

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CIVIL APPEAL NO. 28 OF 2020

(Arising from Matrimonial Appeal No. 1 of 2020 of Ruangwa District Court.
Original Matrimonial Cause No. 35 of 2019 from Ruangwa Primary Court)

FATUMA HAMIS HASSAN.....APPELLANT

VERSUS

YUSUPH SELEMANI MKOMBE.....RESPONDENT

JUDGMENT

19 Nov. & 4 Dec.2020

DYANSOBERA, J.:

This is a second appeal. The appellant herein seeks to impugn the judgment and decree of District Court of Ruangwa which was delivered on 18th June, 2020. The grounds of appeal, according to the petition of appeal filed on 13th July, 2020, are the following:-

1. That, the District appellate court erred in law and fact to hold that the bricks house given to the respondent as compensation to the appellant's house situated at Mkowe village while the said house situated at Mkowe is a sole property belonging to the appellant which she built prior to the marriage between the parties, and hence the court divided the house at Mkowe the property which was not matrimonial.
2. That the appellate court erred in law and fact in dividing the bricks matrimonial houses by giving it to the respondent without considering high extent of contribution made by the appellant towards the acquisition of the said house then that of the respondent.
3. That, both the trial and appellate court erred in law and fact in dividing two matrimonial farms by giving only 30% to the appellant without considering much extent of contribution of the appellant towards the acquisition of the said two houses than that of the respondent.
4. That the appellate court erred in law and fact in dividing the fridge and ordering the appellant to be given 30% and respondent to get 70% while the said fridge is the property of the appellant as she bought it through her money which acquired as a bribe (sic) price, and hence the court divided the properties which is not one among of the matrimonial property.

5. That, both the trial and appellate court erred in law and fact in dividing matrimonial properties without analyzing and evaluating the entire evidence adduced by both parties during the and observe much extent of contribution of the appellant towards the acquisition of the said matrimonial properties.

It is upon these grounds of appeal that the appellant prays this Honourable Court to allow the appeal with costs.

The respondent who was duly served resisted the appeal by filing a reply to the petition of appeal.

The brief facts of the case according to the evidence unfurled at the trial is that the parties were wife and husband having contracted Islamic marriage on 14th day of November, 2016 as evidenced by the marriage certificate (exhibit D 5). They were blessed with one issue and managed to jointly acquire various properties, landed properties as well as other assets. After their marriage became sored, the appellant went to the Primary Court at Ruangwa and successfully petitioned for dissolution of marriage and division of matrimonial assets. The appellant was aggrieved by the way the order given on division of the matrimonial assets made by the trial Primary Court and

appealed to the District Court. Her appeal was, however, dismissed on 18th June, 2020 hence the instant appeal.

On 19th day of November, 2020 when this appeal came up for hearing, the parties appeared in person.

Arguing in support of the appeal, the appellant told this court that the respondent promised many things which he failed to fulfil. She contended that she assisted him to rear the children. She argued that there are farms, four in number. It was her further argument that the respondent found her with a house which has tenant and was of the view that the 30% was unjust. She lamented that the respondent took her healthy but has left him sick and the respondent is not maintaining her and the child nor does he assist her anyhow.. she insisted that there was a motor cycle and she gave him Tshs. 700,000/=. She refuted the respondent's claims that he used the money to nurse her mother.

Replying, the respondent stressed that he bought the motor cycle by his own money. He asserted that he was living with the appellant's mother. He urged this court to consider the evidence on record arguing that he has five children left behind by their mother. He insisted that the appellant is after money. As regards the matrimonial assets, the respondent told this court that

the appellant took with her all the clothes and house hold assets and he had to start a fresh.

With regard to the child, the respondent said that he is 8 years and therefore, would wish to stay with him arguing that the welfare office was on his side. The respondent complained that when the child visits him, the appellant flogs him.

In her rejoinder, the appellant said that she was chased when she was in hospital and that the respondent had been with the child but he got lost two times and that he was given custody of the child through the welfare office. She contended that the child is not willing to go to his father.

I now turn to the appeal which is the crux of the matter.

In her first and second grounds of appeal, the appellant is complaining on the order made by the lower courts that a brick house be given to the respondent as compensation to the appellant's house situated at Nkowe which, according to the appellant was built prior to the marriage and was therefore, not a matrimonial property.

In its judgment, the first appellate court observed at page 5 of the typed judgment thus:

"The bricks house be given to the respondent as the appellant had a house at Nkowe which was developed by parties."

The learned trial Resident Magistrate did not invent this fact but it was in evidence before the trial court. In his evidence, the respondent is recorded to have said:

*"Katika uchumba wetu ulitokea mgogoro tukagawana, ikabaki kila mmoja anamiliki vitu vyake. Nilibaki na vitu vyangu ambavyo nilinunua kwa pesa yangu, pasi na mdai kuchangia kitu chocote. **Nilimuacha na mali zake ambazo mimi nilichangia: nyumba ya Nkowe alibaki nayo ilikuwa na vyumba vitatu, sebule, mabanda mawili na choo** na mabanda mawili ya biashara ambayo yapo Mitope. Kuna shamba pori ambalo alirithi mdai, nilikata msitu na shamba lingine niling'oa visiki pamoja na pesa kuwapa watu. Hivyo vyote vipo kwa mdai"*

(Emphasis supplied)

Further, when cross examined by the appellant, the respondent stated:

"Nyumba ya Nkowe nilitoa fedha kiuchumba."

This means that although the appellant got her share from the jointly acquired matrimonial assets, still she retained the house at Nkowe which the respondent substantially contributed to its improvement. The learned Resident Magistrate was justified in finding that both houses were not included in the

division. Indeed, these two houses did not feature in the complaint from the appellant had presented before the Primary Court when instituting the petition, the subject of this appeal. The first and second grounds of appeal have no basis.

On the third and fourth grounds of appeal, in ordering the appellant to get 30% of the said matrimonial properties, the trial court considered *inter alia* that the appellant had already received her share. This, she admitted in her evidence when she said that she was given a bed, mattress, two seater set of coach, two buckets, four cooking pots, cage for fowls, a drum, a table and a cow. Indeed, she supported her oral evidence by tendering in court the documentary exhibit. it is on record that when the appellant was testifying at the trial she had this to say:-

*"Baadhi ya vitu 2016 tuligawana kwa kumshirikisha mwenyekiti wa Kitongoji. Naomba mgawanyo wa kwa mwenyekiti upokelewe kama kielelezo-**exhibit P 3** maliziano kati ya Bw.Yusufu Mkombe na Fatuma Hassan.*

Ndugu Yusufu Mkombe:

- 1. Ng'ombe 1,*
- 2. Godoro 1*
- 3. Kochi 1*

4. *Shamba la poni ½*
5. *Banda la biashara 1*
6. *Mapapi 14*
7. *Shamba ½*

Bi. Fatuma Hamis

1. *Ng'ombe 1,*
2. *Kitanda na Godoro 1*
3. *Kochi 1*
4. *Shamba la poni ½*
5. *Mashine ya korosho laki moja*
6. *Mbuzi 3*
7. *Kuku 5*
8. *Banda la mbuzi moja*
9. *Boriti 2*
10. *Shamba 1*

Both parties and the Kitongoji Chairperson signed. The same applied to witnesses, namely, Ali J. Chambambe, Said Machela and Tekela I Lilai.

The said exhibit was endorsed: "vyombo vimegawanywa bila tatizo kwa makubaliano ya wenyewe and the parties also signed".

Besides, the trial court considered that both parties acquired the said matrimonial assets jointly and during the subsistence of their concubinage and marriage and that each party had a share of contribution.

On my part, I agree. The appellant's argument that she contributed much more than the respondent is not supported by any evidence on record nor can it be discerned even from the analysis of evidence as made by the trial court. To appreciate my finding, I can do no better than quoting in extenso the manner the trial Primary Court dealt with the issue of division of matrimonial assets between the parties.

In her judgment, learned Resident Magistrate observed:-how it dealt

"Katika suala la mchango wa pamoja Mahakama hii imepokea ushahidi kwamba mdai alikuwa mkulima na mfugaji akisaidiana na mdaiwa lakini pia Mdaiwa ni mtumish wa serikali. Hivyo mdai pia alikuwa na mchango kama ilivyoamriwa kwenye kesi ya Bibie Maurid v. Mohamed Ibrahim [1989] TLR 162 kuwa kazi za nyumbani ni mchango katika mali za pamoja japo siyo kwa asilimia 50.

Kwa kuzingatia mchango wa kila upande katika upatikanaji wa mali za wadaawa ambazo zimepatikana tokea waanze kuishi wote 2009 na baadaye kuoana 2016 mpaka kuachana 2019, mali hizo kutokana na

ushahidi zilizopatikana kwa juhudi za pamoja ni: nyumba mbili –Likunja na banda la biashara, Shamba Mtutumo, Shamba-pori, ng'ombe watano bati 12, friji, TV na deki, kabati kitanda. Ni Dhahiri hizi ndizo mali za wadaawa ambazo zimethibitishwa kama mali za juhudi za pamoja. Kwa kuwa kuna ushahidi wa mdai na mdaiwa kuna mali zilishagawanywa na mdai amekiri kwamba baadhi ya vitu anavyo yeye ambavyo Mahakama hii pia itazingatia katika mgawanyo huu.

Mdai katika shauri hili atapata bati tano, ng'ombe mmoja mkubwa kwa kuwa alishapewa ng'ombe mwingine, T na deki.

Mdaiwa achukue friji, bati saba, kabati la nguo, kitanda na ng'ombe nne.

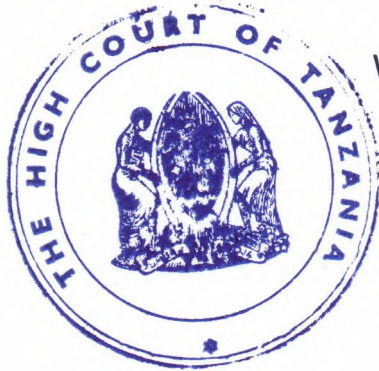
Lakini pia kuhusu nyumba mbili za Likunja, moja ya tofali na nyingine ya nyasi, zote zitathiminiwe kwa kila mmoja na mdai apate asilimia 30% na mdaiwa asilimia 70% pamoja na banda la biashara. Mwenye uwezo wa kumrudishia mwenzake fedha afanye hivyo.


Pia, mashamba (2) Mtutumo na shamba pori, yote yatathiminiwe, mdai apate 30% na mdaiwa 70%.

There is nothing material to fault both the trial court and the first appellant court. Having said so, I am far from being convinced that the fourth and fifth grounds of appeal have any merit.

In the totality, I find this appeal lacking in merit and, accordingly, dismiss it with costs to the respondent.

Order accordingly.



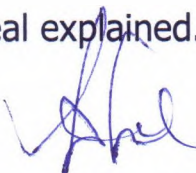

W. P. Dyansobera

Judge

4.12.2020

This judgment is delivered under my hand and the seal of 4th day of December, 2020 in the presence of appellant and Rights of appeal to the Court of Appeal explained.




W. P. Dyansobera

JUDGE