

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MATRIMONIAL APPEAL NO. 106 OF 2021**

*(Arising from the decision of District Court of Bagamoyo at Bagamoyo in Matrimonial  
Appeal No. 25 of 2020, delivered by Hon. M.B. Mmanya, RM)*

**LUCIA MBOJE.....APPELLANT**

**VERSUS**

**CHILOMWA MWITOND BITULO.....RESPONDENT**

**JUDGMENT**

16<sup>th</sup> November, 2021 – 28<sup>nd</sup> December, 2021

**N.R. MWASEBA, J.**

The appellant herein is dissatisfied with the judgment and decree of the District Court of Bagamoyo at Bagamoyo in Matrimonial Appeal No. 25 of 2020 delivered by Hon. M.B. Mmanya, RM and appealed to this court on the following grounds:

- 1. That, the trial magistrate erred in law and fact for assuming that the appellant was accorded with the right to be heard in the*

*primary court of Mwambao while the appellant was not given the said right to be heard.*

*2. That, the trial magistrate erred in law and fact for assuming that the rules of procedure in the primary court of Mwambao were observed and as well as erred for blessing admission of secondary evidence in Mwambao Primary Court contrary to Primary Court evidence rules.*

*3. That, the trial court erred in law and fact for not making proper analysis of the appellants and respondent's evidence on contribution and acquisition of matrimonial properties.*

In consequence, the appellant prays for this honourable court to quash the decision of the District Court and Primary Court, all matrimonial assets be equally divided and the house which is solely owned by the appellant located at Tabata Segerea remain under the custody of the appellant.

On 12<sup>th</sup> October, 2021 this court ordered for the appeal to be disposed of by way of written submission to which both parties complied with and filed their submissions timely.

Submitting in chief, on the first ground the appellant stated that the appellant was denied the right to be heard which is her constitutional right; At page 6 of the Primary Court's judgment the trial magistrate was aware that the appellant asked to engage an advocate as a matter of exercising her right to be heard but the trial magistrate did not afford the appellant an opportunity to exercise her right. When the magistrate is shown with the letter to engage the advocate, he has to furnish reasonable time for the appellant to seek an advocate and referred the case of **Agnes Simbambili Gabba v David Samson Gabba, Civil Appeal No. 26 of 2008, CAT at DSM (unreported)**.

Submitting on the second ground, she stated that, at page 5 of the typed judgment the court admitted secondary evidence instead of receiving primary evidence and there was no explanation as to why secondary evidence is admitted in court instead of admitting the original evidence as required under regulation 11 of the Magistrate's Courts (Rules of Evidence in Primary Court) Regulations of 1964. As there was no reasonable cause of admitting secondary evidence the entire proceedings become nullity.

Lastly, the appellant stated that, the evaluation of the evidence was not in terms of **sections 110 and 111 of Tanzania Evidence Act**, Cap 6, R.E 2019 as well as **Magistrate's Courts Rules (Rules of Evidence in Primary Court) Regulations** of 1964. Tabata -Segerea house is separately owned by the appellant but the trial magistrate distributed it as a matrimonial property as he ought to distinguish the same.

Resisting the appeal, the respondent replied that the respondent was afforded the right to be heard as she submitted at page 6 the trial court instructed on the procedure for engagement of an advocate, as it has no jurisdiction as per **Section 33(1) of the Magistrate's Court Act**, Cap 11, R.E 2019 and the appellant ought to have resorted to **Section 47(1)(b) of the Magistrate's Court Act**, Cap 11, R.E 2019 for an order of transfer of the file and the appellant appeared throughout the hearing and adduced her evidence, hence this ground is baseless. The respondent further argued that the right to be heard and the right of representation is not automatic as one should move the court to grant those rights and cited the case of **Abubakar Mohamed Mlenda v Juma Mfaume High Court of Tanzania at Dar es Salaam, TLR (1989)145.**

With regard to the second ground the respondent stated that, the original evidence was tendered and the appellant had the chance of examining it, as it was a big diary the trial court was advised to take a copy instead of putting the diary and there was no objection. Secondary evidence can be received after the original evidence is shown before the court and the appellant had been given an opportunity to examine it.

The respondent further remarked that, the evidence was properly analysed and resulted into fair distribution of matrimonial assets and reminded the appellant that the Evidence Act, Cap 6 is not used in Primary Courts.

The appellant on her rejoinder reiterated mostly what she has submitted in chief and for avoidance of repetition, I do not intend to recapture the same.

Starting with the first ground ~~that the~~ appellant was denied her right to engage an advocate hence her right to be heard was infringed, the issue is whether the trial court denied the appellant her right to be heard.

Upon perusal of the primary court file, at **page 7 of the typed proceeding**, on **10<sup>th</sup> May, 2016**, after having heard the prayer from the respondent (*herein the appellant*) on her wishes to engage an advocate and having been challenged by the applicant (*herein the respondent*) the court gave its order as I quote:

**"Mahakama:** Kuweka wakili ni haki ya kila mtu, mdai au mdaiwa. Mdaiwa kama alivyoomba mbele ya Mahakama hii anaruhusiwa na mahakama hii haina pingamizi lolote juu ya nia yake hiyo. **Hata hivyo shauri hiii haliwezi kusimama kwa maneno matupu ya mdaiwa, shauri litaendelea hadi pale ambapo litashitishiwa na mfawidhi wa mahakama ya wilaya".** (Emphasis is mine)

**Twalibu- Hakim Mkazi**

**10/5/2016**

From the quotation above, the court accepted the wish of the appellant to engage an advocated subject to proof as advocates were not allowed by then in Primary Courts by virtue of **Section 33(1) of the Magistrate Courts Act, Cap 11, R.E 2002.**

This matter attracted me to **Section 47(1)(a), and (b) of the of the Magistrate Courts Act, Cap 11**, (*supra*) which allows the transfer of files as I quote for easy reference:

*(a) "the primary court, with the consent of the district court or a court of a resident magistrate having jurisdiction, to transfer the proceeding to such district court or court of a resident magistrate or to some other primary court";*

*(b) "the district court or a court of a resident magistrate within any part of the local jurisdiction of which the primary court is established, to order the transfer of the proceedings to itself or to another magistrates' court"*

The procedure was for the respondent (*herein the appellant*) to reproduce the engagement letter before the court so as the primary court could transfer the file to District Court upon consent as one of the parties is being represented as per **Section 45(1)(a) of the Magistrate Courts Act, Cap 11**, (*supra*) or the advocate engaged would request for transfer in the District Court and the District Resident Magistrate Incharge would call for the transfer of such proceedings by

virtue of **Section 47(1)(b) of the Magistrate Courts Act, Cap 11,** (*supra*).

In the instant case there was a letter in the lower court's file dated **13<sup>th</sup> May, 2016** with **ref. No. JM/ADV/063/2016** from **Msemwa and Company Advocates** which was received on **13<sup>th</sup> May, 2016** as the court stamp indicates. Upon consent, the court was required to transfer the file to the District Court so as the appellant might exercise her right of representation and be entitled for a fair hearing as per **Article 13(6) of the Constitution of the United Republic of Tanzania of 1977.**

In the case at hand, although the appellant gave her evidence but her right was denied by the court as the proceedings of **23<sup>rd</sup> May, 2015** indicates during cross -examination by court assessor one Mzee Mkondo as she replied:

*"Mzee Mkondo- Ni haki yangu kuweka wakili"*

At this stage the court had already received an engagement letter from the advocate and the law permits for the trial court to transfer the file but this was not done and no feedback of the letter was issued. Hence,



this action amounts to infringement of the right of representation, right to be heard and right of a fair trial.

In the upshot, therefore, I agree with the first ground that, the appellant was not given an opportunity to be heard, as her case was not awarded a chance for representation. The case of **Hussein Khanbhai v Kodi Ralph Siara, Civil Revision No. 25 of 2014, Court of Appeal at Arusha (unreported)** referred the case of **Mbeya - Rukwa Auto Parts & Transport Limited v. Jestina Mwakyoma, Civil Appeal No. 45 of 2000 (unreported)**, and in considering the principles of natural justice, this court had this to say:

*"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law."*

Also, in the case of **Ausdrill Tanzania Limited v Mussa Joseph Kumili & Another, Civil Appeal No. 78 of 2014, Court of Appeal at Mwanza, (unreported)** it was held that:

*"...It must be emphasized at this point in time that the right to be heard (**audi alteram partem**) is a fundamental principle which the courts of law jealously guard against."*

Further, in **Deo Shirima and Two Others v. Scandinavian Express Services Limited, Civil Application No. 34 of 2008 (unreported)** and observed:

*"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is common knowledge."*

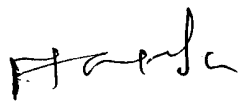
As this ground alone is sufficient to vitiate the proceedings, I shall not attempt to delve into the remaining two grounds of this appeal since the proceedings of lower trial courts are nullity. I hereby set aside the decision of District Court and Primary Court and order for retrial before

another magistrate. Due to the nature of this case, I make no order as to costs.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 28<sup>th</sup> Day of December, 2021.



  
**N. R. MWASEBA**

**JUDGE**

**28<sup>th</sup> December, 2021**