IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KIHWELO, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 277 OF 2020

KHAMIS ABDALLAH MBARUKU .....APPELLANT

VERSUS

NEEMA JUMA SAID .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

Dated the 30th day of November 2017

in

Matrimonial Appeal No. 2 of 2015

.....

JUDGMENT OF THE COURT

22nd & 26th September 2023

NDIKA, J.A.:

On 31st March 2000, Khamis Abdallah Mbaruku and Neema Juma Said, the appellant and respondent respectively, celebrated a marriage according to Islamic rites. Their marriage, like others, started in blissful happiness and by their thirteenth wedding anniversary, they had been blessed with a son and a daughter. Nonetheless, around that time their relationship had soured and eventually they fell out of love.

Upon the respondent's petition against the appellant, the Resident Magistrate's Court of Mwanza at Mwanza (Ruboroga, SRM) dissolved the

marriage on 5th June 2015 having found it irretrievably broken down. Consequent to the grant of the decree of divorce, the trial court ruled against the respondent on the division of matrimonial assets, holding, purportedly on the authority of **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R. 32, that the respondent was not entitled to any share of the assets because she was guilty of a matrimonial misconduct *"that was detrimental to the welfare of the family and consequential acquisition of matrimonial or family assets."* The court stressed that, *"No one should be allowed to benefit from his/her own wrongs."* Certainly, the alleged misconduct related to the appellant's claim that his estranged wife mismanaged the family spare parts retailing business between 2006 and 2010. In particular, she was accused to have once stolen or misappropriated proceeds of sale amounting to TZS. 14,000,000.00.

So far as the care of the children was concerned, the court granted custody to the appellant on the grounds that the children, then aged 13 and 7 years, no longer needed to be under their mother's care, that the respondent had no fixed place of abode, and that she had no known means of living to support and maintain them.

The respondent appealed to the High Court of Tanzania at Mwanza against the aforesaid decision on three grounds: **one**, that the trial court

erred in law and in fact by holding, without any proof, that she stole TZS. 14,000,000.00. **Two**, that the trial court erred in law and in fact by finding her guilty of a matrimonial misconduct simply because she was once relieved of her shopkeeping duties. **Three**, that the trial court erred in law and in fact by failing to grant her visitation rights.

The High Court (Bukuku, J.) allowed the appeal. The learned judge took off by dismissing the third grievance on the reason that it was a non-issue at the trial. She then found merit in the first ground of appeal, holding that the trial court wrongly misapprehended the law and the facts on the record. She took the view that the accusation of stealing against the respondent had to be established beyond reasonable doubt and that suspicion, however strong, was not a substitute for proof beyond peradventure.

As regards the second complaint, the learned judge began by observing that the trial court misapprehended the principle in **Bi Hawa Mohamed** (*supra*) on contribution by spouses in acquisition of matrimonial assets in terms of section 114 (2) of the Law of Marriage Act, Cap. 29. Elaborating, the learned judge stated, rightly so, that:

> *"... the court in **Hawa**'s case was dealing with the issue of contribution towards acquisition of the*

matrimonial assets, not contribution towards the breakdown of the marriage. Under normal circumstances, in ordering division of matrimonial assets, ***the court will consider whether the conduct or behaviour of the guilty party who wrecked the marriage operated in such a way that by reason of such conduct the said party cannot have made a contribution to the acquisition of the matrimonial assets.*** *The point to stress here is that, such conduct, in order to warrant consideration, must have been operative at the time of acquiring the matrimonial assets".* [Emphasis added]

Bearing in mind that it was established in the evidence that during the subsistence of their marriage, the parties acquired several houses, a motor vehicle and several plots of land and that the respondent contributed to the acquisition of the assets by performing domestic work and helping with the running of the shop business, the learned judge ruled that the respondent was wrongly disqualified by the trial court from entitlement to division of the matrimonial assets. Consequently, she allowed the appeal and made the following dispositive order:

"In the result, the appeal succeeds with costs. ***The judgment and decree of the trial court are***

> ***hereby quashed and set aside.*** *It is further ordered that the case file be remitted back to the trial court as soon as possible, before another magistrate, in order to* ***determine the issue of division of matrimonial assets, in accordance with the law and as per the stipulated guidelines....***"[Emphasis added]

Mr. Deocles Rutahindurwa, learned counsel for the appellant, argued the appeal on three grounds, namely: **one**, that the learned judge erred in law and in fact by determining the matter on a ground not raised in the memorandum of appeal without affording the parties a hearing on it. **Two**, that the learned judge erred in law by remitting the case to the trial court for it to consider and determine division of the matrimonial assets while the trial court had already made its decision on that aspect to the effect that the respondent was not entitled to any share of the assets. **Three**, that having quashed the judgment and set aside the decree of the trial court the learned judge erred in law by ordering the trial court to divide the matrimonial assets.

Submitting on the first grievance above, Mr. Rutahindurwa claimed that division of the matrimonial assets was neither raised in the memorandum of appeal nor argued by the parties. On that basis, he

censured the learned judge for abrogating the parties' right to be heard on that issue.

As rightly argued by Mr. Leonard S. Joseph, learned counsel for the respondent, the complaint at hand is completely off the mark. At the heart of the first and second grounds of appeal before the High Court, upon which the respondent assailed the trial court's finding that she stole money from the family shop and that she was guilty of a matrimonial misconduct, was surely the contention that she was entitled to a share of the matrimonial assets. Having heard both parties on the two grounds, the learned judge was justified not only to find the criminal accusation against the respondent unproven but also to hold that the alleged matrimonial misconduct did not disqualify her from entitlement to a share of the assets. In the premises, it was ineluctable for the learned judge to find and hold that the respondent was entitled to share the assets with the appellant. Consequently, the first ground of appeal fails.

Mr. Rutahindurwa canvassed the second and third grounds jointly. The essence of his submission was that since by its dispositive order the High Court vacated the trial court's judgment and orders the parties reverted to their original position, the court wrongly remitted the matter to the trial court for consideration and determination of division of

matrimonial assets only leaving behind the other aspects of the case. We understood the learned counsel's argument to imply that the High Court should have ordered the trial court to hear and determine the petition anew.

Mr. Joseph's reply was very brief. In essence, he supported the High Court's decision remanding the matter to the trial court for division of the matrimonial assets. He contended that the order became unavoidable upon the court establishing that the respondent was entitled to a share of the assets.

Without doubt, there is merit in the complaints at hand. First and foremost, it is manifest that the High Court, having faulted the trial court for disentitling the respondent from division of the matrimonial assets, went overboard by quashing the trial court's judgment in whole and setting aside the corresponding decree in entirety. In effect, that dispositive order swept away not just the trial court's holding on division of the matrimonial assets, but also the finding that the marriage was irretrievably broken down as well as the consequential decree of divorce and the order of custody. By dint of logic, we wonder how the trial court could have considered and determined division of the matrimonial assets in the absence of the decree of divorce set aside by the High Court. It is our

respectful view that the proper course for the High Court was to vacate the trial court's erroneous finding on division of the matrimonial assets, leaving the judgment, the divorce decree, and the order of custody intact. On this basis, Mr. Rutahindurwa's submission that the High Court should have ordered the trial court to hear and determine the whole petition anew is untenable.

Finally, turning to the propriety of the order remitting the issue of division of the matrimonial assets to the trial court, we should hasten to observe that the High Court in the instant matter sat as the first appellate court, with the jurisdiction to rehear the evidence on record and draw its own inferences of fact. It cannot be gainsaid that the court had all powers and duties of the trial court. On this basis, we were perturbed why the court chose to remit the case to the trial court instead of stepping into the shoes of that court and determine the issue on the evidence on record and in accordance with the law.

On the way forward, we wondered whether we should step into the shoes of the High Court. For, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141, we are vested with the power, authority and jurisdiction vested in the court or tribunal from which the appeal is brought, besides our appellate and revisional jurisdiction. However, as the

apex court in the country, this Court would normally deal with matters already considered and determined by the High Court. Given the circumstances, we think this matter should be remanded to the High Court for it to decide the pending question of division of the matrimonial assets.

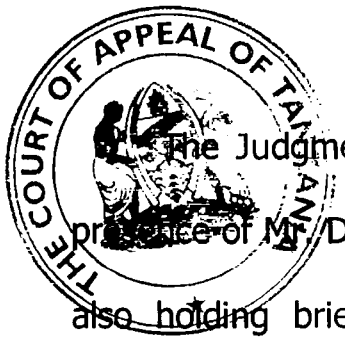
In the final analysis, we allow the appeal to the extent stated above. Accordingly, we remand the matter to the High Court for it to decide the pending question of division of the matrimonial assets upon the evidence on record and in accordance with the law. We make no order as to costs.

DATED at **MWANZA** this 25th day of September 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL



I certify that Judgment delivered this 26th day of September, 2023 in the presence of Mr. Deocles Rutahindurwa, learned counsel for the appellant also holding brief for Mr. Leonard Joseph, learned counsel for the respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL