

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF MUSOMA**  
**AT MUSOMA**  
**MATRIMONIAL APPEAL NO. 03 OF 2021**  
(Arising from Matrimonial Appeal No. 09 of 2020  
of the District Court of Tarime at Tarime)  
**GHATI ISACK MWITA..... APPELLANT**  
**VERSUS**  
**DIDA MAHENDE MAGANCHA ..... RESPONDENT**

**JUDGMENT**

5<sup>th</sup> and 23<sup>rd</sup> July, 2021

**MKASIMONGWA, J.:**

The appellant; Ghati Isack Mwita and the respondent; Dida Mahende Magancha had sometime in 2002 contracted a customary marriage. In the marriage the two are blessed with five issues, namely; Mahende Dida Magancha (14), Leila Dida Mahende (12), Happiness Dida Mahende (9), Jenipher Dida Mahende (5) and Isack Dida Mahende (2). During subsistence of their union, they had by joint efforts acquired a house located at Sirari, one motor vehicle, one motor cycle, a cereals shop and one fridge.

The two happily enjoyed their marriage until sometime in 2018 when their relationship started going sour. The appellant felt that she could not, any more, take the bitter relationship; hence she went to Tarime Primary

Court at Tarime where she petitioned for divorce, and subsequent orders for distribution of matrimonial properties, custody and maintenance of their five issues against the Respondent.

After a full trial of the matter divorce was granted, all five children were left under the custody of the appellant and the Respondent was ordered to maintain them. As regard to the matrimonial house the Court ordered it to be sold and the appellant and the Respondent were awarded with 75% and 25% of the sale proceeds, respectively. The Respondent was not satisfied with that decision hence appealed to the District Court of Tarime at Tarime challenging the same. The appeal was partly successful as Order for distribution of the matrimonial assets passed by the trial Court was reversed and the first appellate Court held that the appellant is not entitled to any share in the available matrimonial properties. The appellant was aggrieved by that decision hence she filed this appeal. The appeal is predicated on four grounds of grievance; namely in verbatim;

1. ***That, the 1<sup>st</sup> Appellate court erred in law and in facts for deciding that the appellant do not deserve to be given matrimonial assets while matrimonial assets were jointly acquired during subsistence of marriage.***
2. ***That, the 1<sup>st</sup> Appellate court erred in law and in facts for disregarding watertight evidence adduced by the appellant on matrimonial assert (sic) and child custody during the trial.***

3. ***That***, the 1<sup>st</sup> Appellate court erred in law and in facts for failure to state costs or amount of money which the Appellant need to receive from the respondent for child custody.
4. ***That***, the 1<sup>st</sup> Appellate court erred in law and in facts for deciding that the appellant do not deserve to be given matrimonial assets because she squandered money of respondent.

When this matter came up for hearing, both the appellant and the respondent appeared unrepresented. On being invited to argue her case, the appellant contended that in the judgment delivered by the District Court the Court denied her of her share in the matrimonial properties during division of the assets alleging that she had squandered the family's properties which allegation was not true nor was it substantiated. The court erred when it so ordered because the order was made without considering the fact that she was the family's engine towards acquisition of the properties and in elevating its wealth as it is shown by the evidence on record. Further to that the first appellate court the appellant stated that although the District Court did not interfere with the order of the trial court regarding to the custody of the five issues of the marriage, it was silent regarding to their maintenance. The court did not order the Respondent to provide for the maintenance of the children. On the basis o the grounds of

appeal and submission made the appellant prayed the Court that it allows the appeal.

On the other hand in reply to the appellant's submission, the respondent supported the challenged judgment of the District Court. He submitted that the same was justified. As far as the division of the matrimonial assets, the appellant contended that the first Appellate Court did rightly find the appellant was not entitled to any of them as she had squandered the family's properties. As for the maintenance of the children, the Respondent submitted that on appeal to the District Court, the Court ordered placing the custody of the three children under him. As such it was not necessary for it to make an order on their maintenance. He further stated that he however provides maintenance of those children left under the appellant's custody and that in so doing he, occasionally sends money and other basic needs to the appellant. In that premise, the Respondent prayed the Court that appeal be dismissed as it is devoid of merits.

In a brief rejoinder submission the appellant stated that what the entire respondent had stated was not true. The respondent had never provided for maintenance of their children.

That is the end of the submissions. I have attentively considered the submissions and also the courts record records placed before me and will deal with the grounds of appeal which are mainly on the custody and

maintenance of the children and distribution of matrimonial assets. As far as the custody of the children is concerned, where the court is confronted by a matter requiring it to determine on the custody of the children upon divorce, which powers it has in terms of Section 125 (1) of the Law of Marriage Act [Cap 29 R. E 2019], subsection (2) of the section provides for what it should consider before making such an order. The subsection reads as follows:

*"125 (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-*

- (a) the wishes of the parents of the child;*
- (b) the wishes of the child, where he or she is of an age to express an independent opinion;*  
*and*
- (c) the customs of the community to which the parties belong."*

Our Supreme Court that is the Court of Appeal of Tanzania when was to resolve the issue and taking from the above provision of law when was dealing with the case of **Celestine Kilala and Halima Yusuf v. Restituta Celestine Kilala** (1980) TLR 76 held that;

*"... the court's paramount consideration is the welfare of the child more than anything."*

As for maintenance of a child the law is clear when the parents have separated or divorced the child shall have a right to maintenance. One can grasp this position of the law from the provisions of Section 26 (1) of the Law of the Child Act [Cap 13 R. E 2019] which is couched in the following words:

*"26 (1) Subject to the provisions of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to:*

- (a) Maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced"*
- (b) live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child; and*
- (c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.*

According to law, primarily the duty to maintain children is of a man. This has been clearly stipulated under section 129 of the Law of Marriage Act [Cap 29 R. E 2019] which again reads as follows:

*"129 (1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation,*

*clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.*

*(2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them."*

In the case at hand the trial court ordered for the custody of the children to be under the appellant. The court however did not order the Respondent to provide for maintenance of the children. Even though it could be held that it is the father's legal duty to maintain the children, the trial court ought to have explained as to how the father shall provide the maintenance to render the Order enforceable. On appeal, the first appellate court slightly reversed the order for custody of the children. Whereas by Order of the District Court the custody of Isack Dida Mahende and Jeniipher Dida Mahende were left with the Appellant that of the other three children shifted to the Respondent. As it was for the trial Court, although the District Court ordered the Respondent to provide for maintenance of the two children left under the custody of their mother it did not state how the Respondent should do that the fact which again, renders the Order capable of being enforced. Is this Court in a position to order for the mode of maintenance, I think the answer is no. This is



because the issue requires production of evidence regarding the economic ability of the father to maintain the children which evidence can be effectively heard, assessed and the issue determined by the trial court.

I will now move to deal with the division of matrimonial property issue. Going through the court's records there is ample evidence that the parties by joint efforts acquired a motor vehicle with Registration No. DF 770, a Motor cycle and a house. In evidence the Appellant told the Court that with the Respondent she lived in a rented house. Then then engaged themselves in a fish business from which they managed building their own house. They again bought a motor vehicle, motor cycle and a refrigerator. They further established a cereal shop business. This evidence was not challenged. The Respondent did not put any question during cross examination which suggested that the Appellant was telling the lie or even that she had squandered the family' assets which fact clearly shows that the allegation that the Appellant had squandered the wealth of the family an afterthought and it could not be relied upon. In testimony again the Respondent admitted to have sold the car. He is silent as to how the proceeds thereof were spent. The two are silent as to the whereabouts of the motor cycle and the refrigerator. Keeping in mind of all these fact it was unfair when the first appellate Court denied the Appellant a share to the house the two had jointly acquired. The order of the district court to

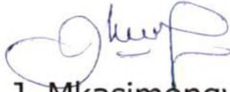


that effect is hereby quashed. The trial court awarded the Appellant with 75% of the value of the house. It reasoned that the Respondent did not account for the motor vehicle sale proceeds. The evidence is silent as to the estimated value of the house and the actual contribution of the Appellant in the acquisition of the house. In that a premise I find the award of 75% of the value of the house was unjustified. The same is quashed. In the the circumstances of this case I find it will be doing justice if it is ordered that the parties equally share the value of the house and it is so ordered.

From the foregoing, the appeal is partly allowed. As regard to the maintenance of the two children put under the custody of the Appellant the record should be returned to the trial Court for it to take by way of evidence all necessary facts from the parties and come up with a decision. No Order as to costs is made.

**DATED at MUSOMA** this 23<sup>rd</sup> day of July, 2021



  
E. J. Mkasimongwa

**JUDGE**

**23/7/2021**