IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL No 297 OF 2020

(Appeal from the Judgment and Decree of the District Court of Kinondoni at Kinondoni in Matrimonial Cause No. 88 of 2015)

BETWEEN

DR. HENRY MAMBO.....APPELLANT

Versus

RENALDA JOHN RAUYA.....RESPONDENT

JUDGMENT

MRUMA, J.

The Appellant herein, DR. Henry Mambo instituted this appeal vide Memorandum of Appeal dated 11th December, 2020 and presented for filing in court on 15th December, 2020 04/09/2019. It is his case that the Trial Court was wrong in making a finding that he was the husband of Renalda John Rauya, the Respondent herein and as such could have shares in supposed matrimonial assets and/or jointly acquired property.

The background of the matter is that the Respondent instituted, **Matrimonial Cause No 88** before the District court of Kinondoni seeking for divorce claiming that she was the wife of the

Appellant. It was her claim that she had three children with the Appellant by the names of Irene Henry Mambo, Edwin Henry Mambo and Ezekiel Henry Mambo. That she got married to the Appellant through customary law in September 1999 where he paid a dowry of local beer and a got to her mother Maria John Rauya PW2. That they stayed with the Appellant from the year 1999 when she was 18 years old till 2013 when she was chased away by the Appellant. She further stated that she was chased from the matrimonial home and her attempts to reconcile them were refuted by the Appellant they separate.

Based on the foregone, the Respondent sought a declaration that the marriage between her and the Appellant had irreparably broken down, division of matrimonial assets, custody and maintenance of three issues of their marriage and costs.

Briefly, the Appellant in the answer to the petition stated that the Respondent was a mere cohabitant to him because at the time she alleges to be married by him he had an existing Christian marriage with one Mrs Winfrida Jamhuri Mambo. It was his further statement that the Appellant is a thief who in 2013 stole from him USD 400, Tanzania shillings 2,600,000.00 which she transferred from the Appellant's phone to her young sister mentioned as Glory and other properties. It was

further statement of the Appellant that after living him, the Respondent cohabited with other men and was caught live committing adultery.

It was his case that the pronouncement by a court of law for a decree of divorce was not disputable but that the custody of the three issues be vested in him as the Respondent had no moral authority and character to raise the children.

He stated that the Respondent's case was calculated to abuse court processes and since she was at fault in this case she should not benefit from her own wrongs and that in fact it is the Appellant who ought to have been compensated by the Respondent.

The Trial Court allowed the Respondent's case. Dissatisfied, with the judgment, the Appellant preferred the instant appeal on the following grounds as set out in the Memorandum of Appeal.

a. That the learned Trial Magistrate erred in law and fact by ordering that there was lawful marriage between Appellant and Respondent;

b. The learned erred in law and in fact in ordering that the three issue of marriage are to maintained by the Respondent while

there was neither marriage nor issues of marriage between the Appellant and the Respondent;

c. That the learned trial magistrate erred in law and in fact by ordering the Respondent free access and visitation in respect of the three issues at school and place of living since there was neither marriage or issues of marriage between the Appellant and the Respondent;

d. That the trial magistrate erred in law and in fact by ordering that the three issues of marriage are to be sent to the Respondent during holidays since there was neither marriage nor issue of marriage between the Appellant and the Respondent;

e. That the trial magistrate erred in law and in fact by ordering the house situated at Mbezi Beach to be given to the Respondent;

f. That the trial magistrate erred in law and in fact by orderig Appellant to take costs.

The role of the first appellate court was settled in the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**. It was observed that the court is duty bound to revisit all the evidence on record, evaluate it and reach its own conclusion. The court nevertheless will not ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings.

It was the Respondent's evidence that they got married 1999 and that the Appellant paid a got and local beer as dowry to her mother. However, she didn't produce any exhibit to corroborate her claims. A close look at her testimony it appears that she was aware that the Appellant was living with another woman and therefore she was "a second wife" to him.

In cross-examination, the Respondent's evidence was that she discovered that the Appellant had another wife later on.

Maria John Rauya testified as PW2. She is the Respondent's mother. It was her testimony that the Respondent got married to the Appellant in 1999 and that the Appellant paid one goat but didn't pay dowry (bride price). In cross examination however, it came out clearly that her

evidence was there was no marriage between her daughter and the Appellant. She said that the goat paid was part of dowry.

Leons Faustine Masawe testified as PW3. He is the Respondent's maternal uncle. It was his evidence that the Appellant was unlawfully taken by the Appellant after she completed primary school in 1999. Thereafter the Appellant went to their home and informed them he had taken her as his wife. Upon cross-examination, she stated that it is not necessary for customary marriage to be perfected.

Apparently the Appellant didn't give. He seems to have protested after his advocate's attempt to have the matter adjourned sine die on ground that he was intending to appeal against the ruling of the trial court hit a snag.

Initially this appeal was assigned to my brother in bench his Lordship Kulita J. Upon his transfer to another working station it was re-assigned to me. The appeal was argued by written submissions. Mr. Erick Rweyemamu appeared for the Appellant, while Mr Daniel Ngudungi appeared for the Respondent.

Submitting in support of the appeal Mr Rweyemamu submitted that the Trial Court relied on the evidence of PW1 amd PW3 to find that there was lawful marriage between the parties despite the fact that PW1

had admitted in cross-examination that the Appellant had another marriage before marrying her. It was his contention that in terms of Section 15 (1) of the Law of Marriage Act the Appellant could not conduct another marriage while he was under a subsisting Christian marriage. He said that such a new could be invalid in terms of Section 38(1) (c) of the same Act, because the Appellant was incompetent to contract another village.

The learned counsel submitted further that the assumption that parties were married in accordance with customary law could not be valid because section 43(5) of the Law of Marriage Act requires such marriage to be registered and the alleged marriage was not registered therefore it renders any purported marriage a nullity.

Submitting in support of 2nd, 3rd and 4th, grounds of appeal the learned counsel contended that in view of the fact that there was no marriage between the parties the trial magistrate erred in law and fact to deal with issues of marriage. He said that the fact that in her evidence the Respondent had told the court that one of her child forgot her as a result of which she was calling her aunt, and her failure to tender any birth certificate in respect of the said children is a proof that

the Respondent was a stranger to the purported children of their marriage.

Regarding division of matrimonial property, it was the learned counsel's submission that during the trial the Respondent didn't produce any documentary evidence to prove that the properties listed in the petition were matrimonial properties but unexpectedly the trial magistrate ordered a house located at Mbezi Beach to be given to the Respondent while unable to make any order against other listed properties an act which shows that there was ill motive between the trial magistrate and the Respondent. The learned counsel referred this court to its own decision in the case of **Deodatus Rutagwerela V.Deograsia Ramadhan Mtego Matrimonial Appeal No 5 of 2020 HC (Iringa)** unreported, and **section 110 (1) of the Evidence Act** to the effect that he who alleges must prove.

On the issue of costs the learned counsel for the Appellant submitted that this being a matrimonial cause the trial magistrate was wrong to condemn the Appellant to pay costs. He cited the decision of this court in the case **Kibibi Yusuf Makame V. Mkerenge Horera Rashidi,** where the court (Kakolaki J), was of the view that in matrimonial causes court should not order costs.

In his submissions in reply, Mr Ngudungi for the Respondent submitted that since the Appellant had admitted existence of marriage in his answer to the petition and particularly so in paragraph 4(ix) of the said answer to the petition, he cannot be heard disputing it at the appeal level. The learned counsel cited the decision of the Court of Appeal in the case of **Jackson Sifael Mtares and 3 Others Vs DPP** where the Court of Appeal stated that parties are bound by their pleadings and no party should be allowed to depart from his pleadings. It was his case that dowry was paid to buttress the existence of a customary marriage and that the Appellant didn't dispute that in his pleadings which he filed in court and no wonder he didn't give any evidence to challenge the Respondent's assertions during the trial.

Regarding issues of marriage it is the learned counsel's submission that the Respondent asserted in her pleadings that they were blessed with three issues and the Appellant in his reply he noted the existence of such fact. The learned counsel referred this court to the decision of the Court of Appeal in the case of Hellence Foundation of Tanzania Ltd T/a St Constantine's International School Vs Commissioner General Tanzania Revenue Authority Civil Appeal No 225 of 2020 where it was held that:-

"We think that by noting the contents of the aforesaid paragraph the Respondent did not dispute the Appellant's assertion"

Let me start by saying that marriage must be distinguished from sexual relationship that results into siring of children. Whereas such relationship raises fundamental legal issues, customary marriage like any other legal marriage (i.e Islamic and/or Christian marriages) transcends such boundaries. Considering the facts as pleaded and the evidence as tendered in this matter during the trial, a return in a finding that this is not one of the safe instances where a court can find in favour of existence of customary marriage. A customary marriage is a marriage which takes place in terms of the customs of the community. There exist some requirements that must be complied with to conclude a valid customary marriage. The burden to prove that a customary marriage do exists like any other burden of proof in civil litigations lies with he who alleges (See also Section 110 (1) of the Evidence Act). In this case a part form the evidence of PW2 which was to the effect that she was given a goat as part of their customs but when she was required by the court she admitted that she was not familiar with Chaga customary marriage. I have no doubt that for a chaga customary marriage to be

celebrated some customs and traditions of that tribe had to be performed including payment and acceptance of dowry which must happen at least in presence of clan members. Since this didn't happen and PW3 told the court that she was given a goat as part of the payables, I therefore hold that there was no customary marriage between the Appellant and the Respondent.

However in view of the undisputed evidence of the Respondent and her witnesses Maria John Rauya her mother who testified as PW2, and Leons Faustine Masawe (her maternal uncle) who testified as PW3 I am prepared to hold that there was marriage by operation of the doctrine of presumption of marriage. Section 160 of the Law of Marriage Act provides that it is proved that a couple has cohabited as husband and wife for at least two years there shall be a rebuttable presumption that the two are married. The Respondent told the court that she met the Appellant and was taken by him for the first time in 1999. She lived with him up to 2013 when he started to mistreat her. Efforts to reconcile them failed and she left the Appellant in 2013 when he threatened to shoot her with a gun.

On her part PW2 told the trial court that the Appellant took the Respondent from her parents without their knowledge and consent in

1999. After one year he went with the Respondent's home and introduced himself as her husband. The Respondent had a child. The Appellant was asked to send his parents and a matchmaker (i.e. mshenga). There was also the testimony of Leons Faustine Masawe (PW3) which was to the effect that the Appellant took the respondent in 1999 and lived with her as his wife for 13 years till 2013 and that they were blessed with five issues.

In view of the evidence adduced by PW1, PW2 and PW3 I, find (like the trial court) that parties in this case lived as husband wife for a period of 13 years and had three issues, and therefore the doctrine of presumption of marriage applies. In law a woman is presumed to be married if she lives with a man in a manner and style the society around them would believe that they are husband and wife for a period of more than two years. This type of marriage however is devoid of legal right to petition for divorce or separation. Therefore parties under presumption of marriage cannot petition for decree of divorce or separation in court because their union is merely presumed, accordingly it was wrong for the trial court to make a declaration that the marriage has broken beyond repair and this brings me to the second issue of this appeal, that

is whether the parties had acquired any property worth the title of being matrimonial home or matrimonial property.

Under sub section (2) of Section 160 of the Law of Marriage Act the woman in a presumption of marriage union is entitled to apply to the court with competent jurisdiction for maintenance for herself and the children of the union, for division of the properties acquired by their joint efforts during their cohabitation and for such other reliefs including custody of the children etc.

Counsel for the Appellant had contended that since there was no marriage, there could be no matrimonial property therefore the trial court was wrong to order the house at Mbezi to be given to the Respondent on pretext that it was a matrimonial property. Whereas Section 2(1) of the Law of Marriage Act defines matrimonial home as:-

> ".....the building or part of the building in which the wife and husband ordinarily reside together"

The term matrimonial property is not defined in the Act, but in any event it entails property that is acquired during the marriage and that is subject to distribution or division at the time of marital dissolution. In the case at hand I have found as a matter of fact that

there was no marriage between the parties but a presumption of marriage, thus the matrimonial property in such circumstances it will include all property acquired by the parties during their cohabitation. It should be so because there can be no doubt that during cohabitation of the parties they must have acquired either jointly or separately some properties which on dissolution of their marital partnership or cohabitation must be divided between the couple. On how the same should be divided, I think the same formula which is used in dividing matrimonial assets or property between the married couple should be used because though not married, these are persons who have been together for many years. For the period they lived together, they undoubtedly did various works for their joint development. I have no doubt that in the beginning of the joint lives no one doubted that one day they will separate. In that environment it is obvious that everything that they did, they believed to be theirs. They lived as life partners so for justice to be done, it will be right to share the proceeds of their joint efforts.

The trial court after reviewing the uncontested evidence adduced for the Respondent held that the Appellant was entitled to a share in the properties which she had listed as "matrimonial properties".

Consequently and based on the principle laid down in the case of **Bihawa Mohammed Versus Ally Seif (1983) T.L.R. 32** ordered the Respondent to be given a house at Mbezi Beach. The Appellant is aggrieved with this decision. He is complaining that the case of Bihawa Mohammed (supra) is not applicable here because there was no marriage and hence no matrimonial property. I agree with this contention. However absence of marriage doesn't mean also the parties didn't live together. As I have demonstrated in this judgment living together under the umbrella of a marriage being it Civil, Christian Islamic or customary does not mean there is no other relationship which can entitle the participants rights upon its dissolution. Among them is the presumption of marriage and other formal and informal partnerships.

The most important fact to be proved is the evidence of existence of such association or cohabitation. In this case that had been proved through the uncontested testimonies of PW1, PW2 and PW3. The next biggest contention in this case revolves around contribution toward acquisition of the property in dispute. In view of the principle laid down in Bihawa Mohammed's case (supra) contributions need not necessarily to be physical or financially. Domestic services, comfort and love that

make another's mind to be calm are also considered to be substantial contribution towards acquisition of a property as to make it jointly acquired. In the case at hand there is evidence to the effect that from 1999 to 2013 parties were living happily. This means for all those years they were creating wealth for their lives. Nothing much is known about how much wealth was created during that period of time but the Respondent didn't challenge the share she was given by the trial court.

On the issues of their association what the Appellant is disputing if their title only. He didn't seriously dispute their existence. His dispute is that since there is no marriage then there can be no issues of marriage. I would agree with the Appellant's contention. However, whichever the title they may have, these are children begot by the parties. Under the Law of Marriage Act and the Law of Child Act they have the right to be maintained and to be under the custody of their parents. In determining all those rights the underlying principle is the best interest of the children. The evidence adduced indicated that the three issues have been in the custody of their father the Appellant since 2013. There is no complain about that I think it I in their best interest and there is no reason to disturb them.

Finally the order for costs, I agree with the Appellant's counsel submissions that there should be no costs in such cases not because it was a matrimonial cause because it wasn't but because it a family related matter. Awarding costs in such matters will simply expand scope of hostilities between the family members instead of reducing them. I thus allow this appeal on that point only and order that each party should bear own costs. Otherwise and in upshot the appeal lacks merit and is hereby dismissed. It is ordered.

A.R. Mruma,

Judge

5. 10. 2022

Dated at Dar Es Salaam this 5th Day of October 2022.