IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 69 OF 2020

(Appeal from the judgment of the District Court of Ilemela at Mwanza (Kubaja, RM) in Matrimonial Appeal No. 15 of 2019 dated 24th of January, 2020)

JESCA CHARLES ..... APPELLANT

VERSUS

KUMALIJA KISHOLA ..... RESPONDENT

JUDGMENT

8th July, & 17th August, 2021

ISMAIL, J.

This is a second appeal which traces its roots from the trial proceedings in PC Matrimonial Cause No. 48 of 2019. The present appellant was the petitioner in the said proceedings in which dissolution of the marriage; division of matrimonial properties; and maintenance of the children featured as issues for determination. At the end of the trial proceedings, the trial court ordered that the marriage contracted in 2014 be dissolved thanks to the parties' irreconcilable differences. With respect to the matrimonial assets, the trial court ordered that the matrimonial house be sold and proceeds

thereof be shared on an even basis. The respondent was also ordered to pay the monthly sum of TZS. 50,000/- as maintenance.

The trial court's decision aggrieved the appellant. His appeal to the 1st appellate court did not bear the desired result. Undeterred, the appellant took up an appeal to this Court. The petition of appeal contains three grounds of appeal. These are reproduced as follows: ***One***, that the appellate magistrate erred in law and fact for failing to evaluate evidence adduced before it, thereby arriving at a wrong decision. ***Two***, that the appellate magistrate erred in law and fact for failing to evaluate evidence adduced and meeting the legal threshold regarding the matrimonial properties acquired. ***Three***, that the appellate court erred in law and fact for arriving at a decision in the respondent's favour.

Hearing of the appeal took the form of written submissions. Before getting into the heart of the proceedings, the Court acceded to the appellant's prayer to proceed with the appeal *ex-parte,* on account of the respondent's absence. This was despite the appellant's effort to trace the respondent's whereabouts and publication of the notice of hearing in the newspaper.

The appellant's submission in support of the appeal was preferred by Godfrey Mwita Paul, learned counsel. He chose to combine grounds one and

two, while ground three was argued separately. Submitting on grounds one and two, the learned counsel argued that the testimony adduced during the trial showed that the appellant was an entrepreneur who contributed immensely in the acquisition of the properties listed at page 11 of the typed proceedings. He contended that the appellant supervised the construction of the Kangae matrimonial home at a time when the respondent was working in the mines. Mr. Paul argued that this fact was corroborated by the testimony of SM2 whose testimony was allegedly not recorded in the proceedings but featured in the judgment, an act that is interpreted as the trial magistrate's attempt to help the respondent win the case.

The learned counsel further contended that the testimony of SM1 and SM2 was not evaluated and, as a result, the trial court's decision to issue a divorce and order division of matrimonial property was based on a forged document that excluded the Kangae house and include a makeshift house located at Meko. The alleged forgery saw the Kangae house fictitiously belong to Magembe Sabato, the respondent's friend, who was not called to testify on the alleged transfer. It was the counsel's further contention that the house which was ordered for division was not listed by the appellant. He argued that the trial court's decision to base on the respondent's side left all the claimed properties undivided on the pretext that the existence of the

said properties was not proved. He prayed that these grounds of appeal be allowed.

With regards to paragraph 3, the appellant's argument is that the trial and 1st appellate courts erred in law and fact for making decisions that were in the respondent's favour. The appellant's counsel argued that the trial court had been called upon to investigate into the existence of the matrimonial assets and the extent of the parties' contribution in the acquisition. He argued that, while SM1 and SM2 proved the existence of the said properties, the respondent failed to disprove that fact. Instead, he came up with a contention that the matrimonial home belonged to Magembe Sabato whose attendance as a witness was craved by the appellant. The request was turned down by the trial court that allowed tendering of the documents that purportedly came from the said witness. The counsel contended that admission of the said documents was contrary to the law, as guided in the decision of the Court in ***Erick Ashery v. The Republic***, HC-Criminal Appeal No. 32 of 2020 (unreported), in which such conduct was held to be unprocedural and contrary to the law. It was the counsel's contention that the respondent's failure to procure the attendance of the witness amounted to the respondent's failure to disprove the existence of the matrimonial

properties. The counsel urged the Court to allow the appeal by setting aside the lower courts' decisions.

The broad issue to be resolved in this matter is whether the appeal presents any meritorious contention worth of favourable consideration.

Before I get to the heart of the discussion of the grounds of appeal, need arises for me to say a word or two regarding some of the issues raised in the appeal. These are mainly two. The first is with respect to the contention that the trial proceedings had parts which were not recorded; while the second is with regards to the allegation of forgery. While these contentions may carry some weight, it is the manner in which they were introduced that raises a few eyebrows. Both of these issues were not raised as grounds of contention in the appeal to the 1st appellate court. The question is, can these be raised on second appeal? The answer to this question is in the negative.

This position is premised on the decision in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic***, CAT-Criminal Appeal No. 417 of 2018 (unreported), wherein the Court of Appeal of Tanzania quoted with approval, its earlier decision in ***Asael Mwanga v. Republic***, CAT-Criminal Appeal No. 216 of 2018 (unreported). In the latter, the upper Bench held:

"Now all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactorily, the appeilant could resort to this Court. What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court.

We must, therefore decline to turn this Court into a first appellate court from decisions of the District Court. in the result, we express no opinion on the grounds of appeal which the appellant brought to this court."

The superior Court concluded, in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic*** (supra), that *"the appellant's attempt to challenge the conviction at this stage is therefore not only legally untenable but illogical too."*

I am profoundly inspired by these decisions and take the view that issues relating to the trial court's failure to record trial proceedings, as they feature in ground three of the appeal; and the question of genuineness or otherwise of the ownership documents of the Kangae house are new and were not raised as grounds of contention in the first appeal. I choose to

ignore them and hold that they are untenable for having been raised at this stage of the 2nd appeal.

But even assuming, just for the sake of argument, that the issue of forgery featured in the 1st appeal, I would still reject this contention. I would do so by drawing an inspiration from the decision of the Court of Appeal of Tanzania in ***Omari Yusufu v. Rahma Ahmed Abdulkadr*** [1987] TLR 169 (CA), which was quoted with approval in ***Kalumuna Tryphony Theodory (as an Administrator of the Estate of Theodory Dezdery Kamugisha) v. Doto Yona Gilta & 2 Others***, HC-Misc. Land Application No. 207 of 2019 (unreported). In the former, it was held as follows:

> *"I think it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a C higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof, though as Rupert Cross cautions and illustrates in his text-book on Evidence at page 124 the application of that D rule is not always commodious. In my assessment and as demonstrated above, the evidence that was led against the purchasers and Mr. Ismail fell short of the required standard."*

Reverting to the appeal, two main issues canvassed in all of the grounds are with regards to division of matrimonial properties, especially exclusion of the Kangae house from the division. The appellant feels that such exclusion defied the testimony which indicated that the house was part of the matrimonial assets. The position that the appellant is not happy with is shared by both of the lower courts, and this Court is invited to fault it. it should be noted that the vast powers that the Court enjoys on appeal are limited in this respect, and the concurrent findings can only be interfered with, if it is apparent that the said decisions were arrived at in a misapprehension of evidence, miscarriage of justice or violation of some principle of law or procedure. This has been stated in numerous court decisions. These include ***Amratlal Damodar Maltaser & Another t/a Zanzibar Silk Stores v. Jariwalla t/a Zanzibar Hotel*** [1980] TLR 31; ***Samwel Kimaro v. Hidaya Didas***, CAT-Civil Appeal No. 271 of 2018 (unreported). In ***Fatuma Ally v. Ally Shabani***, CAT–Civil Appeal No. 103 of 2009 (unreported), it was held as follows:

> *"Where there are concurrent findings of fact by two Courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or*

violation of some principle of law or procedure. In other words, concurrent findings of facts by lower Courts should not be interfered with except under certain circumstances."

It is in view of the foregoing, that I find no justification to fault the concurrent positions taken by the lower courts in this matter. I neither read misapprehension of evidence or miscarriage of justice, nor do I see a violation of some principle of law or procedure.

In the upshot of all this, I see no merit in the appeal and I dismiss it. I make no order as to costs, knowing that this is a matrimonial appeal.

Order accordingly.

DATED at **MWANZA** this 17th day of August, 2021.

M.K. ISMAIL

JUDGE