IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

(original Matrimonial Cause No.117/2020 of Kinondoni District Court before Hon. F.S Kiswaga – SRM)

BAHATI BONIPHACE KAZUZU.....APPELLANT

VERSUS

RUTH ALEX BURA.....RESPONDENT

JUDGMENT

11/10/2021 &25/20/2021

I.C MUGETA, J

The parties to the case do not challenge the trial court's order of divorce because they agree that their marriage has irreparably broken down. Further, they have no dispute over custody of the children to the respondent and the appellant to pay Tshs. 200,000/= as their monthly maintenance. However, they disagree on how the matrimonial assets were divided. The appellant is aggrieved more and he has preferred this appeal. The appeal raises several interesting issues. One of such issue is whether a party who cheats on a spouse and acquire personal property in form of a gift as a result, that property is a matrimonial asset because the other spouse contributed its acquisition by staying at home taking care of the family. The appellant has knocked the doors of this court on two grounds of appeal that: -

1. *The trial magistrate grossly erred in law and in fact by dividing personal properties of the appellant while they are not matrimonial properties without proper principle or/and credible evidence.*
2. *The trial magistrate erred in law and in fact by arriving at unjust decision for failure to analyse evidence and misconceived the interpretation of the principle of matrimonial property hence arrived at unjustifiable and unjust division of matrimonial assets to the detriment of the appellant.*

At the oral hearing before this court the appellant was represented by Mr. Ferdinand Makore, learned advocate, while respondent appeared in person. He challenged the decision of the trial court on two fronts. Firstly, that part of the distributed properties are personal properties not matrimonial assets. Secondly, that the trial court applied a wrong principle of law to distribute the matrimonial properties. It was submitted by Mr. Makore that personal properties in this case are of two categories. Those acquired before marriage and not substantially improved during marriage and those registered in one party's name as provided under section 58 and 60 of the Law of Marriage Act [Cap 29 R.E 2019] (the LMA). He mentioned the personal immovable properties to include Plot No.65, Block 6, Mbweni Mpiji and a male salon located at Mikocheni, "kwa Nyerere". According to the learned counsel for the appellant, the respondent did not provide evidence that she contributed

towards substantial improvement of the properties acquired before marriage, therefore, did not acquire automatic right to those properties by reason of marriage. To buttress his argument, he cited the case of **Neema Kulwa Mvanga vs Samson Rebule Maira**, Civil Appeal No.1/2018, High Court - Tanga at page 22.

Regarding motor vehicles, the counsel for the appellant complained most about the bus make coaster which was given to him as a gift and a tractor they bought by loan. Therefore, it is a personal asset. He contended further that the tractor was obtained on hire purchase agreement and the respondent contributed 22,000,000/= out of the purchase price of Tshs. 58,000,000/= and the lender repossessed it upon failure to repay.

On wrong application of the principle for division of matrimonial assets the learned advocate referred to a plot at Mapinga and submitted that the trial court erred to divide it equally between the parties. He contended that the plot was bought in 2019 at the tune of Tshs. 7,000,000/= of which the respondent contributed Tshs. 2,000,000/= but the appellant repaid her later which means that the respondent contributed nothing to the plot acquisition. The learned counsel argued that the trial magistrate ordered equal division of these properties

without regard to the contribution of each party which is a guiding principle under the situation. He cited the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No.102/2018 Court of Appeal – Tanga, at page 11 – 12 and section 114(1) of the LMA to support his argument that a party ought to prove by evidence his/her extent of contribution in property acquisition.

In reply, the respondent who was unrepresented argued that a Plot at Mapinga near baobab school and a Plot at Mbweni were bought during marriage and she contributed money in buying the same. She argued further that she borrowed money from the Bank, as reflected on record, to support acquisition of the properties including Tshs 22,000,000/= spent in buying the tractor.

Regarding the bus, make Coaster, she submitted that it is, indeed, registered in the appellant's name after he was given as a gift by his concubine from Italy. However, she argued that even if it is registered in the appellant's name it is a matrimonial asset because when appellant travelled to Italy to meet his concubine, she stayed at home maintaining their children and sustaining a good welfare of the family. According to her that amounts to contribution towards the acquisition of that property.

As for the male salon, respondent admitted it was acquired by appellant before marriage but she improved the same by buying coaches, air conditioner and posting it on her social media account in Instagram which attracted more customers.

In rejoinder, the learned counsel for the appellant reiterated what he submitted in chief. All grounds of appeal will be jointly determined since they raise two issues that; whether any party owned personal properties and whether an order for equal distribution of some properties was unfair.

In determining the appeal, I shall start with deciding whether during marriage the parties had personal properties. Personal properties are properties owned by a couple in exclusion of the other. Under section 60 of the LMA when a property is acquired in the name of one couple during subsistence of the marriage, there is a rebuttable presumption that the property belongs absolutely to that person. Counsel for the appellant has tried and would wish I hold that properties registered in the appellant's name belongs to him in exclusion of the appellant. I, respectfully, disagree. The evidence on the parties life style does not support this proposition. It is my view and I hold that when a spouse alleges personal ownership of properties acquired during subsistence of

the marriage on account of being registered in his or her name, the presumption is deemed rebutted once it is proved that the parties never formed a common intention to that effect. In her evidence the respondent admitted that several properties are in the appellant's name. In rebutting the presumption that the properties in the name of the appellant belongs solely to him she had this to say at page 17 of the proceedings: -

> *'I relaxed his name to appear only his name (sic) because we were spouses'*

I hold that properties acquired during subsistence of the marriage were intended for joint ownership. Those acquired before marriage and was not substantially improved after marriage are the exception. Their distribution ought to be consistent with the principle of the extent of the contribution of the spouse towards acquisition of each property in issue.

According to the evidence of the parties, I find that it is the salon only that was acquired before marriage. The land at Mbweni was acquired in 2018 while the parties married in 2017. The appellant admitted the respondent improved the salon by buying coaches but he, allegedly, refunded the purchase price of the couches. Herein court the respondent said she put an air conditioner in the salon and opened

Instagram page which increased customers. However, this is not borne in evidence. The trial court awarded the respondent 10% share in the salon as her contribution on improvement during marriage. I find no reason to disturb that decision.

I move to the complaint that the matrimonial properties were unfairly distributed. The respondent had this to say regarding the properties registered in the appellant's names: -

On the property at Mbweni: -

> *'About the plot at Mbweni I gave Bahati Tshs. 10,000,000/= where he bought such plot. We bought it on 14/12/2018'*

On the property at Mapinga: -

> *'... a plot at mapinga ... I paid 2 million and later gave Bahati Tshs. 5 million he went to pay seller'*

The trial court divided these properties equally between the parties. I find that this decision is correct considering the above contribution of the respondent and the fact that the spouses intended a joint ownership of their properties.

The complaint that the appellant refunded Tshs. 2,000,000/= she paid for the plot at Mapinga has no merits. Firstly, while the appellant

admitted the respondent's contribution of the said amount, he produced nothing in court to prove the refund. Further, he did not challenge the evidence of the respondent that after the 2 million she gave him another 5 million as above quoted.

It is undisputed that the tractor was bought in the name of the appellant and the respondent contributed Tshs. 22,000,000/= after obtaining a loan from Stanbic Bank. It is also undisputed that the appellant used the tractor and the respondent does not know its where about while her loan remains unpaid. The trial court ordered that the loan, if any, be repaid upon sale of the jointly acquired properties. This order is problematic for being incapable of execution as those properties have been shared equally between the parties. The appellant said the tractor was bought on hire purchase and the seller alienated it after they failed to repay the loan. While I agree with his assertion, I am of the view that since he is the one who used the tractor, he is liable to pay from his share the loan of the respondent at the bank. I set aside the order of the trial court on the mode of repaying the bank loan.

Now I move to the strange but interesting issue of whether a gift obtained in adultery can be a matrimonial asset. The parties agree that the motor vehicle make coaster was bought by the appellant with funds

from Floriana Monte who is an Italian. While the appellant testified that she is his friend, the respondent testified that she is his mistress. The respondent is supported by Sylvester Kazuzu Njebele (PW4) who on cross examination testified on the appellant's character thus: -

> *'I know you have not settled. You have other women. ... you have a woman abroad, a white woman'*

By the phrase "you have not settled", I have no doubt the learned magistrate made direct translation of the Swahili slang "hujatulia" which when used against a person regarding his/her sexuality it refers to being an adulterer or fornicator. PW4 is the appellant's grandfather whom I believe meant what he said in his evidence. It follows therefore that the gift was a result of an amorous relationship between the appellant and Froliana Monte.

In her evidence, the respondent alluded to this gift and said: -

> *'Respondent says he obtained gift. Be that it may that is a matrimonial property'*

On appeal she said since when the appellant cheated on her she was at home taking care of the family, that was her contribution towards the acquisition of the property, hence, a matrimonial property. I agree with the respondent. When it is proved, as in this case, that a party who

cheated obtained advantage in the process while the other party maintained the family at that time, the accruing benefit is nothing but a matrimonial property. I hold that the efforts the honest party puts in caring for the family is enough contribution towards acquisition of the gift. The trial magistrate was right to consider the dispute motor vehicle as a matrimonial asset subject to division. However, it erred to award the respondent 10% of its value. I hold that in such circumstances the contribution of the parties is equal. I set aside the order and substitute it with an order that it be divided equally between the parties.

It is from the above analysis I find no merits in the appeal. It is hereby dismissed without costs. The trial court's decision is upheld except for the variation that the motor vehicle, make coaster bus, shall be shared equally between the parties and the unpaid loan for the tractor be paid from the appellant's share in matrimonial assets.

I.C MUGETA

JUDGE

25/10/2021

COURT – Judgement delivered in chambers in the presence of respondent who appeared in person, unrepresented and the appellant was absent.

Sgd: I.C. MUGETA

JUDGE

25/10/2021

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.287 OF 2021

(Original Matrimonial Cause No.117 of 2020 of Kinondoni District Court before Hon. F.S Kiswaga – SRM)

BAHATI BONIPHACE KAZUZU.....APPELLANT

VERSUS

RUTH ALEX BURA.....RESPONDENT

DECREE IN APPEAL

WHEREAS, the appellant prays for orders that;

i. *This appeal be allowed, and the decision of the trial court be quashed and set aside.*
ii. *Costs of this appeal to be provided by respondent*
iii. *Any other relief(s) this court deem fit to grant*

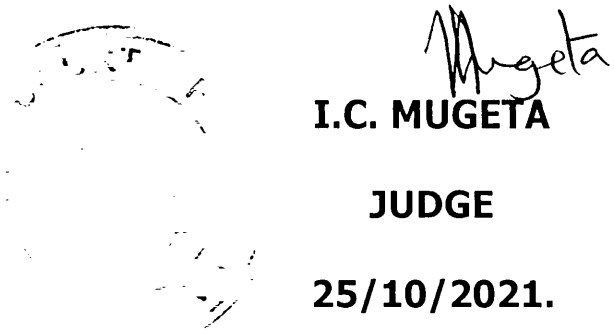
This appeal is coming for judgement on this 25th day of October, 2021 before I.C MUGETA, J in the presence of respondent who appeared in person, appellant was absent.

THIS COURT DOTH ORDERED THAT

i. Appeal is dismissed.
ii. The orders by the trial court are upheld except:
    a) The unpaid balance of the respondent's loan at Stanibic Bank shall be paid from the appellant's share in the matrimonial assets

b) A motor vehicle, make coaster bus, shall be shared equally between the parties.

iii. No orders as to costs.



I.C. MUGETA

JUDGE

25/10/2021.

Extracted on 28/10/2021 and read for collection together with the judgment.