IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 12 OF 2021

(Arising from Civil Appeal No. 34 of 2019, Original Matrimonial Cause No. 18 of 2019 at Bukoba Urban Primary Court)

MONICA K. DIONIZ..... APPELLANT

VERSUS

JOHANESS GOERGE ..... RESPONDENT

JUDGMENT

11/10/2021 & 10/12/2021
NGIGWANA, J.

In the Primary Court of Bukoba Urban the appellant Monica K. Dioniz Petitioned for divorce, division of matrimonial assets and maintenance of the two issues of marriage; Joram Johanes and Johaven Johanes in Matrimonial cause No. 18 of 2019.

The material facts of the matter obtained from the record of appeal giving rise to the present appeal indicate that, the appellant alleged that they celebrated their marriage under Christian rites sometimes in 2005.That, thereafter, they started living in a rented house and were blessed with two issues. That, they lived a happy marriage life for sometimes where they jointly acquired one residential house. That, misunderstanding in their marriage life started when they moved to their residential house. That the

misunderstanding grew worse and intolerable, and as a result, the appellant reported the matter to a police station and the Social Welfare Officer. Following such long unsolved misunderstanding, the appellant decided to petition for divorce as indicated above.

At the end of the trial, the trial court was convinced that the marriage between the parties had broken down beyond repair due to cruelty and desertion, hence the decree of divorce was granted. She was also awarded 60% proceeds of the Matrimonial house (the trial court ordered valuation of the house and its proceeds be divided on 60% and 40%) and custody of the two issues. The respondent was ordered to maintain the two issues of marriage.

Aggrieved by the decision of the trial court in relation to division of matrimonial property and maintenance of the issues of marriage the respondent Johannes George appealed to the District Court of Bukoba, Civil Appeal No. 34 of 2019. The district court reversed the order of the trial court. Part of the judgment read.

"*In the up short, I hereby reverse the trial court's order for sale of the matrimonial house and division of the proceeds on 60% and 40% --- the house shall remain residential house for the appellant and the issues of marriage; and instead, I substituted for an order that the appellant shall get 70% and the respondent shall get 30%. The appellant is at liberty to compensate the equivalent value of the respondent's share".*

The district court further placed maintenance of the two issues of marriage to both parties appellant and respondent.

Dissatisfied by the decision of the first appellate court, Monica Dioniz who was the respondent in the District Court appealed to this court on two grounds;

(1) The 1st appellate court erred in law and fact faulting the trial court's judgment, hence came to the judgment which favored the Respondent without any justifiable cause.

(2) That the 1st appellate magistrate erred in law and fact when came to a judgment that both parties were responsible with maintenance of children and further proceeded to order custody of children to the respondent.

The respondent opposed the appeal, wherefore prays that the same be dismissed with costs.

When this appeal was called on for hearing, the appellant had the legal service. Ms. Theresia learned advocate while the respondent had the legal service of Mr. Ibrahim Mswadiki, learned advocate.

The matter was argued orally, however when the court posed to compose the judgment, it discovered an anomaly which was committed by the trial court that the evidence of PW1 was taken without oath. Unfortunately, it was not discovered by the 1st appellate court.

It has to be noted that this issue was not raised as a ground of appeal. It is trite in our adversary system of administration of justice where the judge or magistrate is as all-time expected to play the role of unbiased umpire, he/she cannot raise any **issue suomotu** and proceed to decide the matter

on the said issue without hearing the parties. As to what procedure should be adopted where the issue has been discovered at the time of composing judgment, I sought guidance of the Court of Appeal in **Zaidi Sozy Mziba versus The Director of Board Casting, Radio Tanzania Oms and Another**, Civil Appeal No. 4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import and Export Co. Ltd**, Civil Reference No. 20 of 2006 (Both unreported) where the court stressed that where the court in the course of composing its decision discovers an important issue that was not addressed by the parties at the time of hearing, it is duly bound to re-open the proceedings and invite the parties to address it on the issue.

Upon inviting the parties, Mr. Ibrahim Mswadick learned advocate for the respondent stated that, having made a careful perused of the trial court proceedings both hand written and typed, he discovered that the petitioner was not sworn before her evidence is taken, and therefore the said evidence is of no evidential value. On her side, the appellant conceded that the trial court records show that she was not sworn before her evidence is recorded but added that, that was not her fault.

Now the court's duty is to determine whether the noted irregularity is capable of vitiating the court proceedings. It is trite law that evidence of any witness except for a child of tender age must be given on oath or affirmation. The consequences of the evidence of a witness who gave evidence without being sworn is that, the evidence becomes of no value.

In the case at hand, the trial court reveals that the petitioner professed Christianity, and she was the only witness in her case, but she was not sworn. Let the record speak for itself.

"***SHAURI UPANDE WA MDAI KUSIKILIZWA.***

Mdai: *Monica Dioniz, Umri 35 Kibeta, Mwalimu, Muhaya, Mkristo, ndoa yetu tulifunga mwaka 2005 katika Kanisa la Katoliki Rumuli. Ndoa yetu ilikuwa ya Kikatoliki. Baada ya hiyo ndoa yetu tulienda kuishi kwenye nyumba ya kupanga---".*

Failure by/for the trial court to administer oath to the appellant before recording her evidence, is fatal because the evidence shall amount to no evidence in law. This court is alive that the trial magistrate in the judgment purported to show that the petitioner was sworn before her evidence is recorded. Part of the trial court judgment read-

"*Mdaiwa Monica Doniz baada ya kuapishwa na mahakama hii aongee ameeleza kuwa----".*

It should be noted that there is always a presumption that a court record accurately represents what happened, thus it should not be lightly impeached. **See Halfani Sudi versus Abieza Chichili [1998] TLR 52.**

In the case at hand, since the proceedings did not show if the petitioner (PW1)/appellant was sworn, and since the judgment is preceded by proceedings, it cannot be said by any means or whatever standard that the Appellant (PW1) was sworn before the trial court before her evidence is being recorded.

Section 46 (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, G.N No.310 of 1964 states that;

*"The evidence of each witness **shall** be given on affirmation save in a case of a child of tender years, who in the opinion of the court, does not understand the nature of the affirmation"*

The anomaly discovered in this case goes to the root of the matter, as without evidence, there shall be no evidence-based decision.

Since there was no evidence adduced in the eye of the law in the trial court, the proceedings and the judgment thereof are a nullity. In the same line, it is obvious that the 1st appellate court acted upon a nullity, thus its proceedings and judgment are also a nullity. Under the circumstances, I see no reason to address the grounds of appeal otherwise it would be a mere academic exercise which I see no need to do.

Consequently, in the exercise of the powers vested into this court under section 29 (b) of the Magistrates Courts Act Cap.11 R: E 2019, I do hereby make the following orders;

(i) I hereby quash both the trial court and appellate District Court proceedings and judgments/decision, and set aside the orders thereof.
(ii) I hereby order an expeditious trial denovo before a different magistrate (the magistrate may sit with the aid of the assessors if the parties so wish)
(iii) Each party to bear its own costs.

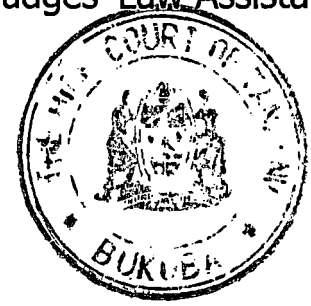
It is so ordered.

E.L. NGIGWANA

JUDGE

10/12/2021

Judgment delivered this 10th day of December, 2021 in the presence of both parties, Mr. Ibrahim Fahad for the respondent, Mr. E. M Kamaleki, Judges' Law Assistant and Mr. Gosbert Rugaika, B/C.



E.L. NGIGWANA

JUDGE

10/12/2021