

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

PC. MATRIMONIAL APPEAL NO 11. OF 2019

(Arising from Matrimonial Appeal No.11 of 2018 at Ilemela District Court, and originating from
Matrimonial Cause No. 586 of 2018 at Ilemela Primary Court)

**AMONI BENEDICTOR BUCHWA.....APPELLANT
VERSUS**

AISHA SHABANI HAMIS.....RESPONDENT

JUDGMENT

19.12.2019 & 27.2.2020

U. E. Madeha. J

This is the second appeal which arises from the decision of Ilemela District Court. Amon Benedictor Buchwa married Aisha Shabani Hamis. They were blessed with two issues, they lived together for eleven years. The problems arose in their marriage Aisha Shabani Hamisi petitioned for the divorce, custody of issues, maintenance and the division of the matrimonial properties. The trial Court did not distribute the matrimonial assets because Aisha Shabani Hamis had no contribution in the family properties. The Court did not grant divorce on the bases that there was no marriage between the parties, there was no evidence as to whether the two had lived under the presumption of marriage. On the issue of custody of children's, the trial Court considered that all two children to remain with

Amon Benedictor Buchwa. Aisha Shabani Hamis was awarded 30% while Amoni Benedictor Buchwa was awarded 70% of the house. The District Court found that those people lived together for eleven years and therefore deserved to be given a division of matrimonial properties. Amon Benedictor Buchwa was dissatisfied with the decision of the District Court and hence preferred this appeal. The grounds in this appeal raises the following issues.

1. Whether there was a presumption of marriage.
2. Whether the respondent contributed to the acquisition of matrimonial properties.
3. Whether the respondent is entitled to the distribution of matrimonial properties and to what extent.
4. Whether the respondent is entitled to the custody of children.
5. Whether the appellant is entitled to the maintenance.

Starting with the first issue whether there was a presumption of marriage. The appellant's learned advocate Mr. Aloys Msafiri Henga stated that, the mere fact that both parties lived together under the same roof which does not automatically qualify them to be husband and wife, for it is rebutted. Lack of any witness to testify before the court that they

considered both parties as married couples, they were never considered by the community around them to have that status of husband and wife.

Thus, it is enough ground to rebut the presumption of marriage as provided under section 160(1) of the Law of Marriage Act, Cap 29 of 1971. Amon Benedictor Buchwa went ahead and stated further that they only lived together under the same roof for the purpose of raising their children and nothing else. Amon Benedictor Buchwa submitted that although they had lived together with Aisha Shabani Hamis for more than two years under the same roof, they did not qualify to be considered as husband and wife, under the presumption of marriage since they have lived for seven years without having sex, hence resulted to such presumption being rebutted. Presumption of marriage is provided under section 160(1) of the Law of Marriage Act, Cap 29 of 1971, which reads as follows;

- (1) *"Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were dully married."*

From the above provision of the law, both parties have agreed that the period of which the two have lived together is not disputed as they have

lived for more than two years. The only dispute is whether the two had the reputation of being husband and wife. The appellant claimed that they did not have that reputation because they had not engaged in sexual activities for seven years.

Mr. Stephen Charles the learned counsel for the respondent argued that, it is undeniable that the parties have lived under the same roof for more than two years as provided under the law, and that the denial of conjugal right for some period of time is immaterial since the law does not state what the two should be doing when sleeping under the same roof hence there is proof that there was presumption of marriage between the parties.

In my opinion I think, there is no dispute that the two characters lived together for eleven years and were a marriage couples, then that is a perfect marriage, so they are known as a marriage couple, assuming that a woman had been paid for a bride price, therefore, throughout their lives she was known as a legitimate wife and deserving of divorce.

Coming to whether Aisha Shabani Hamisi contributed to the acquisition of matrimonial properties. There was further argument that

Aisha shabani Hamis being house wife contribute to the acquisition of the properties by cooking to the household and fetching water for construction. Amon Benedictor Buchwa was involved in various activities who sought all the properties.

The division shall be conducted in relation to the amount of contribution towards the acquisition of the said property. It is the submission of Amon Benedictor Buchwa that Asha shabani Hamis failed to prove her contribution towards the properties as the appellant acquired them individually without Aisha Shabani Hamis. The appellant cited the famous case of **Bi. Hawa Mohamed Versus Ally Seif** (1983) TLR 32.

With regard to third issue based on the issue of distribution of matrimonial property. The power of the court to divide the matrimonial assets is derived from **section 114 (1) and (2) of the Law of Marriage Act Cap 29 (R. E 2002)** which provides as hereunder: -

- (1) *"The court shall have power when granting or subsequent to the grant of a decree of separation or divorce to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such*

asset and the division between the parties of the proceeds of the said sale.

- (2) *In exercising the power conferred by subsection (1) the court shall have regard:*
- (a) *To customs of the community to which the parties belong.*
 - (b) *To extend the contributions made by each party in money, property or work towards the acquiring of the assets.*
 - (c) *To any debts owing by either party which were contributed for their joint benefit and*
 - (d) *To the needs of the infant children, if any, in the marriage'.*

In the case of **Cleophas M. Matibaro Versus Sophia Washusa**, Civil Application No. 13 of 2011 Court of Appeal of Tanzania, it was made clear that, there must be a link between the accumulations of wealth and the responsibility of the couple during such accumulation. So, the matrimonial assets for distribution should be assets acquired in the course of the marriage by both parties.

The power of the court to divide the matrimonial assets under section 114 (1) of the Law of Marriage Act Cap 29 (R. E 2002) can only be invoked when the following conditions exist:

- (i) *"When the court has granted or is granted a decree of divorce or separation, and*
- (ii) *When there are matrimonial or family assets which were acquired by the parties during the marriage and*
- (iii) *When the acquisition of such assets was brought about by the joint efforts of the parties".*

In the case of **Bi. Hawa Mohamed Versus Ally Sefu** of 1983 TLR 33, the concept of separate ownership of properties by spouses was discussed in relation to the Law of Marriage Act (supra). According to this case, the concept is recognized under section 58 and 60 of the Law of Marriage Act Cap 29 (R. E 2002). In this case, i.e. **Bi. Hawa Mohamed Versus Ally Seif**, it was held that:

- (i) *"Since the welfare of the family is an essential component of Economic Activities, it is proper to consider the contribution of a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets".*
- (ii) *The joint effort and work towards the acquiring of the assets have to construe as a joint effort for domestic effort of work of husband and wife."*

From the record of the trial court and as it became clear that, Aisha Shabani Hamis was a house wife and her job was to look after her children, do the households and Amon Benedictor Buchwa was involved in various activities and was the one who sought all the properties. Accordingly, section 114 (2) of the Law of Marriage Act Cap 29 (R. E 2002), empowers the court to have regard in the division of matrimonial property:

- (a) *".... The extent of the contributions made by a party in money, property or work towards the acquiring of the assets".*
- (b) *".... The needs of the infant children if any of the marriage and subject to those considerations, shall include towards equality of division the Law recognized in terms of money, property or work", section 4 (b), the law of Marriage Act Cap 29 (R. E 2002)*

This court is not in doubt that Aisha Shabani Hamis contribution towards the acquisition of matrimonial assets in terms of her domestic work which include bearing and rearing of children, making the home comfortable for Amon Benedictor Buchwa and the issues plus her domestic duties. Even if Amon Benedictor Buchwa engaged himself in various

activities, Aisha Shabani Hamis would have still been entitled to the matrimonial property by virtue of her contribution through domestic work.

The case of **Bibie Maridi Versus Mohammed Ibrahim** (1988) TLR... provide further guidance on the issue of distribution of matrimonial property. It was in this case held that with regard to the issue of contribution, there must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets. In this respect, the performance of the domestic duties also amounts to contribution towards such acquisition.

I am of the view that, each of the spouses made a contribution towards the acquisition of the matrimonial property which need not be financial. In the case of **Kagga Versus Kagga**, High Court Divorce Case No. 11 of 2005 Uganda, Mqwangusya J. Held that:

"Our courts have established a principle which recognizes each spouse's contribution to the acquisition of property and this contribution may be direct or monetary. When distributing the property of such divorced couple, it is immaterial that one of the spouses was not financially endowed as the others as this case clearly show that while the first respondent was the financier

behind all the wealth acquired. In this case, the contribution of the petitioner is not less important than that made by the respondent”.

Based on the foregoing, I am inclined to apply the same principles to the contribution of assets. Consequently, I hereby uphold the decision of Ilemela District Court and realized that Amon Benedictor Buchwa to be paid 70% and Aisha Shabani Hamis to be given 30% of the house.

For the issue of custody of children, access and the maintenance of Children, all these issues should be determined by the Juvenile Court. Parties to the suit are thus urged to file the case concerning the issue of custody/access and the issue of maintenance in the Juvenile Court. For the time being, all two issues/children are required to remain with their mother Aisha shabani Hamis and Amon Benedictor Buchwa should provide all basic needs to them while waiting the determination of the issue of custody and maintenance when referred to the Juvenile Courts by the either of the parties in the best interest of the children.

In the results, as indicated herein above. Amon Benedictor Buchwa to be paid 70% and Aisha Shabani Hamisi to be given 30% of the house. As to custody of children and maintenance, let this matter be referred to the

Juvenile Courts for its determination as above indicated. In the meantime, Amon Benedictor Buchwa shall be responsible for maintenance and Aisha Shabani Hamis shall take custody while Amon Benedictor Buchwa shall take access of the children. Each party to bear its own costs. It is so ordered. Appeal dismissed. Order accordingly.

DATED and **DELIVERED** at **MWANZA** this 27th day of February 2020.



U. E. Madeha
Judge
27/2/2020