

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 45 of 2001

GULYA MOHAMED APLLICANT

VERSUS

AHMED MAKAMO RESPONDENT

J U D G M E N T

BEFORE N. P. KIMARO, J.

Before this court is an appeal by Guliya Mohamed. She is asking this court to reverse the judgment of the District court which granted her only 5% of the matrimonial properties jointly acquired and order an equal division.

Guliya filed a petition for divorce in the District Court of Kinondoni. She also asked for custody and maintenance of the issues of the marriage as well as division of matrimonial assets and payment of edda. The respondent was/is Ahmed Makamo.

What is on record is that the parties went through a process of contracting an Islamic marriage at Lindi in 1983. The parties moved to Dar es Salaam in 1984 and cohabited together until 1999 when they separated because of a big misunderstanding and problems between them. The respondent had issued 'talak' to the appellant. The parties have three issues

of the marriage born in 1983, 1988 and 1991 respectively. The appellant's marriage to the respondent was a second one. Her first marriage had other children too.

The matrimonial Proceedings in the District Court were filed by the appellant after the respondent had issued a talak to her.

, Two issues were framed:

- (1) Whether the marriage has broken down beyond repair.
- (2) If the answer to the first issue is in the affirmative
What reliefs are the parties entitled to.

From the pleadings filed by the parties, they were not at issue on the question of the breakdown of the marriage. There was no need for the trial magistrate to frame it as an issue. He could proceed to declare the marriage broken down beyond repair on the famous authority of the case of Butiku V Butiku.

On the issue of custody, the trial magistrate gave custody to the respondent because the children were above seven years and their father had a job and so he could maintain them whereas the petitioner had no particular business to guarantee her financial ability to maintain the children. The trial

magistrate quoted section 125 of the Law of Marriage Act, 1971 to support his finding saying that that is the spirit of section 125.

After granting the custody of the children to the respondent, the trial magistrate said there was no need to issue an order for maintenance.

Regarding division of matrimonial assets the trial magistrate observed that the plot on which the matrimonial home was constructed was purchased before the marriage but the construction was carried on during the subsistence of the marriage and so she contributed towards its construction. She was awarded only five percent with an explanation that she failed to elaborate on the contribution she made towards the acquisition of the matrimonial house. The trial magistrate did not make any finding on the prayer of payment for "Edda".

The appellant was aggrieved by the decision of the trial court particularly on the division of matrimonial assets and hence this appeal.

Her ground of appeal is only one. She is faulting the decision of the trial magistrate of giving her only 5% of the matrimonial assets. She says this decision contravened section 57 and 114 of the Law of Marriage Act 1971.

During the hearing of the appeal, the appellant emphasized her ground of appeal. The appellant denied that the plot on which the matrimonial home is constructed was bought before the marriage. She said it was bought

in 1984. This is a fact which is also contained in the judgement of the District Court and also the evidence of the appellant. It is not clear to me why the trial magistrate contradicted himself in the judgment by saying that the respondent purchased the plot before marriage while the marriage was contracted in 1983 and the plot purchased in 1984.

Learned Mr. Mjindo Advocate who represented the respondent both at the trial and in this appeal admitted in his submission that the appellant made a contribution towards the acquisition of the properties but said she failed to show the extent of her contribution. Mr. Mjindo also raised the question of 200 bricks and 30 corrugated iron sheets which the appellant had questioned and submitted that the house is still under construction and so they were used and that the corrugated iron sheets were sold for purposes of getting school fees for their children.

Regarding other properties, Mr. Mjindo said the appellant had collected them. He relied on two documents which are annexed to the answer to the petition saying that they are evidence that the appellant collected the properties.

He then made a prayer that the appeal be dismissed.

I stated at the beginning of this judgment that the appellant was aggrieved by the 5% share which was given to her. The trial magistrate said

she was only entitled to 5% share because she did not show her extent of contribution. This was repeated by the learned Counsel for the respondent during the hearing of the appeal.

However, a thorough go through of the proceedings, particularly the evidence of the appellant and that of the respondent, one can not see the justification for the trial magistrate granting the respondent 95% share and the appellant 5% share. The reason is very simple. In the evidence given by the respondent he does not mention anywhere the extent of his contribution towards the acquisition of the matrimonial assets. The appellants evidence on the other hand, was that after they purchased the plot at Mbagala in 1984, construction of the house started on the same year and she was helping her husband through a business of "Mama Ntilie" and they shifted into the house in 1995. During cross examination by the Learned Advocate for the respondent, she said she was getting about T.shs 1000/- to 1500/=.

With the evidence of the respondent who did not show his contribution at all towards the acquisition of the matrimonial house, he was granted 95% while the appellant who made an attempt to show how she contributed towards the acquisition of the matrimonial house, she was granted only 5% with a remark that she failed to show her extent of contribution.

Where is fairness in this decision? With greatest respect to the trial magistrate the decision is discriminatory and a reflection of stereotyped concepts of the roles of man and woman. There is no other explanation which can be given to justify the decision of the trial magistrate. The appellant was given 5% division because she is a woman and women are taken to be inferior in all respects to men.

The Constitution of the United Republic of Tanzania bars discrimination. Article 13(i) is very precise. It reads and I quote:

All persons are equal before the law
and are entitled, without discrimination
to protection and equality before the
Law.

Article 13(1) of our Constitution is a reflection of Article 7 of the Universal Declaration of Human Rights.

It is expressly provided by our Constitution on chapter 1 Part II Article 9(f) that State Authorities and all its agencies are to direct their policies and programs towards ensuring that human dignity is preserved in accordance with the spirit of the Universal Declaration of Human Rights.

The Convention on The Elimination of all Forms of Discrimination Against Women (CEDAW) which was ratified by our country on 17TH July,

1980 require state parties to abolish discrimination against women by embodying the principle of equality between men and women in the National Constitutions. There is Article 12(1) of the Constitution in place. The article reads:

All human beings are born
free, and are all equal

Again, Article 15 of CEDAW require State Parties to accord women equality with man before the Law. Article 13(1) of Our Constitution caters for the same. Having demonstrated what the Constitution of the United Republic of Tanzania requires and the decision which was given by the District court it is clear that the decision is not fair but it is discriminatory because Article 13(1) of the Constitution was not observed.

The trial magistrate ought to have decided the case on the basis of the evidence which was on record and not to decide the case on the stereo type concepts of roles of men and women. Why should a man who never gave evidence at all on his extent of contribution be given 95% share of the matrimonial house and a woman who attempted at most remotely to show her contribution be given only 5%. Obviously, no justifiable explanation can be given under the circumstances.

The appellant complained that the decision of the trial magistrate contravened section 114 of the Law of Marriage Act. She is right. The

section clearly guides the court on matters which should be taken into consideration when granting an order for division of the matrimonial assets. Among them is the extent of contribution made by either party in money, property and work. This was totally not considered. She also complained that the decision is contrary to Article 13(1) of the Constitution of the United Republic of Tanzania and I have shown how.

Under the circumstances, the order of the trial magistrate which granted the appellant only 5% share as her contribution towards the acquisition of the matrimonial house can not stand. I set it aside. Since the respondent did not lead any evidence at all and the appellant led evidence only remotely I will substitute the order of division of matrimonial assets with an order of equal division of the matrimonial house. The matrimonial house to be valued by a Government Valuer in the presence of both the appellant and the respondent. After the valuation, each party to be at liberty to pay the other half value of the house. In the event that this option fails to work out, the house to be sold by public auction and the proceeds to be shared equally between the parties.

The appellant has also complained that there are other matrimonial assets which included utensils and other house up-keepings, 30 iron sheets and 200 cement bricks. Mr. Mjindo Advocate responded by saying that some of the properties namely utensils and house up-keepings have been collected by the appellant. He relied on documents annexed to the answer to the petition as evidence that the appellant received them. With greatest

respect to Mr. Mjindo, those documents were not tendered and admitted in court as exhibits nor do they show anywhere that the appellant signed them acknowledging the contents of those documents. She is therefore entitled to the utensils and house – up-keepings as well as 15 iron sheets and 100 cement bricks which the respondent is said to have sold without consultation with the appellant and to have used for the construction, again without consultation with the appellant.

I thus allow the appeal by the appellant and set aside the order of the District Court on the division of matrimonial assets and substitute it with an order as indicated in this judgment.

Much as I would have wished to comment on the remarks made by the trial magistrate when granting custody to the respondent, I refrain from doing so because the appellant did not appeal against the said order.



N. P. Kimaro

JUDGE

8/6/2001