IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC MATRIMONIAL APPEAL NO. 27 OF 2021

(Arising from the Decision of Misungwi District Court in Matrimonial Appeal No 5 of 2021 originating from Matrimonial Cause No 01 of 2021 at Inonelwa Primary Court)

EMMANUEL MACHIYA---------- APPELLANT

VERSUS

IRENE KAZIKUBONA---------- RESPONDENT

JUDGMENT

Last Order: 11.05.2022

Judgment Date: 30.5.2022

M. MNYUKWA, J.

This is a second appeal by the appellant challenging the concurrent findings of the two lower courts namely the Primary Court of Inonelwa (trial court) and the District Court of Misungwi (the 1st appellate court) as to the competence of the petition as he alleged that the matter was not resolved by the marriage conciliation board, the confirmation of the issuance of the decree of divorce while the marriage was not broken down beyond repair. He also challenged the equal division of the matrimonial

assets to the parties. The concurrent findings of the trial court and the 1st appellate court aggrieved the appellant, hence the present appeal.

The brief facts that have given rise to this appeal as per the records in the trial court goes that; the parties in this appeal were husband and wife respectively. They started to cohabit under the same roof in 2013 and in 2016, they blessed their cohabitation by contracting Christian marriage at Shinyanga and they were blessed to have one issue. During their marriage, the parties were living at Shinyanga before the respondent who is a public servant was transferred to Mwanza in 2020 and she still used to visit the applicant. The evidence on record reveals that, during their cohabitation, the respondent found the appellant with the unfinished house and the respondent substantially contributed to the completion of the said house.

The parties' marriage became sour when the appellant started to have sexual relations with other women outside of their marriage. The marriage relationship became worse when the respondent realized that the appellant impregnated her sister who is their family friend and blessed to have a child. This makes the respondent to have failed to tolerate the behaviour of the appellant and referred the matter to the family members. Unfortunately, the family members failed to resolve the dispute as the

respondent claimed that she can no longer tolerate the behaviour of the appellant. Among other things, the family members ordered the appellant to pay compensation for the marital misconduct he had committed to have a child with the sister of the respondent.

As she thought that she can no longer tolerate the marriage life, the respondent referred the matter to the marriage conciliation board and the board issued Form No. 3 to certify that it has failed to reconcile the parties. After the board's certification, the respondent petitioned for a decree of divorce at Inonelwe Primary Court. After conducting the full trial, the Primary Court of Inonelwe formed the view that the marriage between the parties is broken down beyond repair, it issued a decree of divorce, ordered the equal division of the matrimonial house, make an order of the custody of the child to respondent and allows the appellant the right to visitation and both parties to be responsible to maintain the child.

Aggrieved by the decision of the trial court, the appellant herein appeals to the District Court of Misungwi by advancing five grounds of appeal which were

1. *That the trial court erred to entertain the dispute which has not been referred to Marriage Conciliation Board*
2. *That the lower court erred in law to divide the matrimonial property at 50% for each party*

3. *The court erred in law to hold that the marriage was broken irreparably*
4. *That the court erred to place the child into respondent custody contrary to law*
5. *That the whole decision was against the law and evidence in record.*

The hearing of the appeal before the 1st appellate court was done by way of written submissions. After hearing the appeal, the 1st appellate court was satisfied that the matter was referred to the marriage conciliation board, the trial court rightly divide the matrimonial property to the parties, that the evidence on record proves that the marriage between the parties was irreparably broken down and thus it was proper for the trial court to issue a decree of divorce and also conform the other of the custody of the child to the respondent as it was for the best interest of a child.

Aggrieved further by the decision of the 1st appellate court, the appellant came to this court and this time around advanced four grounds of appeal to with: -

1. *That the first appellate court erred to hold that the dispute between the parties was resolved by the Marriage Reconciliation Board*
2. *That the first appellate court erred to affirm the distribution of matrimonial property to a rate of 50% for each party*

3. *That both courts below erred to hold that marriage was broken irreparably*
4. *That the whole decision was against the law and evidence on record.*

When the matter was scheduled for hearing, the respondent prayed for the appeal to be argued by way of written submission. By the consent of the parties and with the leave of the court, the appeal was argued by way of written submissions. I thank both parties for compliance with the court's order when filing their respective submissions.

Arguing in support of the first ground of appeal, the appellant submitted that the 1st appellate court erred to uphold the decision of the trial court as the matter was presented before it prematurely as the dispute was not referred to the board which had the jurisdiction to resolve the dispute. He remarked that the appellant referred the matter to the Evangelist Assemblies of God Church of Shinyanga and Illumajate Marriage Conciliation Board situated at Misungwi to which they had no jurisdiction to hear the matter. He enlightens that the Marriage Conciliation Board which had the jurisdiction to hear the matter is the marriage conciliation board established for the ward within which the husband, in this case, the appellant resides. He also wondered how Form No. 3 is available in the court record while they were not told if the

appellant was present. He insisted that the appellant was not present and that, Form No 3 was not legally obtained.

On the second ground, the counsel for the appellant avers that the 1st appellate court erred to uphold equal division of the disputed matrimonial asset while the direct contribution of the respondent was not shown. He claimed that the respondent found the house which is disputed as a matrimonial property to be semi-finished. Thus, it was not proper to order equal division of the said property. On the third ground, the counsel for the appellant fault the findings of the 1st appellate court and trial court who holds the view that the marriage was broken down beyond repair while there was only one act of adulterous association contrary to section 107(2) of the Law of Marriage Act.

The counsel for the appellant submitted a new ground that was not raised in the petition of appeal that the 1st appellate court erred to upheld the decision of the trial court because the trial court was not vested with geographical jurisdiction because the marriage was contracted at Shinyanga and the disputed house subject to division is at Shinanga while the dispute was filed at Mwanza. He retires by seeking to abandon the fourth ground of appeal and prayed the appeal to be allowed with no order as to costs.

In response, the respondent opposes the entire appeal and prayed the same to be dismissed with costs. As to the new issue of the territorial jurisdiction which has been raised during the submission in this appeal, the counsel for the respondent avers that despite of being a new issue, it is her submission that the Marriage Conciliation Board within which the matter was referred to, had jurisdiction because it is the place where parties reside after the official transfer of the respondent. The respondent claimed that in the 1st appellate court, the appellant raised the issue of the reference of the matter in the Marriage Conciliation Board, after realizing that the same was referred, he is now coming with the issue of the jurisdiction of the board. He, therefore, prays this ground to be dismissed.

On the allegation that the certificate from the Marriage Conciliation Board was not legally obtained, she claimed that the appellant was summoned to attend the board but willfully neglected and his failure to attend made reference to the board impracticable. To support her argument, the respondent refers to section 101(f) of the Law of Marriage Act, Cap. 29 R.E 2019 and the case of **Khan v Khan** (1973) LRT No. 57. She went further to submit that even if the court found that the

procedures were not followed, still the appellant was not prejudiced since he did not object to the issuance of the decree of divorce.

On the second ground, she avers that it was right for the 1st appellate court to uphold the decision of the trial court on the issue of the division of matrimonial assets because the respondent being a public servant contributed more than 50% and the parties started to live together since 2013 and they have accumulated wealth together and the appellant did not adduce any evidence to the contrary at the trial court. On the third ground, she claimed that the act of the appellant to engage in a sexual relationship with other women and particularly his engagement with the sister of the respondent made the marriage life intolerable to her. Insisting, she refers to the case of **Mariam Tumbo v Harold Tumbo** 1983 TLR 293. Finally, the respondent did not submit on the fourth ground as the same was not submitted by the appellant.

From these submissions, I will now determine this appeal in which I will have one issue to tackle which is, whether this appeal has merit. In answering this issue, I will determine the grounds of appeal as presented by the appellant and since there was the issue of jurisdiction, I will determine that issue first because if the court hears and entertains the

matter without being clothed with jurisdiction, the whole decision became a nullity.

Before I embark to determine the merit of the appeal it is important to point out that the appellant raised the issue of jurisdiction of the marriage conciliation board as well as the issue of territorial jurisdiction of the trial court in this court when arguing the appeal as the same was not the ground of appeal in this court and to the the 1st appellate court. I understand that there is a guidance of the Court of Appeal on a well-established principle of law that the second appellate court must only confine to the matters that were determined by the lower court, and the issue of jurisdiction was not raised in the two lower courts below. (See the case of **Nurdin Musa Wailu vs Republic**, Criminal Appeal No. 164 of 2004, **Thomas Peter @ Chacha Marwa vs Republic**, Criminal Appeal No. 553 of 2015 and **Florence Athanas @ Baba Ali & Another vs Republic**, Criminal Appeal No. 438 of 2016). However, as I have earlier noted, since the issue of jurisdiction goes to the root of the matter and it can be raised at any stage of the case, I will determine first and if need arises, I will proceed to determine other grounds of appeal.

In his submission, the appellant averred that the marriage conciliation board of Ilujamate and the trial tribunal had no jurisdiction to entertain the dispute because the respondent was residing at Shinyanga and the dispute was purported to have been reported at the marriage conciliation board of Mwanza and the trial court also lacks the jurisdiction in terms of the territorial jurisdiction since the respondent (now the appellant) residing at Shinyanga.

While appreciating the fact that the issue of jurisdiction is very important and a court is duty-bound to satisfy itself whether it has jurisdiction to entertain the matter or not, It is also well known that parties cannot give jurisdiction to the court that it does not possess. (See the case of **Frank Marealle v Paul Kyauka Njau** 1882 TLR 32).

Upon going through to the available records, it is undisputed that parties contracted Christian marriage at Shinyanga and part of their marriage life they were living at Shinyanga as the appellant is working for gain at Shinyanga and the respondent as a public servant, she was working at Shinyanga. In other words, their matrimonial house was at Shinyanga. Nevertheless, the available records also show that sometimes on 10th January 2020 while the parties were living under the same roof as husband and wife, the appellant was transferred to Mwanza. This was

part of the evidence of the respondent when testified at the trial court as reflected on page 4 of the trial court's proceedings.

The evidence further reveals that, the duo were living as husband and wife and sometimes in May 2020 she realized that her husband had a love affairs with her sister and sometimes in 2021, she filed a matrimonial cause at Inonelwa Primary Court. Thus, to my understanding from the day the respondent was transferred to Mwanza, the parties were husband and wife respectively, as the right to consortium did not cease as the respondent was still considering the appellant as her husband the same applies to the appellant who considered the respondent as her wife. Even the law recognizes them as spouses as there was neither separation nor divorce between the parties. In other words, the parties were considered to have resided at Shinyanga and Mwanza.

I say so because, on record, there is no evidence which shows that the respondent ran away from the matrimonial home at Shinyanga rather than she has shifted to Mwanza after official transfer being a public servant. This fact of transferring to Mwanza was not disputed or cross-examined by the appellant. This suggests that the respondent did not abandon the matrimonial home and she was still the wife of the appellant and there was no evidence on record that the parties were not enjoying the right of a consortium at Mwanza.

For that reason, I join hands with the submissions of the respondent that at the time their matrimonial dispute arose, the two were considered to be living at Ilujamate ward within Misungwi district following the official transfer of the respondent being a public servant. On the other hand of the coin, the appellant was not prejudiced in anyhow for the dispute to be referred to the marriage conciliation board of Mwanza and the matrimonial cause to be filed at Mwanza, as he consected the divorce be granted. Thus, for the aforesaid reason, it is my view that the Ilujamate marriage conciliation board and the trial court that of Inonelwa Primary Court vested with the jurisdiction to entertain the matter.

On the issue that the dispute had been referred to the marriage reconciliation board or not, when they were at the 1st appellate court the appellant alleged that the dispute was not referred to the marriage reconciliation. In its judgement, the 1st appellate court held that the matter was referred to the marriage conciliation board as there was a certificate from the board certifying that it has failed to reconcile the parties as evidenced by Form No 3.

In this court, the appellant alleged that there was no proof that he was served to appear to the marriage conciliation board and that Form No. 3 was fraudulently procured. First of all, I would like to point out the appellant failed to show how the certificate from the marriage conciliation

board was fraudulently available as there was no evidence on record to substitute the same. It is the submission of the respondent that the appellant refused to attend to the marriage conciliation board that's why the board certify that it has failed to reconcile the parties. Section 101 (c) of the Law of Marriage Act, Cap. 29 R.E 2019 gave an exception to the petitioner to file a petition for divorce without having a certificate from the board if the respondent refused to attend before the board. Therefore, it is my understanding that, as long as the appellant had left the certificate from the marriage conciliation board that is Form No. 3 in the trial court intact, the absence of the evidence from the appellant to challenge it in the trial court suggests that he admitted that what is before the court is proper.

As the records of the trial court speaks louder, the appellant did not claim that he was not served, rather than he claims to this court on his submissions that he was not served. Thus, the issue of service in the marriage conciliation was not part of the evidence in the trial court. It is the trite position of the law that submissions are not evidence. This position is well stated in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman of Bunju Village Government and 11 others,** Civil Appeal No 147 of 2006.

Thus, this court will not base its decision on submission without having any backup with the available evidence in the court record. That alone disputed the claim by the appellant's learned counsel that the appellant was not served. For that reason, I find this ground of appeal to be unfounded and it is hereby dismissed.

Turning now to the second ground of appeal which challenge the issue of equal division of the disputed house among the parties. From my perusal on the record, it is undisputed that the disputed house is the matrimonial house, what is in dispute is the extent of contribution of each party in the acquisition of the disputed matrimonial property. It is on record that parties lived together since 2013 under one roof as husband and wife and they later on contracted marriage in 2016. It is also undisputed that the respondent is a civil servant who earned monthly income and indeed she contributed to substantially improved the disputed house as it was semi-finished.

Thus, the respondent, being a public servant contributed financially in the construction of the disputed house even if she found it to be semi-finished. Also being a woman, she was performing domestic works which to my view adds credit in acquiring or substantially improving the disputed house as the appellant was comfortable in the matrimonial home due to

performance of the housewife duty by the respondent who not only take care of the issue available in their union but also take care the appellant who lives and works comfortably. In other words, the respondent made double contribution in the acquisition of the disputed house.

In the case of **Helmina Nyoni vs Yeremia Magoti,** Civil Appeal No. 61 of 2020, the Court of Appeal recognized the contribution of a wife who is a public servant, a teacher and performing domestic work as those contributions entitled her to have been awarded equal division and there is no need to adduce direct evidence to show how she had contributed in the acquisition of the disputed property.

Guided by the above decision and taking into consideration the circumstances of our case ta hand, I don't see any reason to fault the lower court's decision that the disputed matrimonial house to be divided to the parties equally in the sense that each one of them get 50%/. For that reasoning, I find this ground also lacks merit and it is hereby dismissed.

On the third ground of appeal which challenge the first appellate court to uphold that the marriage is broken down beyond repair, I think this issue should not detain me much. Section 107(2)(a) of the Law of Marriage Act, Cap 29 R.E 2019 accepts evidence of adultery as one among

the evidence which shows that the marriage is irreparably broken down. The section requires that there should be more than one act of adultery or adultery has been continued without protests. In my perusal of the available record, I found the respondent to have claimed that the appellant committed more than one act of adultery as it is reflected on pages 3 and 4 of the trial court's proceedings. The second act of adultery which made the respondent to have failed to tolerate in the marriage is also supported by the evidence of SM2 as it is reflected on pages 6 and 7 of the trial court's proceedings.

The second act of adultery resulted into the birth of the child which is one among the evidence that the appellant committed adultery. This fact was not disputed by the appellant at the trial court which implies that he had admitted the evidence of the respondent and her witnesses at the trial court. It is a trite position of the law that failure to cross-examine on the vital point, ordinarily, implies the acceptance of the truth of the witness evidence, and any alarm to the contrary is taken as an afterthought if raised thereafter. (See the case of **Martin Misara v R,** Criminal Appeal No 128 of 2016, CAT at Mbeya.)

Thus, like it was held by the trial court, it is also my considered view that the evidence of adultery has been proved towards the appellant, therefore I will not disturb the findings of the lower courts that this

marriage is broken down beyond repair and therefore this ground is dismissed too.

In view of the above, I find the appeal is devoid of merit and it is hereby dismissed in its entirety. Based on the relation of the parties, I make no order as to costs.

It is so ordered.

Right of appeal explained to the parties.

M. MNYUKWA
JUDGE
30/05/2022

Court: Judgment delivered on 30th May, 2022 in the presence of the respondent and in the absence of the appellant.

M. MNYUKWA
JUDGE
30/05/2022