IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAM

PC CIVIL APPEAL NO 21 OF 2021

(Arising From Civil Appeal No. 42 of 2020 at Kinondoni District Court)

AISHA NYAMBWA.....APPELLANT

VERSUS

FREDRICK MALIMA.....RESPONDENT

Date of Last Order: 4/11/2021

Date of Judgment: 4/01/2022

JUDGMENT

N.R. MWASEBA, J.

The appellant herein started the matrimonial proceedings at Kawe Primary Court seeking for divorce, distribution of matrimonial assets and maintenance of children. The decision did not please her then she unsuccessfully appealed to the district court where the verdict was against her favour. So, this is her second appeal with the following grounds of appeal.

1. *That the trial court erred in law and facts by certainly not declaring that the parties herein were living under presumption of marriage despite the fact that the parties cohabited under one roof since September, 2007.*

2. *That, the Honourable Magistrate erred in law and fact when he did not consider the strong evidence adduced by the appellant and her witnesses during the trial.*

3. *That, the Honourable Magistrate erred in law and fact for ordering that the aforesaid matrimonial assets are not acquired jointly during the subsistence of their cohabitation, and hence failed to order equal division.*

Before this court the appellant appeared in person but was receiving legal assistance from Women's Legal Aid Centre (WLAC) who wrote to this court to allow the appellant to file her appeal and submissions under *forma pauperis.* The respondent enjoyed the service of Mr Barnaba Lugua learned advocate. The appeal was disposed of by way of written submission. And both parties complied with the scheduling order to file their submissions within the prescribed time.

The appellant submitted on the first ground that the appellant and the respondent were living as husband and wife since September, 2007 up to April, 2019. She says at the trial court she brought two witnesses who testified to the effect that they know the appellant and the respondent to have been living as husband and wife. The witnesses testified that there is existence of presumption of marriage but the appellate court failed to declare the presumption of marriage between the parties. She referred this court to **Section 160 of the Law of Marriage Act**, CAP 29 R.E 2019 and reiterated that due to the sworn testimony of her two witnesses and herself the appellant and the respondent lived together as husband and wife since 2007 to 2019 which shows there was a presumption of marriage.

The Appellant further submitted on the second and third grounds that when she started to live with the respondent, they had nothing but one mattress and four stools. Later, after hustles the respondent started his own company, bought a plot and built two houses. He also bought three vehicles and plots at Kibaha and Tegeta. Thereafter, he married another wife and started living with her in the said house.

She submitted that the trial magistrate did not consider the evidence adduced by the appellant while she contributed financially to the

acquisition of the matrimonial assets during their marriage life and she proved her allegation on the balance of probabilities. The appellant referred this court to **Section 114 (2) (b) of Law of Marriage Act** (Supra) which recognises the spouse's contributions in terms of money, property or work. She avers that the appellant's contribution towards the acquisition of matrimonial assets was monetary, and in terms of household and domestic works. That, additionally she is the one who was providing transportation costs to the respondent during the movement when he was looking for job. She cited the case of **Bi Hawa Mohamed vs Ally Sefu** (1983) TLR to insist that due to the contribution of the appellant to the acquisition of the matrimonial assets she deserved equal distribution of the matrimonial house of which the appellate court did not consider.

Replying to the submission in chief the respondent gave the fact of the case briefly that the appellant and the respondent fell in love and developed sexual relationship. That they lived under concubinage relationship. He submitted on the first ground that the facts of this case establish that the presumption of marriage was rebutted by the evidence adduced that the parties herein were not married.

He further avers that it is not in dispute that the parties developed love affairs and in fact at one point they cohabited under the same roof and the appellant became pregnant and delivered an issue but subsequently they parted ways and the respondent went ahead to marry another woman according to Christian rituals. It should be understood that the rights under the presumption of marriage are enjoyed where the said presumption is proved but where evidence has proved that there was no legal marriage or any ceremony of marriage recognised under any law or custom then the said presumption is rebutted and the parties cannot be bound by any obligation as married persons. Hence, ground number one is redundant.

Regarding the second and third grounds of appeal he submitted that the evidence has proved that the appellant and the respondent were never married. Therefore, the use of the term marriage to refer to the relationship between the parties is a misnomer. He submitted that the property and the company were acquired when the respondent was staying with his legal wife. So, the mere fact that the respondent extended a hand of grace and paid rent for the child and her mother should not entice the concubine to make her reap the fruits of the property acquired by the respondent and his legal wife.

He referred the court to **Section 114 of the Law of Marriage Act** (Supra) which gives the court the power to order division of matrimonial assets when granting a decree of separation or divorce. He asserts that, so far there was no marriage between the parties, therefore this court and the court below have no power to order the division between the parties of any assets. This is because the property was acquired when the parties were not cohabiting under the same roof. He prays that the appeal be dismissed with costs.

In her rejoinder, the appellant stated that the respondent's submission shows clearly that the appellant and the respondent lived under one roof for more than three years. This shows that there was a presumption of marriage as shown under Section 160 of the Law of Marriage Act. She says the respondent misled the court that he married in 2011 while he knows that he contracted a Christian marriage in 2019 during Easter holidays and then he returned home to live with the appellant. When the appellant asked about such a marriage, he chased her out of the matrimonial home and the matrimonial problem cropped in.

I have had ample time to go through the submissions from both sides and the grounds of appeal, and then I consider the following issues are worth to be determined by this court:

1. Whether the two lower courts determined the status of the relationship between the appellant and the respondent if the presumption was rebutted or not.

2. Whether there were any matrimonial assets acquired together and whether the custody and maintenance order were determined with regard to the best interest of the child.

Starting with the first issue, the first appellate court did not determine this issue due to the fact that the trial court did not determine the same. He cited the case of **Richard Majenga V Spesioza Sylvester**, Civil Appeal No. 208/2018, a Court of Appeal decision at Tabora where the court held that since the relationship between the parties were based under presumption of marriage there was a need for a trial court to satisfy itself whether the said presumption was rebutted or not.

I concur with this finding due to the fact that I have gone through the judgment of the trial court and found that when dealing with the issue, the trial court recorded:

"Je wadaawa walikuwa na ndoa itambulikayo kwa mujibu wa sheria?"

He concluded at the third paragraph of page 10 by granting divorce just because there was evidence to prove that they had been living together and sometimes, he had been renting a house for the appellant. On the second point at page 11 of the typed judgment the trial magistrate stated that they did not get enough evidence to prove that the parties herein had been living as husband and wife. From that evidence I concur with the appellate magistrate that there was no valid marriage to be annulled. This is because it is not disputed by both parties that they never contracted any valid marriage. And also, the court did not satisfy itself whether there was presumption of marriage or not and whether it was rebutted or not. After determining this, the court had to go for other reliefs. This is very clear as stated under **Section 160 (1) (2) of the Law of Marriage Act (Supra).** The trial court did not determine if the relationship of the parties falls under presumption of marriage and thus the appellate court hesitated to do the same. Therefore, the first issue is answered in negative.

Coming to the second issue which was determined by the two lower courts, I wish to get directives from **Section 160 (1) and (2) of the Law of Marriage Act** which states that:

> *(1) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*

> *(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefore either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order*

for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section.

The appellate magistrate discussed very well that it was not proper to discuss these issues without deciding whether the said presumption was rebutted or not. So, he decided not to discuss on the issue of distribution of the matrimonial assets. However, he proceeded to grant maintenance order by increasing the amount from Tsh 100,000/= which was ordered by the trial court to 150,000/= per month. It is my considered view that this relief as well cannot be determined before deciding whether the presumption was rebutted or not.

The appellate court nullified the orders made by the trial court save for the custody and the maintenance order. Looking at **Section 160 (2) of the Law of Marriage Act**, the appellate magistrate was supposed to nullify all orders as the trial magistrate had no mandate to go for other remedies without deciding whether the presumption was rebutted or

not. (**See Gabriel John Musa V. Voster Kimati, Civil Appeal No. 344 of 2019. Court of Appeal decision sitting at Dodoma**). That being the legal position, I am compelled to nullify the orders of the two lower courts and remit the file for determination as to whether the presumption was rebutted or not.

Nevertheless, before remitting the matter I wish to revisit a little bit the evidence to see if it will be in the interest of justice or it will be increasing backlog and keep our customers be merely moving around the court premises for long time in an anticipation of uncertain verdict-whether in or against their favour. This moves me to have a look at the evidences which were adduced in court if it was satisfactory to determine this matter.

Section 160 (1) of the Law of Marriage Act, (Supra) stipulates as hereunder:

> *"Where it is proved that a man and woman* ***have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife,*** *there shall be a rebuttable presumption that they were duly married." (Emphasis added)*

The issue of presumption of marriage was discussed by the trial court though in a contradictory manner. But looking at the emphasis made on the above provision, the parties' relationship did not acquire the status of being a husband and wife. SM2 and SM3 stated that the appellant and the respondent were living as husband and wife. However, the parents particularly SU2 told the court that the parties never lived as husband and wife but they had one child due to the concubinage relationship. There was no proof to make the court decide that there was a presumption of marriage. Going through the evidence adduced in court, I hesitate to believe that there was a presumption of marriage between the parties. The respondent did not dispute that he had been cohabiting with the appellant since 2007 and that out of their relationship they were blessed with one issue. But he denies the claim that they had been living as a husband and wife under the same roof. He says, he had been renting rooms at several places for the appellant for the best interest of their child.

The record shows that the respondent contracted a Christian marriage in 2013. This fact is not disputed by the appellant who says the dispute arose after the respondent's marriage to another wife. However, the record shows that there is no any kind of marriage cerebrated by the

parties in this case. That is the reason the appellant prays for the mercy of this court to declare that there was a presumption of marriage between them. Both two lower courts found that there was no enough evidence to justify that there was a presumption of marriage between the parties. That is the position.

And in the evidence, there is a wanting on the proof of matrimonial assets which are alleged to be acquired together; her evidence in court is dull as to when those properties were acquired and how much was paid form them. She just told the court that the respondent showed her a paper indicating that there was a plot he bought somewhere. Such evidence is nothing but hearsay evidence.

Again, on the issue of maintenance of children there is no evidence to state the real income of both parties to enable the court to ascertain the amount to be paid as maintenance as specified under **Section 44 of the LCA**. Otherwise, the orders may end up unexecuted or bar some rights of the child which could have been executed by their parents.

As it had been opined by the appellate court, I hereby advice the appellant to institute a civil suit if she thinks she is having any proof on the acquisition of the properties. Further, on the issue of custody of the child and maintenance the parties can go for determination at the

Juvenile Court which has the jurisdiction to determine civil applications related to children as specified under **Section 98 (1) of the Law of the Child Act, CAP. 13 R.E 2019.**

Having so said this appeal has no merit. I nullify the orders of the appellate court with regard to the maintenance order. The parties are at liberty to seek their remedies at a proper forum.

It is so ordered.

DATED at **DAR ES SALAAM** this 5th day of January, 2022.

N.R. MWASEBA

JUDGE

5/01/2022