IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRISRY REGISTRY)

AT IRINGA

MATRIMONIAL APPEAL NO. 05 OF 2020

(Originating from Matrimonial Cause No. 02 of 2019 Resident Magistrate Iringa)

DEODATUS RUTAGWERELA ..... APPELLANT

VERSUS

DEOGRASIA RAMADHAN MTEGO ..... RESPONDENT

29/9 & 23/10/2020

JUDGMENT

MATOGOLO, J.

The parties in this appeal above mentioned were husband and wife. On 4th January, 2003 they contracted a Christian marriage which was cerebrated at Kigurunyembe Parish Morogoro Region. Their marriage was blessed with three issues. The two have lived in Dar es salaam until 2006 when they shifted to Iringa as both were working with Mkwawa University College of Education. While at Iringa, their marriage was at peace only for two years. Thereafter their marriage turned sour due to number of reasons. The respondent petitioned for divorce. After hear the parties, the trial court was satisfied that their marriage has broken down irreparably thus dissolved it. The trial court also granted the attendant orders prayed by the petitioner/ respondent. That is division of matrimonial assets in

which the court ordered for 50 percent to each party and the petitioner was given custody of children. The appellant was aggrieved with the decision particularly the orders for division of matrimonial assets and custody of children. He has appealed to this court.

He filed a memorandum of appeal with a total of ten (10) grounds of appeal as follows;

1. The trial Court erred both in law and facts for treating the appellant's properties and divided them equally with the respondent.
2. The trial Court erred in law and facts for failing to evaluate properly the evidence adduced by the appellant the fact compelled the same court to come up with a judgment that favored the respondent unreasonably.
3. The trial Court erred in law and facts to give the respondent 50% shares of matrimonial properties in absence proof on how she contributed in acquiring them.
4. The trial Court erred both in law and facts to order division of semi finished house located at Kashenye, Misenyi Kagera which belongs to the family of Rutagwerela Binyumo henceforth neither a property of the appellant nor a matrimonial property.
5. The trial Court erred both in law and facts to grant the respondent custody of the children and maintenance by relying on an unprecedented principle.

6. The trial Court was indeed acted with bias to order the appellant paying Tshs. 300000/= per month and paying school fees and health services of the children meanwhile refusing an appellant a right to stay or having access with them.
7. The trial court erred both in law and facts to order custody of children to the respondent without summoning and affording children with a right to choose a parent to live with.
8. The judgment of the trial court is contradicting and bad in law for disposing of the issue of distribution of matrimonial properties while in the same judgment it is remarked that the parties have failed to advance any physical evidence to substantiate the averments.
9. The judgment of the trial court is a nullity because it contains some facts which are not reflected in the court proceedings.
10. The trial court erred both in law and facts for failing to reflect in its proceedings and judgment some of the properties which were mentioned by the appellant as his own properties.

At the hearing of this appeal parties were represented, the appellant was represented by Mr. Moses Ambindwile learned advocate while the respondent was represented by Mr. Barnabasi Nyalusi learned advocate.

This appeal was disposed of by way of written submissions.

In support of the appeal, Mr. Ambindwile submitted on the 1st, 2nd and 3rd grounds together, that, the trial court erred in law and facts for treating the appellant's properties as matrimonial properties as well as dividing equally the same properties to the respondent on 50% shares bases, he

submitted that the trial court failed absolutely to evaluate the evidence adduced especially by the appellant. He contended that, had the trial court could have evaluated the said evidence it could not reach to such impugned decision.

He submitted further that, according to the evidence adduced by the respondent, she managed to list a number of properties and informed the court that the same were acquired through joint efforts.

That, the appellant established and substantiated how far he obtained his properties, on the other hand the respondent failed at all to adduce evidence on how far she contributed to acquire those properties through her efforts, she only mentioned the list of properties. And the appellant testimonies on how he acquired the said properties were not challenged in cross-examination by the respondent.

Mr. Ambindwile contended that, it is a well established principle of law that proof of contribution must be procured. To support his argument he cited the case of ***Mariam Mbeie vs Fidelis Mawona*** (PC) Matrimonial Appeal No.1/2018 High Court of Tanzania Iringa Registry (unreported) at page 7 and the case of ***Gabriel Nimrod Kurwijila vs. Theresis Hassan Malongo*** Civil Appeal No. 102 of 2018 CAT (unreported) at page 11-13.

He was of the considered opinion that had the trial magistrate evaluated properly the evidence adduced by the parties on this ground undoubtedly would find out that the respondent did not contribute anything to warrant distribution of 50%.

With regard to ground No.4 Mr. Ambindwile submitted that, the appellant testimony on this ground was not contested in cross-examination

by the respondent. He said the respondent failed absolutely to substantiate how and when the said house was acquired in Bukoba while their permanent abode is in Iringa. The respondent failed to inform the court how she contributed in purchasing or acquiring the said property. If the trial magistrate could have broadly evaluated and considered the evidence adduced by both sides he would found out that the referred property is not falling in the realm of matrimonial assets.

Mr. Ambindwile argued together ground No. 5, 6 and 7 that, the trial court was not proper to order custody of children and maintenance by relying on petitioner's weak testimonies as indicated at page 31 of the trial court typed judgment. He contended that, the facts considered by the trial court were contrary to the dictates of the law. To that he cited section 125(2)(a)(b)(c) and (4) of the Law of Marriage Act, [Cap. 29 R.E. 2019] (The Act).

He went on submitting that, after denying custody of children to the appellant the court went ahead and ordered the appellant to have been paying Tshs. 300,000/= per month as maintenance allowance as well as paying school fees and health service to the children. He contended that, the trial court was biased and went astray in its finding in the first paragraph at page 29 of the typed judgment in which it is clearly indicated that the respondent has more income than that of the appellant. If this is the position, why the same court placed heavy burden of maintenance to the appellant (a person with lower income) instead of the respondent (a person with higher income).

He submitted that, it is a mandatory requirement of the law that, the person given custody of children to decide all questions relating to the upbringing and education of the child, and supported his argument by citing section 126(1) of the Act. The learned counsel contended that, if the trial court took trouble to consider this provision undoubtedly, would come out with different findings which are free from biasness.

He went on submitting that, it was a grave error for the trial court to determine and dispose of the issue of custody of children without summoning and affording particular children right to choose a parent to live with, bearing in mind the same children were all over seven years old. The order of custody of all children to the respondent would only suffice if the children would be bellow seven years old. He supported his argument by citing section 125(3) of the Act.

He went on submitting that, the custodian order as granted by the trial court was a nullity ab initio for contravening the requirement of the law as per Rule 32(1) of the law of Marriage (Matrimonial proceedings) Rules which requires parties to lodge a formal application for maintenance of a party to a marriage or the children of the marriage) or for the custody of the children of the marriage by a chamber summons supported by an affidavit.

Mr. Ambindwile opted to argue Ground No. 8, 9 and 10 together, that the trial court erred absolutely to go on distributing matrimonial properties as it did despite the fact that parties have failed to advance any physical evidence. And that, if parties lacked material evidence to substantiate their allegation, the questions to ask ourselves are as follows, one, what type of

evidence which was used by the court to determine the facts alleged? Two, what was the source of such evidence? Three, did the court act properly to come up with its own evidence after seen that parties lacked material evidence?.

He contended that, since the parties lacked physical evidence to substantiate the facts alleged on distribution of properties, it was therefore wrong for the trial court to distribute the same properties relying on its own observation as indicated in the last part of the 1st paragraph, page 29 of the judgment in which the trial magistrate stated that;

> "…. *I take that, on balance of probability, each party in this matter being the employee of Mkwawa University as lecturers played equal role in the acquisition of those matrimonial asserts"*

He said neither the appellant nor the respondent informed the court while on the dock that they played equal role in the acquisition of those matrimonial assets. He said it has to be noted that at page 28 of the trial judgment especially in last paragraph it is expressly indicated by the trial magistrate as follows;

> *"Apparently, according to the court records, the petitioner had during her testimony, stated that she contributed to a certain amount of money in the acquisition of the matrimonial assets.*

Whereas the respondent responded that it was his own money that acquired all the assets except only for a farm at Mgela area which they both purchased it"

He said part of the appellant's testimonies on his properties particularly two Bajaji, plot at Ikonongo, trees at Mafinga a plot in Coastal region that were acquired by the disputants in the name of the respondent is not reflected by the trial court both in proceedings and judgment. He argued that, this is fatal.

Mr. Ambindwile submitted further that, the judgment of the trial court is nullity since it contains some facts and matters of evidence as expounded in the foregoing paragraphs which however are not found in the court proceedings.

He prayed to this court to allow the appeal with costa, nullify the whole judgment and proceedings of the trial court and order retrial before another magistrate who will be able to take the proceeding afresh and decide the dispute in accordance with the parties testimonies.

In reply Mr. Nyalusi with regard to ground No. 1, 2 and 3 of appeal argued them together to the effect that, the counsel for the appellant in his written submission is totally wrong and wanted to mislead this Court. He said section 114(1) and 114(3) of the Act are very clear on the position of the law that, before the court issue such order there are number of factors the court should consider and one among them is the extent of contribution by each party in acquiring those properties, to support his

argument he referred the case of ***Bibie Maulidi vs. Mohamed Ibrahim (1989) TLR 162***.

He argued that, looking at page 29 in the first paragraph of the judgment, it clearly indicates that the respondent proved to the extent of which she contributed to the said acquired matrimonial properties on the balance of probabilities this was also evidenced at the judgment of the trial court where the trial Magistrate stated interalia that because both the parties are lecturers at Mkwawa University it is obvious that they have equal contributions in the acquisition of the matrimonial properties.

He submitted further that, basing on this piece of evidence, it is clear that the respondent proved that she has contributed to a larger extent in the acquisition of those matrimonial property as required by law and both cases cited by the counsel for the Appellant's are totally distinguishable compare to this matter at hand, because both cases focused on the issue where the party failed to provide evidence which shows and support that there was a contribution in acquisition of the matrimonial properties which is quite different from the matter at hand because the said respondent proved her contribution on the balance of probabilities as required by law. He contended that, this can be established at page 23 of the trial court judgment.

The learned counsel submitted further that, the appellant did not establish how his assertion is right by proving the 100% contribution of the appellant or rather the 100% ownership of the properties that are labelled as matrimonial properties. He said the consolidated grounds of appeal are

devoid of merits and he prayed this honourable court to dismiss these grounds with costs.

With regard to the 4th ground of appeal Mr. Nyalusi submitted that, the same is baseless due to the fact that looking at page 23 in the last paragraph of the trial judgment it is clear that the appellant himself confessed by testifying that the unfinished house at Misenyi is a family house and they are continuing with its construction, so due to this piece of evidence, it signifies that the appellant admitted that the said unfinished house at Misenyi is a family house and was acquired during the subsistence of their marriage and for the benefit of their family hence the said property falls within the ambit of the matrimonial property and the trial magistrate was right and correctly ordered the said unfinished house at Misenyi to be one among of the matrimonial property.

He went on submitting that, even if we assume that the said house is the property of the family of Rutagwerela Binyemo, this fact to be raised at this appellate stage is an afterthought due to the fact that the appellant failed to tender any of the document in order to prove his assertion at the trial court nor did he even mention this fact at trial. He said this ground of appeal is baseless and he prayed to this court to dismiss it.

With regard to the 5th, 6th and 7th grounds of appeal, Mr. Nyalusi submitted that, the evidence on record indicates that the father was not fit to be granted custody as he was not aware of many affairs of his children especially school affairs which are paramount and important priority of their welfare, it should be noted that the appellant has no time to make follow up to their children concerning school matters this was evidenced as

the appellant failure to tell how Mwombeki scored in his studies and the position of Niwemgizi at the level of standard 3 and 4. The appellant further states that the respondent is the one who took the results also the Appellant even failed to know the exact birth dates of his children and the appellant also failed to make follow up to the school of Namala to know exactly why she claimed to be harassed at that school. He submitted further that, looking at the respondent testimony she pointed out that the appellant has other children out of wedlock. Further that, the appellant is irresponsible man who could not care of his children and this was evidenced that there was an incident where certain woman wanted to bring her children to the appellant so that he could live with them because she could not afford to care for them on her own.

He went on submitting that, the respondent during the hearing she stated that, she prayed to be given the custody of three children due to the fact that the appellant could not manage to care for them and further argued that the appellant had once failed to take care of Niwemgizi Talemwa, Justice Rutagwerela when he was sick and she further stated that the appellant had no time with the children he even used to teach them bad manners, and the respondent prayed to the appellant to be ordered pay Tshs. 500,000/= per each children as maintenance allowance but during cross examination the respondent told the court that the appellant salaries is Tshs. 3,256,000/= a fact which was not disproved by the appellant.

He went on submitting that, going through the testimony which was adduced by both the respondent and the appellant at the trial court it is

clear that the honourable Magistrate was right and correct to order the said custody of children to the respondent by considering the welfare of the child and other things in accordance with section 125 of the Act and the Magistrate to order payment of Tshs. 300,000/= per month was so fairly due to the fact that, the appellant is an employee, he is a lecturer of Mkwawa University and his salary per month is Tshs. 3,256,000/= the fact which was not disputed at the trial court.

With regard to rule 32(1) of the Marriage (Matrimonial Proceedings) Rules as contended by the counsel for the appellant, he submitted that this issue is misconceived by the counsel for the appellant due to the fact that this rule applies if there is no such prayer in the petition for divorce or there is pending petition before the court, but looking at the respondent's petition for divorce one among of her prayers was maintenance and custody of children so the said section cannot apply at this situation and continue to apply again the same order which was ready prayed in the petition for divorce this will amount to abuse of the court process.

Regarding grounds No.8, 9 and 10 of appeal, Mr. Nyalusi submitted that, the counsel for the appellant is misguided and misconceived. The trial court stated very clearly the basis for his decision that because both parties are employees and the respondent established that she had contributed in attaining the matrimonial properties then on balance of probabilities both parties had equal contribution on attainment of matrimonial properties. He contended that the only evidence adduced by the appellant was that because the properties appear in his name they are his personal properties though he purchased for family use. To support his argument he referred

the case of ***Reginald Danda vs Felichina Wikesi*** Matrimonial Appeal No.1 of 2015 (unreported) at page 16 of the said case provides the meaning of matrimonial property. He argued that, according to the description given in ***Halsburys Laws of England 4th Edition*** at page 491, cited in ***Bihawa Mohamed*** case (supra) a family or matrimonial assets:-

> *"Refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole"*

He went on submitting that, basing on the trial court record, the Appellant claimed to remain with all properties that bear his name and for those other assets that bear the names of both parties he opted to leave that issue for the court to decide so basing on this testimony of the appellant it is clearly indicated that the appellant failed even to prove or tender any of the document which evidenced that he bought the said properties that bears his name for his personal use rather than he bought them for family hence they are matrimonial properties.

He submitted further that, the trial magistrate was right and correct to order each party 50% share at the current market of the said listed Matrimonial properties due to the evidence that both parties are employees and the respondent has more income than the Appellant the fact which is

undisputed that is why the respondent contributed to the acquisition of those assets and it should always be remembered that each case should be decided on its own peculiar surrounding circumstances.

He went on submitting that, the appellant is praying for retrial, a prayer that is not reflected in his memorandum of appeal. He said that is misconceived prayer because the major issue in dispute was whether the marriage is broken down irreparable to warrant divorce a fact that was never disputed and the court rightly granted divorce, so the issue of distribution of matrimonial properties and custody are no worth to warrant retrial, it would make a mockery of court process and make the whole process as gamesmanship which is not the essence of our judicial system.

The learned counsel concluded by submitting that, the appellant appeal before this court is misconceived and the same should be dismissed with costs and the decision of the trial court be upheld.

In rejoinder Mr. Ambindwile mainly reiterated what he stated in his submission in chief with emphasis in certain areas which I need not to reproduce them but I will highlight them in the course of my decision.

Having read the respective submissions by the parties and having carefully gone through the grounds of appeal and the court records, the main issue to be determined here is whether the complaints raised in the grounds of appeal carry weight for consideration.

In this appeal the appellant raised ten grounds of appeal, but they boil down into three main complaints.

1. The first complaint is on division of matrimonial assets.
2. The second one is on Custody of children.

3. The third one is on maintenance of children.

In the first complaint, the appellant complains that the trial court erred to go on distributing matrimonial properties despite the fact that parties have failed to advance any physical evidence and there is no evidence to prove whether the properties is a matrimonial properties.

There is therefore no complaint on the dissolution of the marriage. Section 114(1) and (2) of the Act gives powers to the court to divide matrimonial properties after dissolve the marriage.

In the case of ***Cieaphas M. Matibaro versus Sophia Washusa***, Civil Application No.13 of 2011 CAT of Tanzania (unreported), the Court put it clear that, there must be a link of accumulations of wealth and the responsibility of the couple during such accumulation. For that reason, the matrimonial assets for distribution should be matrimonial properties acquired in the course of the marriage by both parties. Also in the case of ***Bibie Mauridi versus Mohamed Ibrahim*** (supra), it was insisted that, in regard to the issue of contribution, there must be evidence to show the extent of contribution of each party to the acquisition of matrimonial properties. In the instant appeal the respondent as a petitioner at the trial court was legal bound to prove that the properties listed in her plaint were matrimonial properties and to prove his contribution toward acquisition of those matrimonial properties.

It is the principle of law that, he who alleges must prove, in other words whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he/she assert must prove that facts exists. This is provided under section 110(1) of the

Evidence Act Cap 6 R.E. 2019. See also the case of ***Yusuph Abdallah Mpwatile vs Sophia Rashid Mlaponi*** (PC) Matrimonial Appeal No.03 of 2018 (HC) Iringa Registry. In this appeal the respondent was supposed to prove that those properties are matrimonial properties by leading evidence to prove the same and was supposed to prove his contribution toward acquisition of those matrimonial assets, because in determining the division of matrimonial assets, the contribution of each party in acquiring them must be considered. This was stated in the case of ***Yesse Mrisho vs Sania Abdu***, Civil Appeal No. 147 of 2016 (unreported). But also the court has to consider the community to which the parties belong.

I have carefully gone through the trial court proceeding, there is no evidence to prove that the properties listed in her petition are matrimonial properties. Not only that but also there is no evidence in the trial court records showing the parties contribution towards acquisition of those matrimonial properties, rather the trial Magistrate decision was based on assumption that, as the parties are all lecturers and employees of Mkwawa University College of Education their contribution towards matrimonial assets would be the same. This is revealed at page 29 of the typed judgment where the trial Magistrate stated that:-

> *"Sincerely, both parties have failed to advance any physical evidence to substantiate their averments. However, there is also evidence on record that both parties are employee and the petitioner has more income than that of the respondent. This piece of evidence that she*

contributed to the acquisition of those assets. I take that, on balance of probabilities, each party in this matter being the employee of Mkwawa University as Lecturers played equal role in the acquisition of those matrimonial assets"

It is my considered opinion that a mere fact that parties are lecturers does not necessarily mean that they equally contributed to the acquisition of the said matrimonial properties. The contribution ought to be proved by evidence.

Furthermore the trial court decision with regard to the order of division of matrimonial properties is too general. I'm of the view that the trial magistrate was supposed to be specific in his decision, through mentioning those matrimonial properties subject for division. As the respondent listed those matrimonial properties but the appellant disputed to some of those properties, evidence was required to prove what she had alleged.

The first complaint has merit, the same is sustained.

With regard to the complaint on the custody of children, the appellant complained that, the trial court erred to order custody of children, and the factors considered by the court was contrary to the requirements of section 125(2((a)(b)(c) and (4) of the Act. The counsel for the appellant submitted that as the children were above 7 years old, the court was supposed to summon them so as to give them chance to state as to where they are comfortable to stay. It is my view that this complaint

has merit due to the fact that, the children in the instant appeal are of the age capable was expressing their independent opinion and wishes, as provided for under section 125(2) (b) of Act. By listening them the court could be able to learn under whose custody their welfare could be more protected. The trial court was supposed to summon the children so as to give them chance and hear their wishes with regard to the custody, rather than ordering custody of the same basing on the allegation by the respondent that the appellant cannot manage to take care for them and he cannot maintain them because he has no time for them. These allegations by the respondent were not corroborated with other independent evidence.

With regard to complaint on maintenance of children, the counsel for the appellant said the trial court was biased in ordering maintenance in the sum of Tshs.300,000/= per month as well as paying school fees and for health (treatment) of the children. It is my considered opinion that, this complaint has no merit and order of maintenance was reasonable taking into account the economic position of the appellant. And the respondent as the mother she has more responsibility for many needs and taking care of those children. Thus this complaint has no merit the same is disregarded.

Basing on the above given reasons, this appeal save for the issue of maintenance, has merit because the issue of distribution of matrimonial property, the trial magistrate was not specific on what properties to be divided, hence making the trial court decision contradictory and impossible to execute. Thus for the interest of justice it is my considered opinion that the interest of justice will be more saved, for this case to be retried specifically on the issues of division of matrimonial properties and custody

of children where more evidence is to be taken before coming to the decision. It is hereby ordered that the case be heard *denovo* but before another magistrate with competent jurisdiction.

DATED at **IRINGA** this 23rd day October, 2020.

F.N. MATOGOLO
JUDGE
23/10/2020.

Date:	23/10/2020
Coram:	Hon. F. N. Matogolo – Judge
L/A:	B. Mwenda
Appellant:	Present
Respondent:	Absent
C/C:	Grace

Mr. Alfred Stephano – Advocate:

My Lord I am appearing for the Respondent. But also holding brief for Mr. Moses Ambindwile Advocate for the appellant.

My Lord the appeal is for judgment. We are ready.

COURT: Judgment delivered.

F. N. MATOGOLO

JUDGE

23/10/2020