IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB-REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 2 OF 2022

(Arising from Matrimonial Appeal No. 41 of 2021 of Kinondoni District Court before Hon. L. Silayo – RM, Original Matrimonial Cause No. 109 of 2021 of the Primary Court of Kinondoni District at Kimara before Hon. H.J. Mmbaga – RM)

JUMA FRANCIS MAJANI.....APPELLANT

VERSUS

MILLIAN GEORGE LEMAH..... RESPONDENT

JUDGMENT

17/5/2022 & 30/5/2022.

I.C. MUGETA, J

This is a second appeal. It is against the decision of the District Court as first appellate court. It was argued by way of written submissions. The appellant is represented by Benjamin Mageni, learned advocate while the Respondent is served by Wabeya Kung'e, learned counsel. Both parties complied with the schedule to file written submissions and the judgment was scheduled for delivery. When I started to compose the judgement, I noticed that the trial magistrate recorded the evidence in a reported speech. Few examples can illustrate what I am trying to say. The evidence of the respondent was partly recorded thus:

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'...Ameapa na kusema kuwa anamfahamu mdaiwa....mdai alieleza kuwa kuanzia kubeba mimba....wakati amepeleka shauri lake katika baraza la usuluhishi....'

After being sworn, part of the evidence of the appellant was recorded as follows:

'Ameapa na kusema kwamba anamfahamu mdai kuwa ni mzazi mwenzake; kuhusu talaka mdaiwa alieleza kuwa...'

In the case of **Jayant Kumar Chandubhai Patel & 3 others V. A.G & 2 others,** Civil Application No. 160 of 2016, Court of Appeal – Dar es Salaam (unreported) it was held that when in the course of composing a judgment the court uncovers an issue on which the decision can be based, it ought to re-open the proceedings to afford the parties a hearing over that matter.

Upon noticing the irregularity, I summoned the counsel for the parties to address me on whether what is on record is evidence. Therefore, the judgment date was used to hear submissions by the learned counsel. In their submissions, both counsel admitted that the evidence on record which is in the reported speech is not evidence. They cited no law or case law to support their conclusion. Both of them said that due to short notice given to them to appear and argue the case, they were unable to refer to any law or case law. Indeed, the learned counsel had been given a one day notice and I

appreciate that they attended despite the short notice. Consequently, they left the issue to the court to consider and decide it appropriately.

I agree with the learned counsel that evidence which is recorded in a reported speech is not evidence because it is not a statement of a witness but a report of the magistrate/judge as to what he heard the witness say. Essentially, the evidence so recorded turns out to be hearsay. According to section 62 (1) of the Evidence Act [Cap. 6 R.E 2019] and regulation 10 (1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulation, GNs. Nos 22 of 1964 and 66 of 1972 (the Regulation) oral evidence must be direct. Evidence is direct when it is recorded in the first person being singular or plural. In my view, the said section and regulation are the basis of the legal requirement that the evidence ought to be recorded in the direct speech in the District Courts, Resident Magistrates' Courts and the High Court on one hand and the Primary Courts on the other hand, respectively.

The foregoing notwithstanding, there is also a plethora of authorities of the Court of Appeal which commands that evidence ought to be in direct speech. The cases which I have landed my hand on dealt with the interpretation of section 210 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) which is in pari materia with Order XVIII rule 5 of the Civil Procedure Code [Cap 33 R.E 2019] (the CPC). In the case of **Juma Bakari Vs**

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Republic, Criminal Appeal No. 362 "B" of 2009, Court of Appeal – Tabora (unreported) it was held:

> *'It is clear from the wording of the provision of sub section (a) and (b) of section 210 (1) of Cap. 20 that in recording the evidence of a witness, the trial magistrate must record it in the first person. In other words, he/she must record and not report what the witness says'.*

The same holding is found in the case of **Malando s/o Charles @ Madwilu V Republic,** Criminal Appeal No. 510 of 2016, Court of Appeal – Tabora (unreported). It is a doctrine in statutory interpretation that similar provisions in different statutes would be construed together. The construction of section 210 (1) (a) and (b) of the CPA by the Court of Appeal in the cited cases, therefore, applies to order XVIII rule 5 of the CPC which governs the recording of evidence in Civil Cases.

I understand neither the CPA nor the CPC apply in Primary Courts where this case originates. I have not found similar provisions in the Regulations. However, under regulations 10 (1) of the regulations, as I have already held, recording of evidence in Primary Courts ought to be in direct speech too. Therefore, the learned magistrate ought to have recorded the parties' evidence in direct speech not indirect speech.

Having finished with the issue raised to the learned advocates, let me comment on two more things. Regulation 46 of the Regulation provides:

> *'The substance of such evidence shall be recorded in Kiswahili by the magistrate, and after each witness has given evidence, the magistrate shall read over his evidence to him and shall record any amendments or corrections. The magistrate shall certify at the foot of such evidence, that he has complied with this requirement'.*

The trial magistrate never certified compliance with that regulation. Secondly, the trial magistrate marked the exhibits for the plaintiff as exhibit MGL1 - MGL5 and that of the defendant as JFM1 – JFM 2. The practice in all trial courts is that exhibits are marked as P1, etc for the plaintiff and D1, etc for the defendant. The more we record evidence consistent with the established practices the better. There is no need to reinvent the wheel.

In view of the foregoing, there is no evidence for the court to act upon. The proceedings of the trial court are, therefore, vitiated and cannot support an appeal either in the district court or this court. I set them aside on account of the evidence being recorded in the indirect speech. The consequent judgments of the primary and district courts are quashed. I order an expeditious retrial before another magistrate of competent jurisdiction. I give no orders for costs as no party can be blamed for the reasons leading to this

decision. Since this appeal has not been determined on merits, orders of this court are based on the revisional powers of this court under section 44 (1) of the Magistrates' Courts Act [Cap. 11 R.E 2019]. This appeal is struck off this court's register for being incompetent.

I.C. MUGETA

JUDGE

30/05/2022

Court: - Judgment delivered in chambers in the presence of Benjamini William Mageni Advocate for the appellant and Wabeya Kung'e advocate for the respondent and in the absence of both parties.

Sgd: I.C. MUGETA

JUDGE

30/05/2022