THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MATRIMONIAL APPEAL NO. 21 OF 2022

(From Matrimonial Appeal No. 12 of 2022 in District Court of Momba at Chapwa. Originating from Matrimonial Cause No. 88 of 2022 in Tunduma Primary Court)

MARY ELENESTO MTEWELE…….…… APPELLANT

VERSUS

MESCO YOHAS MSIGWA……..……..…… RESPONDENT

JUDGEMENT

Date of Last Order: 27.04.2023
Date of Judgment: 16.10.2023

MONGELLA, J.

The appellant herein filed Matrimonial Cause No. 88 of 2022 before the Primary Court of Tunduma within Momba District (the trial court) seeking for divorce against the respondent, custody of their three issues and division of matrimonial properties.

After their case was heard, the trial court found that their marriage, which was under presumption, was broken beyond repair. It thus never issued a decree of divorce, but ordered for division of properties jointly acquired during cohabitation. It also awarded custody of the first two issues to the respondent and the last issue to

the appellant. Aggrieved, the appellant preferred an appeal before the District Court of Momba at Chapwa (the first appellate court, hereinafter) vide Matrimonial Appeal No. 12 of 2022 on the following grounds:

1. *Honourable learned primary court magistrate erred in law and facts by providing the order for the division of properties without clarifying what kind of properties and the actual value of each.*

2. *Honourable learned primary court erred in law and facts to consider that the vehicle make Noah was sold while she knew that it was not.*

3. *Honourable learned primary court magistrate erred in law and facts for denying her a priority to explain all properties with inclusion of the forest of trees in Makete.*

4. *Honourable learned trial primary court erred in law and facts for giving the respondent all three children while the two were under seven years.*

The first appellate court found the appeal without merit and dismissed the same without costs. Aggrieved with the judgment of the 1st appellate court, the appellant has preferred this second appeal on the following grounds:

1. *That the trial court erred in law and facts to determine the matter without regarding the appeal filed to the district court.* (sic)

2. *That, the trial court erred in law and facts to determine the matter by announcing that the car, make Noah was sold while it was not.*

3. *That, the trial court erred in law and facts to determine the matter without determining the 10 hectors farm located at Makete.*

4. *That, the trial court erred in law and facts to declare the judgment in favour of the respondent without regarding evidence adduced by the appellant.*

The appeal was resolved by written submissions whereby the appellant was unrepresented while the respondent enjoyed the services of Mr. James Bedon Kyando, learned advocate.

On the 1st ground, the appellant submitted that the first appellate court did not re-evaluate the evidence adduced in the trail court thus, it failed to discharge its duty. She cited the case of **Justus Ntibandetse vs. CRDB Bank PLC** Misc. Civil Application No. 41 of 2021 (unreported) to support her argument.

On the 2nd and 3rd grounds, the appellant averred that the trial court did not determine all issues before it. She claimed that the 1st appellate court did not determine the issue of division of matrimonial assets. She faulted the court for ruling that the vehicle was sold while in fact the same is still in the respondent's possession. She again faulted the trial court for failure to address the issue of 10 hectors farm located at Makiete and divide the same. She further complained that the two issues were raised, but the parties were not given the opportunity to address the court. In support of her averments, she referred the case of **Said Mohamed Said vs. Muhusin Amiri and Muharami Juma** Civil Appeal No. 110 of 2020 (unreported).

Arguing on the 4th ground, the appellant contended that courts must put into regard the evidence of both parties so as to arrive at a fair decision. In that respect, she challenged the trial court below for ignoring her evidence and only considering the respondent's evidence thereby reaching into an unfair decision. She concluded by praying for the appeal to be allowed with costs.

The respondent opposed the appeal. Replying to the first ground, Mr. Kyando averred that this court being the second appellate court has no power to reassess and re-evaluate the evidence of the trial court unless where there are special circumstances whereby the same should also be exercised judiciously. He had the stance that in this appeal there are no circumstances calling for this court to re- evaluate the evidence of the trial court.

In alternative, he averred that the ground was a new ground and the same cannot be raised before this court as this is the second appellate court. He supported his argument with the case of **Galus Kitaya vs. Republic**, Criminal Appeal No, 196 of 2015 (unreported).

On the 2nd and 3rd grounds of appeal, Mr. Kyando replied that both of them are baseless and devoid of merit. He argued that, as provided under section 110 (1) of the Evidence Act [Cap 6 R.E 2019] he who alleges must prove. He challenged the appellant for failure to prove the existence of the alleged car as no motor vehicle registration card or any other relevant evidence was tendered before the court. He added that the appellant failed to prove the existence of the farm and she is also uncertain as to the size of the alleged farm as she stated the same to be 10 acres, and in this appeal, she stated the same to be 10 hectors.

He distinguished the case of **Said Mohamed Said** (supra) cited by the appellant arguing that the same is inapplicable since the trial court did determine the issue of matrimonial assets as evident on page 5, 6, and 7 of the trial court's judgment. He added that, the appellant did not cross examine the respondent on the two assets and she is therefore precluded from challenging the same in this appeal.

As to the fourth ground, Mr. Kyando contended that the trial court did consider the appellant's evidence whereby it employed a similar line of reasoning as on the issue of the motor vehicle make

Noah and the farm as on the issue of the shop whereby it held that the respondent had failed to prove that he acquired the said shop prior to marrying the appellant. Mr. Kyando finally prayed that this court dismisses the appeal for being devoid of merits.

Rejoining on the 1st ground, the appellant averred that she only challenged the appellate court's failure to re-evaluate the evidence of the trial court. That, the fist appellate court is endowed with the power to evaluate the trial court evidence and enter judgment from the re-evaluation, but that was not done by the first appellate court. She reiterated her stance that the court is bound to consider the evidence of both parties and failure to do so rendered the decision unjust and unfair.

On the 2nd and 3rd grounds, she averred that the trial court and the first appellate court erred in not showing what was to be divided since they did not list the items to be divided. The appellant did not rejoin on the 4th ground, but maintained her prayer for the appeal to be allowed with costs.

I have considered the submissions of both parties as well as gone through the records of the trial court and the first appellate court. I will resolve the 1st ground, then jointly address 2nd and 3rd grounds, then finalize with the 4th ground.

Prior to resolving the 1st ground of appeal, I find it necessary to address the phrasing under this ground. The ground states:

> "That the trial court erred in law and facts to determine the matter without regarding the appeal filed to the district court."

The appellant maintained the same phrasing in her submissions which caused me to question as to whether this was a clerical error on her part or rather intentional. In that respect, I am of the view that the appellant did not properly present her ground such that it rather caused a paradoxical presentation of her submissions. However, reading her submission between the lines, I observe that she is challenging the first appellate court's failure to re-evaluate the evidence on record. As such, for interest of justice, I shall resolve this ground in the light of this observation.

While the appellant complained that the fist appellate court failed to re-evaluate the evidence of the trial court, Mr. Kyando maintained that this was a new ground and the same should not be entertained. I understand that parties are not allowed to raise new grounds on the second appeal that were not raised in the first appeal. This is however limited to issues of facts only. In the case of **Filbert Gadson @ Pasco vs Republic** (Criminal Appeal 267 of 2019) [2021] TZCA 360 TANZLII the Court expounded on this question whereby it held:

> "However, as an exception to the stated general rule, new grounds of appeal which raise matters of law are bound to be determined."

The question of re-evaluation of evidence by the first appellate court is not only an issue of law but also advanced to question the analysis of the evidence on record by the first appellate court. In that respect, it cannot be termed as a new ground as it was not a ground in the trial court or first appellate court.

It is settled law that the first appellate court, has the duty to re-evaluate the evidence of the trial court and make its finding where necessary. In **Siza Patrice vs. Republic**, Criminal Appeal No. 19 of 2010 (CAT, unreported) the Court of Appeal held:

> 'We understand that it is settled law that a first appeal is in the form of a rehearing. **The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary**."

The apex Court also maintained the same position in **Registered Trustees of Joy in The Harvest vs. Hamza K. Sungura** (Civil Appeal 149 of 2017) [2021] TZCA 139 TANZLII where it stated:

> "On our part, we are in agreement with both learned advocates that it is part of our jurisprudence **that a first appellate court is entitled to re evaluate the entire evidence**

adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

I have observed the evidence of the first appellate court and I am of the considered view that the appellate Magistrate did re-evaluate the evidence of the trial court and thereafter explicitly made his orders. This is evident on page 3, 4, 5 and 6 of the first appellate court's judgment. Besides, as I shall demonstrate in due course, the trial court very well evaluated the evidence on record and the first appellate court was at one with such evaluation. This ground therefore epically fails.

On the 2nd and 3rd grounds, the appellant faults the decision of the trial court averring that the same failed to note that the car was not sold and that the farm at Makete existed. On the other hand, the respondent averred that the trial court appropriately made its decision considering that no evidence was adduced to prove the existence of the two assets. Observing the record of the trial court, I align with the reasoning accorded by both lower courts. The appellant merely asserted that they owned a motor vehicle, make Noah which they acquired together. Further, that they purchased a 10-acre/hector farm located at Makete.

With regard to the motor vehicle, the appellant did not produce any evidence to support her averment, she had no motor vehicle registration card nor did she call any further witness that could attest as to the existence of the said vehicle at the time. Her witness,

SM2 testified reiterated what the appellant stated, that is, the parties owned the motor vehicle. Further, when the respondent testified on the vehicle being sold and that she had knowledge of the same, as they agreed to do so, she did not cross examine the respondent on that fact.

As to the farm allegedly located at Makete, she only testified that they owned a tree farm at at Ukinga. However, she did not specify its measurement or the price they purchased the same and her contribution to the acquisition or development of the farm. In fact, the statement that the farm was located at Makete was given by SM2, her brother, who also told the court that the same was 10 acres. On his part, the respondent denied the existence of the alleged farm and the appellant never cross examined him on the same.

It is trite law that failure to cross examine a witness translates to admission of his statement as true. See, **Shomari Mohamed Mkwama vs. Republic** (Criminal Appeal 606 of 2021) [2022] TZCA 644; **Issa Hassani Uki vs. Republi**c (Criminal Appeal 129 of 2017) [2018] TZCA 361 and; **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 all reported at TANZLII. In Sh**omari Mohamed Mkwama vs. Republic** (supra) the Court of Appeal stated:

> "It is now a settled position of the law that failure to cross examine the adverse party's witness on a particular aspect, the party who

> ought to cross examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross examined."

Apart from the failure to cross examine connoting that the party with duty to cross examine accepting a fact as true, the party is also estopped from asking the court to disbelieve the witness. This was explained in **Nyerere Nyague vs. Republic** (supra) whereby the Court of Appeal reasoned that:

> "As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

The first appellate court noted that the evidence adduced in relation to the two properties did not prove the existence of the two properties hence, maintained that the trial court's assessment on the issue was correct. There were no issues raised by both courts nor did the trial court fail to address issues before it. I thus find the 2nd and 3rd grounds without merit.

On the 4th ground, the appellant averred that the trial court did not consider her evidence. It however, appears to me that the trial court properly assessed the evidence before it. The trial court did not rely on the respondent's evidence alone to reach its decision. As evidently seen on the trial court decision, the trial court observed

that that the parties lived under presumption of marriage and ruled that a divorce decree cannot be issued in the circumstances.

As to the division of matrimonial assets, the trial court very well evaluated the evidence on record whereby it correctly found that the appellant failed to prove existence of the claimed motor vehicle and farm at Makete. What is on record is mere assertion by the appellant that they own such properties. As observed earlier, with regard to the farm, the appellant even stated that the farm was located at Ukinga thereby contradicting with his witness, who stated that the farm was located at Makete. The contradiction further proves that the appellant had no idea of what she was talking about. The first appellate court also re-evaluated such evidence and concurred with the trial court's position. I find no fault on its assessment.

It is trite law that he/she who alleges must prove the allegation. See: **section 110 and 111 of the Evidence Act, Cap 6 R.E. 2022** which is *pari materia* with **Regulation 1 (2) and 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations GN 66 of 1972**. See also: **James Makundi vs. Permanent Secretary, Ministry of Lands, Housing & Human Settlements Development & Others** (Civil Appeal 181 of 2021) [2022] TZCA 242 TANZLII whereby the Court of Appeal stated:

> "The law under sections 110 and 111 of the Evidence Act states that, he who alleges the

existence of a fact is duty bound to prove it and would fail if no evidence is given at all."

I wish to further observe that apart from failure to prove existence of the alleged motor vehicle and tree farm at Makete, there was also no evidence on her part on her contribution to the acquisition of the alleged matrimonial properties. The law is settled that division of matrimonial assets is done basing on the extent of contribution as evidenced by the parties in court. Contribution is therefore a question of evidence.

Section 114 (1) and (2) (b) of the Law of Marriage Act, empowers the courts to divide matrimonial assets between the parties by considering the extent of the contribution made by each party in money, property or work towards the acquisition of the assets. See: ***Gabriel Nimrod Kurwijila vs. Theresia Hassani Mallongo*** (Civil Appeal No. 102 of 2018) [2020] TZCA 31, in which the Court of Appeal insisted that the extent of contribution by a party in matrimonial proceeding is a question of evidence, thus evidence to that effect must be provided. See also: ***Yesse Mrisho vs. Sania Abdu***, Civil Appeal No. 147 of 2016 (CAT, unreported); ***Cleophas M. Matibaro vs. Sophia Washusa***, Civil Application No. 13 of 2011, in which it was held that there must be a link between the accumulation of wealth and the responsibility of the couple during such accumulation.

In the upshot, it is my view that the two lower courts justly reached their decisions. The appellant failed to prove existence of the properties allegedly not distributed by the trial court, as well as, her contribution to the acquisition of the same. This appeal is thus found without merit. It is hereby dismissed. Considering the relationship between the parties, I make no orders as costs.

Dated and delivered at Mbeya this this 16th day of October 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA