

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO 33 OF 2020

**[Arising from the decision of the District Court of Kinondoni at Kinondoni
in Civil Appeal No 60 of 2018 and Originating from the decision of Kawe
Primary Court in Matrimonial Cause No 28 of 2018]**

BETWEEN

MOSI MBWANA.....APPELLANT

Versus

YASINI THABIT.....RESPONDENT

JUDGMENT

MRUMA, J

The brief facts of this case are that the appellant contracted an Islamic marriage with the Respondent in 1999. After their wedding, the parties produced two children Zaituni Yasini who was 19 years in 2018 and Sikudhani Yasin who was 7 years in 2018. The Appellant and the Respondent developed serious misunderstandings since 2008, which culminated in the Respondent chasing the Appellant out of the couple's residence. The Appellant refused to leave without divorce. The Appellant subsequently petitioned for divorce on 20th April 2018 under Matrimonial

Cause No. 38 of 2018, of Kawe Primary Court on grounds of the Respondent's cruelty among others, which led to their marriage to irretrievably break down. She prayed for judgment against the Respondent for the following orders:

1. Divorce order;
2. Maintenance order for the child;
3. A share of the property to which she contributed;

The Respondent resisted the Appellant claims for divorce, maintenance and division of matrimonial properties. He told the trial court that he was loving his wife and children and he was providing for her and their children and he did not see any reason to devorce. The matrimonial cause was heard and the trial court entered a Decree Nisi dissolving the parties' marriage and made orders for the sharing of the parties' property.

Dissatisfied with the judgment of the trial Court, the Appellant lodged Civil Appeal No. 60 of 2018 in the District Court of Kinondoni at Kinondoni, which dismissed her appeal.

Still dissatisfied with the District court's decision the Appellant filed this second appeal on the following grounds:

1. That the honourable Magistrate erred in law and in facts for not ordering equal division of jointly acquired matrimonial property as prayed by the Appellant and for not considering the contribution of the Appellant in the acquisition of those properties;
2. That the learned Magistrate erred in law and in facts for excluding some of the properties in the division of matrimonial properties which were jointly acquired by the parties during their marriage;
3. That the learned Magistrate erred in law and in fact for not ordering the Respondent to provide maintenance of issues and without specifying the amount of maintenance of those issues;
4. That the learned Magistrate erred in law and in fact in upholding the decision of the Primary Court without considering the evidence that was tendered and not considered by that court.

The Appellant prayed that his appeal be allowed and that the judgment and orders of the District Court be set aside. She also prayed that this court make an order for custody of the issues of their marriage in her favour and specify the amount to be paid by the Respondent for their maintenance.

At the hearing of this appeal, the parties were not represented. Both made brief oral submissions in support of and against the appeal.

Appellant argued all grounds of appeal together. The Respondent, on the other hand, first questioned the truthfulness of the Appellant. Thereafter, he replied to the appellant's submissions, tackling all the grounds of appeal together.

I will first consider submissions made in respect of contribution of the Appellant in acquisition of the matrimonial property and their division (1st and 2nd grounds), thereafter, I will consider a ground of appeal relating to maintenance of issues of marriage. Lastly, I will deal with the appellant's fourth ground regarding the District appellate court's allegedly failure to re-evaluate the evidence tendered during the trial.

Submitting in support of the first and second ground, the Appellant contended that it was not fair for the District court to give her 25% shares in the matrimonial property taking into account the fact that she was a business woman and she gave the Respondent cash towards purchasing of building materials for three houses which they acquired during the subsistence of their marriage. She said that although she doesn't think that her contribution reaches 50% but it is not 25% as ordered by the lower court. She argued this court to allow her appeal and make appropriate and just order.

On his part the Respondent submitted that the Appellant was not telling the truth. He said that when he married the Appellant she found him with some of his properties therefore she cannot claim equal division of the matrimonial property. Regarding the matrimonial home, the Respondent contended that when he married the Appellant she found him he had already constructed 4 rooms out of 5 rooms. He said that the Appellant had her own plot and he constructed one room house for her in that plot.

Let me consider the first and second grounds of the Appellant's appeal which relates to contribution, acquisition and division of matrimonial property. In her submissions in respect of these two grounds the Appellant took issue with the District appellate court orders regarding the contribution, acquisition and division of the matrimonial property. She Appellant faulted the learned appellate District Magistrate when he confirmed the trial Magistrate's holding that the Appellant was entitled get 25% share in the house which the court found to be a matrimonial property. She argued that basing on the evidence she produced her share must be greater than 25% ordered by the trial court. She said that there was evidence that she had contributed towards the construction of that house. On this basis, she argued that the District appellate court failed to properly evaluate the evidence and to find, according to the respective

parties' contribution ratio, that the Appellant's share of the property was only one 25%, as the trial court had found. The appellant submitted that the District appellate court failed to re-evaluate not only her evidence but also her submissions. She prayed to this court to allow the appeal, and to reverse the orders relating to the sharing of the matrimonial property, as well as the District appellate court's wrong holding on the law of distribution of property upon marriage and upon divorce.

The Respondent, on the other hand, supported the judgment of the District appellate court. He submitted that the learned District appellate Magistrate properly addressed himself to the law and facts of the case and reached the right decision by ordering that matrimonial property should be shared on the 25% to 75% ratio at the time of dissolution of marriage.

In response to the Appellant's submissions, the Respondent submitted that nowhere did the learned District appellate court hold that matrimonial property acquired by him became a joint property upon his marriage to the Appellant. He contended that the learned Magistrate's decision had actually excluded the properties he acquired before his marriage to the Appellant. The Respondent urged the court to disallow the appeal because the appellant had failed to show how the learned

District appellate magistrate erred in law and in fact by holding as they did that marital property has to be shared on 25% to 75% between the parties at the dissolution of the marriage.

Let me now turn to consider the merits of the appeal. The first contention is that the learned appellate District Magistrate erred in upholding the decision and orders of the trial court that the property which was jointly acquired by the parties' should be divided on 25% to 75% shares. Contrary to counsel for the Appellant's contentions, the holding of the trial court with regard to the matrimonial property, can be clearly found on last but one page of the trial court's judgment which reads:

"Mdai apewe thamani ya nyumba moja asilimia ishrini na tano tu 25% Kwa sababu amejengewa nyumba chumba Kimoja Kwao na amechukua shilingi 8,000,000/= na kuweka anakojua yeye bila kununua Kiwanja. Kodi za nyumba kwa ajili ya matumizi alikuwa anachukua"

In the instant appeal, the learned trial Primary court magistrate tried as much as he could to order the sharing of share what he found as matrimonial property between the Appellant and the Respondent. He took into account to what extent the spouses had contributed to the acquisition of property in question. He was obviously following the

common law and local authorities on the issue. I do not think that I should disturb his findings and division of the property, especially where the Appellant did not challenge the findings that the Respondent gave her shillings 8,000,000/= and constructed a one room house for her. I would uphold the decision of the trial Magistrate which was upheld by the District appellate court on the sharing percentages of the property held to be a matrimonial property.

I agree with the Respondent that that the Appellant didn't lead any evidence to establish the extent of her contribution towards acquisition of the said property. To the contrary there is evidence which was not challenged to the effect that one five roomed house was constructed during the subsistence of parties' marriage but solely by the Respondent's efforts. It is this house that the trial court ordered the Appellant to get 25% share of its value.

The trial court found this house to have been the home where the parties had lived during their short lived marriage, it nevertheless allowed the Appellant to retain one room house which was constructed for her by the Respondent as her separate property. The Appellant was also left to retain shillings 8,000,000/= which she was given by the Respondent for purposes of by a plot which she didn't buy.

The court also held that Motor Vehicle No. UAE 944 R, which the respondent testified not having made any contribution, solely belonged to the appellant.

I therefore find that the learned District appellate Magistrate actually excluded the properties the Appellant when he upheld the division of property ordered by the trial court. This is a fair decision in the circumstance of the case.

The issue of how a court should determine a contributing spouse's share in joint property has come up in several cases before the High Court and the Court of Appeal. Our courts have established a principle which recognizes each spouse's contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services. When distributing the property of a divorced couple, it is immaterial that one of the spouses as not as financially endowed as the other. Where one of spouse is the financial muscle behind all the wealth they acquired, the contribution of the other spouse is no less important than that made be the respondent. But in law an acquisition of a property is a question of fact. Section 110 of the Evidence Act requires he who alleges to prove.

In the case at hand the Appellant claims that she is entitled to more than 25% of the value of property. She however didn't lead evidence of her contribution towards its acquisition and the percentage she is entitled to. It is worth noting that the contributing spouses share is not restricted to a maximum of 50% share either in the matrimonial home or in other jointly held property. In some other cases, the court awarded a higher or lesser percentage share either in the matrimonial home or in some other properties. The wife's interest in a matrimonial home may be at a 75% or more share. Similarly, the court may award the husband several properties, in addition to over 75% share he receives in the parties' matrimonial home. It all depends on a party's contribution in the acquisition of the same. The contribution may be direct and monetary or indirect and non-monetary. Indirect contributions towards acquisition of a property may be in terms of payments for household expenses, preparation of food, purchase of children's clothing, organizing children for school and generally enhancing the welfare of the family which may amount to a substantial indirect contribution to the family income and assets which entitled a spouse to an equal share in the couples' joint property.

I am therefore in agreement with both courts below that the 25% share given to the Appellant was fair in the circumstance of the case.

I am therefore in agreement with both courts below that the 25% share given to the Appellant was fair in the circumstance of the case.

With respect to maintenance of Sikudhani Yasin, I agree with the Appellant that the court below did not specify the amount for maintenance. In the circumstance of this case I order that the Respondent shall pay Tshs. 50,000/= monthly towards maintenance of Sikudhani Yasin who will remain in the custody her mother Zaituni Yasin who is now of the age of majority is at liberty to chose where to stay. She can decide to stay with her mother as well as her father.

In conclusion, I would dismiss this appeal. Given the fact that this is a matrimonial proceeding I would order each party to bear own cots.

Order accordingly,




A. R. Mruma,

Judge.

Dated at Dar Es Salam this ^{19th}.....day of May 2022.