

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT SUMBAWANGA

MATRIMONIAL APPEAL NO. 4 OF 2020

*(Originating from Matrimonial Appeal No 17 of 2019 of the District Court of
Sumbawanga)*

TABIA MATISHO APPELLANT

VERSUS

GEORGE CHAPAULINGE RESPONDENT

Date of last Order: 03/06/2021

Date of Judgment: 22/06/2021

JUDGMENT

C.P. MKEHA, J

On the 12th day of September 2019 the appellant herein petitioned for dissolution of her marriage with the respondent. The Petition was filed at the Urban Primary Court of Sumbawanga at Sumbawanga. To be specific, the appellant prayed for the following reliefs.

- (i) Divorce;
- (ii) Division of matrimonial properties and
- (iii) Custody of a child born during subsistence of the marriage
between the parties

At the end of trial, an order for divorce was granted. All matrimonial assets acquired during subsistence of the parties' marriage were accordingly distributed as appearing at pages 14 and 15 of the trial court's judgment.

Custody of a child known as Geoffrey George was placed under the petitioner/appellant. The respondent was ordered to provide TZS. 25,000/= to the appellant monthly, being part of maintenance of the said child. The respondent was also ordered to cater for housing, clothing, education and medical expenses of the said child. The appellant was also awarded 40% share of a house located at Chanji Area, at Kilimani Street within Sumbawanga Municipality. On the other hand, the respondent was awarded 60% share of the said house. The respondent was not satisfied with the trial court's decision. He appealed to the District Court of Sumbawanga challenging decision of matrimonial assets by the trial court.

The first appellate court upheld the appellant's appeal. The District Court held that, nowhere in the trial court's record did the appellant/petitioner adduce evidence showing how she contributed towards acquisition of matrimonial properties. The court added that, the appellant spent much of her time and efforts to mention the said assets rather than showing how she contributed towards acquisition of the same. While the trial court's orders regarding divorce, custody of the parties' child and maintenance remained undisturbed, the first appellate redivided matrimonial assets to the parties basing on what the learned Resident Magistrate found to be contribution of each of them towards acquisition of the said properties. The said order appears at page 11 of the District Court's decision.

The appellant was not satisfied. She appealed to this court with the following ground of appeal:

1. That, the appellate court erred in law and misconceived the interpretation of the principle of matrimonial property hence, arrived at unjustifiable and unjust division of matrimonial assets to the appellant.

The appeal was argued by the parties by way of written submissions. In their respective written submissions, the appellant, speaking through Mr. Lubusi learned advocate was firm that, there was sufficient evidence on record to entitle her, share of the matrimonial assets to the extent held by the trial court. In her considered opinion, the trial court's decision was fair and just. On the other hand, the respondent submitted that the appellant had not shown before the trial court on how she contributed towards acquisition of matrimonial assets. The respondent condemned the appellant for squandering TZS. 3000, 000/= given to her as capital for doing business which ought to reduce her share in the matrimonial assets. The respondent prayed that the decision of the first appellate which granted to him amongst other things, 100% share of the house at Chanji Area, be upheld and the appeal be dismissed.

The only determinative issue is **whether there is on record, evidence on how the appellant contributed towards acquisition of the matrimonial assets.**

The learned Resident Magistrate on first appeal, found that there was no such evidence, that, the appellant had contributed towards acquisition of the matrimonial assets. The appellant submitted that, there was ample evidence on how she contributed towards acquisition of matrimonial assets. The respondent's position was that, such evidence was lacking. Upon reading the first appellate court's decision against the evidence on the trial court's record, I formed an opinion that, this is one of the rare cases in which the second appellate court is permitted to re-evaluate evidence adduced before the trial court. In the case of **HASSAN MZEE MFAUME vs. REPUBLIC (1981) TLR 167** it was held that, where the first appellate court fails to re-evaluate the evidence and to consider the material issues involved, on a subsequent appeal the court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court.

I have opted to re-evaluate the evidence against the holding of the first appellate court. It was the learned Resident Magistrate's holding that the appellant had failed to demonstrate before the trial court on how she contributed towards acquisition of matrimonial assets. Basing on that finding, he proceeded to issue an order for re-division of matrimonial assets thereby varying the division done by the trial court based on the evidence on record.

The appellant testified on oath before the trial court that during subsistence of her marriage with the respondent, she was an entrepreneur who used to travel to Kigoma and other places trading in "vitenge". That, what she

obtained from the said businesses was spent in procurement of the matrimonial assets and family development in general. That, she spent her time taking care of her family and that she participated in farming activities at their various farms, for purposes of ensuring food security at a family level. **See:** page 21 of the typed proceeding of the trial court. When the respondent was invited for cross examination, he merely cross examined the appellant over cruelty issues and nothing more. Therefore, the fact that the appellant contributed in acquiring the matrimonial assets to the extent appearing in her testimony at page 21 of the trial court's typed proceedings stands uncontroverted. Therefore, the first appellate court's decision of re-dividing matrimonial assets was unjustified and unfounded.

For the foregoing reasons, the first appellate court's decision is reversed. In its place, the trial court's judgment and orders are restored. Appeal allowed.

Dated at **SUMBAWANGA** this 22nd day of June, 2021.




C.P. MKEHA

JUDGE

22/06/2021

Court: Judgment is delivered in the presence of the parties.




C.P. MKEHA

JUDGE

22/06/2021

Court: Right of further Appeal to the Court of Appeal of Tanzania is explained.




C.P. MKEHA

JUDGE

22/06/2021