

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

AT DAR ES SALAAM

PC CIVIL APPEAL NO 95 OF 2021

(Arising from the Judgment and decree of the District Court of Bagamoyo in Civil Appeal No. 05 of 2020 dated 12/04/2021 before V. P Mwaria –RM, Originating from the decision of Kerege Primary Court in Civil Case No 03 of 2020 dated 23/04/2020 before Kibona RM.)

ANNA MGOMBA.....APPELLANT

VERSUS

MATHAYO MSIGWA.....RESPONDENT

JUDGMENT

Date of last Order: 11/05/2022

Date of judgment 17/06/2022

E.E. KAKOLAKI J.

Before the Primary Court of Kerege at Bagamoyo, respondent successful sued the appellant vide *Shauri la Madai No. 3 of 2020* for recovery of Tsh.3,875,500/=. As per the trial Court records, it was the respondent's claim that, he had secured oral promise from the appellant to marry him, on a condition that respondent will construct her a house first. The record further reveals that, respondent sought assurance from the appellant as to whether her parents will support their agreement and finally marriage, in which the appellant assured him. It appears relying on such promise the

respondent complied with the condition set by the appellant but to his surprise, and after completion of construction of the house, the appellant informed him of her parent's refusal to bless their plan (marriage). When the appellant was asked to refund his money the respondent turned her ears deaf, despite of their dispute being referred to different authorities including the church and ward office where she offered empty promises to repay. In the end, the respondent opted to file a civil case before Kerege Primary Court as alluded to above, whereby the court ordered the appellant to refund his construction costs to the tune of 3,875,500/=. Not amused, the appellant unsuccessfully appealed before Bagamoyo District Court via Civil Appeal No. 05 of 2020, as the Court upheld the trial court findings and dismissed the appeal. It is the said decision that triggered this appeal in which appellant has filed a memorandum of appeal consisting of four grounds of appeal going thus:

1. That both the trial and first appellate courts grossly erred in both law and fact to hold as they did that there was a promise to marry between the appellate and the respondent in the absence of affectionate relationship.
2. That both trial and first appellate court failed to make a finding a source of proposal to marry and how it was received by counter party

3. That both the trial and first appellate court erred by their failure to make findings as to who actually purchased the plot and constructed the house single handed
4. That both the trial court and appellate court erred in both law and fact by failing to assess the nature of the admission if any made by the appellant in the wake of fears of loss of life of her mother given police environment and intimidation.

Basing on the above grounds, the appellant is inviting this court to allow the appeal, quash the proceedings of both lower courts and set aside the judgments, decree and orders thereof with cost.

At the hearing of this appeal parties proceeded by way of written submission, as the appellant appeared in person while respondent enjoyed the services of Mr. Robert Rutaihwa learned advocate. The submissions' filing schedule orders were followed save for the appellant who opted not to file the rejoinder submission. In this judgment I am proposing to consider and determine all grounds of appeal as argued in the parties respective submissions after a thorough perusal.

To start with, the appellant in the first ground of appeal is faulting both lower courts holding that there existed marriage promise between the parties while

there was no affectionate relationship. Arguing on this ground she started by quoting the provisions of section 71 of the law of marriage Act, which provides for the return of gifts made in contemplation of marriage. She argued that, looking at the first appellate court Judgment, there is no proof whatsoever showing that the gift which the respondent is claiming to have given the appellant was given in contemplation of marriage as there was no bride price paid or any engagement whatsoever between the two. In her view there is a big difference between a promise to marry and boyfriend and girlfriend relationship. To fortify her stance, she refereed the court to the case of **Generoza Ndimbo Vs. Blasidus Yohanes Kapes** (1988) TLR 73, where it was held that, a suit may be brought for the return of any gift made in the contemplation of marriage which has not been contracted. Appellant further submitted that, a gift unconditionally given during a boyfriend and girlfriend relationship or birthday cannot be recovered as the same does not fall within the provisions of Law of Marriage Act. She therefore pressed to the Court to find merit in this ground.

In his response, Mr. Rutaiwa started by reminding this court that, where there are concurrent findings of the lower court it is hard for the second appellate court to interfere such findings. To justify his point, he cited the

case of **Fatuma Ally Vs. Ally Shabani** Civil Appeal No. 103 of 2009 (Unreported) which cited with approval the case of **Silverius Uhuru Onyango Vs. Barnabas Madaraka Nguri**, Misc. Land Appeal No 139 of 2000 HC. He then implores this court to follow the decision on the above cited case.

Responding the first ground of appeal, Mr. Rutaihwa submitted that, this ground has no legal point to be discussed rather than a request for evidence re-evaluation. He argued that, there is a big gap if not a complete departure between the ground raised and the appellant's arguments, since appellant quoted section 71 of the Law of Marriage Act and pegged her stance on the difference between contemplation of marriage and boyfriend girlfriend relationship. To him, the argument does not relate to the ground of appeal. He went on submitting that, respondent managed to establish the promise to marry between parties as stated at page 7, 9 and page 10 of the trial court's judgment. He submitted further that, the same was concurrently reiterated by the first appellate court at page 5 and 9 of the judgment. In his view, the claimed contemplation of marriage was therefore proven to the required standard. As regard to the appellant's complaint that if the claimed refund was a gift given out love and affection for being treated by the

respondent as his daughter, he argued the same did not feature in evidence in both lower courts, so to raise it at this stage amounts to seeking sympathy of this Court which is a misplaced idea. He added that, even the case of **Generoza Ndimbo** (supra) relied on by the appellant does not bail her out as she never expressed its relevance to this appeal.

Having considered both parties' fighting arguments in this ground, the issue for determination is whether both lower courts erred to hold there was a promise to marry between the parties as claimed by the appellant. To answer this issue and others in this appeal, I will be guided by the principle that, this being the second appellate court is not entitled to interfere with concurrent findings of two lower courts, unless there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424, **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported) and **Wankuru Mwita Vs. R**, Criminal Appeal No. 219 of 2012 (unreported). Having so stated I now proceed to consider and determine the above issue in which I find it impressive so seek guidance of this Court in the case of **Generoza Ndimbo Vs. Blasidus Yohane Kapesi [1988] TLR 73** HCT, which has inspired me on the issue

of return of gift in contemplation of marriage. It was stated in that case that, a suit may be brought for the return of any gift made in contemplation of marriage which has not been contracted, where the court is satisfied that, the same was extended by the giver with intent and condition that, marriage shall be contracted and not otherwise. The condition to be established to the satisfaction of the Court before any order for repayment of the gift is issued to the party sued therefore, is the answer as to whether the said gift was offered on the condition that parties intended to marry each other. The crucial issue here then is whether under the circumstances of the present appeal the above condition was met. As alluded to earlier above, both lower courts answered this question in affirmative.

Notably, as per uncontroverted respondent's testimony, the promise to marry was entered orally. I so hold being mindful of the principle that, for an oral agreement to stand there must be proper scrutiny of witness's credibility and the entire evidence as well as parties' conduct and the general underlying circumstances of the case. See the case of **Catherine Merema Vs. Wathaigo Chacha**, Civil Appeal No 319 of 2017 (CAT-Unreported). In this appeal, though hesitantly appellant disputes and stated that there was no promise to marry between them, and that the house was not given to her

in contemplation of marriage, but the record speaks louder than her that, she requested the respondent to build her the house before marriage as a condition precedent in fulfilling the promise to marry the respondent since she had grown up children. It is also in record that, the respondent executed that condition on anticipation that she will marry him. This crucial fact is exhibited at page 3 of the trial court proceedings where the respondent testified that, after appellant had agreed to marry him, she requested for the house and respondent constructed the same. The Respondent evidence was never cross examined by the appellant hence its admission by the appellant. It is a principle of law that failure to cross examine on important facts amounts to admission of the evidence adduced to that specific fact. See the case of **Nyerere Nyague Vs. Republic**, Criminal Appeal No 67 of 2010 (CAT-unreported). In this case the Court held that:

As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.

The above fact aside the trial Court record reveals further that, before building the said house respondent wanted assurance whether the appellant's parents will accept agreement and got assured by her. Again this

fact was never cross examined on. Furthermore in her defence appellant confirmed existence of the said promise when testified during cross examination to have extended it in front of her parents and brother. At page 10 of the trial court proceeding is recorded to have said:

Nilikubali kuwa nilitaka kuolewa na Sm1 na nyumba alijenga yeye.

Nilikubali kuolewa na wewe mbele ya mama, kaka, na wewe ukatoa kishika Uchumba.

Further to that, Regulation 6 of the Magistrates' Court (Rules of Evidence in Primary Courts) Regulations GN. No. 22 of 1964 and 66 of 1972 provides clearly on whose party should the evidence be accorded more weight by reading thus: -

*In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party **is greater than the weight** of the evidence of the other.*

On the reasons and authorities cited above, I am satisfied that both lower courts properly analysed the evidence before arriving to the conclusion reached that there was a promise to marry issued by the appellant to the respondent which resulted into being offered the gift she received, as it was

proved by the respondent to the balance of probabilities. I therefore see no justifiable reasons to interfere their decision. Appellant's story that, respondent built the said house while treating her as his daughter or as her girlfriend does not hold water for not being supported. Thus, the first ground therefore lacks merit and the same is dismissed.

On second ground of appeal, the appellant is faulting both lower courts for not making a finding as to the source of marriage proposal and how was it receive by the appellant. She challenged the appellate court's decision submitting that, even if each society has its own and different ways of executing a promise to marry, in this matter there was no any form applied whatsoever to prove that she promised to marry the respondent.

In his rebuttal submission on this ground Mr. Rutaihwa contended that, the ground was never raised before the District Court, thus cannot be considered at this stage. That notwithstanding submitted that, receiving proposal for marriage may involves the feelings and conduct(s) of an individual person (the proposed) and therefore does not necessary need be proved by engagement or payment of bride price as it was the case in this matter.

To start with the issue as to whether this ground was raised and discussed in the appellate court, I find the contention by Mr. Rutaihwa that it was not

is baseless as the ground arises out of first appellate court's reasoning in the impugned judgment that, each society has its own and different ways of exhibiting the promise to marry. The appellate court said, in some societies the promise to marry is exhibited by payment of bride price but in some it is through engagement ring in the presence of people. Having so found I now move to the merit of this ground, where the appellant is contending that, respondent never adhered to any above stated to prove that there was a promise to marry. In my view this ground need not detain this court. This is so because, there is no any form or rather specified standard or form set by the law, to prove existence of the promise to marry. The law under section 71 of Law of Marriage Act, [Cap. 29 R.E 2019] (the LMA) is that the party bringing the suit for compensation must prove to the Court that, he gave gift(s) to the other party on the condition that marriage be contracted and not otherwise. For the purposes of clarity of the above stance section 71 of LMA reads:

S.71.A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise.

In this matter as alluded to above, the respondent proved before the trial court the finding which was embraced by the appellant court that, his act of constructing the house of the applicants was based on fulfilling the condition set by the applicant for the promise to marry him. It follows therefore that allegations that there was no any form of promise to marry proved by the respondent lacks basis as it is not a requirement of the law. This ground therefore fails.

Next for determination is the third ground of appeal, where appellant contends that, the support rendered by the respondent to her, for construction of the single room house cannot be recovered as there is no proof that, it was given in the contemplation of marriage. She said that, the respondent supervised construction of the said house as he was treating her like his daughter. In his reply submission to this ground Mr. Rutaihwa argued that, the same lacks merit as the parties' dispute centred on the breach of the promise to marry and return of gift given in contemplation of marriage, and not the issue of ownership as the appellant would want to put it. He submitted that, appellant on her own when cross examined, did not dispute the house to have been constructed by the respondent and that she freely

executed an agreement with him to reimburse the costs incurred but failed to honour the promise.

Having revisited the evidence and both lower court judgments, I distance myself from appellant's allegation that construction of house by the respondent was not associated with the promise to marry the respondent but rather to assist her as her daughter on the following reasons. Firstly, in her evidence appellant did not categorically dispute that the house was built by the respondent, nor did she cross examine the respondent to challenge that fact during his testimony. Secondly, when dissolving the issue of breach of promise to marry and return of the gift given her in contemplation of marriage, parties executed an agreement for the recovery of cost incurred for the construction of the disputed house and it is the appellant who initiated the same. *Thirdly*, it is was proved on the balance of probabilities that house was constructed in contemplation that, the appellant would marry the respondent, hence under section 71 of the LMA, the respondent is entitled to compensation for breach of the promise to marry. In view of the above therefore the third ground collapses as well.

Lastly is on the fourth ground, where the appellant is contending that, the her admission to sign the agreement for repay of the cost incurred by the

respondent was made out of fear of life of her mother and intimidation given at police, thus there was no free consent to enter into marriage or return of gift given to her by respondent. She relied on the provisions of section 16 (2) (a), (b), and (c) of the LMA, providing for circumstances under which consent to marry is not considered to be obtained freely or voluntarily. On the respondent's side Rutaihwa resisted the appellant's allegation while terming the ground as new one thus not deserving consideration of the court at this stage. That aside while admitting the proper interpretation of section 16(1) of LMA on consent of the party to marriage, he was adamant to support the submission that the same is applicable in the present ground since the issue here is not on consent to marry but rather breach of promise to marry and repayment of the costs incurred by the respondent. To start with, I do not embrace Mr. Rutaihwa's argument that this ground is new. My perusal of the record has unearthed the truth that, this ground was raised by the appellant in the first appellate court as the 8th ground of appeal. However, I subscribe his submission on the argument that, the section cited by the appellant in this ground, has no relation with her assertion on the lack of consent to sign the agreement to repay the cost, as it was signed at police under intimidation. I so find as it is on record that, the discussion on signing

of the said agreement to repay the cost and promise to marry the respondent after breaching it, was held in the pastors' office in front of her brother as a free agent and not at police station as alleged. And that it was the pastor who advised her to pay back respondents' money, and she agreed to pay 100,000 per month before she requested the respondent to prepare payment agreement for her signature. Page 9 of the trial court proceedings lives as a testimony of what she said and I quote:

Nilimwambia mchungaji kuwa nimekubali kuolewa, ndipo mchungaji akasema usaini kuwa utalipa pesa. Ndipo nikasema nitalipa laki moja 100,000/= badala ya laki mbili 200,000/= ili nilipe pesa yote milioni tatu na laki nane na sabini na tano elfu na mia tano 3,875,500/= mama naye alisema nilipe tu.

Undoubtedly the above excerpt speaks for itself as there was no intimidation, nor force applied to the appellant to admit that she breached the promise to marry and that she was agreeing to pay back the money used to construct the disputed house which was a gift in contemplation of marriage. In view of those uncontroverted facts, I find this ground is without merit too.

In the circumstances and for the fore stated reasons which I have endeavoured to provide, I find no need to interfere with concurrent findings

of the lower court as the appeal is devoid of merit, which I hereby dismiss.

For the interest of justice, I order each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 17th day of June, 2022.



E. E. KAKOLAKI

JUDGE

17/06/2022.

The Judgment has been delivered at Dar es Salaam today on 17th day of June, 2022 in the presence of the Appellant in person, Mr. Mahfudhu Mbagwa, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

17/06/2022

