IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC.MATRIMONIAL APPEAL NO. 01 OF 2019

(Arising from matrimonial Appeal No. 03 of 2018 from Kahama District Court. Originating from P/C Matrimonial cause No 21 of 2018 of Kahama Urban Primary Court.)

MASUNGA BUZZY...APPELLANT

VERSUS

SCHOLASTICA PASTORY...................................RESPONDENT

JUDGEMENT

Date of last order: 18.02.2020
Date of Judgement: 20.03.2020

MKWIZU, J.:

This is a second appeal. The Respondent herein had in 2018 petitioned for divorce via Matrimonial Cause No. 21/2018 at Kahama Urban Primary Court praying for two things, divorce decree and distribution of matrimonial properties. The trial court after it being satisfied that the marriage has broken down irreparably, granted divorce and proceeded to order a division of matrimonial house egually between the parties. Dissatisfied with the decision of the primary court, appellant, appealed to the District court of Kahama in Matrimonial appeal No 3/2018 on the main ground that the division of matrimonial asset did not take into

account the fact that the appellant had two wives and that the house in dispute was acquired by the appellant and his first wife jointly, and it is the respondent who is to blame for the breakdown of their marriage. The appeal to the District Court was dismissed for lacking in merit. Discontented, the appellant has again, come to this court on the following grounds of appeal.

1. That the trial magistrate erred in law and in fact by not taking into account the weight and gravity of the evidence adduced by the appellant on the division of Matrimonial assets by disregarding the evidence adduced by the applicant (sic) that he acquired the house jointly with his first wife.
2. That the trial magistrate erred in law and in fact by ignoring the strong evidence adduced by the appellant hence deciding the matter in favour of the Respondent.
3. That the trial magistrate erred in law and in fact for considering cooked, hearsay and a contradicting evidence and the trial magistrate failed to analyse the evidence of the appellant which proves that the house is jointly owned by the applicant(sic) together with his first wife.

Appellant and the respondent had solemnized their traditional marriage in the year 1998. At this time, appellant had another wife, herein after to be referred to as the first wife. As the record would reveal, appellant's wives that is respondent and the first wife lived in one house. There existed a misunderstanding between the two wives. Respondent left the appellant's home .Appellant followed the respondent and left with her to Ulowa where they started farming and business which enabled them to buy a plot and build a house at Majengo within Kahama District. The appellant's mother became violent and forced the respondent to move out of her matrimonial home.

The appellant evidence at the trial court tallies that of the respondent except on the cause of dissolution of their marriage. On his part appellant said, respondent had left the matrimonial home with all the households and some shop commodities without any reasonable cause. He claimed in addition that the house in dispute was acquired by him and his first wife and that respondent had not contributed to its acquisition.

After hearing the evidence from both sides, the trial magistrate was satisfied that the marriage was broken down beyond repair and ordered that the matrimonial house be equally divided among parties.

When the appeal was called for hearing the appellant appeared in person unrepresented while the Respondent had the services of advocate Ng'wanzalima Kushigwa Mponeja.

Submitting in support of the appeal, appellant stated that the trial court erred in deciding in favour of the respondent in respect of the division of the matrimonial house as the house was a result of a joint effort between him and his first wife.

On the reason of the respondent's leaving the matrimonial home, it was the Appellant's submission that, respondent left the matrimonial home after he had diagnosed HIV positive. He was of the view that, appellant is not to blame for the respondents' own action. The house is for his children and therefore should not be subjected to the division.

On his part. Mr Mponeja for the respondent submitted that it is not disputed that respondent is a second wife to the appellant and that after their marriage, appellant moved to Ulowa with the respondent where they engaged themselves in tobacco farming and later business which altogether enabled them to build a house which is the subject of the

appeal. He supported the trial court's decision on the division of the matrimonial house and so the first appellate court's decision.

It was Mr. Mponeja's further argument that, the allegation that the house was a result of a joint effort between the appellant and his first wife was not born by the evidence. He urged this court to dismiss the appeal.

In his rejoinder, appellant indicated his willingness to have the respondent go back to her house (the house in dispute) but not otherwise. He stressed however that, he should not be blamed for the respondent's own decision of leaving the matrimonial home.

As stated earlier, the issue which calls for my determination is whether the appellate magistrate erred in agreeing with the trial magistrate on the issue of the division of matrimonial house.

It is a trite law that ownership of a matrimonial property is vested in the spouses according to the contribution of each parts towards its acquisition and that must be divided between the spouse on divorce. In this part, the court is guide by the provisions of **section 114(1) and (2) of the Law of Marriage Act**, CAP 29 RE 2002 which reads:

"114 (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order 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 assets 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 custom of the community to which the parties belong;

(b) to the extent of the contributions made by each party money, property or work towards the acquiring of the assets;

(c) NA; and

(d) to the needs of the infant children, if any, of the marriage, and subject to those

considerations, shall incline towards equality of division."

In the instant case the house subject of the division was acquired while the marriage between the parties was in subsistence. It is also not in dispute that the house was a result of the farming activities and businesses done by the appellant and the respondent jointly. It is the appellant's argument that the initial capital was raised by him and the first wife and therefore for that reason, the house result of the said activities should be declared to have been acquired by the appellant and his first wife.

A clear scrutiny of the record reveals that, the first appellate court were in agreement with the trial magistrate that the evidence on record do not show how the mentioned 1st wife contributed to the acquisition of the said house. In dismissing this complaint the 1st appellate court had this to say at Page 3 of the its decision:-

"The appellant claimed that the house was acquired by the 1st wife but there is no evidence to show that the 1st wife contributed to wards acquisition of the house. He did not adduce any evidence at the trial. The witness of the

respondent shows that the parties were living together in a rented house and that thereafter they acquired a plot and started building the house. There is no evidence at all to show how and when the 1st wife contributed towards the acquisition of the house or to show that she was also living in Kahama...the appellant's allegation that the property was acquired by his joint efforts with the first wife were not proved at all. The respondent contributed towards acquisition of the assets and therefore the trial court was right to order equal distribution of the assets to the parties."

The above decision, in my considered view, is fully supported by the evidence on record. The appellant testified that the house in dispute was acquired by him and his first wife. He called no witnesses to support the said assertion. Section 110 (1) of the Law of Evidence Act 1967 places the burden of proof on the party alleging a fact, here, the appellant's assertion that he acquired the house in dispute with his first wife. Section 110 (1) states:

"110.-(1) Whoever desires any court to give

judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

From the evidence adduced at the trial, I am satisfied that the appellant, did not, on the balance of probabilities, discharge the burden of proving that he built the matrimonial house in dispute without the assistance and contribution of the respondent. That the said house was a matrimonial home was evidenced by the fact that the appellant built the said house using the proceed of their joint efforts in farming and business activities they engaged in. The evidence is supported by the appellant's own submission in his rejoinder that he is willing if the respondent would be ordered to go back to her house but not to sale the same.

In that regard, the courts below rightly held that the respondent should get a fifty percent (50%) share of the matrimonial house and that the rest should go to the appellant.

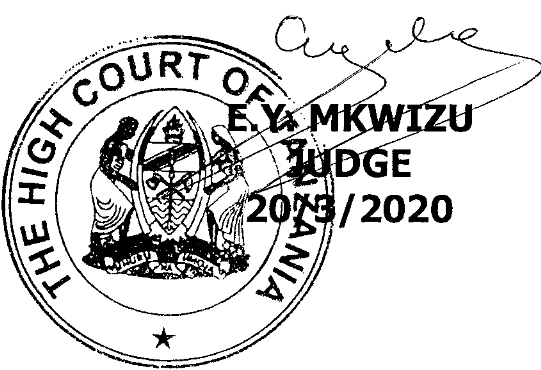
Under the circumstances, I find no merit in this appeal. I accordingly dismiss the appeal with costs.

It is so ordered.

DATED at **Shinyanga** this 20th day of **March,** 2020.

E.Y. MKWIZU
JUDGE
20/3/2020

Court : Right of appeal explained.



E.Y. MKWIZU
JUDGE
20/3/2020

evidence is to the effect that she was informed of the incident by the parents who attended the parents meeting in her school. This evidence is a hearsay evidence which lacks value. Again, PW3 is a doctor who examined the victim and found that there was penetration. However, by itself, the evidence of PW1 cannot stand to sustain the conviction as it does not tell as to who committed the offence.

In the circumstances therefore, I find the appeal meritorious to the extent explained above. I allow the appellant's appeal, set aside the conviction and sentence and order appellant's release from prison unless he is held there for any other lawful purpose.

It is ordered.

DATED at **SHINYANGA** this 27th day of MARCH, 2020.

E.Y.MKWIZU
JUDGE
27/3/2020

Court. Right of Appeal explained.

THE HIGH COURT OF TANZANIA

E.Y.MKWIZU
JUDGE
27/3/2020