

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB – REGISTRY)
(ONE STOP JUDICIAL CENTRE)**

AT TEMEKE

CIVIL APPEAL NO. 04 OF 2023

(Originating from the judgement and decree of the District Court of Kinondoni at Kinondoni in Matrimonial Cause No. 50 of 2021 before Hon. Kaluyenda – SRM)

MAGDALENA AMINIEL KOKA.....APPELLANT

VERSUS

GALILA RAMADHANI WABANHU.....RESPONDENT

RULING

01/08/2023 & 03/08/2023

M.MNYUKWA, J.

Parties in this case contracted Christian marriage on 2012. They lived happy marriage until 2016 when they separated. They are blessed with two issues of marriage. The appellant in this appeal (the then respondent) appealed against the decision of Kinondoni District Court (the trial court) which declared the marriage between her and the respondent (the then petitioner) has been irreparably broken down and granted a decree of divorce. It was also ordered the appellant to take the house situated at Goba, Tegeta A while the respondent shall take the rented rooms within the same compound, each party to remain with the properties he/she

acquired personally and an order on the custody of the issues of marriage to the appellant.

Aggrieved, the appellant filed a Memorandum of Appeal in this court that contains three grounds of appeal.

When the matter came for hearing, the appellant was represented by Kaizer Msosa, learned counsel while the respondent was represented by Mastidia Morris, learned counsel too. However, upon perusal of the court record, I noticed that the respondent and his witness, Fausha Seraphine their evidence was recorded without taking oath. The record also shows that the trial magistrate did not append signature after completion of taking witnesses' evidence.

Therefore, the counsel of the parties were asked to address the court on the propriety or otherwise of the proceedings of the trial court specifically on that anomalies. I thus invited the counsel for the parties to make submissions on the above issues raised by the court *suo moto*.

Taking the floor, the appellant's counsel conceded to the anomalies observed by the court. He submitted that, the records of the trial court shows that the evidence of the respondent and his witness were recorded without firstly taking oath. He also conceded on the second issue as he submitted that, the records is very clear that the trial magistrate did not

append signature after she has completed to record the evidence of the respondent and his witness.

Before he retires, the counsel for appellant averred that, the above anomalies vitiated the entire proceedings. As to the way forward, he prayed the matter to be remitted back to the trial court for it to be heard afresh.

Responding, the counsel for respondent did not have much to submit. She briefly join hands the submissions made by the appellant's counsel. She added that, the anomalies vitiated the entire proceedings which deserved to be nullified and the court has to order appropriate remedy.

As I have indicated above, when I went through the proceedings, I observed two anomalies in the trial court's record. This is vividly shown on page 4 and 6 of the proceedings where the evidence of the respondent and his witness were recorded without taking oath and as reflected on page 5, 6 and 7 of the same trial court's proceedings, the magistrate did not append signature after completion of taking their evidence.

Starting with the first anomaly on the failure of the trial magistrate to administer oath to the witness before his evidence was taken. It is a trite law that every witness must give evidence on oath. The omissions to take



oath is fatal since it contravene the requirement of section 4 of the Oaths and Statutory Declarations Act, Cap 34 R.E 2019 which provides that:

"S. 4. Subject to any provision to the contrary contained in any written law, an oath shall be made by-

- (a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court."*

The law is settled that, witness whose evidence is recorded in a court of law must give his evidence under oath. The evidence given without taking oath without any lawful excuse is as good as no evidence. Thus, taking oath before one's adduced evidence is a mandatory requirement which must be complied with any court.

In **Catholic University of Health and Allied Science (CUHAS) v Epiphania Mkunde Athanase**, Civil Appeal No 257 of 2020 the Court of Appeal stated that:

"When the law makes it mandatory for a person who is competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case."

Additionally, in the case of **Attu J. Myna v CFAO Motors Tanzania Limited**, Civil Appeal No 269 of 2021 it was held that:

"It is now clear that the law makes it mandatory for the witnesses giving evidence in court to do so under oath. It follows therefore that the omission by the witness to take oath before giving evidence in this case is fatal and it vitiates the proceedings. Fortunately, this is not a new territory, as the court has discussed in its various decisions..."

Thus, it is improper to record the evidence of the witness without firstly taking oath.

On the second anomaly, it is also clear from the record that the trial magistrate did not append signature after completion of recording the respondent's evidence and his witness. The law is settled that, failure to append signature after completion of recording evidence is incurable as it question the authenticity of the proceedings. The provision of Order XVIII Rule 5 of the Civil Procedure Code, Cap 33 R.E 2019 provides that:

*" The evidence of each witness shall be taken down in writing, in the language of the court by or in the presence and under the personal direction and superintendence of **the judge or magistrate, not ordinarily in the form of question and answer, but in that of narrative and the judge or magistrate shall sign the same.**" (emphasis is mine).*

The emphasis on the requirement to append signature after completion of recording the evidence of a witness in the trial court has been stated in a number of authorities like the cases of **Sabasaba Enos @ Joseph v Republic**, Criminal Appeal No 411 of 2017 and **Iringa International School v Elizabeth Post**, Civil Appeal No 155 of 2019. Further to that, the Court of Appeal in the case of **Yohana Mussa Makubi and Another v Republic**, Criminal Appeal No 556 of 2015 observed that:

"... In the absence of the signature of the trial [Judge] at the end of the testimony of every witness; firstly; it is impossible to authenticate who took down such evidence; secondly, if the maker is unknown, the authenticity of such evidence is put to questions as raised by the appellant's counsel; thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; fourthly such evidence does not constitute part of the record of trial and the record before us."

As I have said, the trial magistrate recorded the evidence of the respondent and his witness at the trial court without appended signature after completion of taking their evidence as reflected on page 5. 6 and 7 of the trial court's proceedings. The same questions the authenticity of the record of the trial court and this court cannot safely make decision on that evidence.



Consequently, in the exercise of the powers conferred in this court, I hereby quash the proceedings of the trial court and set aside the Judgement and Decree. I further order the matter to be remitted back to the trial court for a matrimonial dispute to be heard *denovo* before another Magistrate. Since the matter originates from the matrimonial dispute and the issue raised by the court *suo moto*, I make no order as to costs.

It is so ordered.




M. MNYUKWA.
JUDGE
03/08/2023

Court: Judgment delivered in the presence of both parties' counsel


M. MNYUKWA.
JUDGE
03/08/2023