

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY AT MWANZA (PC)
MATRIMONIAL APPEAL NO. 16 OF 2017 {Arising from Nyamagana District Court Civil Appeal No.
8 of 2016) KHALID SIMBA -----APPELLANT VERSUS ZUBEDA
BARNABA MASUKA -----RESPONDENT

JUDGEMENT

Ebrahim, J.: This is a second appeal. Having regard to the Primary Court of Ilembelela

- -- -- where the Matrimonial Case no. 77/2015 was filed by the Respondent, the Appellant herein filed an appeal at the District Court of Nyamagana at Mwanza (Civil Appeal No. 08/2016). The said appeal at the District Court was initially heard by Hon. Chitepo whereby the respondent herein was dissatisfied with the decision and appealed at this Court vide PC Matrimonial Appeal No. 33/2016. Upon hearing the appeal, Hon. Makaramba, J on 21.02.2017 quashed the decision of Hon. Chitepo and reverted the file to the District Court so that proper judgement could be composed by another Magistrate from the written submissions on record. 1 The file was placed before Hon. Ruboroga who on 20.03.2017
- delivered judgement which is the subject matter of this appeal. '0 The brief facts of the case as could be discerned from the records of proceedings are that the appellant and the respondents were married. They solemnized their Muslim wedding on 25 th October 1995. They were blessed with five issues namely Simba Khalid (18 yrs), Ibrahimu Khalid (18yrs), Aisha Khalid (13yrs), Ismail Khalid (9yrs) and Khariri Khalid (6 yrs). The respondent claimed at the Primary Court (SM1) that out of the 19 years that they had lived together, they managed to live peacefully for 3 years only. She blamed the appellant for being unfaithfully to their holy matrimony, not consummating the 'marriage with the respondent, irresponsible to the family and that he, assaulted her. She testified that following the problems they had she went to the social welfare office to claim for maintenance · (exhibit P1) and then went to the Ward Reconciliation Board. The respondent called 3 additional witnesses. Mussa Simba (SM2), nephew of the appellant who has been living with them since 1996 testified on the unfaithfulness of the appellant and that it was the respondent who was maintaining them. Gasper Nyalali (SM3) uncle of the respondent gave his testimony that he heard on the 2 -problems in the marriage of his niece. He. knows that his niece moved out (tj> · of the matrimonial home but the appellant never engaged them for any

reconciliation despite the fact that they called a meeting that the appellant did not attend. Mashiku Lutonja (SM4) the nephew of the appellant testified that after the couple got married they built a block house at a plot that was bought by the appellant. He testified further that he evidenced seeing them building another house and that they had cattle and goats as well as a plot at Buhongwa and Dar Es Salaam. They also own three cars. On his part, the appellant (SU1) admitted that they solemnized their . -Muslim marriage with the appellant in 1995 at Kisesa and they later moved to Ilemela in 1996. He testified that they separated in 2014 and of their three issues live with the respondent while 2 issues are at the boarding school but they stay with him during school holidays. He testified further that the attitude of the respondent changed after 15 years of marriage when she started having extra marital affair with one David Misana. They were reconciled but the respondent continued with the affair until she was conned Tshs. 6,000,000/-. There after the respondent moved from matrimonial home with the issues and took all the items that she wanted. The appellant claimed also that the respondent converted back to Christianity hence under Islamic law he cannot issue her with talak. u - Speaking of the property jointly acquired, he explained that when he married the respondent he already had a plot. They bought together one plot at Nyanh'olongo Ukiliguru where the mother of the respondent resides .. They also purchased a plot at Kanyama near Kisesa where the respondent is conducting her business. They purchased another plot at Nyamwilolelwa which has a foundation, they have two cars, six heads of cattle (3 already sold) and seven goats, stated the appellant. Sudi Mfaume (SU2), the Imam at Rahma Masjid Ilemela evidenced to know the parties as they were believers in his. masjid. He testified to have been told by the - respondent in 2015 that she has converted back to Christianity and that the appellant has already moved from the house. They were called for reconciliation but the respondent did not appear. Sylvester Simba (SU3), nephew of the . appellant testified that the respondent moved out of the matrimonial home when the appellant was in Dar Es Salaam in 2014 and took with her two issues and some other house hold items. He testified also that there are properties that parties acquired together which are plots at Nyanh'olongo, Kisesa Kanyama, Nyamwilolelwa, six cattle, six goats and 3 cars, Chaser, Harrier and Mark II. Raja bu Ponas Mashimba(Raphael) SU4, testified 4 , that the respondent moved out of the house in 2014 and that during their. 0 ~ subsistence of marriage, they bought plots at Nyanh'olongo and Kanyama. He testified further that he has been living with the parties since 2009. On cross examination he responded that currently the respondent lives with all the issues. Yusuph Simba (SUS) testified that the appellant purchased a plot at Ilemela in 1993 and built a house. He testified further that parties purchased a plot in Nyanh'olongo Ukigulu where they built a house in 2012, another plot at Nyamwilolelwa and Kisesa. He mentioned their other . properties being 6 heads cattle of which 3 were sold to obtain school fees for children, 5 goats and 3 cars. After hearing both parties and their witnesses, the trial Magistrate declared the marriage between parties to have been irreparably broken under Section 110 of the Law of Marriage Act, Cap 29, RE 2002 and issued a divorce. The trial Court ordered further that the appellant should pay maintenance for the children of Tshs. 150,000/- per month and should also pay for the school fees. As for the distribution of matrimonial properties, the

court ordered the to be dealt with separately. 5 Aggrieved, the appellant lodged an appeal at the District Court where CJ'' – the first appellate Magistrate upheld the decision of the trial Court. Aggrieved again, the appellant has come to this Court raising three

(3) grounds of appeal that:

1. The Hon. Learned Magistrate made an error in law to confirm an award of 150,000 Tshs. per month as maintenance cost without ascertaining the appellant's means of income.
2. That the Hon. Appellate Magistrate court magistrate made an error in , law to order payment of 150,000 Tshs as maintenance cost payable to the respondent basing on wrong information that there are four (4) issues within the custody of the respondent.
3. The Hon. Magistrate made an error in law to uphold the Ilemela Primary Court decision in matrimonial cause No. 77 of 2015 without considering that the same was heard without there being a certificate from the marriage conciliation board. When the appeal was called for hearing, the appellant was represented by Mr. Joseph Muna whilst the respondent preferred the services of Mr. Laurian Vedastus, both are learned advocates. 6 nd In his submission Mr. Muna preferred to submit the 1st and 2 grounds of appeal together. Referring to Section 129(1) of the Law of Marriage Act, 1971, Mr. Muna faulted the trial Magistrate for basing her decision without ascertaining the income of the appellant instead she only considered the needs of the dependants. He referred the Court to the case of Jerome Chilumba V Amina Adam [1989] TLR 117. ·, 'l Mr. Muna rebutted on the information relied by the trial Court that all five issues are under the custody of the respondent. He explained that only two issues are with the respondent while one is at the University and the other two are at a boarding school. Further the fees for all the issue are paid by the appellant hence the magistrate based her decision on the amount of maintenance allowance on incorrect information. Finally Mr. Muna challenged the proceedings of the trial Court for there being no certificate of Marriage Conciliation Board. He referred to Section 101 and 106 (2) of the LMA, 1971 and insisted that exhibit P1 is not a certificate from Marriage Conciliation Board. He was of the firm 7 belief that since parties was Muslims then they should have brought a r. ~- certificate from Bakwata. He finally prayed for the appeal to be allowed and the decision of the first appellate court be reversed. Reminding the Court that it is a second appeal hence should not deal with concurrent findings of facts, unless otherwise (Amratal Danodor & Another t/a Zanzibar Silk Store VA.H Janowala t/a Zanzibar Hotel, [1980] TLR, 31at page 35), Mr. Laurian conceded that the trial Court did· not ascertain the income of the appellant. Mr. Laurian submitted however that the appellate Court considered the fact that the appellant has means of income following his own admission that he has 3 cars, four plots and a matrimonial house that he is living with another woman and has live- stocks. Moreover the appellant is a traditional healer and going by the proceedings he started paying school fees in 2016 following the order of the Court, stressed Mr. Laurian. Citing .the provisions of Section 129 (1) of the LMA, Mr. Laurian insisted that it is the responsibility of the father to care for his issues including food, clothes, education etc. 8

On the issue as to where the issues live, Mr. Laurian agreed that some issues are at school but they are still under the custody of the respondent. Again it is the role of the father to care for them until they reach 18 years as per Section 132 of the LMA, Cap 29. More importantly, the appellant never appealed on the custody of children. On the issue of Certificate of Conciliation Board, Mr. Laurian told the Court that the same was filed and it is in the Court records of 09.10.2015. Moreover, the certificate is a condition precedent and it was complied with in terms of Section 101 of Cap 29. He emphasized on the point that the respondent mentioned that he went to Ward Tribunal and she did not — —, —

- _ want to go to Bakwata as the Ward Tribunal has legal mandate to reconcile marriages. He referred to Sections 102 and 103 (2) (b) of the Marriage Act, that there is no law that makes it a mandatory for Muslim couples to go to Bakwata. The said principle that was held in the case of Halima Athumani V Maulid Hamisi [1991] TLR 179. Thus dismissed argument as being baseless. He prayed for the appeal to be dismissed for lack of merits. In brief rejoinder, Mr. Muna urged this Court to consider points of law that were not complied with. He mentioned that in terms of Section 129 9 ~f Cap 29 they are contesting the capability of the provider. As for the u certificate, the same must be presented at the filing of a petition however the court must acknowledge its presence. He insisted that Section 103(2) of the LMA is couched on the mandatory terms; it should therefore be adhered to. He reiterated his prayers. I shall begin by addressing the third ground of appeal that the trial court as well as appellate court erred to determine the marriage dispute that has not been referred to the Marriage Conciliation Board. Section 101 of the Law of Marriage Act, CAP 29, R.E. 2002 provides that: "101. No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a Board 'and the Board has certified that it has failed to reconcile the partiesH (emphasis is mine) Proviso (a) to (f) to Section 101 of the Act provides for the circumstance~ where the Court may dispense with reference to the Board. Again Section 102 of the Act, provides for establishment of the Board in every Ward and that the Minister may designate committee or body of persons of a certain community to perform the functions of a Marriage Conciliation Board. 10 From the above cited provisions of the law, I must state on the .. , w- outset that with respect to Mr. Muna, the law has not stated anywhere that it is mandatory for the Muslim couple to go to Bakwata in so far as the interpretation of section 102 is concerned. I subscribe to the holding of my brother Judge Mwalusanya (as he then was) in the case of Halima Athumani (supra) in his wisdom that "The mere fact that the Board that reconciled the parties was not a Moslem Conciliatory Board did not render the reconciliation a nullity/'. Following the same principle, indeed the argument by Mr. Muna that Since the couple were Muslim the respondent ought to have gone to Bakwata has no any legal basis. Now coming to the issue of the Certificate from the Conciliation Board; like the first appellate Court I also perused the file and found one. The certificate of 9th October 2015 was filed at Ilemela Primary Court and · endorsed by the · Magistrate In charge on 13th October 2015. The argument here is whether the filing of the Certificate alone is enough without the same appearing as an exhibit or mentioned by the trial Court. 11 Going back to the law that provides for the requirement of certificate, it is

obvious that for a person to be able to file a matrimonial petition he/she must present a Certificate from Conciliation Board and that has been the practice. The law has further allowed an exception where a Court can dispense with the said certificate. It is therefore my considered view that the filing of certificate together with the petition is enough to show compliance with the law. The same would have been otherwise if there was no certificate filed and no explanation recorded on its absence by the Court. Besides, in our instant case, the respondent clearly stated during the trial that she went to Ilemela Ward Conciliation Board and the Certificate is conspicuously attached with the petition. Moreover, the presence of the certificate at the Primary Court was not an issue at first place and nowhere has the respondent been recorded to have doubted that the certificate cropped up out of nowhere in the appeal. It is on that background I agree with the first appellate Magistrate that Form No. 3 is a document pre-requisite to the filing of the petition and the same was adhered to in terms of Section 102 and 106(2) of the LMA. I therefore find the argument by Mr. Muna that the Court must acknowledge its presence is devoid of merits and I accordingly dismiss it. 12 Coming to the first and second grounds of appeal, it was argued by ~- , Mr. Muna that trial magistrate based her decision without ascertaining the income of the appellant; and that she based her decision on wrong information that all issues are in custody of the respondent. As intimated earlier, this is a second appeal. The general rule is that the court should not disturb the concurrent findings of facts of the lower courts unless there has been a misapprehension of evidence, a miscarriage of justice or violation of some principles of law or practice (CA - in the case of Salum Bugu V Mariam Kibwana, Civil Appeal No 29 of 1992). That being said however, the duty of the first appellate Court is to subject the entire evidence of the trial Court into objective scrutiny and might come up with its own findings of facts. I have gone through the evidence on record and the judgement of the trial Court as well as that of the first appellate Court. The trial Magistrate Court in determining the issue of maintenance concluded that the same should be Tshs. 150,000/-. She did not expressly state the basis of her assessment. However, the first appellate Court in addressing that ground of appeal, considered the prevailing cost of living and was in agreement with the assessment of Tshs. 150,000/- for four issues per 13 u month done by the Counsel for the respondent. He then found no reason d ·, to interfere with the findings of the trial Court. Section 129(1) of the Law of Marriage Act provides that;

- (1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with · such accommodation/ clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof. (Emphasis supplied) From my reading of the above provision of law in so far as the maintenance of the children is concerned, it is my considered view that there is no hard and fast rule in assessing costs for maintenance in matrimonial issues. The Court has to give regard to the means and station in life but it is not the only criteria to be looked upon. Other factors have also to be considered like cost of living, station in life and/or welfare of the Children. The case of Jerome Chilumba (supra) only gave some guidelines on assessment of

those costs. Coming to our present case, I have briefly summarized above the whole evidence adduced in Court during the trial. Evidence on record 14 would reveal that the appellant owns plots, houses, cars and livestock. He is also a traditional healer. All these facts were testified in Court by the appellant's witnesses as well as his own testimony. Nowhere has the appellant contested on his means as per the adduced evidence. As the rule goes failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence (see the case of Damian Ruhele V R, Criminal Appeal No 501 of 2007(unreported)). From the above background therefore and in consideration of the prevailing standard cost of living, I find that the trial Court as well as the appellate court was correct in ordering the appellant to pay for the maintenance allowance of Tshs. 150,000/-. Thus, I find no any other justifying reason to interfere with the assessment that was made and I leave it undisturbed. As for the issue of custody of children and how many children are with the respondent, I am aware that one issue namely Simba Khalid had already attained the age of majority hence is at liberty to decide where he wishes to live. Moreover, I agree with Mr. Laurian here that the appellant never appealed on the custody of children and it is his role as a father to care for them until they attain the age of majority. 15 Again the law is very clear that in deciding on the custody of a child, the courts paramount consideration is the welfare of children (see the case of Celestine Kilala and Halima Yusufu V Restituta Celestine Kilala

[1980] TLR 76; and Section 125 of the Law of Marriage Act. The court is undesirable in disturbing the life of the child by changes of custody. Nevertheless, even if there are only three children who have now not attained the age of majority and are in the custody of the respondent; I would not alter the amount of Tshs. 150,000/- per month as per the reasons I have explained above. For all purpose and intent therefore, I uphold the decision of the first appellate Court and further order the appellant to continue catering for education costs for the issues below the age of majority. In the end result, I dismiss the appeal for being devoid of merits. This case being a matrimonial matter, I give no order as to costs, each party to bear its own. Mwanza 08.09.2016

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