disturbed on a second appeal, unless the finding is shrouded in wanton irregularity. This postulation was underscored by the Court of Appeal of Tanzania in the case of ***The Registered Trustees of Joy In The Harvest v. Hamza K. Sungura***, CAT-Civil Appeal No. 149 of 2017 (TBR-unreported). It held:

> *"Ordinarily, this Court would not readily disturb such findings, unless it can be demonstrated that the findings of the lower courts, are clearly unreasonable or are a result of a complete misapprehension of the substance of the evidence or that the findings are based on a violation of some principle of law culminating into a miscarriage of justice."*

See also: ***Director of Public Prosecutions v. Jafari Mfaume Kawawa*** [1981] TLR 149; ***Salum Mhando v. R*** [1983] TLR 170; ***Omari Mohamed China & 3 Others v. R***, CAT-Criminal Appeal No. 230 of 2004; and ***Wankuru Mwita v. R***, CAT-Criminal Appeal No. 219 of 2012 (both unreported).

Reverting to grounds of appeal, the appellant's contention in ground one is that the 1st appellate court's decision to dismiss the appeal was needless. Nothing more has been expounded to convince the Court that the dismissal was erroneous. It would be an unnecessary waste of time to try and figure out what the appellant intended to tell the Court on this ground. I simply choose to dismiss this casual contention.

Grounds two and three decry the decision of the 1st appellate court to support the finding of the trial court with respect to payment of maintenance. The view taken by the appellant is that he gave out TZS. 1,500,000/- to finance the setting up of a shop business from which maintenance of the children would be sourced. Before I delve into the issue of financing the shop, let me state that the issue of maintenance of the children is guided by law. It is a statutory obligation bestowed on parents and, most specifically, a male parent. One of the guiding tools is section 129 (1) of the Law of Marriage Act, Cap. 29 R.E. 2019 which provides as hereunder:

> *"(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such* ***accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.***"

The cited provision is to be read with section 44 of the Law of the Child Act, Cap. 13 R.E. 2019 which states:

> *"The court shall consider the following matters when making a maintenance order-*
>
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
>
> *(b) any impairment of the earning capacity of the person with a duty to maintain the child;*
>
> *(c) the financial responsibility of the person with respect to the maintenance of other children;*
>
> *(d) the cost of living in the area where the child is resident; and*
>
> *(e) the rights of the child under this Act."*

As stated by the appellant, the trial court ordered him to pay TZS. 60,000/- as maintenance for the twin children the custody of whom is placed under the respondent. This decision was upheld by the 1st appellate court, much to the appellant disliking. Glancing through the proceedings, I note that the order of payment of maintenance of TZS. 60,000/- was made without first establishing the appellant's station of life, an important factor in determining the quantum to be paid as maintenance. Thus, while the quantum may not be an area of serious contention, it is the manner in which it was arrived that raises a few aye brows. No known method, let alone the

method prescribed by the law, was applied in imposing this quantum. In my view, this was inappropriate and the appellant's complaint in this respect is justified.

Whilst it is clear, in my view, that the imposition of this quantum was subjective, a reality dawns on me that, compared to the cost of living that obtains in Mwanza at the moment, the sum of TZS. 60,000/- that is hotly contested by the appellant is nothing better than a paltry sum that can hardly last a dozen days for two children. Ordering a sum lower than that, irrespective of the appellant's station of life, would certainly appeal to and appease the appellant. That, however, would consign the children to a miserable lifestyle, thereby affecting their wellbeing. In that regard, I find that the sum of TZS. 60,000/-, ordered by the trial court, constitutes an irreducible minimum that should be sustained.

I now turn to the appellant's contention on the establishment of the shop business. The appellant's contention is that the sum of TZS. 1,500,000/- was disbursed to the respondent for setting up a shop that would relieve or absolve the appellant from doing what the law demands him to do. This contention was raised by the appellant during the trial proceedings, and what came out is that the said shop was set up before 2014, the year in which the appellant alleged it died. In the appeal hearing,

the appellant conceded that he did not have any evidence to substantiate his claims. What is clear is that such money, if any, was given before their marriage became sour. One wonders how would the parties foretell or anticipate that they would soon break up and that the sum that had changed hands would become a consideration for the appellant's future obligations. These questions point to the conclusion that the appellant's argument in that respect is lacking the sensibility that would make it comprehensible. I consider it to be hollow and I dismiss it.

The fourth ground questions the trial court's decision to grant custody of the children to the respondent, while the children were above seven years of age. The appellant's wish is that he be given the custody of the children. As I break this deadlock, I feel obliged to lay down the legal position with respect to custody of the children. This is as provided for under section 125 (1) of Cap. 29, which provides as hereunder:

> *"(1) The court may, at any time, by order, place an infant in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.*
>
> *(2) In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the*

infant and, subject to this, the court shall have regard to–

(a) the wishes of the parents of the infant;

(b) the wishes of the infant, 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 an infant 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 infant by changes of custody."

The foregoing provision has received numerous judicial interpretations by this Court and the superior Bench. In ***Mariam Tumbo v. Harold Tumbo*** [1983] TLR 4, it was observed as follows:

"The petitioner also prayed for custody of the youngest five children; the respondent prayed for custody of the last three. Custody may only be ordered in respect of a child who has not attained the age of 18 years. .... The fifth, sixth and seventh were born in 1967, 1968 and 1970 respectively. They are therefore still "infants" within the meaning of the law. However, they are not the sort of infants whose views one can safely ignore. .... In matters of custody the welfare of the infant is of paramount consideration, but where the

infant is of an age to express an independent opinion, the court is obliged to have regard to his or her wishes."

See: ***Ramesh Rajput v. Sunanda Rajput*** [1988] TLR 96.

From the testimony adduced by the parties, the process espoused by the law was not followed. But, while this process was not undertaken by the trial court, I take note that the appellant's quest is driven more by the need to circumvent the obligation of having to provide maintenance to children than meeting the wishes of the children. The courts below have not been treated to any sensible evidence that would prove that the welfare of the children, which is the Court's paramount consideration in such cases, is well catered for if the children are placed in the custody of the appellant. In my view, continued custody of the children of tender age under the respondent is in keeping with the requirements of section 4 (2) of the Law of the Child Act (supra) which states that:

"The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies."

I take the view that the concurrent findings of the lower courts on the custody of the children bode well with the requirement of ensuring that

interests of the children are of paramount importance and are upheld. This ground of appeal fails.

In the circumstances and, in view of the foregoing, this appeal fails and it is hereby dismissed. For avoidance of doubt, the following orders are issued:

1. That the custody of the children will continue to be in the hands of the respondent;
2. The appellant will pay TZS. 60,000/- every month to cater for maintenance of the children;
3. The appellant will provide other necessaries such as medical care, clothing, school fees and such other necessities as they may fall due.

Each party shall bear own costs.

Order accordingly.

DATED at **MWANZA** this 29th day of July, 2021.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

M.K. ISMAIL

JUDGE

Date: 29/07/2021

Coram: Hon. C. M. Tengwa, DR

Appellant: Present

Respondent: Mr. William Muyungu, Advocate

B/C: J. Mhina

Court:

Judgment delivered in the presence of both sides.

C. M. Tengwa

DR

At Mwanza

29th July, 2021