**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**PC CIVIL APPEAL NO. 23 OF 2021**

*(C/F PC Civil Appeal No. 30 of 2021 before the District Court of Arumeru, Originating from Matrimonial Cause No. 17/2020 of Enaboishu Primary Court)*

**FRENKY WILBERD URIO .....APPELLANT**

**VERSUS**

**GRACE STEPHEN CHACHA.....RESPONDENT**

**JUDGMENT**

08th & 24th June, 2022

**TIGANGA, J**

Challenging the decision of the District Court of Arumeru, which was passed in Civil Appeal No. 30 of 2021, the appellant in this appeal through the service of Ms Yustawinnie Vitalis Mtui, learned Advocate filed three grounds of appeal as follows; -

(i) That the first appellate court erred in law by upholding the final court's decision which relied on the facts obtained unprocedurally outside the court

(ii) That the fist appellate court erred in law and facts by failing to evaluate and consider evidence adduced by the appellant and his witnessed before the trial court

(iii) That the first appellate court erred in law and facts in ordering the sale of the house located at Chekereni and awarding 45% of its shares to the respondent.

Pursuant to these grounds, she requested the appeal to be allowed with costs by quashing and setting aside the judgment and the decree of District court.

At the hearing of the appeal, the appellant was represented by Ms. Yustawinnie Vitalis Mtui, learned counsel, while the respondent was represented by Mr. Lengai N. Merinyo, learned counsel.

It was after the counsel for the appellant had submitted in support of the appeal in all three grounds, when Mr. Merinyo learned counsel for the respondent conceded to the appeal basing on the first ground of appeal

alone. In his concession, Mr. Merinyo argued that as that ground has managed to disposed off the appeal, he therefore asked the court to allow the appeal basing on that ground only.

As earlier on pointed out, the first ground of appeal which Mr. Merinyo has conceded, raises a complainant that, the 1st appellate court erred in law by upholding the trial court's decision which relied on evidence which was obtained unprocedurally outside the court.

So conceding, he referred this court to page 24 of the proceedings of the Primary Court which was also correctly cited and referred by Ms. Yustawinnie Vitalis, learned counsel, where the trial primary court at page 24 of the proceedings collected the evidence of the persons it found at the locus in quo and relied on the same in its decision without following the procedure of receiving evidence. The persons whose evidence was unprocedurally received are Mama Iqram, Mama Gire, Mama Catherine, Shadrack or Baba Paul, Mama Ally and Majooli. Some of them were referred to as neighbours, while others were referred as Uongozi wa Serikali ya Kata and Balozi. All these witnesses had their evidence collected at the *locus in quo*, incorporated in the proceedings of the trial Primary Court and formed a base of the judgment of the trial court.

However, although these witnesses had their evidence recorded and relied upon but they were not subjected to the normal procedure of being taken on oath or affirmation as required by law.

On the basis of that argument Mr. Merinyo asked this court to allow this appeal basing on the first ground of appeal alone as it is true that the judgment based on the evidence which was unprocedurally or illegally obtained. He consequently asked the judgments of both lower courts and the proceedings referred to, to be quashed, and set aside without costs.

Substantiating his prayers for the waiver of costs, Mr Merinyo asked the court to do so basing on two reasons;

(i) That the irregularities was not caused by the parties but the court

(ii) The irregularities were not raised before the lower courts

(iii) The matter relates to love relationship whether legal or otherwise

On the basis of these reasons, he prayed the appeal to be allowed without costs and after allowing the same based on irregularities he prayed the court to order retrial

Ms Yustawinnie Vitalis, learned counsel did not dispute the concession by Mr Merinyo basing on the first ground only, but she asked the court to take into

account the fact that, the appeal by the appellant based on both, substantive and procedural aspects, she insisted that the appellant be granted costs of the appeal which will be the fruit of what has been litigated for.

In deliberating on what has been raised as a complaint and subsequent concession, I should first and foremost, say that as a general rule, every witnessed testifying in court is required to taken oath or make an affirmation before giving evidence, subject to certain provisions of the law. See the requirement of the Oaths and Statutory Declaration Act (Cap 34 R.E 2019) especially sections 3 and 4(a) and the proviso thereto. In the proceeding before the Primary Court, this can be seen in the Magistrates Courts (Civil Procedure in Primary Court) Rules, GN 310 of 1964 as amended by GN 119 of 1983 the relevant rule being rule 46 (2) which provides that;

Rule 46(2)

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

That being the position of the law, then it goes without saying that for evident to have evidential weight or probative value, except for those per sons excluded by law, every evidence of every witness must as a matter of

law be recorded on oath or affirmation. Evidence recorded without oath or affirmation lacks quality of being evidence and the court should not act on it, to found the findings in any decision determining the right of the parties.

In this case, the evidence of the witnesses who were referred to as neighbor or uongozi wa kata, as well as those mentioned at the last paragraph of page 3 of this judgment was recorded without taking oath or affirmation. It is unfortunately that the evidence was used to determine the right of the parties in the case before the trial court and that decision was blessed by the first appellate Court. That makes the decisions which resulted from the evidence so received and recorded to be a nullity and so is the appeal emanating and basing from that evidence.

That said, I find the proceedings and judgment of both lower courts to be a nullity, they are consequently quashed and set aside for the reasons given herein above.

Consequent to allowing this appeal on that sole ground, I was asked to order retrial. Before venturing in ordering retrial, I find it important to look at the circumstances in which retrial can be ordered. The principle for an order for retrial was formulated in the case of **Rashid Kazimoto and**

**Masudi Hamisi vs The Republic**, Criminal Appeal No. 458 of 2016, CAT (Unreported) where the authority in the case of **Sultan Mohamed vs The Republic,** Criminal Appeal No. 176 of 2003, which also quoted with approval the decision of **Fatehali Manji vs The Republic** (1966) EA 343 which stated that;

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps its evidence at the first trial. However, each case must depend on its own facts and circumstances and an order for retrial should be only be made when the interest of justice require it."*

Also see **Pascal Clement Braganza vs The Republic** (1957) EA 152.

From the authorities cited herein above retrial may be ordered where the following conditions exist;

i) When the original trial was illegal or defective;

ii) Where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.

iii) Where the circumstances so demand

iv) Where the interest of justice requires it"

In this case I find the above conditions to be existing and the interest of justice demand so. I find so because, the trial was irregular by receiving evidence without the witnesses taking oath, the fault which was committed by the trial court itself, and not at the fault of the party. That said, I make an order for retrial before another magistrate of competent jurisdiction.

Last, I have been asked by the respondent not to grant costs on the ground that the fault was committed by the court not by the parties. The other ground which I was required to base on in not awarding costs is that, even the appellant is at fault because he did not raise the issue before the trial court or first appellate court. On the other hand, the appellant asked to be awarded costs.

In my understating, the general rule is that the victorious party who has spent costs in either defending or prosecuting the case must, as a matter of the law, be reimbursed the cots he spent.

In this case its true that, the appellant and respondent were not at fault for what happened, and neither of them raised this concern before the 1st appellate court. That being the case, I agree that none of them deserves to

be blamed. However, that does not take away the right of the victorious party to be reimbursed his costs. Taking all the factors discussed here in above, I award only half of the costs spent by the appellant in this appeal.

It is accordingly so ordered.

**DATED** at **ARUSHA** this 24th June 2022


**J. C. TIGANGA**

**JUDGE**