

IN THE HIGH COURT OF TANZANIA

GEITA SUB REGISTRY

AT GEITA

MATRIMONIAL APPEAL NO. 2858/2024

*(Arising from Geita District Court in Appeal No.16/2023. Originating from Nyankumbu Primary Court
in Matrimonial Case No.24/2023.)*

BETWEEN

HAPPINESS JOHN.....APPELLANT

VERSUS

ALAMU NDENGANYA.....RESPONDENT

JUDGMENT

Date of Last Order: 28/02/2024

Date of Judgment: 08/03/2024

MWAKAPEJE, J.:

The Appellant, Happiness John, and Respondent, Alamu Ndenganya, herein cohabited for seven years, holding themselves out as husband and wife until the Respondent initiated divorce proceedings in 2023 in the Primary Court of Nyankumbu. The Primary Court, after due consideration, declined to grant the divorce petition, concluding that no valid marriage existed between the parties. Subsequently, following its deliberations, the trial court awarded custody of the children to the Appellant and provided her with compensation in the amount of Tshs. 3,000,000 for the duration of the cohabitation.

Dissatisfied with the trial court's decision, the Appellant appealed to the District Court, which upheld the decision of the Primary Court while altering the custody arrangement to place the children under the care of the Respondent. The Appellant, expressing discontent with the outcome, seeks further redress before this Court. In her second appeal to this Court, she advanced nine grounds of appeal as follows:

- 1. that the trial magistrate misguided himself and did not consider the fact that the Respondent did not present the marriage conciliation certificate from the Ward Executive Officer.*
- 2. that the trial magistrate erred in law and fact by not considering the evidence she presented, which are children's health insurance cards, family photos, and copies of property that the Appellant and the Respondent jointly acquired since they lived together for about seven years.*
- 3. that the trial court in case number 24/2023 and the appellate Court in appeal number 16/2023 both erred by not considering the issue of the division of properties jointly acquired while the parties have lived as husband and wife for a period of about seven*
- 4. that the trial court erred in law and fact in the sense that in the original claim for divorce and prayers for the custody of children, the Respondent who was the applicant therein failed to provide reasons for claiming divorce.*
- 5. that the trial magistrate and the appellate Court erred by placing the children's custody under the Respondent without considering that both of them are under seven years old.*

- 6. that the trial magistrate erred in law and fact by ordering the Respondent to compensate the Appellant Tshs. 3,000,000 without explaining how the same was reached while the duos were not married.*
- 7. that the trial magistrate erred by ignoring her evidence and testimonies by witnesses; she brought and just considered the testimony by the Respondent.*
- 8. that the trial magistrate erred by failing to decide on the custody of children in his judgment.*
- 9. that the trial magistrate erred in law and fact by failing to pronounce that the parties were married.*

At the appeal hearing, both parties appeared in person and presented their arguments orally. The Appellant was the first to address the court. In her submission, she reiterated the contents of her filed grounds of appeal without adding any new points. This led me to conclude that she adopted the grounds of appeal as submitted in the petition.

In response, the Respondent addressed grounds 2, 3, and 7 collectively, asserting that the Appellant failed to prove joint property acquisition and the existence of marriage. On the fourth ground of appeal, the Respondent argued that the court rightly awarded him custody of the children due to his ability to financially provide for them and his wife's presence to care for them.

Regarding grounds 5 and 8, the Respondent contended that custody decisions should prioritise the children's best interests and emphasise his

rights as their father. He pointed out the Appellant's lack of permanent residence and dependence on others, suggesting that she may not be the best caretaker for the children.

On the sixth ground, the Respondent acknowledged a compensation offer but argued against it, citing his responsibility to support and educate the children.

Lastly, the Respondent contested the Appellant's marriage claim, asserting that she failed to provide evidence to support it.

When the court gave the Appellant the floor to make a rejoinder, she had nothing substantial.

After reviewing the arguments presented by both parties, it is clear that the crux of this appeal revolves around determining the matter without a marriage conciliation board certificate, custody of children, compensation, and the division of properties. I will deal with the first ground of appeal to clarify a point raised and dispose of the appeal on the procedural aspects under which the lower courts arrived at their decisions.

From the outset, it is imperative to acknowledge that the marriage conciliation board certificate issue was not a ground of appeal in the first appellate court. Consequently, its absence from the proceedings of the first appellate court renders it a novel fact that should not be entertained at this stage. Notably, this omission in the first appellate court proceedings

has significant legal implications, as established by various precedents, including but not limited to the cases of ***Ramadhan Mohamed vs R*** Criminal Appeal No. 112 of 2006 (unreported) as was quoted in the case of ***Sadick Marwa Kisase vs Republic*** (Criminal Appeal 83 of 2012) [2013] TZCA 420. Also, see the cases of ***George Maili Kemboge vs Republic*** (Criminal Appeal 327 of 2013) [2014] TZCA 203 and ***Abdallah Said @ Kundum vs Republic*** (Criminal Appeal 354 of 2017) [2020] TZCA 249. Specifically, in the case of ***Ramadhan Mohamed v. R (Supra)***, it was stated that:

"We take it to be settled law, which we are not inclined to depart from that, "this Court will only look into matters which came up in the lower court and were decided, not on matters which were not raised nor decided by neither the trial court nor the High court on appeal."

Similarly, in the case of ***Hotel Travertine and 2 Others vs National Bank of Commerce*** [2006] TLR 133, it was stated that:

As a matter of general principle, an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal.

At this stage, therefore, the court's jurisdiction is limited to matters previously addressed by the lower court. Consequently, raising new issues on appeal is inappropriate as they are considered novel and fall outside

the scope of the current proceedings. I, therefore, proceed to dismiss the first ground of appeal.

As I reviewed the proceedings of the appeal in the lower courts concerning the current union between the Appellant and the Respondent, I found it necessary to consider the procedure leading to the decisions rendered. After determining that there was no marriage between the Appellant and the Respondent, I pondered whether the trial court was justified in issuing compensation, custody, and property division orders in the matrimonial proceedings.

In the present appeal, there was no dispute that the Appellant and Respondent cohabited for almost seven years and were blessed with two issues. We are told that the union between the twosomes went south when the Respondent discovered that the Appellant was previously married to another individual with whom she shares a child. From this aspect, the trial court declared no marriage between them. However, the court proceeded to order custody, compensation, and determined the property purported to have been jointly acquired during the union.

It is common knowledge that marriage in Tanzania is regulated by the ***Law of Marriage Act, Cap 29 R.E. 2019***. Consequently, the validity of any marriage is assessed in accordance with the provisions of this Act. In the present case, the Appellant asserted that she was married to the

Respondent in a customary marriage, while the Respondent disputed this claim. The trial court did not recognise such a union as a marriage since it did not meet the standards outlined in **section 25(1)(d) of the Act**. This was so because there was no evidence to prove the assertion.

Unfortunately, the trial court, although not explicitly stated, proceeded to apply the provisions of **section 160(2)** ordering for custody, compensation, and distribution of properties without first determining whether there was or was no presumption regarding the existence of the marriage and whether the same was rebuttable or not under **section 160(1) of the Law of Marriage Act. Section 160(1)** and **(2)** provides that:

1) Where it is proved that a man and a woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.

*(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in section (1) and **such presumption is rebutted in any court of competent jurisdiction**, the woman shall be entitled to apply for the maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the **court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefor either by the woman or the man, to grant such other reliefs,***

including custody of children, as it has jurisdiction under this Act, to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provision of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in orders of maintenance and other reliefs under this section. [Emphasis is mine].

The provisions above signify that when the presumption is rebutted and that upon satisfying the court that one party to a union, whether male or female, has cohabited with the other for a duration exceeding two years, the court is empowered to issue orders akin to those made in response to divorce or separation proceedings among legally married spouses under the provisions of the Marriage Act.

It should be noted that a party in such a union is precluded from petitioning for divorce or separation. The reliefs may include maintenance, custody of children or distribution of property jointly acquired during the union. See the case of *Harubushi Seif v Amina Rajabu* [1986] TLR 221. It follows that unless the presumption of marriage is rebutted, the court cannot grant reliefs as those granted during separation or divorce.

Since this matter was filed under the Marriage Act and it was found that there was no marriage between the parties, the court ought to have considered **section 160(1)** before granting the orders it did. Granting such orders under the Marriage Act in the circumstances of this case is

fatal; see the case of ***Richard Majenga vs Specioza Sylvester*** (Civil Appeal 208 of 2018) [2020] TZCA 227, where it was stated that:

*"....., though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but **since their relationship was based on presumption of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not.** In the circumstances, we are in agreement with both learned counsel for the parties that **it was improper for the trial court to resort into granting the subsequent reliefs prayed before satisfying itself on the existence of the presumed marriage.**" [Emphasis is mine]*

So, was in the present appeal. It is evident, therefore, that adherence to the procedure delineated in section 160(2) serves to safeguard the rights and prevent infringement of individuals involved in relationships devoid of formal legal recognition through marriage yet susceptible to dissolution and consequential legal implications. In addition, the provision ensures equitable treatment of the parties to such unions, particularly when seeking relief upon the dissolution of said unions subsequent to a significant duration of cohabitation. Failure to comply with the provisions stipulated in sections 160(1) and (2) in such a situation renders the proceedings defective.

Given the circumstances, and upon finding that the proceedings before the trial court and the first appellate court were flawed, there exists no recourse but to nullify all the proceedings and annul the judgments of both lower courts and any subsequent orders issued therein. Accordingly, I hereby order a retrial of the matter before another magistrate. I make no order as to costs.


G.V. MWAKAPEJE
JUDGE
08/03/2024

Right to appeal explained.

The judgment is delivered on the 8th day of March 2024, in the presence of both the Appellant and Respondent.




G.V. MWAKAPEJE
JUDGE
08/03/2024