THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

PC. MATRIMONIAL APPEAL NO. 04 OF 2018

(From Matrimonial Appeal No. 17 of 2017 of the District Court of Mbeya at Mbeya, originating from Mbeya Urban Primary Court in Matrimonial Case No. 12 of 2017)

FARAJA NSEMWA ..... APPELLANT

VERSUS

ALEX MBILINYI ..... RESPONDENT

JUDGMENT

Date of last Order: 13/10/2020

Date of Judgment: 06/11/2020

Dr. A. J. Mambi, J

The appellant **(FARAJA NSEMWA)** in this appeal that relates to Matrimonial Cause was dissatisfied by both decision and orders of the Mbeya District Court and the Mbeya Urban court where both courts made the decisions in favour of the respondent.

Aggrieved by the decision of the District Court, the appellant has now appealed to this court against the decision of the District Court on the following grounds;

1. That both court erred in law and fact by distributing three houses unequally contrary to the requirement of the law.
2. That both lower courts erred in law and fact by relying on the vehemently and unfounded evidence of the respondent named above without considering the strength of the appellant.
3. That both lower court erred in law and fact by giving inadequate maintenance of the child without considering the best interest of the child.
4. That both lower court erred in law and fact by distributing other matrimonial property unequally contrary to the law.

Before the matter was scheduled for hearing, parties prayed to argue by way of Written Submission and court ordered the parties to do so in line with agreed schedules.

The appellant in his first ground of appeal submitted that, the two lower Courts erred in law and fact when failed to interpret Section 114 of the Law of Marriage Act Cap 29 [R.E. 2019] by narrowly defining the term "joint effort" to mean direct contribution by a spouse by way of money, property and work to the acquisition of the said three houses. She argued that the evidence shows that she was conducting the charcoal business apart from doing the domestic activities and she thus entitled equal distribution to the others two house. She referred the decision of the court in **Bi Hawa Mohamed versus Ally Sefu (1983) TLR 32**.

The appellant further submitted that the two lower Courts did not consider the domestic service of the appellant which had positive impact in placing the respondent in a financial position to acquire the other two houses.

Addressing, the second ground of appeal, the appellant submitted that the two lower Courts failed to consider the strong evidence adduced by the appellant. She averred that it is clear from the court records that SM 2 and SM 3 support how the appellant participated in the acquisition of the matrimonial assets.

Elaborating the third ground of appeal, the appellant submitted that the sum of Tsh. 20, 000/= as money for the maintenance is not sufficient considering the current situation of life and for the best interest of the child. The appellant prayed this court to order the respondent to pay her the sum of Tshs. 80,000/= per month as maintenance.

With regarding to the fourth ground of appeal, the appellant submitted that, the two lower courts were wrong to deny her the equal distribution other matrimonial property while the appellant proved that she participated to the large extent in the acquisition of those other matrimonial properties.

In response, the respondent contended that all the lower court properly made the right decision. The learned Counsel for the respondent averred that the respondent's evidence was clear to the effect that, the appellant only contributed to the acquisition of the

1st house only. With regard to the 2nd House, the respondent Counsel argued that, the appellant separated herself and deserted the respondent in January 2015 when the said house was in foundation stage and the 3rd House was built by the respondent and his first wife only.

The learned Counsel was of the view that the Trial Court and the Appellate District court were right to hold that, the appellant is entitled nothing from the other houses which were built by the contribution between the Respondent and his other wife since the Appellant contributed nothing to the acquisition of the second house and the third house. He argued that it is a well-established principle in law that, one to be entitled to the division of matrimonial property must prove the extent of their contribution. He averred that since division of matrimonial properties is a question of law, section 114 of the Law of Marriage Act, Cap 29 [R.E. 2019] provides for the guidance on matters for the Court to consider when granting order for division of matrimonial assets. He referred the decision of the court in **SAMWEL MOYO Vs. MARY CASSIAN KAYOMBO [1999] TLR 197,** which held that;.

> *"...its apparent that the assets envisaged there at must firstly be matrimonial assets, secondly must have been acquired by them during the marriage and thirdly they must have been acquired by their joint efforts. The three conditions must exist before Court's power to divide matrimonial or family assets under s.114 (1) of the Law of Marriage Act is involved..."*

He argued that there were other two houses which the appellant failed to prove her contribution apart to the first house which she got her share after the Primary Court was satisfied by her contribution on the same as the law requires, given the respondent had legal wife while the appellant was just a co-cohabitant. He referred the decision of the court in **GABRIEL NIMRODI KURWIJILA Vs THERESIA HASSAN MALONGO, Civil Appeal No 102 of 2018 (Unreported)** where the court held that:

> *"...The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution..."*

The respondent Counsel contended that the appellant has failed to prove the extent of her contribution in the obtaining of the two houses which were elected after she has left and deserted the Respondent.

Responding to the second ground of appeal the respondent submitted that, both lower Courts rightly considered the evidence of both parties whereby the Respondent's evidence superseded that of the appellant which was feeble, weightless and untrustworthy, as the appellant never testified what was her contribution in the acquisition of the matrimonial properties. He was of the view that the proof of extent of the spouse contribution to the matrimonial

property is a very key ingredient to the division of matrimonial property.

The respondent Counsel also disputed the third ground of appeal by submitting that both lower Courts rightly decided and gave sufficient and adequate maintenance of the last child. He argued that both lower courts took into consideration that the respondent's sources of income is not reliable and that the respondent was tasked to continue maintaining the 2nd and 3rd children. He contended that the respondent is a Mason and has no permanent income, so the amount tasked to him by the lower courts is enough as the first child is studying aged 7 years old and another aged 11 years.

I have carefully gone through the submissions from both parties including the records such as proceedings, judgment and other records. In my considered view this appeal forms almost three issues that are interrelated as follows:

(i) Whether the District Magistrate Court which upheld the primary court decision on matrimonial divisions erred in its decision or not.

(ii) Whether the amount of maintained ordered by both lower courts was justifiable or not

Having summarized submission by both parties, I will now collectively address two issues I have raised. This brings me in determining as to whether the matrimonial assets were distributed

in accordance with the law. I have gone through the judgment of the District Magistrate and noted that the District Court Magistrate properly made his decision given the nature of the relationship among the parties.

As submitted by the respondent, it is clear that the magistrate clearly directed himself to the extent of contribution made by each party in acquiring money, property or work toward the acquisition of the assets. While the evidence is clear that both parties had contribution on one house that was divided equally, the appellant failed to prove her contribution on the other two houses. In this regard the lower court properly made its decision basing on the extent of the contributions made by each party .I wish to refer the relevant provision of the law that is Section 114 (2) (b) of the Law of Marriage Act, Cap 29 [R.E. 2019] as follows:

> *"(2) In exercising the power conferred by subsection (1), the court shall have regard-*
>
> *(a) ....*
>
> *(b) to* ***the extent of the contributions*** *made by each party in money, property or work towards the acquiring of the assets"*

Reading between the lines on the above paragraph of the Section, it is clear that before ordering the division of the matrimonial assets the court must foresee the extent of the contributions made by each party in money, property or work towards the acquiring of the assets". The word **"Shall"** under the Law of Interpretation Act, Cap.

1 [R.E. 2019] implies mandatory and not optional. Since the Respondent had already acquired some properties before he started cohabitating with the appellant it is obvious that he had more share than his partner. It is on the record that the appellant separated herself and deserted the respondent in January 2015 when the other house was in foundation stage. It is also on the record that the 3rd House was built by the respondent and his first wife only. The appellant has failed to prove the extent of her contribution in the obtaining of the two houses which were elected after she has left and deserted the respondent. It is a cardinal principle of the law that in civil cases, the burden of proof lies on the plaintiff and the standard of proof is on the balance of probabilities. This simply means that he who alleges must prove as indicated under section 112 of the of Evidence Act, Cap 6 [R.E2019], which provides that:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person".*

The court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM,*** observed that:-

> *"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side".*

I entirely agree with the respondent Counsel that proof of extent of the spouse contribution to the matrimonial property is a very key ingredient to the division of matrimonial property.

There is no doubt the repellant made "house service" for the period she stayed with the respondent before their relationship broke, entitled her to a share in the properties acquired to the extent of her contribution and not always on equal share basis. See ***Charles Manoo vs. Kasare & Another Vs. Agona Manoo [2003] TLR.).***

The Law of Marriage Act under Section 114(2) (b) is very clear that the division of matrimonial properties should be based on the contribution of each party. I wish to reproduce Section 114 of the Law of Marriage Act as follows;

> *(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 sale.*
>
> *(2) In exercising the power conferred by subsection (1), the court shall have regard– (a) to the customs of the community to which the parties belong;*
>
> *(b) to the* ***extent of 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 contracted for their joint benefit; and (d) to the needs of the infant children, if any, of the marriage,*

The above provision is very clear that any court dealing with matrimonial cause is empowered to grant a decree of separation or divorce and order the division between the parties of any assets acquired by them during the marriage by their joint efforts if there

is evidence to prove **contribution** of each party. Reference can also be made to the decision of the court in **SAMWEL MOYO Vs. MARY CASSIAN KAYOMBO [1999] TLR 197,** where it was held that:

> *"...its apparent that the assets envisaged* ***there at must firstly be matrimonial assets****, secondly* ***must have been acquired by them during the marriage*** *and thirdly they must have been acquired by their* ***joint efforts. The three conditions must exist before Court's power to divide matrimonial*** *or family assets under s.114 (1) of the Law of Marriage Act is involved..."*

The law under Section114(2) (b) goes further by requiring the court in exercising its power under the law to have regard to **the extent of the contributions** made by each party in money, property or work towards the acquiring of the assets. I am of the settled view that both the Primary and District Court Magistrates did properly exercise their power conferred under Section 114(2) (b) of the Law of Marriage Act. It is clear from the evidence adduced by the respondent at the lower courts that the respondent acquired most of the properties before he started staying with the appellant the appellant as cohabitants. The records from the trial courts show theta the division of matrimonial assets was done as follows:

1. The first house which was built in the year 2006 was equally divided where each was entitled to 50%,

2. the second house built in 2010 to remained in the ownership of the respondent since he acquired it before their relationship started , and

3. The third house the appellant was awarded 10% while the respondent got 90% basing on the contribution of each while, the loan acquired jointly at the SACCOS was to be paid equally.

There is also no dispute that the appellant who cohabited with the respondent and blessed with some children has some contribution on the acquisition of the matrimonial assets but that should not plainly mean that she contributed fifty percent (50%) without prove. Since the respondent had already acquired some properties such as land, he is entitled to higher share as decided by the lower courts. It is also on the record that the respondent had much contribution as compared to his co-cohabitant who was just staying at home taking care of the home and children.

My thorough perusal from the records from the lower court reveal that the appellant failed to prove the extent of her contribution in the obtaining of the two houses which were elected after she has left and deserted the Respondent. Worth also referring the decision of the court (which was also rightly cited by the respondent Counsel) in ***GABRIEL NIMRODI KURWIJILA Vs THERESIA HASSAN MALONGO, Civil Appeal No 102 of 2018*** (Unreported) where it was held that;

"...The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution..."

It is on the records that the trial court divided the acquired joint assets and granted the other reliefs sought, pursuant to section 160 (2) and could not have issued orders of divorce or separation since the parties had not undergone any formal legal marriage apart from cohabitation. I am of the considered view that the evidence of the parties was considered and the division was not necessarily to be equally but the efforts renders the court to divide on the joint efforts. In this regard, I find that the division was properly made by the trial court and first appellate Court.

With regard to the assessment of maintenance of the child who is under the custodian of the appellant, I wish to highlight that the amount of money to be paid as maintenance of the children depends on the income of the husband. The records show that the first appellate court uphold Tsh. 20,000/= per month as the trial court's award for maintenance to the child. The appellant has requested this court to increase the amount of maintenance of the child from 20,000/= to 80,000/= Indeed in awarding the maintenance to the child the court is guided with ability to pay the awarded amount. This means that in determining the amount of maintenance, the source of income of the husband or respondent in

our case should be ascertained in line with the opinion from the social welfare. In considering the amount of maintenance, the Court is also required to consider the other factors such as if the party in which the order is made has other children under his care. See; ***JEROME CHILUMBA S. AMINA ADAMU [1989] TLR 117*** at page 119 where the court held that:

> *"where the equality of maintenance is required to all children and dependents of the sued person's income for sake of ability to pay".*

Basing on findings, I find it proper to uphold the decision of the lower courts which ordered the respondent to pay the appellant the amount of 20,000/= per months as maintained of the child who is under the custody of the appellant.

In the premises and basing on the above reasoning, I have no reason to fault the findings reached by the District Court rather than upholding its decision. In the event as I reasoned above, this appeal is non-meritorious hence dismissed.

I make no orders as to costs. Order accordingly.

A. J. MAMBI, J
JUDGE
06.11. 2020

Judgment delivered in Chambers this 6th day of November, 2020 in presence of both parties.

A. J. MAMBI, J
JUDGE
06.11. 2020

Right of Appeal Explained.

A. J. MAMBI, J
JUDGE
06.11. 2020