

IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 46 OF 2023

(Originating from Magu District Court in Matrimonial Appeal No.18 of 2023 and from Nyaguge Primary Court in Matrimonial Case No. 28 of 2022)

SHIKALILE NTEMI NDAKI.....APPELLANT

VERSUS

MISAMO MUTABO NTEMI.....RESPONDENT

JUDGMENT

Date of Last Order:14/09/2023

Date of Judgment: 29/09/2023

Kamana, J:

This is a second appeal preferred by Shikalile Ntemi Ndaki, the appellant against the decision of Magu District Court in Matrimonial Appeal No. 18 of 2023. The first appeal was against the decision of Nyaguge Primary Court in Matrimonial Case No. 28 of 2022.

Briefly, the appellant and Misabo Mutabo Ntemi, the respondent, were lovers who found themselves living together as wife and husband respectively since the year 2016. Marred with endless disputes, their relationship turned sour and in the year 2022, the appellant found her way to Nyanguge Primary Court seeking divorce and division of matrimonial properties. The trial court heard the parties and found that

they were living under the presumption of marriage as per section 160(1) of the Law of Marriage Act, Cap. 29 [RE.2019]. It proceeded to divide the matrimonial properties to the parties.

The appellant was not satisfied with the trial court's decision concerning the division of matrimonial properties, hence she appealed to the first appellate court. Thereat, the decision of the trial court was sustained.

Aggrieved, the appellant preferred this appeal armed with seven grounds of appeal. For this judgment, I will concentrate on the second ground which determines the fate of the appeal in question. The ground states:

2. That the first appellate court erred in passing a judgment without analyzing all complaints.

When the appeal was set for hearing, the appellant was represented by Mr. Hamis Twaha, learned counsel, whilst the respondent was advocated by Mr. Chiwalo Nchai Samuel, learned counsel. The appeal was disposed of by way of oral submissions.

Arguing in support of the ground, Mr. Twaha contended that his client's appeal to the first appellate court contained six grounds of appeal. He argued further that the first appellate court determined the

appeal without considering the fifth and sixth grounds of appeal which faulted the trial court's proceedings and decision.

About the proceedings, the learned counsel argued that the ground challenged the trial court for its failure to properly record the evidence adduced by the appellant. Concerning the decision, he submitted that the ground was about the trial court's biases against the appellant.

In his opinion, the failure of the first appellate court to determine the two grounds of appeal was fatal and occasioned injustice to the appellant. In that regard, he implored the Court to allow the appeal and remit the matter to the first appellate court for rehearing of the appeal. To strengthen the argument, Mr. Twaha invited the Court to consider the case of **Revocatus Mugisha v. Republic**, Criminal Appeal No.200 of 2020 (Unreported).

Countering, Mr. Samuel contended that the non-determination of the two grounds did not occasion injustice to the appellant as the determination of grounds was sufficient to dispose of the appeal. He went on to argue that the said two grounds were not determined by the first appellate court as they needed evidence. He summed up his arguments by beseeching the Court to dismiss the appeal.

Having heard the parties, I went through the records and found that the first appeal was premised on the following grounds:

1. That the trial court erred in law by basing its decision on the evidence of DW1 and DW2 which was fabricated so far as the acquisition of matrimonial properties was concerned.
2. That the trial court erred in law by giving the appellant only a mattress as a matrimonial property without distributing to her other matrimonial properties acquired during the subsistence of the marriage.
3. That the trial court erred in law by dividing the matrimonial properties without considering the acquired matrimonial properties during the subsistence of marriage.
4. That the trial court erred in law by dividing the matrimonial properties unequally and without considering the appellant's contribution to the acquisition of the matrimonial properties.
5. That the trial court erred in law by failing to record the appellant's evidence regarding the acquisition of

matrimonial properties during the subsistence of marriage.

6. That the trial court was biased against the appellant.

The records reveal further that the trial court combined all the grounds to form one ground which was:

Whether the division of the matrimonial properties by the trial court was correct.

Guided by that ground, the first appellate court determined the appeal and entered judgment in the respondent's favour.

At this point, I hasten to shake hands with Mr. Twaha, learned counsel for the appellant, that the first appellate court did not determine the two grounds of appeal. My perusal of the judgment delivered by the first appellate court convinces me that the said court did not determine the two grounds. It only focused on determining whether the division of the matrimonial properties amongst the parties was just. It determined nothing on the issues of non-recording of the appellant's evidence and bias.

That being the case, the Court is invited to determine the effect of the appellate court's failure to determine grounds for appeal. Established is the general principle that an appellate court is required to determine all the grounds of appeal before it. In so doing, the appellate court may

determine each ground separately or in combination. However, when possible, the appellate court may opt not to determine all grounds of appeal if some of the grounds determine the appeal decisively. This position was well articulated in the case of **Malmo Montagekonsult AB Tanzania Branch v. Margret Gama**, Civil Appeal No. 86 of 2001 where the Court of Appeal had this to state:

*'In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. **It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately.**' (Emphasis added).*

As I stated, the first appellate court did not determine the fifth and sixth grounds of appeal. In my opinion, that was fatal in the determination of the appeal. I hold so while convinced that the two grounds had nothing to do with the division of matrimonial properties as to its correctness. What was faulted by the appellant was the failure of the trial court to record the appellant's evidence and the bias exerted by

the said court against the appellant. In that regard, it was incumbent on the first appellate court to determine those issues.

By concentrating on the correctness of the division of matrimonial properties, the first appellate court misdirected itself as the same did not decisively dispose of the appeal. This is because there were other grounds that challenged the decision of the trial court which were worthy of determination of the first appellate court.

Since the two grounds were not determined, I am inclined to hold that this is a fit case for this Court to exercise its revisionary powers to remit the matter to the first appellate court for rehearing. I take that position on the reason that the first appellate court is privileged to peruse the trial court's records, reconsider and reevaluate the evidence adduced, and come up with its findings. In that case, as the second appellate court, I am not in a position to determine the two grounds of appeal which were not determined by the first appellate court. In holding so, I am fortified by the position taken by the Court of Appeal in the case of **France Michael Nyoni v. Republic**, Criminal Appeal No.505 of 2020 where the Court of Appeal held:

'.....since the grounds of appeal presented before us were placed before the High Court but not dealt with in

*accordance with the law, the same cannot be entertained
in this appeal.'*

Given that, I nullify the first appellate court's proceedings and quash its judgment in Matrimonial Appeal No. 18 of 2023. I remit the case file to Magu District Court for rehearing of the appeal as per the requirements of the law before a different magistrate.

Order accordingly.

Right to Appeal Explained.

DATED at **MWANZA** this 29th day of September, 2023.



KS KAMANA

JUDGE