

**IN THE HIGH COURT OF TANZANIA  
TANGA SUB REGISTRY  
AT TANGA  
PC CIVIL APPEAL NO. 05 OF 2023**

**PILI ISSA RUAMBO .....APPELLANT**

**VERSUS**

**DANIEL MUSA MWAMBASHI .....RESPONDENT**

*(Arising from the judgment of the Matrimonial Appeal No. 04 of 2023 of the District Court of Korogwe, Originating from Matrimonial Cause No. 13 of 2022 of Manundu Primary Court)*

**JUDGEMENT**

*31/05/2024 & 31/05/2024*

**NDESAMBURO, J.:**

This is a second appeal originating from the Manundu Primary Court. The appellant, who had lived with the respondent as husband and wife for over ten years without children, approached the Primary Court for divorce decree and division of properties. Having heard the parties, the Primary Court granted the divorce, awarding the appellant a house and the respondent a motor vehicle.

The respondent, dissatisfied with this decision, appealed to the Korogwe District Court, contending that the dispute had not been referred to a conciliation board and lacked a necessary certificate, thus rendering the petition premature and incompetent before the Primary Court. The District Court found this ground meritless, confirming that the conciliation board had issued a certificate after failing to reconcile the parties.

However, the District Court, exercising its appellate powers, re-evaluated the evidence and determined that the relationship between the parties was not formal and could not be dissolved by a divorce decree consequently, the said order was set aside. Furthermore, it set aside the order for the division of matrimonial properties due to insufficient evidence of contribution from each party. The file was ordered to be remitted to the Primary Court for retrial before a different magistrate.

The appellant, dissatisfied with the District Court's decision, filed the current appeal, arguing that the District Court erred in law and fact by setting aside the division of matrimonial properties, which was not

an issue at the appellate stage, and by failing to provide the parties with the right to be heard.

During the hearing, both the appellant and the respondent had no legal representation, and it was agreed that the matter would proceed through written submissions. However, while the court was preparing the judgment, it had to recall the parties to address the propriety of the proceedings before the Primary Court, considering that the respondent's testimony was received without oath or affirmation, contrary to mandatory legal provisions. Consequently, the court summoned the parties to address this issue and duly appeared before this court.

The appellant argued before the court that the failure of the respondent to testify under oath was a critical error, rendering his evidence null and void.

As a layperson, the respondent submitted that he does not understand the issue or the consequences of this omission.

Having considered the submissions made by both parties and reviewed the trial court record, the primary issue for determination is

the validity of the trial court's proceedings. Upon careful examination, it is evident that on the 25<sup>th</sup> of May 2023, Daniel Musa Mwambashi, the respondent, testified without taking an oath, which was contrary to Rule 46(2) of the Magistrates' Court (Civil Procedure in Primary Courts) Rules, GN Nos. 310 of 1964 and 119 of 1983 ("the Rules").

According to established law, the testimony of any witness, except for a child of tender age, must be given under oath or affirmation, as stipulated by Rule 46(2) of the Rules. Rule 46(2) states that:

*"The evidence of each witness **shall** be given on affirmation save in a case of a child of tender years, who in the opinion of the court, does not understand the nature of the affirmation".*

The use of the word "shall" denotes mandatory compliance with the requirement of the law. See Section 53(2) of the Interpretation of Laws Act Cap 1 R.E. 2019 and the case of **Shabani Iddi Jololo and Three Others v Republic**, Criminal Appeal No. 200 of 2006.

The above authorities stipulate that taking an oath before testifying is a mandatory obligation. Failure to adhere to this statutory

obligation is fatal and vitiates the proceedings, as stipulated in the Court of Appeal decisions, such as the **Catholic University of Health and Allied Sciences (CUHAS) v Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020, among others.

As noted earlier, when Daniel Musa Mwambashi, the respondent, testified on the 25<sup>th</sup> of May 2023, the trial magistrate proceeded to record his evidence without subjecting him to an oath or affirmation. This contravenes the mandatory provision of Rule 46(2) of the Rules, which requires each witness appearing before the court to give his/her testimony under oath or affirmation. Therefore, the Primary Court should have administered an oath or affirmation to this witness before allowing him to testify.

In the present appeal, since the witness gave his testimony without oath or affirmation, this omission is fatal, rendering his evidence legally invalid and vitiating the proceedings before the Primary Court.

Consequently, exercising the powers vested in this court under Section 29(b) of the Magistrate's Courts' Act, Cap 11 R.E. 2019, the

proceedings of the Primary Court are nullified, its decision quashed, and all orders made thereof set aside. This court further nullifies the proceedings of the District Court, quashes its judgment, and sets aside all orders made therein.

In the interest of justice, the file is ordered to be remitted to the Primary Court for the matter to be heard *de novo* before a different magistrate in accordance with the law, if the parties are still interested. No order as to costs is made.

It is so ordered.

**DATE at TANGA** this 31<sup>st</sup> day of May 2024.



  
H. P. NDESAMBURO

**JUDGE**