IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 191 OF 2020

(Arising from Matrimonial Cause No. 51 of 2019 Ilala District Court at Kinyerezi)

MARGRETH HAWARD LYIMO.....APPELLANT

VERSUS

ELIUD JACOB BAILEMBA.....RESPONDENT

RULING

Date of Last Order: 10/06/2021

Date of Judgment: 14/12/2021

S.M. KULITA, J.

This is an appeal from Iiala District Court. The Appellant herein, **MARGRETH HAWARD LYIMO** lodged a Matrimonial Cause No. 51 of 2019 at Ilala District Court at Kinyerezi. In the said case the marriage between the Appellant and Respondent was dissolved. It was further ordered that the matrimonial assets be divided at the ratio of 20% for the Appellant and 80% for the Respondent, **ELIUD JACOB BAILEMBA**. Furthermore, the said trial court decided that custody of two issues be upon the Respondent and one be under custody of the Appellant. Lastly, the trial court

ordered the Respondent to maintain the child who was ordered to stay with the Appellant by affecting monthly payment of Tsh. 50,000/= to the Appellant.

Aggrieved with the decision of the District Court the appellant appealed at this court relying on fourteen grounds which were then consolidated into seven during trial as follows;

1. That the trial Magistrate erred in law and fact by finding that the parties contracted a customary marriage with no evidence in support of.
2. That the trial Magistrate erred in law and fact by relying on the evidence of witnesses who were not sworn.
3. That the trial Magistrate erred in law and fact by relying on the documents which were not properly admitted and/or not admitted at all.
4. That the trial Magistrate erred in law and fact by relying on the weak, uncorroborated and unenforceable evidence of the Respondent, instead of considering the overwhelming evidence of the appellant, hence reaching into a wrong decision in considering, identifying and distribution of the matrimonial properties.
5. That the trial Magistrate erred in law and fact by not considering the best interests of the children and thereby

erroneously awarding the Respondent custody of two children who are the juvenile school girls.

6. That the trial Magistrate erred in law and fact by not controlling the conduct of the proceedings and hence the appellant's rights were severely jeopardized.
7. That the trial Magistrate erred in law and fact by misdirecting himself on the principles of awarding maintenance to the deserted wife and children, hence reaching into erroneous decision.

The matter was disposed of by way of written submissions. While the appellant is represented by Mr. Francis Munuo, Advocate from Plateau Attorneys, the Respondent is represented by Mr. Emmanuel Hyera, Advocate from Hyera Law Chambers.

In my analysis, I prefer to start with the 2nd ground of appeal which states that the trial Magistrate erred in law and fact by relying on the evidence of witnesses who were not sworn. Submitting on the said ground of appeal Mr. Francis Munuo, Advocate stated that the proceedings transpire that a total number of four witnesses testified for both parties at the District Court but neither of them was sworn or affirmed which is contrary to section 4(a) and (b) of the Oaths and Statutory Declarations Act [Cap 34 RE 2019]. He averred that unless they could be children of tender age who do

not understand the nature of oath, the said witnesses ought to have testified on oath as all of them were adults.

The counsel concluded his submission in respect of this issue by praying the evidence adduced by those witnesses be expunged.

In his reply in respect of that ground of appeal the respondent's counsel, Mr. Emmanuel Hyera submitted that the witnesses were sworn, the defect arose in typing, that there was a typing error. He said that it is a technical error which does not touch the root of the case and cannot change anything in respect of parties' rights. He prayed for the said ground of appeal to be dismissed for devoid of merits.

Having gone through the submission in respect of this ground of appeal, I have the following observations; while submitting on ground no. 2 in the Memorandum of Appeal the respondent's counsel alleged that all witnesses had taken oaths, what transpires on the typed proceedings was just a typing error. However, upon going through the original proceedings in the record I noted the same defect as mentioned by the Appellant's counsel, that it does not transpire the witnesses to have taken oath, that they neither affirmed nor sworn before they testified. In that sense the mandatory requirement of the law as per section 4(a) of the Oaths

and Statutory Declarations Act [Cap 34 RE 2019] was not complied with.

The Respondent's counsel contended that, even if the witnesses had not taken oaths, it doesn't occasion into injustice as the defect does not touch the root of the case. I have a contrary opinion, in my view that defect touches the root of the case as it is a prescribed procedure under section 4(a) of the Oaths and Statutory Declarations Act, that witnesses should take oath before they testify. It is a mandatory requirement, hence failure to adhere it is fatal and cannot be cured through Overriding Objective under **section 3A of the Civil Procedure Code [Cap 33 RE 2019].**

The Overriding Objective rule which is also famous as Oxygen Principle enjoins the courts to do away with technicalities, instead it should determine the case justly, basing on substantive justice. However, the said provision cannot be applied blindly against the mandatory provisions of the procedural law which go to the foundation/root of the case. See the case of **MONDOROSI VILLAGE COUNCIL & 2 OTHERS V. TBL & 4 OTHERS, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported).** Hence the principle cannot apply to cure this defect.

Section 4(a) of the Oaths and Statutory Declarations Act [Cap 34 RE 2019] which is applicable in both, criminal and civil cases, provides about kinds of oaths and the respective persons who are required take it. The section states;

> *"Subject to any provision to the contrary contained in any written law, an oath shall be made by-*
>
> *(a)* ***any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court;***
>
> *(b) any person acting as interpreter of questions put to and evidence given by a person being examined by or giving evidence before a court:*
>
> *Provided that, where any person who is required to make an oath professes any faith other than the Christian faith or objects to being* ***sworn****, stating, as the ground of such objection, either that he has no religious belief or that the making of an oath is contrary to his religious belief, such person* ***shall*** *be permitted to make his solemn* ***affirmation*** *instead of making an oath and such affirmation* ***shall*** *be of the same effect as if he had made an oath"* ***(emphasis is mine)***

Therefore, each witness should take oath before he/she testify which is *"swearing"* for Christians and *"affirmation"* for non-Christians.

In **Amos Seleman vs Republic (Criminal Appl No. 267 of 2015) [2016] TZCA 311; (24 April 2016)** while citing the case of **Mwami Ngura V. Republic, Criminal Appeal No. 63 of 2014,** the Court of Appeal had an occasion to deal with a similar scenario regarding non-compliance with section 198(1) of the Criminal Procedure Act which provides for mandatory requirement for the witness to take oaths. The said court stated;

> *".....this means that, as a general rule, every witness who is competent to testify, must do so under oath or affirmation, unless, she falls under the exceptions provided in a written law. As demonstrated above one such exception is section 127(2) of the Evidence Act. But once a trial court, upon an inquiry under section 127(2), of the Evidence Act, finds that the witness understands the nature of an oath, the witness must take an oath or affirmation"*

Now, what is the legal impact if the trial court decides the case relying on the evidence of a witness who was not sworn or affirmed? According to **Iringa International School vs**

Elizabeth Post (Civil Appeal No. 155 of 2019) [2021] TZCA 496; (20 September 2021) the requirement for witnesses to give evidence under oath is mandatory and the omission to do so vitiates the proceedings. In case that happens, the superior court has to nullify the proceedings (testimony) in respect of those witnesses. In that case it was held;

> *"As to what is the effect of omitting to administer oath to witnesses before they give their evidence, the law is settled. The requirement for witnesses to give evidence under oath is mandatory and the omission to do so vitiates the proceedings".*

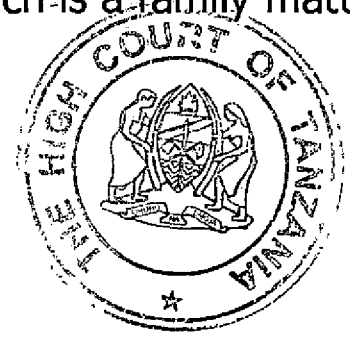
Regarding the position of the Court of Appeal in the above cited case, the fact that in this matter neither witness was sworn/affirmed the whole proceedings should be nullified.

In the same case, while citing the case of **Catholic University of Health and Allied Sciences (CUHAS) V. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020 (unreported)** the Court of Appeal stated that the panel in the said case faced with an identical situation as it was in the matter they had ie. **Iringa International School (supra),** where it was held among other things, that;

"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' cases."

Having so analyzed this 2nd ground of appeal to that conclusion, I find it unnecessary to deal with the other grounds of appeal as this one is sufficient to dispose of the appeal in its entirely.

In up shot the appeal is hereby allowed with an order of ***trial de novo***, that the same should be remitted back to the trial court for retrial, preferably before another Magistrate with competent jurisdiction. As the appeal originates from matrimonial cause, which is a family matter, I make no order as to costs.



S.M. KULITA

JUDGE

14/12/2021