

**IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM**

**P. C. CIVIL APPEAL NA. 6 OF 2001**

**MWAJUMA MOHAMED NJOPEKA.....APPELLANT**

**VERSUS**

**JUMA SAID MKOROGORO.....RESPONDENT**

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**J U D G M E N T**  
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**KIMARO, J.**

Mwajuma Mohamed Njopeka who is the appellant and Juma Said Mkorogo who is the respondent got married in 1989. They contracted an Islamic marriage. The marriage is not blessed with any child.

Sometimes in 1998 the appellant lodged a complaint at BAKWATA after the respondent failed to maintain her, buying her clothes and ceased to visit her and denying her conjugal rights. The respondent was called by BAKWATA and he agreed to rectify the situation.

Subsequent to the meeting held between the parties and BAKWATA, the respondent issued a “talak” to the appellant. The appellant went back to the BAKWATA to report on what the respondent did. BAKWATA confirmed the talak and gave an advice to the parties that the respondent had to pay T.sh.500,000/= to the appellant as a parting gift. The appellant was contented but then the respondent did not pay the T.shs.500,000/=.

The failure by the respondent to pay the appellant T.shs.500,000/= prompted the filing of matrimonial proceedings at the Temeke Primary Court. The proceedings were founded on the fact that the respondent had failed to provide for maintenance and had ceased to visit her. Instead he had

issued her a “talak”. The appellant averred that they jointly required two houses; one at Mbagala and another at Mtoni. She claimed for return of T.shs.4,000/= dowry and prayed that the court should assist her to get her rights.

After the trial in which three witnesses testified, among them being the appellant and the respondent, the Primary Court was satisfied that the marriage was broken down beyond repair and issued a decree of divorce to the appellant. As for the division of matrimonial assets, the respondent was ordered to pay T.shs.500,000/= saying that that was the agreement which had been reached between the appellant and the respondent.

The appellant was aggrieved and she filed an appeal in the District Court of Temeke challenging the propriety of the decision which was given by BAKWATA that she be paid T.shs.500,000/= as a parting gift and blessed by the court. The appellant contended that the amount is insufficient considering the period which they had spent together in their marriage. The District Court dismissed the appeal saying that it had been filed without sufficient grounds of appeal.

Being dissatisfied with the decision of the District Court Temeke, the appellant has now come before this court. She has filed three grounds of appeal but basically they are two.

In the first ground the appellant is faulting the decision of the District Magistrate for failure to consider the period of the marriage and the amount which each of the spouses had contributed towards the acquisition of the matrimonial assets. The appellant says that the District Magistrate ought to have made an order that each of the parties contributed 50% because they were both employed.

The second ground of appeal is that the District Magistrate failed to specify how the amount of T.sh.500,000/= was to be paid by the respondent.

Both the appellant and the respondent appeared in this appeal in person. The appellant told the court that she was relying on the grounds of appeal filed. The respondent on the other hand submitted that the case was decided in accordance with the law because he acquired some of the properties before the marriage. The respondent submitted further that he is now retired and so he does not have ability to pay the appellant the amount

of T.shs.500,000/= in lumpsum as he depends on his pension. He said he will be able to pay the amount in instalments of T.shs.50,000/= after every six months.

Briefly those were the submission given in support of the appeal and against the appeal.

Article 13(1) of the Constitution of the United Republic of Tanzania guarantees every person the right to equality before the law.

Article 107 A(1) and 107 A(2)(a) of the Constitution of the United of Republic of Tanzania are very clear on the role of the courts in Tanzania. They provide in very clear terms on how the courts should dispense their duty of administration of Justice and what should guide the courts. The courts should always address the issues and in so doing they must be guided by the Constitution of the United Republic of Tanzania and other relevant laws which are concerned with the issue(s) before the court.

Under Part II of the Constitution, in Article 9(f) the State Authorities and all its agencies are obliged to direct their policies and programmes in ensuring among other things “that human dignity is preserved and upheld in accordance with the Universal Declaration of Human Rights.

Article 7 of the Universal Declaration of Human Rights provides for equal protection before the law. This is what is provided for in Article 13(1) of the Constitution of the United Republic of Tanzania.

The question which is to be asked is whether the decision which was given by the Primary Court will give a reflection that both the appellant and the respondent were equally protected before the law. In other words if the decision of the Primary Court is put on a weighing scale with the principle of equality at the middle and the reliefs granted to each of the parties on each side of the scale will the scale balance? The respondent was left with the two houses which were acquired during the subsistence of the marriage. The appellant on the other hand was left without shelter. She was given a monetary award of T.sh.500,000/= which to date has not been paid. It is not clearly shown why the option of a monetary award was resorted to. The respondent has informed this court that he can not even pay the amount of T.shs.500,000/= in a lumpsum amount. According to him, his ability is to pay T.shs.50,000/= in every six months. This means that he will take three

years to pay her if at all he is likely to abide by his promise. Can the primary court be said to have given a fair decision to the parties?

The Law of Marriage Act is clear. Section 114 of the Law of Marriage Act, 1971 guides the court on matters which should be taken into consideration when granting an order for division of matrimonial assets.

Among the factors to be considered is the efforts of each spouse towards the acquisition of the matrimonial assets. In the judgment of the primary court it is clearly shown that the spouses acquired two houses during the subsistence of the marriage. Instead of the primary court addressing the issue in accordance with what the law provides, they relied on the opinion of BAKWATA or rather adopted that opinion and made it its decision.

It is important for the Primary Court to be informed that BAKWATA's authority is limited to reconciling the spouses on the matrimonial difficulty which the parties are facing. Where they fail to reconcile the spouses, they have to refer them to the relevant authorities for further steps.

As stated before, the Primary Court having made a finding that the spouses had acquired two houses during the subsistence of the marriage they had to consider how they should divide the properties depending on the efforts exerted by each of the spouses.

The case of Bi. Hawa Mohamed v. Ali Seif [1983] TLR 32 recognises domestic services as a contribution toward acquisition of matrimonial assets. The primary court judgment also shows that the respondent admitted that they acquired the two houses together.

Under such circumstances, the primary court erred by not giving the appellant an effective remedy. The remedy which was given to her by ordering the respondent to pay her T.shs.500,000/= left her in a disadvantaged position. The decision did not put into consideration the right to equal protection before the law. The decision of the Primary Court is discriminatory and offends Article 13(1) of the Constitution of the United Republic of Tanzania. Before taking office a magistrate takes oath to protect the Constitution and to do justice without fear or favour. It is important for each magistrate to abide by his/her oath.

As shown earlier, in this judgment, the Tanzania Constitution recognises the Universal Declaration of Human Rights. This is a source of all subsequent International Conventions/Covenants/Treaties dealing with human rights.

The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) which was rectified by Tanzania on 17<sup>th</sup> July, 1980 in Article 2 require state parties to condemn discrimination against women in all its forms.

Article 2(a) of CEDAW, require state parties to embody the principle of equality before the law in their National Constitutions and to ensure through law the practical realization of this principle.

As said earlier, the Principle of Equality is contained in Article 13(1) of our Constitution.

Our weighing scale clearly shows that the remedy which was given by the primary court did not put into consideration the principle of equality before the law. The decision left the appellant at a disadvantaged position contrary to what is envisaged by the principle of equality before the law. Due to this reason, this court is forced to interfere. In so doing, I will allow the appeal, set aside the order which granted the appellant a monetary award of T.shs.500,000/= and substitute it with an order that the appellant is given the house which is at Mtoni as her share in the division of matrimonial assets. There is no order for costs.



N. P. Kimaro,  
**JUDGE.**

10/07/2001

**13/07/2001**

Coram	-	Kimaro, J.
In person	-	For the Appellant
In person	-	For the Respondent
Court Clerk	-	Mujaya

**Court:** Judgment delivered today in court.

**Order:**

- (1) The appeal is allowed.
- (2) The decision of the District Court which blessed the decision of the trial court <sup>is</sup> set aside.
- (3) The order which granted the appellant T.shs.500,000/= is set aside. Instead she is granted the house at Mtoni as her share of matrimonial assets.
- (4) The respondent is to remain with the house at Mbagala as his share.
- (5) No order for costs.



N. P. Kimaro,  
**JUDGE.**

13/07/2001.