IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIVIL APPEAL NUMBER 13 of 2011

(Originating from the Judgment and Decree of Kisutu Resident Magistrate's Court-Matrimonial Cause No. 54 of 2005 dated 29 October 2010-Katemana-RM)

DEBORAH DONALD KAMORI.....APPELLANT

VS

RICHARD GEORGE MALIPULA.....RESPONDENT

JUDGEMENT

Date of last Order: 13-04-2011
Date of Judgment: 02-06-2011

JUMA, J.:

By a petition dated 20th October, 2005 and filed on the same date at the Resident Magistrates Court of Dar es Salaam at Kisutu; the appellant Deborah Donald Kamori petitioned for dissolution of her marriage to respondent Richard George Malipula, which they contracted on 12th November 2000 at Ilala. Records of the trial court shows that on 20th July 2006, appellant and respondent signed a Consent Settlement Order. That settlement order signified the dissolution of their marriage. An order for a divorce was entered accordingly. Appellant had also asked the trial court to order equal division of their matrimonial assets; maintenance allowance for their only child together with that child's educational and medical expenses.

The trial court was guided by two issues. The first issue was, whether there were any matrimonial assets to be distributed. Secondly, the court sought to know who between the present appellant and present respondent, should have the custody of the only issue of their marriage. In the material part of the judgment; the learned trial Resident Magistrate found that the appellant Deborah Donald Kamori was not entitled to any share in the matrimonial house the couple had at Mbezi Luis because,

> *".....soon after they moved into the house the petitioner went to study at IFM. And the fact that the respondent soiely paid fees for the petitioner's studies from the start to completion of her studies, despite the fact that she is now employed by NMB, it would mean the fees paid for the petitioner by the respondent formed the petitioner's share of her matrimonial assets."*

With regard to the welfare of the child, trial court made a finding that the appellant being employed by National Micro-Finance Bank (NMB) was in a better position to provide care and maintenance to the child of their marriage. Appellant was as a result granted the custody of the child with the condition that the respondent was to enjoy visitation rights. Taking into account the fact that the respondent was unemployed, the trial magistrate found that the TZS 50,000/= which the appellant had claimed as a monthly maintenance for the child was on the high side. The trial court ordered the respondent to provide maintenance, medical and educational needs of the child in accordance with his ability.

It is against the judgment and decree of the trial resident magistrate that this appeal has been filed on four grounds of appeal. Appellant contends that the trial magistrate erred in law and fact;

1) by deciding that the school fees which the respondent paid during the subsistence of their marriage to support the appellant's education, amounted to the Appellant's share of the matrimonial assets;
2) by failing to consider and evaluate the evidence on record in relation to the ownership of the motor vehicle and the shop, and therefore arrived at a wrong decision by denying the appellant her share in the said properties;
3) by failing to consider appellant's domestic services and supervision during the construction of the house, amounted to the appellant's contribution and she should have been awarded her share to the matrimonial house;
4) by deciding that the respondent is indefinitely not capable of providing maintenance and education of their child of marriage because he is not employed, while respondent is capable of earning a living through other means apart from being employed.

Submitting for the appellant on the first ground of appeal, Mulebya & Company Advocates contended that there is no evidence in terms of receipts or otherwise showing that the respondent indeed paid the alleged school fees towards the appellant's study at IFM. In any case, Ms Mulebya does not believe that such payment of fees should be so

construed as to amount to appellant's share of the matrimonial assets. Mr. Mgare the learned counsel for the respondent contended in his replying submission that the issue of fees can be proved by either documentary evidence (e.g. receipts) or by oral evidence. According to Mr. Mgare, it was the duty of the appellant to prove to the trial court that she substantially contributed towards the improvement of a plot which was acquired before her marriage to the respondent. Mr. Mgare referred me to the statement made by Mwalusanya, J. (as he then was) in **Regina Mamboleo v. Paulo Chamba, Civil Appeal No. 15 of 1982**,

> *"... in the absence of the precise extent of contribution of each spouse, the court will have to make the best out of a bad job."*

Mr. Mgare wondered why the appellant failed to lead evidence to contradict such a crucial piece of evidence which contended that the respondent had paid her school. Because the appellant failed to offer evidence on the nature of her contribution the trial court was in the circumstances of the case entitled to take into account the fees paid towards the appellant's education.

In her rejoinder submission, Ms Mulebya pointed out that the first ground of appeal is about the issue whether school fees paid by the respondent for appellant's education amounted to her share in the matrimonial assets. Ms Mulebya also took exception to the case of **Regina Mamboleo v. Paulo Chamba, Civil Appeal No. 15 of 1982**

which was cited by Mr. Mgare but which the appellant could not trace to determine the totality of its application to the present appeal.

After reading the submissions made on this first ground of appeal I must respectfully state that it has been rather difficult for me to grasp how the payment of the appellant's fees by the respondent during the subsistence of their marriage can under the provisions of section 114 of the **Law of Marriage Act, 1971** disentitle the appellant from any share in a matrimonial asset i.e. a house at Mbezi Luis. Section 114-(1) empowers courts when ordering divorce or separation to also issue appropriate orders dividing between the parties the assets that parties acquired during the marriage by their joint efforts

According to section 114 (2), in carrying out the division of any assets which had been acquired by divorcing couples during the marriage by their joint efforts, courts are enjoined to incline towards equality of division guided by-

> *(a) the customs of the community to which the parties belong;*
> *(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
> *(c) any debts owing by either party which were contracted for their joint benefit; and*
> *(d) the needs of the infant children, if any, of the marriage.*

My understanding of this provision is that after identifying a matrimonial asset which was acquired under joint efforts, courts shall first incline towards equal division of that asset. This inclination towards equal

division can be varied or otherwise modified upon proof of any of the considerations provided for under paragraphs (a), (b), (c) and (d) of section 114 (2). With respect, the learned trial magistrate did not state which of the four considerations guided him towards regarding the payment of fees by the respondent as appellant's share in the house at Mbezi Luis. In my opinion, the payment of the college fees by the respondent should not be isolated from the obligation the married couples have, to help each other out. In my opinion and finding, the fees which the respondent allegedly paid towards this appellant's further studies had no link to any of the matrimonial asset. There is no evidence even suggesting that any debt contemplated by section 114 (2) (c), was incurred by the respondent to raise the college fees. The first ground of appeal is allowed.

In so far as the second ground of appeal is concerned, appellant contends that the trial court did not adequately evaluate the evidence on ownership of a vehicle and also the shop. And that, had the court done so, the appellant would not have been denied her share on that vehicle and the shop. On this ground, appellant referred this court to page 10 of the record of proceedings where the appellant testified on purchase of a motor vehicle Nissan Patrol Registration Number T986 ACZ at cost of USD 4,500. According to the appellant, this vehicle was registered in the name of one Silas George Malipula in order to hide the fact of the purchase from respondent's employer. Appellant also refers to the share worth five million shillings, which the respondent allegedly had in a shop

owned by one Nizar Mbaga. In his replying submissions, Mr. Mgare contended that since it was the appellant who in the first place had claimed that the vehicle and the shop were part of matrimonial property, it was upon her to prove its ownership. That it was the appellant who should have summoned Silas Malipula to testify on her behalf, instead of throwing the duty upon the respondent.

After hearing submissions on the second ground of appeal and upon my perusal of the records; it is important to restate that the law which governs the division of matrimonial assets is to be found in section 114 of the **Law of Marriage Act, 1971**. Subsection (2) of section 114 provides the matters on which the courts; while inclining towards equality of division, must have regard to when dividing any assets acquired by divorcing couples during the marriage by their joint efforts. I will ask myself whether the learned trial magistrate took the important initial step to first make a determination whether the motor vehicle Nissan Patrol Registration Number T986 ACZ and the shop were matrimonial assets for purposes of equal division under the aforementioned section 114 (1) and (2). Secondly, this court on first appeal will re-evaluate whether the trial magistrate determined the extent of the contributions which were respectively made by the appellant and respondent towards the vehicle and the shop.

With due respect, the learned trial magistrate on page 5 of his judgment made a lucid finding with regard to both the motor vehicle and also the share the respondent allegedly had in a shop owned by Nizar Mbaga:

> *"As to both the car and the shop the petitioner did not show ownership of either the car or the shop by the petitioner herself, the respondent or even both of them. With that regard I find that the shop and the car do not form part of matrimonial assets to be divided amongst the parties."*

My re-evaluation of evidence leads me to the similar conclusion to one reached by the learned trial magistrate. There was no sufficient evidence before the trial magistrate to definitely establish on balance of probability that the vehicle and the shop were part of matrimonial assets subject of division. There is evidence that the appellant testified in chief that the couple bought a vehicle, Nissan Patrol of 3-doors in 2004. The car was with her brother in law. There is also clear testimony of the appellant that she did not know if her brother in law sold the vehicle or not. Upon cross examination by Mr. Mgare the appellant conceded that she had never even seen the registration card of the vehicle concerned.

With respect to the ownership of the shop, appellant had testified that the respondent had opened a shop at Kariakoo with a capital of TZS 10 million. Appellant insisted that the shop was a joint business venture between the respondent and his friend Nizar Mbaga. All the same appellant did not know what respondent's share was in that joint venture shop. But, upon cross examination, appellant admitted that respondent later quarrelled with Mr. Nizar Mbaga, and took his shares away from the

joint venture. Mr. Nizar continued with business alone. Appellant did not remember the number of shares respondent received when his partnership with Nizar broke up. When he testified in his defence, respondent testified that he did not own the vehicle; neither did he jointly own a shop with Mr. Mbaga.

With those tenuous assumptions by the appellant on ownership of the vehicle and the shop, it cannot be said that appellant had established on balance of probability that the vehicle belonged to the respondent for purposes of inclusion in the list of matrimonial assets. Likewise, the appellant did not on balance of probabilities prove that respondent had any remaining share in the shop now owned by Nizar. From the foregoing, the second ground of appeal lacks merit and is hereby dismissed.

In the third ground of appeal the appellant states that the trial magistrate failed to take into account the appellant's domestic services and the role she played in the supervision of the construction of the house as her own contribution. Submitting on this ground, appellant contended that from the date of their marriage on 12th November 2000 till February 2002 the couple were living at Sinza while both were also supervising the construction of the house at Mbezi Luis. It was submitted further that appellant contributed in the supervision of the construction until 2003 when she joined the IFM for studies. Appellant wondered why the trial magistrate cited the case of **Bi Hawa Mohamed vs Ally Seif [1983] TLR**

32 yet failed to take into account the appellant's domestic services and her supervision of the house under construction. In his replying submission on this ground respondent insisted that he bought the plot in 1999 and he and the appellant were married on 12th November 2000. That contribution by the appellant was minimal on account of her pregnancy and later proceeded to study at IFM. Respondent contended that because of minimal contribution the appellant made towards construction of the house, then the school fees respondent paid should be regarded to be appellant's share.

In his judgment touching on the issue whether the appellant's domestic services and her supervision of the house under construction were considered, the trial magistrate noted on pages 5 and 6,

> *"As to the house both parties admit that the plot was bought by the respondent and that it is solely owned by him. And when the house was built on that plot it was the respondent who was paying for its construction. The petitioner (appellant herein) admitted not to have financially contributed to the construction of the house but only supervision of its construction.*
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> *.... The issue in the present case is on contribution to the construction of the house. The petitioner (appellant) did not contribute financially to the construction of the house. However according to Bi Hawa's case there is no need for financial contribution but even emotional contribution. The fact of comfort afforded during construction of the house is sufficient contribution towards the construction of the house."*

The learned trial magistrate very correctly restated the principle of law enunciated in the **Bi Hawa's** case that emotional support provided by a spouse is as good a contribution to matrimonial asset, as financial contribution is. With respect, although the trial magistrate correctly restated the principle settled in **Bi Hawa**'s case, he did not on page 6 of his judgment give a practical effect of that principle on the case before him:

> *"However it is established fact that soon after they moved into the house the petitioner (appellant) went to study at IFM. And the fact that the respondent solely paid school fees for the petitioner's studies from the start to the completion of her studies, and that the petitioner had never contributed anything to the acquisition of any matrimonial properties after completion of her studies, despite the fact that she is now employed by NMB, it would mean the school fees paid for the petitioner by the respondent formed the petitioner's share of her matrimonial assets. For that reason, therefore this court finds that the petitioner is not entitled to any share on the house at Mbezi Luis"*

In my re-evaluation of evidence, page 10 of the typed record of proceedings clearly bares out the fact that the appellant in fact testified that she did contribute to the construction of a house on a plot the respondent bought before their marriage. Evidence on record shows that after their marriage on 12 November 2000, the couple first lived at Sinza and then shifted to Mbezi Luis where respondent had a plot he acquired before their marriage. Appellant testified that after the marriage the couple started to build a house on the Mbezi Luis plot. The couple

moved into the house and completed the fittings of windows and small things while living in the house.

It is very plausible to suppose that appellant made contributions towards making the house a comfortable place for the couple. This is confirmed on page 11 of the typed record of proceedings by evidence of appellant when she was cross examined by Mr. Mgare. Appellant testified that she was employed as a secretary at a certain company where she earned TZS 50,000/= each month. She also worked with another company along the same flat where she was paid TZS 60,000/= per month. She used her income to buy house expenses like food. In my opinion, all these were contributions within the case of **Bi Hawa Mohamed vs Ally Seif (supra)**. I have already made a finding that the learned trial magistrate should not have decided that the school fees paid for the appellant by the respondent formed the appellant's share of her matrimonial assets. Similarly the learned trial magistrate erred by excluding the appellant from division of matrimonial asset because the appellant was employed by the National Micro-Finance Bank. The learned trial should have weighed and evaluated evidence on contribution the appellant made on the construction of the house at Mbezi Luis. I will allow this third ground of appeal.

In the fourth ground of appeal appellant contends that the trial magistrate erred when he concluded that because respondent was unemployed he was definitely not capable of providing maintenance and

education to their child of marriage. Appellant reiterates that respondent had other means of earning apart from employment. When examined in chief by Mr. Maftah, appellant told the trial court that she was living with their child of marriage and she had been taking care of this child and paying for the schooling of this child. Looking at the financial ability of the appellant to take care of the welfare of the child the trial court was in my opinion entitled to reach the decision he did. In my opinion, at that time of the trial court's judgment the appellant was in a better position than respondent was to look after and maintain their only child of marriage. It was not within the duty of the trial magistrate to issue an order with respect to future ability of the respondent to pay for the upkeep of the child of their marriage. For the foregoing reasons, the fourth ground of appeal fails and is dismissed.

In the upshot, appellant and respondent shall each be awarded 50% share of the matrimonial house which is situated at Mbezi Luis. The appeal therefore succeeds and is allowed to the extent shown in this judgment. The trial court's decision, on the division of matrimonial assets is set aside. The appellant is awarded the costs of the appeal.

Order accordingly.

I.H. Juma
JUDGE
02-06-2011

Delivered in presence of: Ms Mulebya, Advocate (for the appellant) and Richard George Malipula (Respondent).

I.H. Juma
JUDGE
02-06-2011