IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA

PC CRIMINAL APPEAL No. 13 OF 2022

(Arising from Criminal Appeal No. 42/2021 of Muleba District Court, Originating from Criminal Case No. 184 of 2021 of Mubunda Primary Court)

KHALID SAM ..... 1st APPELLANT
NADIA ISAKA ..... 2nd APPELLANT

VERSUS

SANJO SANGOMA ..... RESPONDENT

JUDGMENT

10th November & 14th December, 2022

OTARU, J.:

This is a second Appeal by KHALID SAM and NADIA ISAKA, the Appellants herein, challenging the decision of the District Court of Muleba at Muleba in Criminal Appeal No. 42 of 2021 which upheld the decision of the Primary Court of Mabunda in Muleba in Criminal Case No. 184 of 2021 which convicted the Appellants for the offence of polyandry under Section 152(1) and (2) of the **Law of Marriage Act** [Cap.29 R.E. 2019]. They were sentenced to pay fine of T. Shs 160,000/- each.

The facts of the case are such that the 1st Appellant married the 2nd Appellant on 2nd January 2021. On 1st November 2021 the Respondent filed the criminal charges against the couple claiming that the 2nd Appellant was his wife. At the hearing, the court preceded to determine validity of the marriage between the 2nd Appellant and the Respondent. At the end of which it held that

there was a valid marriage between the two and convicted the Appellants accordingly.

The appellants filed six grounds of Appeal which were consolidated at the hearing to two grounds which read as follows;-

1. That appellate court erred in law and facts to determine the matter while the Respondent did not prove the case beyond reasonable doubt; and
2. That the courts below erred in law and in fact to determine the issue of validity of marriage in a criminal case while the matter is civil in nature.

At the hearing of the Appeal, the Appellants herein enjoyed the legal representation of Mr. Derick Zephrine, learned Advocate while the Respondent appeared in person. The matter was disposed off by way of oral submissions. Counsel for the Appellants began with the 1st ground by arguing that the Respondent did not prove the case beyond reasonable doubt because in reality there was no marriage between the 2nd Appellant and the Respondent. Counsel argued further, that according to the Respondent the couple had a customary marriage which the trial court failed to analyze and determine rightfully. Counsel relied on Section 43(5) of the **Law of Marriage Act** (supra), that bride price alone does not create a marriage, but a requirement of registering the same within 30 days. Which the counsel argues has not been done. Counsel cited the persuasive High Court decisions in **Joyce Peter V. Leonard Faustine**,

Matrimonial Appeal No. 7 of 2020 (HC Mwanza) (Tanzlii) where it was held that *'paying brideprice is a procedure and not proof of marriage'.* The court further stated that, what makes a marriage a marriage is the registration, which, has to be done within 30 days from the arrangement and that there are no exceptions for this.

To further cement his argument, Counsel for the Appellants cited the Case of **Sophia Omari Said v. Bakiri Abdillah Chikuyu** PC Civil Appeal No. 35 of 2020 (HC Mwanza) (Tanzlii) where the court maintained on the legal requirement of registration of a customary union to make it legally recognizable under Section 43(5) of the **Law of Marriage Act** (supra).

In addition to the above the appellants counsel argued that his client, the 2nd Appellant has never lived with the Respondent as husband and wife as claimed by the Respondent. Nevertheless, he stated that she could not have lived with him as in the year 2018 that the respondent claimed to have married her, she was still in primary school. This they claimed was contrary to Section 160(1) of the **Law of Marriage Act** (supra).

Counsel for the appellants concluded that there was never any marriage between the Respondent and the 2nd Appellant. There is however a marriage between the Appellants.

On the second ground, counsel for the Appellants argued that this a matrimonial status should have been determined first prior to determination of

the criminal case. That the trial court should have directed itself on the issue of validity of marriage prior to convicting the Appellants. They prayed for the appeal to be allowed. The conviction and sentence of the trial court be set aside. Quash and set aside the decision of the District Court. Acquit the Appellants and grant any other relief this court may deem fit to grant.

On the part of the Respondent, he claimed that he proved the case to the required standard that there was marriage between him and the 2nd Appellant. He challenged the assertion that the 2nd Appellant was still a student in the year 2018. He said the that it was not proved. He further challenged the evidence of marriage between the Appellants, stating that their marriage is doubtful. He finally prayed that the Appeal be dismissed. The penalties by the courts below should stand to deter anyone else with similar intentions. He also prayed for costs and any other relief as the court may see fit to grant.

In a brief rejoinder, counsel for the appellants insisted that the 2nd Appellant turned 19 in 2021 thus the time period that the Respondent claims to have married the 2nd Appellant, she was still under age. The 2nd Appellant chose to live with the 1st Appellant, thus her choice be respected.

I thank both parties for their submissions. Having heard them, I have also read both records of the courts below. I am in agreement with the Appellants' counsel that there is a legal question for determination of validity of marriage before considering the offence with which the appellants were

convicted. Thus the question is whether there was a valid marriage between the Respondent and the 2nd Appellant at the time the 1st Appellant married the 2nd Appellant.

The record indicates that on 26th April 2018 it was agreed between the Respondent's family and that of the 2nd Appellant that brideprice of 300,000/- will be paid to the 2nd Appellants family, of which, 100,000/- was paid there and then. The Respondent claims that after payment of the dowry he and the 2nd Appellant begun living like husband and wife, something which the 2nd Appellant disputes. She insisted that at that time, she was still a student attending school and had no thoughts of marriage. The marriage that she recognizes is the one entered on 2nd January 2021 between herself and the 1st Appellant, with whom she now has a child.

The Respondent claim is that payment of dowry automatically creates a customary marriage. I have considered this argument. I have also considered the Appellants' argument that in the absence of the registration under Section 43(5) of the **Law of Marriage Act**, there is no valid marriage.

I wish to quote Section 43(5) of the **Law of Marriage Act**, upon which the counsel for the Appellants referred to. It reads as follows;-

> *'when a marriage is contracted according to customary law rites and there is no registration officer present, it shall be the duty of the parties to apply for registration, within 30 days after the marriage, to*

the registrar of registration officer to whom they gave notice of intention to marry'

In the case at hand the bride price was arranged and partially paid. No other process was done. The bride refuses to have lived with the Respondent. She says that they lived in the neighborhood but not together under the same roof. There is no indication that notice of intention to marry was given to the registration officer. I asked myself, would payment of bride price create a customary marriage? I have read the cases cited by the Appellant's counsel. As correctly argued by the Appellants' counsel in the cited case of **Joyce Peter V. Leonard Faustine**, Matrimonial Appeal No. 7 of 2020 (HC Mwanza) (Tanzlii), the court held that '*paying brideprice is a procedure and not proof of marriage'.* In the case of **Sofia Omari Saidi** (supra) it is also stated at page 7 that;-

'*paying brideprice is an early procedure towards marriage, the same cannot prove that a customary marriage was conrtacted*.'

See also the case of **Msangi Hemedi Msangi v. Domina Calist**, Matrimonial Appeal No. 5 of 2020 HCT (unreported). In all these cases, the brideprice is considered as part of procedure towards a marriage but is not marriage itself. Evidently therefore, the Respondent had nothing to register at the registrar of marriages under the quoted section. One needs to have a marriage first, before the same is registered. Since the Respondent had no marriage capable of being registered. Consequently, the respondent did not

prove his case beyond reasonable doubt, because had he done so, the Appellants would not have been convicted.

I have also observed the Respondent's doubt about validity of the marriage between the Appellants. I find this surprising because he is the one who charged them with polyandry, meaning that he believed in the validity of their union. I fail to understand his intentions at the stage when the Appellants have been convicted. Having said that, I will ignore his argument on that and focus on the second ground of appeal.

The Appellants argued that determination of validity of the marriage should have been determined first in a civil matter before the same is decided in a criminal matter. I agree with their argument, in so doing innocent people would not have been wrongly convicted.

Having said that, I find the appeal to have merits and is hereby allowed. The proceedings, conviction and sentence of the Primary Court of Mubunda at Muleba in Criminal Case No. 184 of 2021 are hereby quashed and set aside. The proceedings and decision of the District Court of Muleba at Muleba are also quashed and set aside. Accordingly, Khalid Sam and Nadia Isaka, the appellants herein are acquitted from the conviction.

It is so ordered.

DATED at **BUKOBA** this 14th day of December, 2022.

M.P. Otaru
JUDGE

The right of appeal is duly explained.

M.P. Otaru
JUDGE
14/12/2022