

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**PC CIVIL APPEAL NO. 99 OF 2017**

**DORA REGINALD ..... APPELLANT**

**VERSUS**

**SIGFRID MWALUTAMBI ..... RESPONDENT**

(Arising from the decision of Ilala District Court, at Samora Avenue)

**(Hassan Esq- SRM)**

Dated 2<sup>th</sup> June 2017

in

Civil Appeal No. 73 of 2016

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**JUDGEMENT**

17<sup>th</sup> February & 6<sup>th</sup> April 2021

**Rwizile, J.**

This is a second appeal by Dora Reginald who had first petitioned the Primary Court of Ukonga within Ilala District for divorce, custody of children maintenance and division of matrimonial assets. Dora Reginald the appellant and Sigfrid Mwalutambi the respondent contracted a Christian marriage in 1999. The appellant's ground for seeking dissolution of the marriage was cruelty and adultery committed by the respondent.

She alleged domestic violence in a form of repeated assaults and that the respondent was guilty of adultery for having an affair with another woman. Rustika Mwalyosi (Pw2) Zainury Juma Mwigeka (Pw3) and Dionis Mathias Mnyenyelwa (Pw4) rendered support to the appellant's story regarding the respondent being the cause for the breakdown of the marriage.

On the other hand, the respondent whose story was backed by Raphael Mwalyosi (Dw2), Triphonia Ngailo (Dw3), Reginald Mnyenyelwa (Dw4) and Tuliboko Mwambosi (Dw5) was that it was the appellant's behavior that rocked the marriage. At one time during the subsistence of the marriage, the respondent went for studies in the United Kingdom for one year. The appellant's behavior at the time of her husband's absence is alleged to be the source of the problem. It is alleged that the appellant was extravagant and neglected the children such that Dw4, appellant's own father had to take them (children) to his own home to keep a close eye on them. During this same period the appellant is alleged to have turned to drinking excessively until late hours and that sometimes she would spend nights outside the matrimonial home leaving the children without care.

The marriage is blessed with three children; Raphael, Michael, and Sabina who, at the time of the petition before the Primary Court, were aged 17, 13

and 7 years respectively. As of now, they are 20, 17 and 12 years respectively. Michael, the second born, is said to be disabled and in need of special care.

The Primary Court was satisfied that the marriage is irreparably broken down and granted the petition for divorce. It also granted the appellant custody of Michael, one of the three children while the respondent was given custody of Raphael and Sabina, the other children. Maintenance was ordered against the respondent.

As regards joint matrimonial property, the appellant testified that it consisted of two houses, two motor vehicles, a farm and five plots. On the other hand, the respondent listed down the assets as two houses, one motor vehicle and three plots. The trial court ordered division of these assets as follows; the appellant was given the shamba at Bagamoyo, two Plots at Kisarawe one shop and one Plot at Kifuru.

The appellant unsuccessfully appealed to the District Court pressing for equal division of matrimonial assets, maintenance of Shs. 500,000/= per month and an order that the respondent should provide for education and medical expenses whenever need would arise.

The appeal was dismissed with costs, except for a variation regarding custody of the children having earlier received a report by a Social Welfare Officer showing that the appellant was not an ideal person to have custody of any child. The District Court placed all three children in the respondent's custody.

This second appeal, with three grounds, raises the issue of division of matrimonial assets again demanding it to be equal, and that the court failure to analyse and consider evidence adduced thereby arriving at an unjust decision and lastly that the court did not consider the welfare of the children before placing custody of the same to the respondent.

In her submission in this regard the appellant stated that she should be given a separate house complaining that the shop that has been given to her is part of the house that the respondent lives in. She doubted whether the plot that has been given to her exists in fact as she suspected it to belong to her sister in law. The respondent's advocate Mr. Boaz Moses submitted that the appellant was given a bigger share of the assets because the houses were left for the benefit of the children, a factor to be considered under section 114(1)(b) of the Law of Marriage Act. He submitted that another factor to

be considered is the extend of contribution which he said was minimal from the appellant she having been a housewife.

However, the learned counsel conceded that if the appellant is given custody of the children she may be given the house. The other ground of appeal raised by the appellant is custody of the children. She submitted that the court's interpretation of her father's testimony was erroneous as he never stated the fact that she could not take care of the children. She submitted that the respondent is a frequent traveler which means that the children are left in the care of a house maid. When this appeal was for consideration, it was found out that there was no sufficient evidence to decide the issues placed before it. Having that in mind (Kitusi J, as he then was) remarked and then directed as follows;

*What is glaringly clear from the proceedings before the Primary Court is that evidence was not taken on the assets that were jointly acquired by the parties. There were two lists of assets each party providing own version of assets but not only were the assets such as cars and landed property not described, but the trial court did not make any finding as to which version was correct.*

*Similarly, on the question of custody, if there was enough evidence to determine this fact, I do not see why did the District Court order a Report to be filed by the Social Welfare Officer. This report which formed the basis for the District Court's decision was presented by a person who was not available for examination by the court.*

*I think the two courts below did not follow the procedure laid by Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules GN. No. 246 of 1997 the Rules which provides;*

*"The court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code, and the provisions of the Code which relate to examination of parties, production impounding and return of documents, settlement of issues, Summoning and attendance of witnesses, affidavits judgments and decree shall apply mutatis mutandis to a trial of a petition"*

*I am aware that Rule 38 (b) and (c) of the Rules empowers this Court to decide an appeal on grounds other than those raised in the Memorandum, that it should do so without undue delay to technicalities, but in this case, there is simply no enough evidence to decide the two issues. Considering that the circumstances concerning the children may have changed, I order the District Court to take fresh evidence to enable me determine the issues*

*of custody and division of assets. When that is done let that evidence be placed before me for determination as soon as possible.*

***I.P. KITUSI***

***JUDGE***

***21.2.2018***

Following that order and after some good years of sluggishness, which is unfortunate, the District Court on 23<sup>rd</sup> November 2020, recorded some additional evidence as directed. The same has been placed before me for consideration. On the evidence recorded by the District Court. The appellant testified and called two other witnesses who are her two children, namely Raphael Sigfrid Mwalutambi (Pw2), their first born. He is 20 years and a University Student. His evidence was brief and asked the court to give custody of his youngsters to the appellant because she can take care of them better than it is being done by the respondent. This also happened to Sabina Sigfrid Mwalutambi (Pw3), a 12-year-old girl. Like her brother, she was of the evidence that, she is always better placed and free when living with her mother.

On custody, the appellant asked this court to place custody of children to her, because one is disabled and the other one is sick.

They need their mother because she can handle them better than they are currently being handled by the house maid. She further testified, the respondent is a frequent traveler and cannot take care of them properly. She further stated that there is no evidence showing she is a bad mother as the respondent stated.

On the question of division of the matrimonial assets, she asked for equal division of the same. She said, there are two houses at Kinyerezi and Kifuru in Dar-es salaam. Two motor vehicles a Toyota cami T373 CZQ and a Subaru Forester T759 DRW. There are other properties at Chanika- Two farmlands, which she said was sold, 4 acres of farm land at Bagamoyo. Other properties included five farm lands at Kifuru, where three of them are adjacent to the house of Kifuru while another one is at Kin'gazi. She also called upon division of other assets which are sofa sets (four coaches), dining table, two wardrobes, three refrigerators, one gas cooker, four beds, two TV sets, four water tanks, one radio and one washing machine.

On his party, the respondent was of the evidence that the appellant should not be given custody of his children, because basing on the social inquiry

report called upon by the first appellate court, it was proved, she is a bad mother who cannot take care of her children. It was further testified that the evidence of her father that she was not fit to have custody of her children was considered.

He went on testifying that he has been in custody of the children for five years now and it would be absurd to change custody today. He said, above all, he is taking care of the disabled child and the appellant has never been denied access. Based on the above, the respondent asked this court to maintain the decision of the first appellate court on custody and that of division of the assets. As to assets, he said they had two farm lands at Bagamoyo, two plots at Kisarawe, three at Kifuru -Dar-es salaam, one shop at Kinyerezi and a house. The other house is still under construction which has been at the roofing stage.

It can be recollected that even upon collection of additional evidence by the district Court, still there is no evidence showing if custody is placed on the appellant, what would be the amount of maintenance.

I am saying so because, neither the appellant, nor the respondent provided evidence to that effect. The court which has the duty to guide the parties

did not do so either. Basing on the nature and history of the case and the fact that the same has been pending on appeal since 2018, I decided to call for additional information mainly on maintenance. The respondent proved his income by production for examination a salary slip, stating the amount of his payment per month. It is from the same that his monthly income does not exceed 7.2 million. While the respondent did not have any thing as her income procured.

Having mediated what was submitted by the parties and evidence procured in all stages. I am of the opinion that a decision on the matrimonial property division was made without justification. The evidence showed although the house wife, the appellant was in marriage with the respondent. still, she had contributed something tangible more than what she was given. It is trite that for the parties to have equal shares of the assets, there must be evidence that they equally contributed towards acquisition of the same. The appellant did not show so. She being a house wife, her contribution is not in actual sense equal to that of the respondent, whose income is clearly defined. Under section 114 of the LMA, she is entitled to a share in their matrimonial properties. The respondent did not dispute that they acquired together when in marriage two houses, home utensils, two motor vehicles, two farm lands

at Bagamoyo and five plots of land. There is no dispute therefore that the appellant and the respondent lived together for years. Apart from property, they were blessed with three children. One is 20 years and two are below 18 years. The last born is 12 years and is in the boarding school. According to her opinion, she would feel better to live with the appellant. This was supported by their first child. Since the other child is disabled and cannot give an independent opinion, she could not be contacted.

The trial gave court custody to the appellant. When the first appellate court wanted to deal with custody, a social inquiry report was called upon. It was called upon when hearing an appeal. I am not sure whether it was called as additional evidence or additional information on custody. The manner in which it was invited in the record is not clearly stated. I do not think, the material presented in the same report represented the accurate information from the appellant. But still, the same is not binding on the court. Basing on the additional evidence by the district court, I do not think, it was proper for the appellant to be denied custody. There is evidence that the appellant is not employed and has enough time to take care of the sick child.

The duty she is actually doing according to the additional evidence. The respondent has hired a maid for taking care of the same child. I see, there

is no evidence that the appellant is not capable of taking care of them. I am of the considered opinion that the same deserves custody of her children and section 125 of the Law of Marriage Act explicitly so provides.

The appellant was given a shop and took from it all things that were in. she is therefore having nothing to offer in terms of maintenance. The respondent whose salary slip is self-explanatory, garners atleast 7.1 million. He is therefore capable of providing for the children. I am therefore of the opinion that the appeal has merit. In all fours the appeal is allowed without costs and the appellant is entitled to the following;

1. To 20% share of all properties, namely; two houses, two motor vehicles, home utensils, two farm lands at Bagamoyo, two plots at Kifuru and three plots at Kisarawe.
2. To custody of Michael
3. An amount of 500,000/= for maintenance per month
4. Since the disabled child is 17 years, orders for custody and maintenance will extend beyond 18 years.
5. The other child Sabina will have her choice of where to stay during the vacation

6. The other living expenses such as education to remain in the existing arrangement.

**A.K. Rwizile**  
**JUDGE**  
**06.04.2021**

Delivered in the presence of the appellant. The respondent is absent and his advocate. No notice as to their absence.

**A.K. Rwizile**  
**JUDGE**  
**06.04.2021**



Recoverable Signature

X

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Signed by: A.K.RWIZILE

