IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

PC. CIVIL APPEAL NO. 13 OF 2019.

(Arising from Judgment of the District Court of Tabora in Matrimonial Appeal No. 5 0f 2019 (A.T Millanzi, RM) and the original Matrimonial Cause No. 14 of 2019 of the Tabora Urban Primary Court.)

GAUDENCIA MODESTUS LUHUNGA
as Administratrix of the Estate of
the Late GASTO LUHUNGA.....APPELLANT

VERSUS

AGNESS JOHANNES..... RESPONDENT

JUDGMENT

Date of Last Order: 2/07/2021

Date of Delivery: 4/08/2021

AMOUR S. KHAMIS, J.

Agnes Johannes lodged a complaint in the Tabora Urban Primary Court against Gasto Luhunga for division of matrimonial assets on the ground that their marriage was irreparably broken down.

The trial Court was satisfied that parties had a lived together as husband and wife from 2004 to 2019, gave birth to two issues and jointly acquired assets.

In view of its findings, the trial Court made orders for custody of the two minors and division of matrimonial assets at a ratio of 30% Agnes Johannes and 70% Gasto Luhunga.

On appeal by Agnes Johannes, the District Court of Tabora set aside an order for division of matrimonial assets and substituted it with a 50 – 50 division ratio.

It was further ordered that each of the parties was to get two shop premises and children's custody was left in the hands of the Juvenile Court.

Resentful of the decision, Gasto Luhunga knocked the doors of this Court equipped with four grounds of appeal, namely:

1. The learned magistrate erred in law and facts when he held to the effect that the trial court had no jurisdiction to deal with the issue of custody of children while in reality the trial court is vested with such jurisdiction.
2. The learned magistrate erred in law and facts when he over turned the distribution made by the trial Court basing on an apparent misinterpretation of S. 114(2) (d) of the Law of Marriage Act [Cap 29 R.E 2002].
3. That the 1st Appellate Court erred in law and facts when it went on to distribute the four shops against the weight of evidence, while the appellant's evidence on trial was to the effect that there were no four shops at the time of the trial.
4. That the 1st Appellate Court erred in law and facts when it failed to appreciate the difference between joint contribution and equal contribution and thereby

reaching to a decision not founded on neither evidence nor the law.

Gasto Luhunga passed away on 9th February 2020 during pendency of this appeal which necessitated appointment of Gaudencia Modestus Luhunga as administratrix of the estate.

When the appeal at hand came for hearing, the appellant was represented by Mr. Kelvin Kayaga, learned advocate while the respondent made personal appearance. Both parties agreed that the appeal should be disposed by written submissions.

In support of the grounds of appeal, Mr. Kelvin Kayaga submitted in favour of retrial on the ground that the respondent did not bring in sufficient evidence to establish a presumption of marriage and or contribution for acquisition of matrimonial assets.

Regarding to the first ground of appeal, Mr. Kayaga submitted that the District Court Magistrate held at the last page of his judgement to the effect that *"custody of children is a matter of law and will be determined by the law of the Child under Juvenile courts"*.

The learned Advocate stated that custody of children is a matter of law but the learned magistrate misplaced himself when he said that it could only be dealt with by a Juvenile Court and not any other Court in matrimonial proceedings.

In support of the assertion, the appellant's advocate cited the Law of Marriage Act [Cap 29 R.E (2002)/ (2019)] Part III (h) from Section 125-137 which deals with custody and maintenance of children.

He argued that the appellate magistrate must have been overwhelmed with the joy of the coming into force of the Law of Child Act 2009, its regulations and rules, although the said Act did not repeal Part III of the Law of Marriage Act (Supra).

The learned counsel further argued that, in this case, the coming into force of the Law of the Child Act and its Juvenile Court Procedures did not automatically wither away the matrimonial courts' jurisdiction on custody of children in the same proceedings where a marriage is dissolved especially where such children are subject to that union.

Henceforth, the learned counsel contended that the first appellate Court erred in law in reversing the findings of the trial Court relying on such excuse.

On the third ground of appeal, Mr. Kayaga contended that the issue concerning four shops was not established by evidence as it was also on record that the deceased appellant herein while testifying as SU1 informed the trial court that there were only two shops at the time of hearing and that all were obtained by his own efforts.

The learned advocate maintained that in the impugned appeal, the learned magistrate did not evaluate the evidence on record thereby, but rather relied of the respondent's evidence which did not even locate the position, address or even identify the number of the said shops for clarity, ending up in overturning the decision of the trial court which had a better chance in assessing the witnesses.

He cited the case of **GOODLUCK KYANDO V. R [2006] T.L.R 363**, where the Court of Appeal held that every witness is entitled

to be believed unless there are good reasons for not believing in him.

The learned counsel argued that in the case at hand, the appellate magistrate did not assign any reasons for ignoring the deceased appellant's evidence and cited the case of ***TANZANIA BREWERIES LIMITED VS ANTHONY NYINGI*** **[2016]** wherein the Court of Appeal held that;

> *"if a court of law decides to accept or reject a party's argument, it must demonstrate that it has considered the same and set out the reasons for rejecting or accepting it. Otherwise the decision becomes an arbitrary one."*

Mr. Kayaga further faulted the appellate magistrate for failure to consider the appellant's evidence which negated the respondent's evidence.

In addition, the learned counsel criticized the appellate magistrate for failure to consider that the parties had parted ways and that during such separation, the respondent took away material stuffs and was given properties including a piece of land and cash money Shillings One Million as capital for business.

Mr. Kayaga advanced that in light of **Antony Nyingi's case** (supra), the appellate magistrate's decision was an arbitrary one and urged this Court to overturn it.

The counsel concluded saying that the stance of the law required evidence to be read and interpreted as whole and if such is taken into consideration the evidence of the appellant as a whole negated the whole evidence of the respondent on the contribution made by the respondent.

Further, the appellant's counsel contended that the first appellate Court was bound to address itself on whose evidence was heavier while applying the rules of evidence.

He cited the case of ***ALI ABDALLAH RAJAB VS SAADA ABDALLAH RAJAB & OTHERS*** [1994] TLR 132 wherein it was held that;

> *"Where the decision of a case is wholly based on the credibility of the witnesses it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

He also cited **Rule 1 (2) of the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations** GN No. 22/1964 which states that;

> *"Where a person makes a claim against another in a civil case, the claimant must prove all facts necessary to establish the claim unless the other party admits the claim."*

According to the learned counsel, the claimant who is the respondent herein did not prove her contribution at all and argued that in such circumstances, the Court was bound to hold in favour of the person whose evidence outweighed the opposite party's evidence.

He stressed that the first appellate Court had no valid reasons to disturb the decision of the trial Court.

Mr. Kayaga submitted on the second and forth grounds of appeal in consolidation and contended that the first appellate magistrate was wrong when he misapplied S. 114 (as a whole) of the Law of Marriage Act (Supra) reaching to a wrong decision of distributing properties by fifty – fifty.

The learned advocate faulted the appellate magistrate for distributing properties by fifty - fifty without assigning any reasons for its decision.

He contended that such decision was not supported by the evidence on record and cited the case of ***YESSE MRISHO VS SANIA ABDUL, CIVIL APPEAL NO. 147/2016 CAT AT MWANZA*** (unreported) where the Court of Appeal held that;

> *".....proof of marriage is not the only factor for consideration on determining contribution to acquisition of matrimonial assets..... a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*

He also cited the case of ***YEREMIA MAGOTI VS JELMINA NYONI PC MATRIMONIAL APPEAL NO 12/2017 HC OF TABORA*** (Unreported) where the court stated that;

> *"....the mere fact that a spouse was married to another spouse is not an automatic warrant for benefiting from the division of assets..... no law prohibits a spouse from owning personal assets in isolation of the other spouse.....not every asset in which one spouse has proprietary interests is matrimonial asset subject to the division under Section 114 of the Act.....like in other civil claims, the party who claims for division of matrimonial assets bears the onus of proving the conditions for the court to exercise its divisional powers hinted above."*

Lastly and in alternative, the learned advocate contended that although this ground did not feature in the petition of appeal, it came into his attention that the first appellate Court erred in its

decision by failing to detect that the presumption of marriage had not been established at all, hence the Court had no power to proceed the way it did.

According to him, there was nothing to warrant both courts to grant division of matrimonial properties.

He cited the case of ***RICHARD MAJENGA VS SPECIOZA SYLVESTER, CIVIL APPEAL NO. 208/2018*** (unreported), where the Court of Appeal held that;

> *"Following the above provisions, it is clear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not."*

That said, the appellant's advocate prayed for success of the appeal and an order for quashing the decision of the District Court or in the alternative the decisions and proceedings of both lower courts be quashed and set aside for the respondent failed to prove her claims in the first place.

On reply, the respondent who enjoyed gratis legal services from Mr. Tito Mwakalinga, learned State Attorney, strongly opposed the grounds of appeal.

On the first ground of appeal, the respondent partly joined hands with the appellant on the fact that, the trial court's jurisdiction was not ousted as per Section 125 of the Law of Marriage Act (supra).

However, the respondent argued that the same was in circumstances where there is marriage, and a divorce is sought in Court, then the court can proceed with matters of custody, but if not, she argued, it is legally healthy to proceed with such proceedings under the Law of the Child Act, allegedly because that law attracts an harmonised interpretation of both laws.

Moving on to the third ground, the respondent replied that the appellants claimed that there were only two shops as the four shops were not established in evidence but according to her, in their union as husband and wife, they acquired four shop frames.

She argued that the trial Court's Judgement at page 4 second paragraph briefly represented the court's finding on the four frames of shops.

On the consolidated second and forth grounds of appeal, the respondent stated that the first appellate court did not base its decision on the application of Section 114 of the Law of Marriage Act but rather the decision was based on the trial court's findings.

She argued that the first appellate Court did not disturb the trial court's findings but rather it rectified the distribution of the property which was contrary to its findings.

The respondent asserted that this being a second appeal, legal grounds should have been raised rather than evaluating the evidence afresh.

The alternative ground was argued to that, it was not part of this appeal and that only grounds on jurisdiction could be raised at any time.

To cement her case, the respondent contended that according to the trial court's findings, the parties lived together for more than ten years and that were not married.

She asserted that that at the time of departure, each was to get a share of the matrimonial properties acquired jointly.

Further, the respondent contended that the trial court might have slipped on the issue of jurisdiction but this did not affect its findings and urged this Court to focus on the overriding objective as its omission did not infringe justice to either party, and ordering a retrial would bring more challenge to the administratrix.

On a conclusive remark, the respondent said that the trial court as upheld by the District court were correctly made as the whole case based on credibility of the witness and not otherwise. She prayed for dismissal of the appeal with costs.

I have carefully considered the records from the two lower Courts as well as submissions by Mr. Kelvin Kayaga for the respondent and Mr. Tito A. Mwakalinga, learned State attorney for the respondent and discern a number of issues for determination.

The appellant's grounds of appeal can be condensed into the following main issues: whether the first appellate Court erred in failing to consider evidence and the law on division of matrimonial assets and whether the first appellate Court erred in holding that custody of the children was to be determined by the Juvenile Court.

In ***PIA JOSEPH V REPUBLIC (1984) TLR 161***, this Court stated that as a rule of practice, a first appeal assumes the character of a retrial and further pointed out that:

"An appellate Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowances in this respect."

In ***HASSAN MZEE MFAUME V REPUBLIC (1981) TLR 167***, the Court of Appeal held that:

"1. A Judge in the first appeal should re-appraise the evidence because the appeal before him is, in effect, a rehearing of the case, and that in the course of doing so he should set out or indicate the grounds for his decision.

2. Where the first appellate Court fails to re-evaluate the evidence and consider material issues involved, the Court on a second appeal may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate Court."

This is a second appeal and I have had the advantage of reading Judgment of the first appellate magistrate. The learned magistrate summarised findings of the trial Court and held that division of the matrimonial properties was not based on the trial Court's findings.

Further, the first appellate magistrate faulted the trial magistrate for making an order on custody of the children while contravening requirements of Section 114(2) of the Law of Marriage Act, Cap 29, R.E 2002.

This approach by the first appellate magistrate was entirely wrong as it limited itself to the reasons given by the trial magistrate

for his decision but precluded him from dealing with the entire evidence on record.

In the circumstances, this Court will step into the shoes of the first appellate Court and do what ought to have been done at that stage, that is, re – assessment of the evidence on record.

Records show that a total of two witnesses testified in the trial Court. AGNESS JOHANNES testified for the respondent herein while the late GASTO MODEST LUHUNGA gave evidence for the appellant herein.

AGNESS JOHANNES said that she married and lived with Gasto Modest Luhunga for fifteen fifteen years and that the initial life was poor and humble. The husband earned a living as a hawker (machinga).

She said that by then her mother was a successful businesswoman and imported goods from Nairobi for distribution to businessmen in Tabora.

Agness Johannes was assisting her mother to collect money from businessmen and Gasto Modest Luhunga saw her with such huge amount of cash. In the process, he asked for a loan from her.

Agness Johannes lent various sums of money to Gasto Luhunga from time to time and in few instances, the money was given as mere aid to add up in his business.

When the capital grew up, the couple rented a room for business and focused on new and second hand clothes.

Subsequently, the rented shop room was put on sale and parties contributed money to buy it.

In due course, Gasto Modest Luhunga paid bride price to the parents of Agness Johannes and the relationship was formalised.

Testifying on the aftermath of paying bride price, Agness Johanness stated that:

> *"....Tuliendelea kuuza mitumba kwa mwaka mmoja, tukapata pesa tukanunua kiwanja Mwinyi. Yeye akawa anasafiri mimi nikaendelea na duka huku ujenzi unaendelea. Tukiwa bado wachumba alipata mtoto na mwanamke mwingine. Ikabidi nimchukue yule motto niishi naye nimemlea mpaka hivi yuko form four.*
>
> *Niliendelea na lile duka ambalo hilo duka likazaa fremu nyingine nne na nyumba ikawa imeisha tukahamia kwetu..."*

Agness Johannes testified that she subsequently mothered her own child but quarrelled with Gasto Modest Luhunga because he had an affair with her cousin sister.

Following a misunderstanding, she moved to Dar es Salaam where was accommodated at her sister's residence. However, Gasto Luhunga continued to regularly maintain her.

During her stay in Dar es Salaam, she enrolled for a diploma in journalism and successfully finished the course.

The couple were reconciled and she re-joined the husband in Tabora. On return, she found the husband's financial position had deteriorated.

Agness spoke to her sister who readily advanced them Tshs. 900,000/= as a loan.

From the borrowed capital, Agness started importing goods from Nairobi and assisted in domestic responsibilities.

Subsequently misunderstanding resurfaced and she moved to Dar es Salaam where she worked in Uchumi Supermarket and in some media as a journalist.

After three years, family elders reconciled the couple and she returned to Tabora.

Explaining her contribution after a second return, Agness said that:

> *"Nilivyorudi Tabora nilipiga nyumba ripu, nikapaka rangi wakati huo nikawa tena mjamzito miezi miwili na yeye hana tena biashara..."*

On cross examination by Gaston Luhunga, Agness Johaness stated that:

> *"Hela ya kununua duka nilikuongezea laki moja....Hatujafunga ndoa ila tumeishi pamoja Zaidi ya miaka 15. Mtaji wa duka ulitoka kwangu nilichukua kwa mama yangu. Tumetafuta kila kitu na yeye."*

On his part, Gaston Modest Luhunga recognised Agness Luhunga as his wife and stated that he funded for her diploma education.

On examination, he revealed the matrimonial properties jointly acquired, thus:

> *"Nina vibanda vya biashara viwili siyo vinne kama alivyosema yeye. Vibanda hivyo tulivipata pamoja wakati tunafanya biashara."*
>
> *Pia tuna nyumba ziko mbili lakini zote kwenye kiwanja kimoja, nazo tulizijenga pamoja wakati tunafanya biashara.*

On further examination, Gaston Luhunga said he raised own capital and was not funded by Agness Johannes as alleged.

Regarding a plot of land, he said it was solely bought by him prior to living together. He strongly disputed all allegations relating to loans and aids by Agness and her sister.

Explaining on the shop premises and business capital, Gaston Luhunga said that:

"Fremu za biashara nilikuwa nazo nne, baadae alirudi nyumbani akachukua vitu vya ndani baadhi kabati la vyombo, kitanda na mashuka. Kila mtu akaendelea na maisha yake.

Isitoshe kuna kiwanja nilimnunulia Kidatu Shilingi Laki Tano nikampa na mtaji Milioni Moja.

Kwa hiyo anavyosema alikuja na mtaji sio kweli mimi ndiye nimempa mtaji kila mtu akawa anafanya biashara.

Mwisho wa siku anabadilika anataka tuuze nyumba arudi Dar es Salaam na akataka tubadilishe majina ya fremu ziwe zake nikawa namkatalia akaendelea na maisha yake hadi kufikia kuleta ombi lake hapa."

On cross examination by Agness Johannes, Gaston Luhunga expressly identified her as a wife and recounted the early days of their matrimonial life, thus:

"Nilipokuoa tulikuwa tunakaa kwenye nyumba ya kaka yetu. Wakati huo nyumba yangu ilikuwa na mwaka. Kiwanja nilinunua ila nikaandika jina lako. Sijawahi kukufukuza ila unaondoka mwenyewe..."

On examination by the assessors, Gaston Luhunga said that:

"Mimi nilikuwa nafanya biashara ya mitumba na nilikuwa nakaa kwenye nyumba ya familia. Baada ya nyumba yetu kukamilika tulihamia kwenye nyumba yetu. Maisha yangu yote nakopa hela benki."

I will now address the issues for determination starting with whether the first appellate Court erred in failing to consider the evidence on record and the law on division of matrimonial assets.

Section 160 (1) of ***THE LAW OF MARRIAGE ACT, CAP 29, R.E 2019*** provides that where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.

In its decision, the trial Court excluded the period in which parties lived in separation and concluded that they lived under one roof for ten continuous years.

In ***HEMED TAMIM V RENATA MASHAYO (1994) TLR 197*** the Court of Appeal held that where a Court makes a finding regarding a presumption of marriage, it has the power and jurisdiction to make the consequential orders thereto.

One of such consequential order is the order for division of matrimonial assets.

Section 114 (1) of ***THE LAW OF MARRIAGE ACT*** (supra) provides that when granting the decree of divorce or separation, the Court shall have power to order division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.

Section 114 (2) of the same law provides that in exercising the power to order the division of jointly acquired assets, the Court shall have regard to the customs of the community to which the parties belong, the extent of contributions made by each party in

money, property or work towards the acquiring of the assets, any debts owing by either party which were contracted for their joint benefit and the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality.

In the present case, there is overwhelming evidence that the deceased Gaston Luhunga paid bride price for Agness Johannes and subsequent to that, the two lived together as husband and wife for over fifteen (15) years.

There is also evidence that despite of having two lovely children, the couple were no longer in harmony and as such their marriage was irreparably broken down.

In such circumstances, division of matrimonial assets is a consequential order that was rightly entertained by the two courts below.

However, parties are in disagreement on how those properties should be distributed.

In its decision, the trial Court ordered 70% of the properties to the husband and 30% to the wife (Agness Johannes) on the ground that the husband (Gaston Luhunga) was to maintain the children.

The evidence on record show that the deceased Gaston Luhunga and his wife, Agness Johannes worked jointly in a business of selling second hand clothes and proceeds therefrom were used to acquire and or develop a number of their assets.

In such circumstances, it is difficult to apportion a ratio meant to show one of the couple had a superior contribution than the other towards development and or acquisition of matrimonial assets.

For those factors, the inclination of the Court is towards equal division of the matrimonial assets. This is to say that the parties herein are entitled to equal division of the matrimonial assets.

Related to this is the question on a number of shops or rather shop premises that parties owned.

Whereas Agness Johanness testified that four shops were jointly acquired, the late Gaston Luhunga informed the trial Court that initially there were four shops whose number decreased to two.

Since none of the parties led evidence to identify the location, size and value of the contested shop premises, and Agness Johannes failed to contradict Gaston Luhunga by way of cross examination on a number of such shops, I find that two shop frames or premises existed and thus each of the parties herein is entitled to one shop.

Next is the issue on whether the first appellate Court erred in holding that custody of the children was to be determined by the Juvenile Court.

This issue should not hamper me as it was well argued by Mr. Kelvin Kayaga, learned advocate for the appellant.

The coming into force of the Law of the Child Act, 2009 did not do away with Part VI of the Law of Marriage Act, Cap 29, R.E 2002.

Section 125 of ***THE LAW OF MARRIAGE ACT, CAP 29, R.E 2019*** provides that the Court entertaining matrimonial proceedings is empowered to make an order (s) for custody of the children of marriage.

Section 125 (2) of that law provides that in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child.

Other factors to be considered are wishes of the parents of the child, the wishes of the child where he or she is of an age to express an independent opinion and the customs of the community to which the parties belong.

In the present case, the late Gaston Luhunga testified that Agness Johannes was not well placed to assume custody of the children as she spent more time out of home and relied on house girls.

However, the circumstances have since changed. With death of a father, it is desirable that the two children should be placed in sole custody of their own mother, the respondent herein.

Besides, the appellant should be given unrestricted access to the children as and when a need arises in order to sustain their connectivity with the deceased's family.

For the afore stated reasons, the appeal partly succeeds to the extent herein stated. I make no orders as to costs.

It is so ordered.

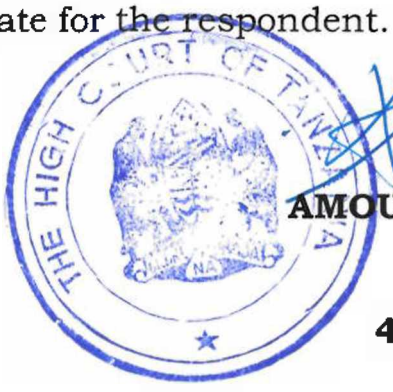
Dated at Tabora this 4th day of August 2021.

AMOUR S. KHAMIS

JUDGE

4/8/2021

Judgment delivered in chambers in presence of Mr. Denis Katambo Kayaga, advocate for the appellant and Mr. Amos Gahise, advocate for the respondent. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

4/8/2021