IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 46 OF 2023

(Arising from the decision of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Appeal No. 75 of 2022 before Hon. A. Mpessa – SRM)

HEZRON WILSON SHALUA.....APPELLANT

VERSUS

TUMAINI ABRAHAM TEMU.....RESPONDENT

JUDGMENT

16/02/2024 & 27/03/2024

M.MNYUKWA, J.

The appellant in this appeal is dissatisfied with the decision of the District Court of Temeke One Stop Judical Centre (the 1st appellate court) on custody of children and division of matrimonial properties. The above orders provoked him who preferred this appeal. Records shows that, before they contracted Christian marriage, parties were fiancee for four years. They contracted a Christian marriage on 14/04/2012 and they were blessed with three issues of marriage.

The parties lived happy marriage until 2014 when matrimonial dispute arose. It was the complaint of the respondent that appellant was cruel to her and she was no longer able to tolerate that behaviour. Efforts to reconcile them in the police station, church and marriage conciliation board were in vain. The records also shows that, Appellant was reluctant

for his marriage to be dissolved for a reason that he still loved his wife and he pleaded at the trial court to be given a chance to reconcile their matrimonial dispute with respondent. Considering respondent's evidence at the trial court, appellant request was not materialized since respondent insisted that her marriage with appellant is broken down to entitle the trial court to grant the prayer sought of dissolving marriage.

After hearing both parties, the trial court dissolved marriage and issued other reliefs including an order for division of matrimonial assets and custody of children. The above orders did not amuse the respondent who appalled to the 1st appellate court to challenge them. It was lucky on her part, the appeal was allowed and the orders on division of matrimonial properties and custody of children were revised.

Disgruntled with the decision of the 1st appellate court, the appellant brought the present appeal with two grounds of appeal which are:

> *1. That the subordinate courts error in law and facts by deciding the custody of the children to the respondent without taking into the consideration the opinion of the children which was supposed to be taken by the social welfare officer in reaching a fair and judicious decision.*
>
> *2. That the subordinate courts erred in law and facts for ignoring, omitting and being biased on the*

mentioned matrimonial properties by the appellant and decided in favour of the respondent. Moreover, the appellant apart from mentioning and being unable to tender the evidence which proves the ownership of the house at Kivule not being the matrimonial property. ***"A copy of the sale agreement is attached herewith and marked as Annex1 for which leave of this Honourable Court is craved."***

He then prayed for the appeal to be allowed and proper orders to be made on the division of matrimonial properties.

At the hearing, the appellant was represented by Mr. Frank Mpasso, learned counsel while respondent appeared in person, unrepresented. The appeal was argued orally.

Supporting the appeal, learned counsel for appellant kicked the ball rolling by submitting the first ground of appeal. He claimed that the lower courts did not give an opportunity for children of the parties who were above seven years to choose as to which parent they wished to live with. He was of the view that it was the duty of the courts below to involve the social welfare officer in reaching its decision as to whom among the two parents is entitled to be granted custody. He claimed that the lower courts gave decision contrary to the law.

The counsel went on to refer section 11 of the Law of the Child Act, **[Cap 13 R.E 2019]** to support his argument. He added that, the trial court's proceedings show that appellant used to take care the children when respondent is absent. He supported his argument with the case of **Mariam Tumbo v Harold Tumbo** 1983 TLR 293 and Rule 72 and 73 of the Law of the Child (Juvenile Court Procedure) Rules 2016. He thus prays for this court to revise the decision of the courts below since respondent denied appellant to access his children.

Arguing in support of the second ground of appeal, he submitted that at the trial court respondent failed to prove her contribution on the acquisition of some of the properties as the law places duty to her. He referred to the provision of section 110(1) and (2) of the Law of Evidence Act, **[Cap 6 R.E 2019]** on the one who alleges must prove.

The appellant's counsel blamed the lower courts for what he believed that they were biased on division of the matrimonial properties jointly acquired by the parties during the subsistence of marriage. He gave an example of the motor vehicles which are Toyota Opa and Toyota Cresta where appellant testified that the same were matrimonial properties subject to division but yet the trial court ordered the said properties belonged to respondent and they are not the matrimonial properties.

The counsel went on to submit that they attached sale agreement to accompany the petition of appeal and prays this court to admit it for a reason that the same was rejected in the lower courts. He claimed that, respondent was given a share of a house which she is not entitled with. He referred to Order 39 Rule 27, 28 and 29 of the Civil Procedure Code, **[Cap 33 R.E 2019]** which gives appellant's right to tender evidence since he was denied to do in the lower courts. He also referred to the case of **Tarmohamed and Another v Lakhan & Co** (3) (1958) EA 567 (CA) which was cited in the case of **Ismail Rashidi v Mariam Msati,** Civil Appeal No 75 of 2015. He thus prayed to tender the documentary evidence and the same be admitted as part of his evidence.

Contesting the appeal, respondent disputed all the grounds of appeal. She said that appellant refused to maintain his children as a father since 2021.She claimed that appellant did not pay school fees since 2021 and prayed to tender school fees receipts as part of her evidence to prove that appellant failed to fulfil his responsibility as a father and she is the one who pays school fees for her children.

She went on that, she objected appellant's new evidence since it is a forged one and the same was not tendered during the hearing of the case in the trial court. On the issue of motor vehicles she stated that appellant does not know even the registration number of the said motor

vehicles claimed to be matrimonial property. She strongly insisted the sale agreement should not be admitted as part of evidence.

In rejoinder, the appellant's counsel had nothing new to add, he mainly reiterated what he had submitted in his submissions in chief.

Having heard the parties and examine the records of the lower courts, the main issue for consideration and determination is whether the appeal is merited. In determining the above issue, I will determine the grounds of appeal as presented.

Before I embark to determine the grounds of appeal, I believe it is crucial at this juncture to make it clear that, in our appeal at hand, all parties wished to tender new evidence that were not tendered and admitted at the trial court. While appellant annexed a copy of the sale agreement of the plot of Kivule to support his assertion on the second ground of appeal, respondent wished to tender school fees receipts when she was responding to the first ground of appeal. Appellant wished to prove that the house at Kivule is not a matrimonial property since its plot was bought before he contracted marriage with appellant. Whereas, respondent wished to tender school fees receipts to show that she was the one who pays the school fees and therefore appellant failed to discharge his duty as a father to maintain the children and thus he is not a suitable person to be granted custody.

It is worth to note that there are procedure of tendering new evidence and there are criteria for this court to admit new evidence tendered during the appeal. All in all, the new evidence sought to be tendered by both parties to this appeal were not admitted as part of evidence. The reason for non-admission will be given in the course of determining this appeal.

To begin with, it is pertinent to state that this is the second appeal. I am mindful with a settled position of law that the second appellate court is supposed to deal with questions of law. However, the above settled position of law is based on the assumption that the findings of facts by the subordinate court was based on the proper analysis of the evidence presented before it. Contrary to that, this court may have power to interfere with the findings of the courts below to save the interest of justice. (See the case of **Sophia Emmanuel v R,** Criminal Appeal No 443 of 2017, CAT at Shinyanga).

Starting with the first ground, it is the complaint of the appellant that the subordinate courts erred by deciding on the issue of custody of children without considering the opinion of children which was supposed to be taken by the social welfare officer. It is the argument of appellant's counsel that, it was unjust for an order of custody of children to be granted to respondent without involving social welfare officer. The

counsel argued that, appellant is capable to maintain his children since he had the history of taking care his child born by another woman as it is reflected in the trial court's proceedings. In his submissions, the counsel underscore the importance of considering the best interest of the child as a primary consideration in all actions concerning children.

On her part, respondent attacked appellant's counsel submissions for what she alleged that appellant was irresponsible father as she failed to pay school fees for his children since 2021. Thus, she strongly denied the first ground of appeal to be allowed.

From the above competing argument, I am compelled to reproduce the decision of the 1st appellate court on custody of children. In its decision the 1st appellate court placed the two children aged 7 and 4 years to respondent and ordered the views of the elder child who was 11 years to be taken by the trial court to ascertain as to which parent the child wished to stay with. Thus, the 1st appellate court ordered the file to be remitted back to the trial court for two matters. First, the view of the child who was 11 years to be taken to ascertain as to which parents the child would like to stay with and to take the evidence on the income of the parties for it to give an order for maintenance.

In reaching the above decision, the 1st appellate court considered the provision of section 125 of the Law of Marriage Act, Cap 29 R.E 2019

when placed custody of children to respondent. The first appellate court had this to say:

> *"... Hakuna ubishi kwamba watoto Ritha Faraja Hezron Shalua (miaka 7) na Serafaith Hezron Shalua (miaka 4) kwa mujibu wa kifungu cha 125(3) cha sharia ya ndoa (supra) watoto wanatakiwa kuwa chini ya uangalizi wa mama. Isipokuwa pale tu ambapo patakuwa na mazingira ambayo yatakuwa hatarishi katika ustawi wa mtoto ndivyo Mahakama itaamua vingenvyo. Katika shauri hili hakuna sababu ya msingi iliyotolewa na Mahakama ya Mwanzo ya kutoa uangalizi wa watoto kwa baba kinyume na kifungu cha 125 ya Sheria ya Ndoa. Ukizingatia kwamba mrufaniwa anakiri kumpenda mke wake na hakuwa tayari kwa talaka katika tafsiri rahisi hii inaashiria mrufani ni mama bora hata kwa watoto wake...."*

In a loosely English translation, the first appellate court stated that, there is no dispute that the children, Ritha Faraja Hezron Shalua (7 years) and Searfaith Hezron Shalua (4 years) are entitled to be under the custody of their mother as per the provision of section 125 of the Law of Marriage Act, except where it is proved that there are unfavourable conditions which the court can decides otherwise. That in our case at hand there is no justifiable reason given by the trial court for placing custody of children to the father contrary to the provision of section 125 of the Law of

Marriage Act taking into consideration that appellant admitted to have loved respondent and that he was not ready to divorce her. This simply means respondent is a good mother to her children.

As it can be discerned from the above excerpt of the Judgment of the 1st appellate court, it reflect clearly that the 1st appellate court was aware with the factors to be considered before placing custody of a child.

Apart from the Law of Marriage Act, **[Cap 29 R.E 2019]**, when dealing with issues concerning children, the Law of the Child Act, **[Cap 13 R.E 2019]** is also applicable since the best interest of the child is a primary consideration as it is provided for under section 4(2) which states that:

> *"The best interest of a child shall be a primary consideration in all actions concerning children whether undertaken by public of private social welfare institutions, courts or administrative bodies."*

In line with the above section, the relevancy of section 26(1)(b) of the same law, that is the Law of the Child Act, Cap 13 R.E 2019 cannot be undermine in the circumstances of our case at hand. The section states that:

> *"S. 26(1) – Subject to the provision of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to–*

(b) live with the parent who in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child."

Additionally, section 37 of the Law of the Child Act, **[Cap 13 R.E 2019]** provides for the factors to be considered by the court before granting an order for custody. Among other factors, it also includes the age and sex of the child and the need to keep the siblings together when determining the issue of custody.

Thus, my humble view is that, since the two children are girls and at the time of granting an order for custody one of the child was 7 years, and the other was 4 years old, it is my firm view that it is desirable for these siblings to stay together. Thus, it was correct when 1st appellate court placed the two children to respondent considering their sex and age since it can be easy for her to consider their needs as girl children.

Again, as it was rightly observed by the 1st appellate court, there was no any justifiable reason given out by the trial court to deny respondent custody of the two children contrary to the set standard established under section 125 of the Law of Marriage Act, **[Cap 29 R.E 2019]**.

The counsel for appellant attacked the lower courts' decision for they have failed to consider the opinion of the children for what he

believed that they were supposed to be taken before the social welfare officer. With all due respect to the learned counsel for appellant, it is neither the statutory law nor the case law which provides a requirement for social welfare officer to take the opinion of the children for a court to consider before making an order for custody. Instead, it is the court which has power to take the independent view of the child if it consider there is a need to do so.

To my understanding, what does the law provides is for social welfare officer to prepare the social inquiry report upon the order of the court. This is in accordance to section 45 (1) and (2) of the Law of the Child Act, **[Cap 13 R.E 2019]** and Rule 72 (1) of the Law of the Child (Juvenile Court Procedure) Rules 2016.

For easy of reference, let me reproduce the above section which reads:

> *"Section 45(1) – A court may order a social welfare officer to prepare a social inquiry report before consideration of an application to make an order for maintenance, custody or access.*
>
> *(2) The court shall in making such order consider the social inquiry report prepared by the social welfare officer".*

I have settled mind in the above provision of law that, it is within the discretionary power of the court to order the social welfare officer to prepare the social inquiry report. In preparing the social inquiry report, the social welfare officer is not mandated to interview and take the opinion of the child. Also, when the court ordered the social inquiry report to be conducted, the court shall consider the report prepared by the social welfare officer.

Moreover, Rule 72 (1) of the Law of the Child (Juvenile Court Procedure) Rules 2016 provides that:

> *"Where there is a contested application for custody or access the court may direct the social welfare officer to prepare a social inquiry report."*

Based on the above discussion, I don't see any reason to fault the 1st appellate court's decision on custody of the two children. Thus, the first ground of appeal lacks merit and it is hereby dismissed.

As regards to the second ground of appeal the appellant's grievance is on the division of a house at Kivule where the 1st appellate court revised the shares given to respondent in the trial court. At the primary court appellant was given 90% while respondent was given 10%.

Disgruntled, respondent appealed to the 1st appellate court where the decision was revised and appellant was given 60% while respondent

was given 40% of the share of the house at Kivule. This decision did not amuse the appellant who came in this court with an argument that the house at Kivule is his sole property as she acquired it before contracting marriage with respondent.

As it is indicated above, appellant attached a copy of sale agreement and wished to tender it as part of his additional evidence, but as I have said earlier on the same was not admitted.

My perusal of the available record supplied to me, there is no point where it is shown that appellant sought to tender copy of the sale agreement and the same was rejected. Contrary to that, the evidence on record shows that appellant's evidence in the trial court collaborated respondent's evidence on the acquisition of the house at Kivule since in his evidence he admitted that the same is a matrimonial property. This is reflected on page 18 of the trial court's proceedings which collaborates respondent's evidence as reflected on page 15 of the trial court's proceedings. Therefore, appellant's argument that his evidence was rejected in the trial court is an afterthought since the record is silent.

I shall now state the reason for rejection of new evidence sought to be tendered by appellant during the hearing of the appeal. It goes without say that the procedure was not followed. As the matter was originated in the primary court, the new evidence could have been tendered and

admitted by the 1st appellate since the law empowers it to receive additional evidence. Section 21(1) of the Magistrates' Courts Act gives power to the district court when exercising its appellate jurisdiction to receive additional evidence. The law states that:

> *Section 21 (1) - In exercise of its appellate jurisdiction, a district court shall have power to*
>
> *(a) direct the primary court to take additional evidence and to certify the same the same to the district court, or for reason to be recorded in writing, itself hear additional evidence."*

Reading from the above provision of law, the appellant who wished his new evidence to be considered, he could have started his move in the District Court. The appellant counsel tried to convince this court by referring to the decision of the Court of Appeal in **Ismail Rashid v Mariam Msati** (supra) for this court to take new evidence.

In fact, I am discussing how the above decision is distinguishable in our case at hand for academic purpose. This is because, even in the High Court, the procedure of receiving new evidence is guided by law. Order XXXIX Rule 27(1) and (2) of the Civil Procedure Code, Cap 33 R.E 2019 stipulates on the production of additional evidence in High Court. It provides that:

27(1)-. The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the Court, but if

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Court requires any document to be produced to any witness to be examined to enable it to pronounce judgment for any other substantial cause.

27(2).-Where additional evidence is allowed to be produced by the Court, the Court shall have regard the reason for its admission.

Guided by the above provisions of law, it is clear that the reason for taking new evidence must be given before taking it or acting with it and the other party must get an opportunity to cross examine the same. New or additional evidence may be taken by this court if this court may order the 1st appellate court as a trial court which is not the case in our matter at hand to certify it and send to the High Court. In **Ismail Rashid v Mariam Msati,** (supra), the Court of Appeal had this to say when the High Court takes and consider new evidence during the hearing of appeal. It was stated that:

"In the premises, we are satisfied that the trial judge had no justification to look into and act upon additional evidence at the hearing of the first appeal because;

One; *the certificate of title was not produced in evidence during trial and rejected so as to necessitate its re-admission on appeal under Order XXXIX rule 27(1) of the CPC;* ***Two,*** *it was not established during trial that the documentary evidence could not have been obtained during trial that the documentary evidence could not have been obtained with reasonable diligence for use at the trial."*

Therefore, appellant's new evidence falls short and the same cannot be admitted as part of evidence.

In conclusion, I am alive with the provision of section 114 of the Law of Marriage Act, Cap 29 R.E 2019 which empowers the court to order division of matrimonial properties upon dissolution of a marriage. This section also provides for factors to be considered by the court when exercising its power. Since the evidence on record shows that respondent contributed in developing a house at Kivule and her evidence was not cross examined by appellant, this means appellant admitted respondent's evidence. For that reason, I don't see any justifiable reason to interfere with the findings of the 1st appellate court.

In the event, the appeal lacks merit and it is disallowed in its entirety. Since the parties were couple I make no orders as to costs.

It is so ordered.

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

27/03/2024.

Court: Judgment delivered in the presence of both parties.

M.MNYUKWA

JUDGE

27/03/2024