IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUGASHA J.A., MWANGESI J.A. And NDIKA J.A.)

CIVIL APPEAL NO. 265 OF 2018

REGNARD DANDA .....APPELLANT

VERSUS

FELICHINA WIKESI ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Sameji, J.)

dated the 10th day of March, 2017
in
Matrimonial Appeal No. 01 of 2015
.....

JUDGMENT OF THE COURT

21st & 25th August, 2020.

MWANGESI, J.A:

On the 15th day of July, 1989 REGNARD S/O DANDA and FELICHINA D/O WIKESI, who are the appellant and the respondent herein respectively, celebrated their marriage under Christian rites at Makambako Roman Catholic Church, as evidenced by the marriage certificate which was admitted in evidence as exhibit P1. Their marriage was thereafter blessed with four issues, one of them being no more at the time of lodging the petition, after having passed away in October, 2013.

On the 17th day of December, 2013 the respondent, petitioned for divorce advancing five reasons which were listed in paragraph 6 of her petition to be;

1. *That, the husband had left the matrimonial home and totally deserted the wife for more than ten years.*
2. *That, the husband was committing adultery with several other women.*
3. *That, the respondent was married to another woman with whom they were living under the same roof at Ngaranga village.*
4. *That, the respondent was threatening the applicant that he would kill her.*
5. *That, the husband (appellant) was continuously insulting the wife (respondent) in the presence of their children and guests, and was in several times being cruel to the applicant.*

It was contended further by the respondent in her pleading, that efforts to settle the dispute with the appellant through amicable means by involving relatives and the Ward Conciliation Board, had proved futile. A certificate issued by the Conciliation Board of Mjimwema Ward on the 6th

December, 2013 certifying that it had failed to reconcile the disputants, was admitted in evidence as exhibit P2.

On the basis of the foregoing, the respondent prayed for the court to grant the following reliefs that is; **one,** a judgment and decree of divorce; **two**, custody and maintenance of the matrimonial children; **three,** division of the matrimonial assets which accrued during the subsistence of the marriage; **four**, costs of the petition and **five,** any other reliefs that the honourable court might deem fit and just to grant.

To establish her claims, the respondent relied on her own sworn testimony, which was supplemented by the testimonies of two witnesses namely, Agrina Regnard Danda (PW2) and Paulo Danda (PW3). Moreover, she tendered as exhibits the marriage certificate and the certificate from the Ward Conciliation Board, certifying that reconciliation between them had failed.

On his part, the appellant resisted almost all the claims advanced by the respondent save for the information concerning celebration of their marriage. To support his defence, apart from his own sworn testimony, he lined up ten witnesses that included, Moshi Mponda (DW2), Josephat Joseph

Danda (DW3), Winfred Joseph Danda (DW4), Solomon Maliyabwana (DW5), Winfred Paulo Mbangala (DW6), Method Luka Danda (DW7), Charles Anania Mfikwa (DW8), John Joseph Mtitu (DW9), Dr. Gerald Mayemba (DW10) and Prosper Joseph Danda (DW11).

From the pleadings which were lodged in court by either party, the learned trial Senior Resident Magistrate, framed the following three issues for determination as reflected on page 50 of the record of appeal, that is: -

1. *Whether the marriage between the parties had broken down irreparably.*
2. *Whether the parties had jointly acquired assets which were subject of division.*
3. *To what reliefs was each of the parties to the petition entitled.*

Upon hearing and analyzing the evidence which was placed before him from either side, the finding of the trial Senior Resident Magistrate in respect of the first issue, was couched in these words: -

> *"Basing on the evidence which has supported each side, it is ruled out that this marriage has broken down irreparably."*

To answer the second issue, which was as to whether there were assets which had been acquired jointly during the subsistence of the marriage and therefore subject of division, the learned trial Senior Resident Magistrate, had to consider the evidence which had been tendered from either side, either in support or opposition to the assets which had been listed by the respondent in her petition under paragraph 7, which were: -

(a) A house situated at Nazareth within Njombe Township;

(b) A plot of land situated at Mjimwema area within Njombe Township;

(c) A shamba of trees located at Msete area;

(d) A motor vehicle, make, Toyota Hilux Double Cabin;

(e) More than five cows of European breed; and

(f) Various household items.

The finding of the trial Senior Resident Magistrate, after analyzing the evidence received from both sides, was that he was convinced on balance of probabilities that all the assets which had been listed by the respondent in the petition, had been acquired by the joint efforts of the parties during the subsistence of the marriage, and therefore, were subject of division save

the asset falling under paragraph (c), which he held that it had not been established to be among the matrimonial assets.

In answer to the third issue which was in regard to the reliefs of which each party to the petition was entitled, the trial Senior Resident Magistrate had this to say, that is: -

> *"Taking into account the nature of this case, I will award fifty percent (50%) share to each party, the matrimonial assets which are: a house at Nazareth, a motor vehicle, make, Toyota Hilux Double Cabin with Registration No. T594 AXE, five cows of European breed and the various household items.*
>
> *He further directed that, each party was free to buy out the other party's share by paying 50% value of the said items as shall be determined by the Government Valuer. Otherwise, the same to be sold and the proceeds shared equally. I make no order as to costs."*

With regard to the custody of matrimonial children, the trial court, ruled out that the only child who was subject of an order for custody, was Samuel Danda, who by then was aged thirteen (13) years, because the others were above the age of eighteen (18) years. On this, he stated that: -

"In my view, Samuel Danda is old enough to express his independent opinion. He was not brought to the court because he is I think, at the boarding school. I have no reason to give custody to either of the parents, for to do so would be defeating his best interest which he has mental ability to know and choose where to go during his vacations and who to live with.

The decision of the trial court aggrieved the appellant, who challenged it in the High Court of Tanzania at Iringa, where he was partially successful. According to the decision of the High Court, which was delivered to the parties on the 10th March, 2018, it upheld the finding of the trial court in regard to the division of the matrimonial assets, but reversed the decision of the trial court in regard to the custody of the child whereby, it ordered that the custody of the child was to be put under the respondent. The court further stated that the appellant, had right to see or visit him unless such arrangement interfered with his school calendar. Finally, the Court ordered the respondent to maintain the child and pay for his school fees as per section 129 of the Law of Marriage Act Cap 29 R.E. 2002 **(the LMA)**.

Still undaunted, the appellant has come to the Court for a second and final appeal, premising his grievance on three grounds namely: -

1. *That, the appellate court erred in law and facts when it upheld the decision of the trial court on the determination of the joint matrimonial property without taking into consideration the evidence adduced and the provision of the law.*
2. *That, the appellate court erred in law and facts when it ordered equal division of non-matrimonial property to the parties.*
3. *That, the appellate court erred in law and facts when it placed the custody of the child to the respondent without the expression of independent opinion of the child Samuel Danda.*

Further, in compliance with the requirement of the provision of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**), on the 29th November, 2018 the appellant lodged written submission in support of the appeal, which was replied by the respondent in the written submission that was lodged by the respondent on the 21st December, 2018 in terms of rule 106 (7) of **the Rules.**

At the hearing of the appeal before us, the appellant who was not present in Court, was represented by Mr. Rutebuka Samson Anthony, learned counsel, whereas the respondent entered appearance in person, with no legal representation.

Before commencement of the hearing, at the very outset, Mr. Anthony, prayed to abandon the third ground of appeal for the reason that it has been overtaken by events in that, the child who was the subject of an order of custody, is now above the age of eighteen (18) years, meaning that the need for an order of custody, is uncalled for. The prayer was granted by the Court un-objected.

In regard to the remaining first and second grounds of appeal, Mr. Anthony, prayed to adopt the written submission which had earlier on been lodged in Court, wherein it is submitted on behalf of the appellant in the first ground, that the lower courts erred to order for equal division of the matrimonial house situated at Nazareth, because the contribution by the respondent in constructing it, if any, was very minimal. This was so for the reason that, the plot of land of that house was purchased by the appellant in the year 1988, which was before they got married.

It was submitted further that, even though the construction of the house started during the subsistence of the marriage, the same was done slowly by the appellant himself with some assistance from his relatives and in particular, DW4, who contributed doors, windows and some other building materials, and DW2, who contributed 52 corrugated iron sheets. Until the

properties. It was from that fact, he argued, the motor vehicle was registered in the name of Nyasaland Regnard Danda, which is the clan name.

With regard to the five cows of European breed, which the lower courts also ordered to be equally divided between the two, Mr. Anthony, submitted that it was also wrong because the said cows were not matrimonial properties as they belonged to Mwalimu Mdenye.

On the division of the matrimonial household items, the challenge by Mr. Anthony was based on the fact that, there were some items which belonged to the appellant and others to the respondent. Under the circumstances, the order of the court ought to have directed that, each of them had to take his/her own assets, and not ordering all of them to be divided *pro rata*.

In view of what he submitted above, the learned counsel for the appellant, put to rest the appeal before the Court, by requesting us first, to remove the assets which are not matrimonial from the list of those which are to be divided between the two. Secondly, in regard to the matrimonial house situated at Nazareth which is the only asset subject of division, to be divided depending on the extent which each party contributed to its

construction. And, as earlier submitted, according to him, a ratio of thirty percent (30%) to seventy percent (70%), was the fair and equitable one.

The submission by the respondent, in reply to what was submitted by the appellant in regard to the acquisition of the matrimonial house situated at Nazareth, she started by explaining the business which each of them was performing at the material time. She stated that while on her part she was a primary school teacher, the appellant was a secondary school teacher. Even though she conceded to the fact that the plot of land was indeed, acquired by the appellant before they got married, she submitted that its construction started when they were already in the marriage.

The respondent went on to submit that, during the subsistence of their marriage and to be specific, the period between 1989 and 2007, it had been agreed between them that, she surrenders the whole of her salary to the appellant, a thing which she did, because he was the one concerned with the management of the general affairs of the matrimonial home, the construction of the house in dispute inclusive. She was thus positive that, she directly contributed to the construction of the house under discussion.

Reacting to the evidence which was tendered by the brothers of the appellant that is, DW2 and DW4 to the effect that they contributed to the construction of the said house, the respondent submitted that their evidence had just been cooked in collusion with their brother, for the aim of denying her of her right in the said matrimonial house, which she had heavily contributed to its acquisition. She therefore, submitted that the authorities which had been relied by the appellant in his submission, were inapplicable to the circumstances of the appeal at hand, of which she asked us to sustain the holding of the lower courts, which was fairly arrived at.

The respondent's response to the assertion by the appellant, that the motor vehicle make Toyota Hilux Double Cabin, was not a matrimonial asset, she strongly resisted the assertion, arguing that the said motor vehicle was purchased by him during the subsistence of their marriage from the matrimonial resources. She insisted that the contention by the appellant that it was a clan property, was continuation of the fabricated evidence aimed to deny her of her right to the same. This was verified by their failure to tender evidence to establish that it was indeed, a clan property. And, with regard to its registration being in the name of Nyasaland Regnard Danda, she

submitted to the effect that, the said name was the business name used by the appellant, which had nothing to do with the clan.

The respondent advanced the same reasoning as above, in submitting about the acquisition of the five cows of European breed and the household items, all of which were also ordered to be shared equally. She argued that all of them were acquired during the subsistence of their marriage using matrimonial resources. She concluded her submission by requesting us to uphold the concurrent decisions of the lower courts.

The issue which stands for the Court to deliberate and determine in view of the submissions from either side above, is whether the division of the matrimonial assets which was made by the lower courts after the marriage between the parties herein had been dissolved, was faulty. We propose to start with the house situated at Nazareth. In essence, there is no dispute to the fact that the said house was a matrimonial asset which was acquired during the subsistence of the marriage. The dispute is on the ratio of the division wherein the appellant, strongly argues that he ought to have been given a lion's share in line with the stipulation of the law after having contributed more than the respondent, in its construction.

Upon closely and objectively considering the evidence on record, we fully subscribe to the position which was taken by the lower courts. On the basis of the holding in **Bi Hawa Mohamed Vs Ally Seif** [1983] TLR 32, the respondent qualified to have a share from the house even if she were not to have directly contributed to its acquisition simply from the fact that she was a house wife. However, the situation in the instant appeal, there was more than that on account that the respondent, who was a teacher, was surrendering the whole of her monthly salary to the appellant, for use in the entire affairs of the matrimonial home among which, was the construction of the house under discussion.

In the circumstances, while we are mindful of the provision of section 114 (2) (b) of **the LMA** as interpreted in **Bi. Hawa Mohamed's** case (*supra)* and **Yesse Mrisho Vs Sania Abdu,** Civil Appeal No.147 of 2016 (unreported), that in determining the division of matrimonial assets, the contribution of each party in acquiring them must be considered, we reserve no doubt that the appellant and the respondent in the instant appeal, directly contributed on equal basis in acquiring the house under discussion.

As regards to the contention by the appellant, that he got some assistance from his brothers that is, DW2 and DW4 in constructing the said

house, implying that their assistance topped up to the extent of his personal contribution to the construction of the house, in the first place, we find nothing wrong with the alleged assistance if at all it was advanced. Whether the version by the appellant was true or not is not an issue when the description of a matrimonial/family asset is put into perspective. According to the description given in Halsbury's Laws of England 4th Edition at page 491, cited in **Bi Hawa Mohamed's** case (*supra)*, a family/matrimonial asset;

> *"refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole."*

In view of the foregoing definition, there was nothing wrong with what DW2 and DW4 to have done as averred by the appellant, that is, of having willingly assisted in constructing the matrimonial home of the appellant. It is common knowledge that the alleged assistance by the relatives, was meant for the entire home and not the appellant as an individual. That said, we dismiss the first ground of appeal and sustain the order which was given by the lower courts.

Next for consideration, is the issue of assets which are claimed by the appellant, not to be matrimonial ones and therefore, not subject of division. To this, we start with the motor vehicle. According to the submission on behalf of the appellant, the motor vehicle was not a matrimonial asset because it belonged to the clan. Among the reasons advanced to fortify the contention was the registration number, which was said to be in the family clan name of 'Nyasaland'. The appellant stated further that, the motor vehicle was purchased from Malawi in a public auction by Winfred Joseph Danda (DW4), who then handed it over to him as a caretaker of the clan.

The testimony of DW4 during trial of the suit, in support of the contention by the appellant, is reflected on pages 73 and 74 of the record of appeal. Part of his testimony as recorded on page 74 of the record of appeal, reads that: -

> *"The motor vehicle used by the brother was bought by me from Malawi. It was registered in the family name which is Nyasaland and I processed it and gave it to him. It was bought by the family for him as a custodian of clan properties"*

On her part, the respondent testified on page 51 of the record of appeal to the effect that a motor vehicle was among the matrimonial assets, which was jointly purchased and that, it was being used for family business as corroborated by the testimony of PW2 (daughter) on page 57 of the record of appeal, and that of PW3 (son), which is reflected on page 60 of the record of appeal. And, with regard to the name of 'Nyasaland', she stated that it was the business name of the appellant.

Both courts below, disbelieved the version from the appellant's side, and believed that of the respondent's side that the motor vehicle was a matrimonial asset and therefore, subject of division. On our part, we share the position taken by the lower courts. We decline to buy the version from the appellant's side for the following reasons. **One**, there was no any scintilla of documentary evidence which was tendered by DW4, to corroborate his contention that he was indeed, the one who purchased it in Malawi. It is common knowledge that the purchase of the motor vehicle, must have been documented. Furthermore, regard being had to the fact that, the motor vehicle was alleged to have been purchased from outside the country, undoubtedly, documents were involved in bringing it into the country.

Additionally, the witness stated in his testimony that, after purchasing the motor vehicle, he processed it until when he registered in the name of the appellant. One would have expected to find the witness, clarifying the type of processes he alleges to have made. Nonetheless, to our surprise, there was no any document which was tendered in evidence, to support any of the said transactions.

Two, apart from the bald assertions from DW4 and the appellant in regard to the purported purchase of the motor vehicle under discussion, there was tendered no evidence, to establish that the said motor vehicle was indeed the property of the clan as claimed.

Three, the contention by the respondent that, Nyasaland was the business name used by the appellant in his business, was not challenged in any way. In the circumstances, the order by the trial court to put the motor vehicle in the list of matrimonial assets, was impeccable and we accordingly sustain it.

In challenging the lower court's order for division of the five cows of European breed between the parties, Mr. Anthony, argued that the said assets belonged to Mwalimu Mdenye and therefore, not subject of division.

Nevertheless, for no apparent reasons, the said Mwalimu Mdenye, was never summoned by the appellant to appear in court and give evidence to corroborate if indeed, he had entrusted the appellant with his cows. The absence of such evidence left the Court with no doubt that, the contention by the appellant was nothing but an attempt to deny the respondent, of her deserved share from the said matrimonial assets as per her complaint. It is the law under section 110 of the Evidence Act, Cap 6 R.E. 2019 (**TEA**) that, whoever desires any court to give decision as to any legal right or liability, dependent on the existence of facts which he asserts, he has to prove those facts. The said duty has not been discharged by the appellant in this appeal.

Lastly, is the issue of division of the matrimonial household assets. We do not think this fact should detain us much. It is common ground that during the happy days of the marriage, household items purchased whether individually or jointly, are for the home. It is something uncommon during such period to find a chair or a radio being purchased for an individual unless, it is for a special purpose like a gift or something of the like. There having been no particularization of the said household items, we find no error in the order which was given by the lower courts, that the division of the matrimonial household assets had to be on equal basis.

Consequently, we find the appeal before us wanting in merit, we accordingly dismiss it. Mindful of the fact that this is a matrimonial matter, we make no order as to costs.

Order accordingly.

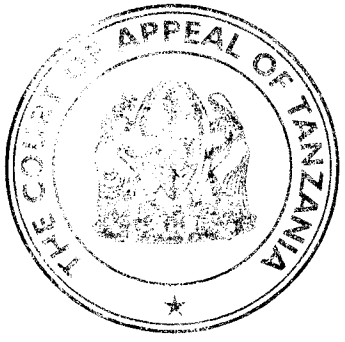
DATED at **IRINGA** this 25th day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of August, 2020 in the absence of the Appellant and represented by Rutebuka Samson Anthony, learned counsel and in the presence of the Respondent in person, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL