

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

(PC) CIVIL APPEAL NO. 25 OF 2019

*(Appeal from the District Court of Monduli Civil Appeal No.1 of 2017, Originating from
Mto wa Mbu Primary Court Matrimonial Cause No. 3 of 2017)*

JUMA RASHID APPELLANT

Versus

NEEMA SYLIVESTER RESPONDENT

JUDGMENT

Date of last Order: 12th February, 2020

Date of Judgment: 20th March, 2020

Masara, J.

1.0 Introduction

Juma Rashidi and Neema Sylvester had lived together as husband and wife for about 12 years and had two issues of marriage, Eunice Juma and Abigael Juma, before their marriage hit the rocks. Misunderstandings in their marriage prompted Neema to leave her matrimonial home. Neema filed Matrimonial Cause before Mto wa Mbu Primary Court seeking for divorce, division of matrimonial properties and custody of children. The Primary Court granted the divorce, divided the matrimonial properties and handed over custody of the children to the Appellant. The Appellant was not satisfied, he appealed to Monduli District Court. His appeal was not successful. He has further appealed to this Court on the following grounds:

- a) That, both lower courts magistrates erred in law and fact for failure to evaluate the evidence adduced before the trial court which was mostly hearsay and consequently arrived at an erroneous decision;*
- b) That, both the lower courts magistrates erred in law and fact when they ordered the distribution of the purported to be matrimonial properties without any justification;*
- c) That, both lower courts magistrates erred in law and fact for failure to consider the strong evidence adduced by the appellant herein as a result the trial court became biased on basing his evaluation on one side of the respondent hence denied the appellant his right of fair hearing;*
- d) That, both the lower courts magistrates erred in law and fact when the trial magistrate refused access of some of the appellant's witnesses namely Ms. Halima Juma, Rashid Nyikisi and the ten-cell leader one Hamis Garimoshi for the reasons that they were his close relatives and that could not render justice; and*
- e) That, both the lower courts magistrates erred in law and fact for ordering an equal distribution of the matrimonial properties among the parties while the burden for maintaining the children remained on the shoulders of the appellant.*

It is on those grounds that the Appellant prays that this Court allows his appeal and reverses the decisions of the two lower courts. He also prays that the court orders that the house which was wrongfully distributed as one of the matrimonial properties be expunged from the distributed properties as it belongs to the Appellant's father. The appeal was heard *ex-parte* as the Respondent's whereabouts could not be traced even after substituted service was employed. The Appeal was heard through written submissions.

One main issue arises from the grounds of Appeal: Did the first appellate Court err in not reversing the trial Court's division of matrimonial property?

2.0 Analysis of the issue

In his written submissions, Mr. Juma Rashid reiterated that both the trial and the first appellate courts magistrates did not evaluate properly the evidence on record. The evidence adduced was mostly hearsay evidence and was not supported by documents therefore it could not be the basis in nullifying their union. He cited section 107(2) of the Law of Marriage Act, Cap. 29 of 1971, R.E 2002 which stipulates the grounds under which a marriage can be nullified. He challenged the finding that there was evidence of cruelty against the Respondent.

I should point out that the finding of the trial Court was that the Appellant and Respondent's marriage was presumptive under Section 160 of the Law of Marriage Act, Cap. 29, there being no formal or traditional marriage between them. The Appellant seems to challenge the evaluation of evidence done by the trial Court and affirmed by the first appellate court. This assertion is not backed up with the record. The record of the two lower courts shows clearly that the first and the appellate magistrates made proper evaluation of the evidence. The main piece of evidence which the two courts relied upon in reaching their decisions is that of SM1 as corroborated by the other witnesses. SM2 who was their neighbour testified to what she was told by SM1 in 2016. SM1 told her how the appellant used to beat and torture her and SM2 is the one who advised SM1 to take her complaints to the Social Welfare Offices. In essence, SM2 corroborated what was testified by SM1. That no medical record was produced cannot be evidence of lack of cruelty. The Respondent testified as to how the Appellant used to forcibly make love

to her even when she was sick or while on her menstrual period. She also alleged to have been beaten several times whereby she complained to the hamlet chairperson, to the police station and to the social welfare offices (SM4 corroborated this). SM5 also testified that he participated in the negotiations where the Appellant admitted the allegations and apologized but still the battle did not end. In essence these acts amount to nothing but cruelty. The trial magistrate's finding was supported by a number of precedents regarding the ascertainment of whether the marriage was broken down irreparably. He concluded that cruelty is the main reasons for dissolving the marriage of the two.

According to section 107(2)(c) of the Law of Marriage Act, Cap 29, R.E 2002, cruelty has been cited as one of the evidences which prove irreparable break down of a marriage. The case of ***Said Mohamed Vs. Zena Ally*** [1985] TLR 13 defined cruelty as;

"Wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, so as to give rise to a reasonable apprehension of such danger."

I have no reasons to doubt the unanimous factual findings of the two Courts below regarding the issue of cruelty. I subscribe to the findings of the lower courts. The acts of the Appellant amounted to cruelty. In several occasions the appellant was warned not to repeat but he paid a deaf ear. The findings of the two lower courts therefore cannot be faulted.

Having so held, I now turn to the crux of the appeal, the issue relating to division of matrimonial property. The Appellant is praying that the five roomed house which was apportioned to him be removed from the list of the matrimonial properties subject to distribution as the same belongs to his father, one Rashid Nyikisi. Arguing on the second and fifth grounds of appeal jointly, the Appellant submitted that the two lower courts below in distributing the alleged matrimonial properties did not take into consideration the contribution made by each party. The two courts below did not bother to verify whether the said properties belong to the couple and were obtained by their joined efforts. He made reference to section 114(1) of the Law of Marriage Act. He reiterated that the said 5-room house does not belong to them and that the two had built a 2-room house during the subsistence of their marriage and the said house should have been left to their children. The Appellant further argues that his witnesses, including his father were not allowed to testify on the issue of properties.

A careful scrutiny of the trial Court record reveal nothing to support the allegations made by the Appellant relating to his potential witnesses or the presence of a two rooms house. Witnesses for the Respondent talked about the 5-roomed house as being their joint property. SM1 and SM5 in their evidence stated that the two had built a 5-room house at Jangwani. The Appellant did not rebut this in his evidence or during cross examination of the Respondent and her witnesses. Needless to say, that the house in question was given to the Appellant. The trial Court's finding, which finding was upheld by the first appellate Court is that the 5-room house was

acquired by the couple during the subsistence of their marriage. The allegations that the house did not belong to the couple surfaced at the first appellate stage but was not expounded during hearing. The learned resident Magistrate therefore did not make a finding on it. He had no basis to comment on the same given the record and submissions before him.

It is a legal requirement that in distributing matrimonial properties, contributions made by each party is taken into account. Such contributions need not be monetary or direct one. I am guided by the decision of the Court of Appeal in ***Charles Manoo Kasare and Another Vs. Apolina Manoo Kasare*** [2003] TLR 425 where it was held that:

"The wife cannot be discounted from the 'business even if she makes no direct monetary contribution, her wifely services during the life of the marriage would in itself entitle her to a share"

The Appellant when cross examined by the Respondent during trial did admit that the two were doing a huge and profitable business together. Even without this fact, the fact that the two had lived together for more than 12 years would entitle the Respondent to a share in the matrimonial properties. This is according to several decided cases, including ***Bibie Maurid Vs. Mohamed Ibrahim*** [1989] TLR 162. I therefore find no merits in the complaints made by the Appellant in this regard. The second and fifth grounds of appeal are accordingly dismissed.

Regarding the third and fourth grounds of appeal it is submitted by the Appellant that the trial court did not consider the evidence of the Appellant

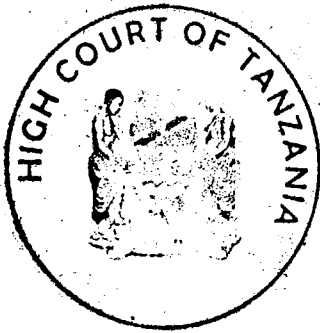
that the Respondent was not faithful to her marriage and that some of his witnesses were denied access to testify in court. I have already stated that there was no record regarding denial of witnesses. The record indicates that after the testimony of SU2, the Appellant prayed to close his defence case. If there were other witnesses in attendance, the record is silent.

I do, however, acknowledge that the issue of unfaithfulness of the Respondent was stated by the Appellant in his testimony. The trial Magistrate did not accord weight to this evidence. At page 14 of the typed judgment he had this to say: "*Hakuna Ushahidi wa aina yeyote ile kama ni kweli mdai amewahi kufumaniwa. Makosa makubwa yanayovunja ndoa ni dhidi ya Mdaiwa.*" I therefore do not subscribe to the contention that his evidence on that regard was not considered. I am of the view that the trial court magistrate took into consideration the evidence of the Appellant. From the extract above, he was of the view that the reason for the dissolution of their union is the cruelty on the part of the Appellant. Be it as it may, such consideration would have no bearing in the distribution of matrimonial property which is the bone of contention in this Appeal. These grounds are also devoid of merits.

3.0 Conclusion

In the upshot, and based on what I have endeavoured to explain above, this appeal is devoid of merits. It is dismissed in its entirety. I make no orders as to costs, taking into consideration the previous relationship of the parties and the fact that the Respondent did not enter appearance.

Order accordingly,




Y. B. Masara

JUDGE

March 20, 2020.