IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 238 OF 2019

(From Matrimonial Cause No. 138/2018 at Kinondoni RM'S Court delivered by Kiliwa RM on 30th October, 2018)

ALLEN DAVID MASSAWE..... APPELLANT

VERSUS

ADELINE NEHEMIA MAJULE.....RESPONDENT

JUDGEMENT

Date of Last Orde: 24/2/2021
Date of Judgement: 9/3/2021

MASABO, J.

The parties herein celebrated their marriage in 2006. During the subsistence of their marriage, they were blessed with two issues aged 12 years and 10 years, respectively, in 2018. They also had fixed and movable assets whose distribution is ardently contested.

In 2018 the respondent petitioned for divorce in Matrimonial Cause No. 138/2018 before the district court of Kinondoni. Her major complaint was premised on cruelty and homosexuality. She alleged that having celebrated the marriage the couple lived happily for two years only. In 2008 the appellant developed cruel behaviour whereby he started to physically abuse her to the extent of threaten her life. Further, he was involved in multiple

homosexual affairs. On his party, the appellant vehemently refuted all the allegations leveled against him. He blamed the respondent for disserting the matrimonial home. He also alleged that the respondent was involved in adulterous relationship with her co- employee. The trial ended in the respondent's favour. The marriage was dissolved. She was subsequently granted custody of the two issues and a share of 40% of the matrimonial assets constituting of a matrimonial house situated at Tegeta in Dar es Salaam, another house currently used as a Nursery School situated at Bunju area and a car make Nissan Fuga whereas the appellant got 60% of the two houses and a vehicle make Nissan Murano.

The appellant is disgruntled. He is now before this court armed with eleven points which revolve around three key issues, namely: **distribution of matrimonial assets**, **custody** and **maintenance of the issues**. With regard to **matrimonial assets**, the appellant has complained that in awarding distribution of matrimonial assets, the trial court erred in law because:

i. It granted the respondent 40%percent share of matrimonial home and the nursery school whereas both assets were acquired prior to the marriage and no substantial improvement was made by the respondent during the subsistence of marriage. Besides, the nursery school is the only source of school fees for their issues;
ii. It ignored the evidence that while deserting the matrimonial home, the respondent took all furniture and household items worth Tshs 106,000,000/=;

iii. It failed to consider that the couple has a shop at Mwenge worth Tshs 10,000,000/= which has been confiscated by the respondent;

iv. It ignored that the appellant was responsible for paying the school fees for the respondent;

v. It wrongly granted a matrimonial vehicle make Land Cruiser Prado with Registration No. T 766 DGC to the respondent's mother;

With regard to **custody** of the issues the appellant has complained that the court erred in holding that the appellant was involved in homosexual affairs thereby denying him custody of the issues. He has complained that the there was no concrete to derive such a conclusion as the telephone messages were fabricated and there was no medical evidence in support. It also erred in disregarding the evidence that the respondent was unfit for custody as she had extra marital affairs. Also, the court erred by failure to solicit the views of the issues although they are both above 7 years old. With regard to **maintenance,** he has complained that the monthly maintenance fee of Tshs 250,000/= is excessive considering that he has no stable income as lost his job. A letter of termination was appended in support.

When the appeal was called on for hearing, both parties had representation. Mr. Samwel Nyari learned advocate appeared for the appellant and for the Respondent it was Mr. Festo Fute learned Advocate.

On the **distribution of matrimonial** assets, Mr. Fute adopted the grounds of appeal and submitted that the court erred in law in granting 40% of the

house situated at Tegeta and the house used as nursery school. He argued that it is clear on record that both properties were acquired by the Appellant before marriage and the respondent did not make any substantial improvement contrary to section 114 (3) of the Law of Marriage Act, Cap 29 RE 2019 which provides that only assets substantially improved during the marriage and those acquired though joint effort during the subsistence of marriage are subject to distribution. He further briefly submitted that, it was wrong for the court to award the motor vehicle make Landcruiser Prado to the respondent's mother who is not a beneficiary to the matrimonial property.

On the issue of **custody,** he briefly submitted that it was wrong for the trial magistrate to hold that the appellant is involved in homosexual affairs while the same was not proved. The telephone messages ought not to be relied upon by the court as they were fabricated and tended by the respondent and not an office from the telephone operator. As regard the issue of **maintenance** he merely adopted the grounds of appeal and rested his case.

In reply to the submission on **distribution of matrimonial assets**, Mr. Fute argued that the court correctly apportioned the shares. The respondent found the appellant with an unfinished house at Tegeta and an unfinished building now used as a nursery school at Bunju. Shortly thereafter they jointly finished the matrimonial house and relocated therein. Decorations and fitting continued while the parties were living in the house and through the joint efforts. He argued further that during the subsistence of marriage the

respondent was employed and used to earn money through her boutique and through her earning she contributed to the improvement of both houses. She paid for the gypsum, tiles, doors, windows, furniture and fixtures for kitchen and financed the construction of fence at the residential house. As for the house at Bunju, she contributed significantly in turning it into suitable place for a school thus she deserved the share awarded by the trial court. In fortification of this point he cited the case of **Pulkeria Pondugu v. Samwel Huma Pundugu** [1985] TLR, 7. In the alternative he argued that, even if it is true that the respondent did not have monetary contribution to the two houses, she would still be entitled to a share deriving from her wifely duties.

Mr. Fute further refuted the assertion that the respondent parted with furniture and other household items worth Tshs 106,000,000/=. He argued that, contrary to the law, the appellant has attached a document titled "Thamani*; vifaa na vyombo vya nyumbani vya Allen Massawe Tegeta vilivyochukuliwa kwa kuibiwa na Adeline Majure"* to his memorandum of appeal which was not produced before the trial court hence it is a new evidence. Regarding the shop allegedly worth Tshs 10,000,000/= and the claim that the appellant was responsible for the respondent's school fees, he submitted assertions are baseless. The appellant had no share in the shop and he did not pay the respondent's school fees. The respondent financed the shop and her education single handedly with contribution from relatives.

Regarding the motor vehicle make Toyota Prado T766 DDC it was submitted that it was bought solely by the respondent out of the earning from her employers, the Tanzania Private Sector Foundation and Tanzania Revenue Authority. All documents are in the respondent's name and there was no agreement that the parties intended it to be a matrimonial asset. Therefore, the respondent had liberty to deal with it in the manner she desired pursuant to section 58 of the Law of Marriage Act. Therefore, the transfer of vehicle by way of gift to her mother was valid.

On the issue of **custody,** it was submitted that the respondent proved her case on the preponderance of probabilities that the marriage has broken down irreparably. She fairly established the behavior of the respondent through messages admitted as exhibit P3 whose admission was never disputed by the appellant at trial. In the alternative, Mr. Fute reasoned that, if the allegation by the respondent was false, the appellant could have supplied evidence to contradict what was asserted in trial but he did not. Further, he submitted that the messages were extracted from the respondent's mobile phone and she filed an affidavit to authenticate messages them per the requirement of section 4 and 5 of the Electronic Transaction Act, 2015. He further cited section 125 (2) of the Law of Marriage Act and section 39(1) and (2) of the Law of the Child Act, Cap 13 RE 2019, and argued that the interest of the issues were considered and since there was no proof of the appellant's immoral conducts, there was no need for soliciting the views of the issue as to custody.

On **maintenance,** Mr. Fute argued that the maintenance fee of Tshs 250,000/= is not excessive. The amount is minute and incapable of covering all the necessities for life as there are two issues. He cited Section 121 (1) of the Law of Marriage Act and argued that, it is a duty of a man to maintain his children. In addition, he argued that, the appellant has a good income and is capable of meeting the responsibility for payment of fees. He is an electronic engineer working as an instructor in vocational centers and builds and directs Vodacom sign towers.

Rejoining, Mr. Nyari submitted that section 60 (a) of the Law of Marriage Act applies to the two houses contested as they were acquired before the marriage and no proof was rendered by the respondent to show that she made any substantial contribution to the maintenance of the two houses. On the issue of custody, he reiterated that the respondent is not fit for custody owing to her immoral conducts such as excessive alcoholism and witchcraft.

I have thoroughly scrutinized the trial court record and dispassionately considered the submissions made by the parties and I am now ready to determine the point raised. Before I delve into these points, I will first address myself to the documents appended to the memorandum of appeal. Two documents have been appended to the memorandum of appeal, to wit, a document titled "THAMANI YA VIFAA NA VYOMBO VYA NYUMBANI KWA ALLEN DAVID MASAWE TEGETA-MIVUMONI VILIVYOCHUKULIWA KWA KUIBWA NA ADELINE NEHEMIA MAJULE ..."; and a copy of a letter of

termination of employment dated 8th June 2017. With respect to the appellant, I reject both documents as they were not tendered in trial and no plausible reason has been rendered to justify their reception at appeal stage.

I say so because the reception on these documents in the absence of a plausible explanation from the appellant will conflict the provision of Order XXXIX Order 27, 28 and 29 of the Civil Procedure Code, Cap 33 RE 2019 and the well-established principles regarding reception of new evidence as stated in **Ismail Rashid v. Mariam Msati,** Civil Appeal No. 75 of 2015, Court of Appeal of Tanzania (unreported). In this case, the Court cited with approval the decision of the Court of Appeal for Eastern Africa in **Tarmohamed and Another v. Lakhani and Co** (3) (1958) EA 567 that:

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; **first,** it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **second,** such that if given would probably have an important influence on the result of a case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

As none of these have been established, the two documents are rejected and hereby expunged from the record.

Regarding the first ground, section 58 of the Law of Marriage Act emphatically states that, marriage not operate to change the ownership

of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property. Assets acquired by a spouse prior to marriage, do not principally fall under the category of matrimonial assets and are not liable for distribution save where they were substantially improved during the subsistence of marriage by the joint efforts of the parties as per section 114(3). Since in the instant case it is undisputed that the two houses were built by the appellant in 2003 to 2005 before his marriage to the respondent, there is a rebuttable presumption that the two assets are not part of matrimonial assets. The burden rested upon the respondent to rebut the presumption by establishing that the two assets were substantially improved through joint efforts during the subsistence of marriage.

The records show that, when the respondent testified in court on 24/5/2019, she told the court that she substantially contributed to the improvement of the residential house. She bought gypsum, tiles, aluminum windows and doors, kitchen furniture's and affixtures, toilet, decoration of the house, toilet, fence and main gate. With respect to the house used as nursery school, she testified that she built the fence, put furnitures, decorations and planting trees. Although no documentary evidence was rendered in proof that indeed she contributed, her testimony as to the contribution in substantially improving the two houses was only partly controverted to the extent that, at the time of marriage, the fence to the two houses had been constructed and the respective gates fixed as per the testimony of DW1 which was corroborated by DW2, the mason who constructed the fence. As

for the finishing and affixtures, her account was not controverted. The respondent never cross examined her on this fact thereby giving an impression that the appellant was in agreement with the assertion.

It is a trite law that the failure to cross examine on a certain fact implies acceptance of the evidence given by the respective witness (see **Martin Misara v R,** Criminal Appeal No. 428 of 2016, Court of Appeal of Tanzania (unreported), Paul **Yustus Nchia v National Executive Secretary Chama cha Mapinduzi and Chairman of Board of Trustees of Chama cha Mapinduzi Head Quarter**, Civil Appeal No. 85 of 2005 Court of Appeal of Tanzania (unreported). In view of this, it is certain that the respondent discharged her burden with regard to these two assets.

The claim that the trial court ignored the evidence that the respondent took all furniture and household items worth Tshs 106,000,000/= will not detain me as there is no sufficient evidence on record. While I note that the appellate testified that the respondent took some households items, the is no concrete evidence as to the items taken and the respective value. The appellant purported to produce a list but the same was rejected and since his attempt to reproduce it at this stage has ended futile, there are no material facts upon which to fault the finding of the trial court.

I will similarly not be detained by the claim that the appellant was responsible for paying the respondent's school fees. While I note that she studied her certificate course and degree programme during the subsistence of

marriage, the appellants' assertion that he sponsored her studies was unsubstantiated. As the record in page 23 of the proceedings reveal, the appellant who testified as DW1 was cross examined as to the assistance he rendered to support the respondent's education but stated that he had no proof. Therefore, there is nothing to vary the trial court finding as there is no evidence upon which to place the finding desired by the appellant.

As for the shop, it is undisputed that it was acquired during the subsistence of marriage hence a rebuttable presumption that it was acquired through joint efforts. Since no evidence was rendered to rebut this presumption, I find and hold that it was wrongly excluded from the list of matrimonial assets.

Regarding the vehicle make Land Cruiser Prado with Registration No. T 766 DGC, I am at per with the trial court. Since at the time of hearing the property had already changed hands to a third party, it would have been wrong for the trial court to consider it as a matrimonial asset and subject to distribution as legally, it did not belong to the parties.

Coming to the complaints on custody, Section 125 (2) (a), (b) of the LMA provides that:

> "In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and subject to this the court shall have regard to the wishes of the parent, the wishes of the infant, where he or she is of an age to express an independent opinion and the custom of the community to which the parties belong."

In the same spirit, section 39 of the Law of the Child Act, mandates the courts while determining custody to accord due regard to the best interest of the child and the importance of a child being with his mother; the rights of the child; the child's age and sex; the child's independent view; desirability or keeping the child and its siblings together, and the need for continuity in the care and control of the child. The question therefore is whether or not the trial court heeded to these principles. The answer to this is found in page 8 of the trial court judgment where, the learned trial magistrate having cited the section 31(1) of the Law of the Child Act as to the paramountcy of the best interest of child, found that placing the issues under the custody of the respondent would not serve the best interest of the child. The finding was based on the assertion that the appellant is involved in homosexual affairs.

In my firm view, although the learned magistrate correctly directed himself on the point of law regarding the paramountcy of the best interest of the child, his reasoning which is entirely based on the messages allegedly copied from the appellant's mobile phone, exhibits a lucid error in evaluation of electronic evidence. The records show that, the only evidenced corroborating the respondent's assertion that the appellant had homosexual affairs was an electronic evidence in the form photostat of short messages allegedly screen shorted by the respondent from the appellant's mobile phone.

Whereas electronic evidence is admissible under section 64A the Evidence Act, Cap 6 RE 2019, the admissibility and weighing of such evidence ought

the mobile phone and the printer were operating properly. The respondent casually stated in her affidavit that after accessing the appelants mobile phone she photographed the messages using her mobile phone and that the photostat are genuine. Under the circumstance, I find and hold that the photostat messages were incapable of attracting the weight accorded to it by the trial court as their authenticity was highly compromised.

Placing reliance on such messages also contravened the position of law with regard to proof of criminal allegations made in civil proceedings. It is a trite principle that where a criminal allegation is made in a civil case it must be substantiated by evidence whose standard is higher above the normal standard of proof on the balance of probabilities required in civil suits (**Ratialal Gordhanbhai Patel v Lalji Makanji** (supra). More so in this case where the allegations made are of a serious offence whose conviction attract a severe sentence. Homosexuality is a criminal offence attracting, on conviction, a life sentence or 30 years imprisonment. Substantiating such a serious allegation, naturally require a higher standard of proof, which in my considered view was lacking in the present case.

In the foregoing, I differ with the trial court's finding that the circumstances of the case were not in favour of the application of section 125 (2) (b) as to the independent opinion of the issues. Considering their age, I have no doubt that they are capable of giving an independent opinion. Accordingly, I allow this ground, quash and set aside the orders as to custody. The parties are directed to refer the matter to the Juvenile Court which shall make a finding

based not only on the independent view of the child but on a social investigation report duly conducted and prepared by a social welfare officer.

As regards maintenance, I agree with the respondent that the law, under section 129 (1) of the LMA imposes a duty on the father to maintain his children whether they are in his custody or under the custody of any other person save where he is unable to meet the maintenance costs in which case, the duty will wholly or partly shift to the mother as per sub-section (2). Pursuant to section 44 of the Law of the Child Act, when determining maintenance, due regard should be placed on such factors as the income and wealth of both parents, impairment of the earning capacity of the person with a duty to maintain the child, his/her financial responsibility and the cost of living in the area where the child is domiciled.

In the instant case, the court ordered the appellant to pay a monthly maintenance fee of Tsh 250,000/= and provide school fees and medical support. The provision of medical support and school is not contest. Having varied the custody order, I will leave this to be determine by the Juvenile Court.

In the foregoing, I partly allow the appeal to the extent that:

(i) The shop at Mwenge is a matrimonial assets. Its total worth should be valued and distributed on equal halves to the parties;

(ii) The order of custody and maintenance are hereby quashed and set aside. The parties are directed to refer the mater to the Juvenile

Court which shall prior to awarding custody and maintenance, order a social investigation report to ascertain in whose custody the best interest of the issues will be best served.

(iii) Other findings and orders of the trial court shall remain intact; and

(iv) Costs shall be shared.

DATED at **DAR ES SALAAM** this 9th day of March, 2021

J. L. MASABO

JUDGE