IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 38 OF 1992

BETWEEN

RICHARD WILLIAM SAWE . . . . . APPELLANT

AND

WOITARA RICHARD SAWE . . . . . RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam)

(Bahati, J.)

dated the 28th day of September, 1990

in

Matrimonial Cause No. 12 of 1985

JUDGEMENT OF THE COURT

KISANGA, J.A.:

The appellant Richard William Sawe petitioned the High Court for divorce against his wife on grounds of adultery and cruelty. The High Court (Bahati, J.) granted the decree of divorce with an order to divide the matrimonial assets equally between the parties, and each party to bear his or her own costs of the suit. The appellant was aggrieved with the order for the division of the matrimonial assets. He was also dissatisfied with the order for costs, hence this appeal. Before us both parties were unrepresented and each of them appeared and argued the appeal in person.

In dissolving the marriage of the parties the trial Court found that the respondent wife, through her adultery, was to a great degree responsible for the breakdown of that marriage. The appellant, therefore argued at great length,

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and this was the thrust of the whole appeal, that in view of such finding the learned judge erred in ordering the division of the matrimonial assets equally between the parties. Instead he should have held that in accordance with the custom of the Wachagga tribe to which both parties belong, the appellant alone was to have all the matrimonial assets, and the respondent was not entitled to any part thereof. For the same reason, the appellant went on, the order that each party should bear his or her own costs was wholly unjustified; rather the respondent alone should have been made to bear all the costs of the suit.

We have given due consideration to the appellant's submission that in considering the division of the matrimonial assets the trial judge should have had regard to the custom of the Wachagga which, upon dissolution of a marriage, disentitles the offending spouse to any share of the matrimonial assets. Although the appellant did not say so expressly, it seems clear that he was relying for this submission on the provisions of Section 114 (2) (a) of the Law of Marriage Act which require the Court, when ordering division of the matrimonial assets, to have regard to the custom of the community to which the parties belong. However, the main difficulty which we find concerning this submission is that no evidence was led of any such custom of the Wachagga as alleged by the appellant. There was only the appellant's assertion as to the existence of it, which assertion was not conceded by the respondent. Indeed the respondent took the view that her marriage with the appellant was not a typical chagga marriage. It was a

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Christian marriage duly solemnized in the church and the parties belonged not to a typical Chagga community but to an urban community in the city of Dar es Salaam. In the circumstances it is plain that the appellant's assertion alone could not do. If a party seeks to rely on a customary rule or practice of a given community or tribe he or she is obliged to adduce evidence in proof thereof. That was not done here.

It should be noted in addition that the aspect of the respondent's degree of responsibility for the break-down of their marriage was considered by the trial judge only in relation to an award of a maintenance order in favour of the respondent, and not in connection with the division of the matrimonial assets. In other words the question of applying customary rule or practice of the Wachagga to disentitle the respondent to a share of the matrimonial assets was never before the trial Court for consideration. The appellant is raising that issue for the first time on appeal in this Court. That is wrong. It ought to have been raised at the trial before the trial judge first for his consideration and opinion.

It therefore follows that the appellant's submission on this point must fail because the whole issue of applying the alleged rule or custom of the Wachagga to deny the respondent a share of the matrimonial assets, including the adducing of evidence in proof thereof, was not before the High Court and this Court cannot entertain it in the

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first instance. Needless to say the appellant's submission raises a number of interesting and pertinent questions. For instance, assuming that the custom or practice as alleged by the appellant does exist, is such custom or practice void for being oppressive or repugment? Is it violative of the basic human rights of equality of all persons before the law and non-discrimination on grounds of sex as guaranteed by the country's Constitution? These are some of the questions which ought to be answered before the appellant's submission can be upheld or rejected, but as stated earlier the occasion did not arise for the High Court to consider them in the first instance.

There was, however, one aspect of the appellant's submission on this point which we think had merit and which was indeed rightly conceded by the respondent. It concerned a loan taken out by the appellant for the construction of the matrimonial home. The loan is not yet repaid in full. The appellant is still repaying the instalments which are due to end in 1997. In ordering the division equally of the matrimonial assets which included the house, the learned judge said nothing about the responsibility to liquidate the outstanding part of the loan on the house. This was wrong and we believe that this was an unfortunate oversight on the part of the learned judge. The parties should be made to participate not only in the division but also in the acquisition of the matrimonial assets in question. As intimated earlier, however, the respondent at the hearing of this appeal readily accepted to share equally the responsibility of liquidating the outstanding part of

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this loan and so nothing further need be said about the matter.

The appellant also claimed compensation and damages from the respondent for the breakdown of the marriage resulting in the loss to him of his love and affection for her, and for lowering his reputation by reason of her adultery. Such compensation should include refund of the dowry paid, pre-marital gifts or accessories and the expenses he incurred in organizing their wedding. However, this claim is being made for the first time on appeal in this Court. It was never raised at the trial. It did not appear anywhere in the Petition, it was never framed as an issue and it did not feature anywhere in the proceedings. As such it would not be proper for us to consider it.

Again the appellant has pleaded for sympathy. He says that he now has 3 young children left by his second wife who died suddenly in 1992, and the responsibility of bringing them up rests solely on him. We think that this point is irrelevant. Indeed we do sympathize with the appellant for the misfortune of losing his second wife, and for the heavy responsibility he has to shoulder as a result. But it seems quite apparent that these matters have nothing to do with the consequences flowing from the dissolution of the appellant's marriage with the respondent. The rights and obligations of the appellant and the respondent following the dissolution of their marriage have to be determined solely with reference to their marriage so dissolved. In our view the death of

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the appellant's second wife and the problems arising therefrom can have nothing whatever to do with the determination of such issues.

And lastly there is the appellant's submission that the costs of the suit should have been born exclusively by the respondent. Section 50 of the Law of Marriage Act provides that costs in matrimonial proceedings shall be in the discretion of the Court. There is a proviso to that statement which, however, is not relevant to the facts of the present case. Now, the main or the only ground advanced by the appellant for his submission on this point is that the order for costs should be made exclusively against the respondent because she was responsible for the breakdown of the marriage. However, we could not acceede to that view. The law does not say that the party who is responsible for the breakdown of the marriage should bear all the costs. The law leaves open the issue of costs. In other words the law gives the Court discretion to decide on how the costs of the proceedings should be born by the parties; and no doubt in exercising that discretion the Court shall have regard to all the circumstances of the case. We have given due consideration to the appellant's submission, but we are of the view that merely because the respondent was found to be responsible for the breakdown of the marriage, that fact alone could not be sufficient as a basis for ordering her to bear all the costs of the proceedings. Therefore we could find no ground on which to fault the learned trial judge in exercising his discretion the way he did.

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In the event the appeal succeeds only to the extent that the respondent shall participate equally with the appellant in liquidating the entire loan which was taken for building the matrimonial home. In all other respects the appeal is dismissed with an order that each party is to bear his or her own costs of the appeal.

Before taking leave of the matter perhaps we should mention that in the course of arguing the appeal the appellant alleged that two cows and two goats, being part of the matrimonial assets, have since died. He would appear to say that the order for the division of the matrimonial assets should be adjusted or varied accordingly to take this into consideration. However, this was not made a ground in the memorandum of appeal, and no leave was obtained or sought to argue it as an additional ground of appeal. In any case we think that this is a matter which might be raised with the execution Court which might wish to receive evidence on the matter.

DATED at DAR ES SALAAM this 9th day of June, 1994.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M. S. SHANGALI)
DEPUTY REGISTRAR