IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 2 OF 2021

(Arising from the decision of Mtwara District Court in Consolidated Matrimonial Appeals Nos. 3 and 4 of 2020. Original Matrimonial Cause No. 17 of 2019 of Mtwara Urban Primary Court)

JUMA OMARY JUMA.....APPELLANT

VERSUS

NURU KHATIBU NAMKUNA.....RESPONDENT

JUDGMENT

9 June & 15 July, 2021

DYANSOBERA, J.:

This is a second appeal in which the appellant, Juma Omary, is seeking to impugn the decision of Mtwara District Court delivered on 20th October, 2020 2017 in Matrimonial Appeals Nos. 3 & 4 of 2019. The appeal is directed against Nuru Hatibu Namkuna, the respondent.

A brief background of the matter leading to this appeal is apposite. The parties herein contracted Islamic marriage on 6th December, 2003 at Raha Leo Street in Mtwara as evidenced by a Certificate of Marriage No. 64577 issued by the National Muslim Council of Tanzania (Exhibit P 1). They were blessed with two issues; Faidha Mbena Omary born on 15.2.2007 and Awammy Mbena Omary born on 11.2.2011. The two certificates of birth tendered at the trial were admitted in court and collectively marked as Exhibit P 2. These issues are

schooling and are under the custody of the respondent. While the appellant is a businessman, the respondent is a Medical Doctor.

The parties enjoyed a matrimonial life whereby, apart from being blessed with the two issues, they managed to jointly acquire some matrimonial assets during the subsistence of their marriage. On 19th day of May, 2016 they separated after their relationship atrophied and the marriage became intolerable. Seeing this, the respondent Nuru Khatibu Namkuna did, on 15th November, 2019, petition the Primary Court of Mtwara District at Urban for dissolution of marriage, division of matrimonial assets, custody of the two infant children and maintenance.

After hearing the matrimonial cause, the trial court granted the petition and dissolved the marriage. It made division of matrimonial assets by ordering the house at Railway to be valued and the appellant to get 75% while the respondent was awarded 25% of the value of the house. The trial court further ordered the appellant to get two pieces of land at Mbae and the respondent to get two pieces of land at Mbae and Mji Mwema. The same court placed the children under the custody of the respondent. With respect to maintenance, the appellant was ordered to pay Tshs. 200, 000/=at the end of each month commencing in June, 2020.

This finding of the trial court aggrieved both the appellant and respondent and each preferred an appeal to the District Court. While the appellant's appeal was registered as Matrimonial Appeal No. 3 of 2020, the appeal by the respondent was registered as Matrimonial Appeal No. 4 of 2020. During the hearing of their appeals, the first appellate court consolidated them. In its judgment, the District Court dismissed the appellant's grounds of appeal Nos. 1, 3 and 5 which were in respect of division of matrimonial assets but allowed the 2nd ground of appeal on custody of infants by ordering the case file to return to

the trial court and the Magistrate to summon the issues of marriage and hear their views on who wished to live with between the parents (page 19 of the typed judgment). The appellant's 4th ground of appeal was allowed in that the payment of Tshs. 200,000/= as maintenance for the infant children was reduced to Tshs. 100,000/= per month and the parties were at liberty to arrange how the amount would reach the respondent.

As far as the appeal by the respondent is concerned, the District Court allowed both grounds of appeal. With regard to the house at Railway area, each party was awarded 50% of the value of the house. In allowing the respondent's 2nd ground of appeal, the first appellate court ordered the appellant to take full responsibility of paying school fees for the issues.

The appellant felt that the decision of the first appellate court was not a triumph of his justice hence this appeal.

In his memorandum of appeal dated 2nd December, 2020, the appellant has filed a total of five grounds of complaint as follows:-

1. That, the trial Resident Magistrate erred in law and fact by ordering the respondent to get 50% of the house situated at Railway in Mtwara Region without considering that the appellant had strong contribution than the respondent to the acquisition of that property.
2. That, the trial Resident Magistrate grossly erred in law and fact by ordering the appellant to pay Tshs. 100, 000/= per month without considering and inquiring on the income and financial position of th appellant.
3. That, the Trial Resident Magistrate erred in law and fact by ordering the appellant to full pay school fees of his issues without considering his income and financial position.

4. That, the trial Resident Magistrate grossly erred in law and fact by dividing appellant's plots in 50% to 50% without considering that the plots were solely acquired by the appellant at the time the respondent was at the university.

5. That, the trial Resident Magistrate erred in law and fact by ignoring and disregarding strong evidence of the appellant on contribution of the acquisition of matrimonial properties.

On 27th day of May, 2021 when the appeal came up for hearing, the appellant was present in person whereas the respondent was represented by the learned Advocate, Ms Anisa Mziray.

Arguing the first ground of appeal, the appellant complained that the amount of contribution was not considered. He explained that he built the house in question from his own business and there were other women with whom he was living with before he got married to the respondent in 2003 who put their efforts in the acquisition of the house. It was his argument that he bought the house in 2006 at a time when the respondent was jobless with no contribution, she having been employed in 2006. The appellant further argued that in 2008 he took the respondent for studies and he was defraying costs. Insisting that the respondent did not make contribution to the acquisition of the said house, the appellant said that the respondent was living at Naliendele as a Medical Officer. He emphasised that when he married the respondent he had already started the business.

Reacting on the 1st ground of appeal, Counsel for the respondent contended that it is not true that the appellant got the house at his own and the respondent did not contribute anything. Referring this court to pages 12 and 13 of the typed judgment of the trial court, learned Counsel said that the respondent was clear on how she made contribution in acquiring the said house;

that she was employed in the government and in 2005, both opened a shop at the street they were residing and she contributed Tshs. 1,000,000/= in the operating the shop. Further that when the shop underwent instability, she contributed in money. She said that she was selling goods in the shop and the house at Railway area was a product of what they jointly got from the shop.

As rightly submitted by learned Advocate for the respondent, there is no dispute that the house was acquired during the subsistence of the parties' marriage hence a matrimonial property. As to the amount each is entitled from the matrimonial property depends on the contribution of each party to the acquisition of the said house and this is a matter of evidence. In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 Tanga, the Court of Appeal stated:-

> "It is clear therefore that extent of contribution by the party in a matrimonial proceedings is a question of evidence"

Going by the evidence given by both parties, I am constrained to think that it was suppressed and did not clearly indicate the extent each contributed to the acquisition of the house at Railway area. For instance, the respondent, when testifying, told the trial court that while at home she was working at private persons, probably at Huruma Dispensary and at Hajirah. However, the respondent was silent on what her earnings were and how she used them as contribution in the acquisition of the house in dispute. Likewise, the respondent told the trial court that in 2006 they bought a piece of land at Railway area and they collaborated in constructing the house and managed to move there in 2008. It was not clear from whom the said piece of land was bought and to what extent the respondent contributed in the construction of the said house. The evidence of her contribution was crucial particularly where the appellant told the trial court that the house was bought but only to be re-structured.

On his part, the appellant told the trial court that he bought the house at Railway area and then re-constructed it. The appellant was, however, silent as to who the vendor of the house was and how much money was used to buy it.

Notwithstanding the suppression of the parties' evidence in the acquisition of the house at Railway area, there is no dispute that the house in question is a matrimonial property which was acquired during the subsistence of their marriage. It seems the appellant appreciated the contribution by the respondent that is why he took pains to find her employment in the government and obtain a higher education institution as well as defraying some expenses for her studies. Besides, the factors the court has to take into account in the division of matrimonial assets are as stipulated under paragraphs (a), (b), (c) and (d) of sub-section (2) of section 114 of the Law of Marriage Act [Cap.29 R.E.2019] which are the custom to which the parties belong, the extent of contribution, the debts owing by either party contracted by their joint benefit and the needs of the infant children. The law is, nevertheless, emphatic that subject to those considerations, the court shall incline towards equality of division.

With the available facts and circumstances of the case and taking into account the law and the decision in the case of **Bihawa Mohamed v. Ally Seif** [1983] TLR page 32, I find nothing to fault the finding of the first appellate court of ordering that each party to this appeal is entitled for 50% of the share in each of the house. The 1st ground of appeal falls away.

With regard to the 2nd and 3rd grounds of appeal on his income, the appellant stated that he was unable to pay the amount decreed by the District Court. He explained that when the respondent was studying at the University, he took the children who by the time were under his custody to private schools and was paiying school fees believing that, they would cooperate after the respondent had completed her studies. but things turned round as when she

completed her studies she decided to forsake him and went to live with her parents leaving him with a lot of debts caused by his defraying costs for her studies. The appellant contended that he was psychologically affected and failed to get opportunity of engaging in production particularly when he was pursuing the matter in courts of law.

Responding to the 2nd and 3rd grounds of appeal, learned Counsel for the respondent contended that the appellant's argument that he is unable to pay the amount is an afterthought as in the proceedings nowhere such complaints were raised before the lower courts. Counsel for the respondent insisted that it is the duty of a man to maintain the children of marriage. Reference was made to section 129 of the Law of Marriage Act [Cap 29 R.E 2002]. According to her, the appellant had payment reduced by the District court from 200,000/= to 100,000/=after he indicated his submission before the District court that he was able to maintain the children at that amount. Counsel pressed that in the proceedings, respondent was clear that the appellant is a business man at Ifakara in Morogoro and the appellant did not state that he was incapable of maintaining the children. Further that since he is the person responsible to maintain the children and pay school fees and there is no evidence that he is incapacitated, the appellant should shoulder the payment of Tshs. 100, 000/= as school fees, though the amount is insufficient.

I think Counsel for the respondent misapprehended the findings of the lower courts on the issue of maintenance of the children. In the same vein, the learned Resident Magistrate in the first appeal misconstrued the law relating to maintenance. I will explain.

According to the record, while the trial Primary Court ordered the appellant to pay Tshs. 200, 000/=at the end of each month commencing in June, 2020 as

maintenance for the two children, the learned Resident Magistrate at the first appellate court reversed that finding and ordered the appellant to pay Tshs. 100, 000/= per month as maintenance for the children and also ordered the appellant to take responsibility of paying school fees for the issues. This is clearly indicated under pages 20 and 24 of the judgment of the District Court.

At p.20, it is recorded that:-

> "the trial court record does not reveal at all if the enquiry was conducted to Omary Juma till when the trial court reached the decision that Tshs. 200,000/=per month is capable of being paid by him.
>
> Also there is law provides that the amount of money should be first pass to the court and thereafter to the respondent. There is no logic for these reasons, is hereby fault order of Tshs. 200,000/- of the trial court to Juma Omary and order him to pay Tshs. 100,000/-as costs for maintenance and the parties should arrange how that amount will reach to Nuru Hatibu Namkuna".

Then at p. 24, the District Court made the following order:

> "On record of the trial court, there is no evidence adduced by Juma Omary that he is incapable of paying school fees of his issues. As the duty of providing maintenance including education lie to man, I am agreed with Nuru Hatibu Namkuna that the trial Magistrate was erred in law and fact failure to order Juma Omary to pay school fees on the issues, henceforth I hereby quash the order of the trial posed to Nuru Hatibu Namkuna and order Juma Omary to take responsibility of paying school fees of his issues.."

My understanding of the record of the trial Primary Court and the first appellate District Court is that the payment of Tshs. 200,000/- as maintenance

of the two children was inclusive of the school fees but the District Court varied that amount and ordered the appellant to pay Tshs. 100,000/= as maintenance and also shouldered him to pay school fees of unspecified amount.

I think the District Court was wrong. It is true that the law imposes the duty on a man to maintain his infant children as stipulated under section 129 of the Law of Marriage Act but that maintenance is, in my view, inclusive of the education.

The said provision stipulates as hereunder:

> 'It shall be the duty of a man to maintain his infant 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."

The trial Primary Court was well conversant with those provisions as indicated at p. 19 of the typed judgment. Although the trial court did not specify what the payment of Tshs. 200,000/= was about, it was clear that both parents had the duty of defraying costs for the education of their children. This is clear when it recorded at page 19 of the typed judgment of the Primary Court thus, '*Kuhusu suala la kuwasomesha watoto hawa ni jukumu lao wote and wadaawa washirikiane kusomesha watoto wao.*"

The above excerpt depicts that although the appellant was ordered to pay Tshs. 200,000/= as maintenance to the infant children, that did not absolve the respondent of her duty of also collaborating with the appellant in defraying the school fees for the children. I think justice supports the course taken by the Primary Court where it is not in dispute that although the appellant is a businessman, the respondent is a Medical Doctor who was in the employment of the Government.

With those findings, I am satisfied that the appellant's 2nd and 3rd grounds of appeal have merit.

Coming to the 4th and 5th grounds of appeal, the appellant, in expounding the 4th ground, argued that it was an error for the District Court to divide the pieces of land by 50% as he got them while the respondent was on studies and had, therefore, no contribution. In a further elaboration, the appellant stated that he discharged his duties of paying school fees for her and bought a tri-cycle to assist the children at home. According to him, he supported her to a large extend and believed that she would be of assistance after completing her studies. She was my wife I informed her that I bought that pieces of land.

On the 5th ground of appeal, the appellant insisted that he contributed more than the respondent and that the property was obtained through his own efforts. He supported this aspect by tendering some exhibits including bank statements. He denied to have taken loans for the house and maintained that the respondent is not assisting him in the payment of the loans. He contended that the respondent took Tshs. 800,000/= from the shop. He prayed the court to do justice insisting that he had good intention to his family and was prepared to make efforts for their life but now the respondent is at her parents. She has education and he, the appellant has incurred costs to take her for the studies. In fine, the appellant was emphatic on the 4th and 5th grounds of appeal, that the said pieces of land were acquired by the appellant at the time the respondent was at IMTU University.

In her submission in response to the 4th and 5th grounds of appeal, learned Counsel for the respondent admitted that the pieces of land at Mji Mwema and Mbae Mashariki were brought when the respondent was on studies. She however argued that, that did not mean that she made no contribution in the acquisition. There were loans secured by title deeds of their house at their

house at Railway area and that the loans were secured on the joint agreement of spouse so that they bought the said pieces of land.

With respect, I agree to the appellant's arguments on the 4th and 5th grounds of appeal. It was amply proved in evidence that during the acquisition of the said pieces of land, the respondent was at IMTU University studying. Learned Counsel for the respondent appreciated this aspect during her submission when she said:-

> 'With regard to the pieces of land at Mji Mwema and Mbae Mashariki, we admit that they were bought while the respondent was on studies'.

Although learned Counsel qualified her admission by arguing that the mere fact that the respondent was on studies did not mean that she made no contribution, the truth remains that after the respondent completed her studies for which the appellant had sacrificed and she was then employed in the government, she forsook the appellant and went to live with her parents.

I think, a spouse who contributed to the education of another spouse does so with the expectation that there would be in the future some benefits to derive from such sacrifice. In his submission, the appellant indicated that there was mutual agreement that the respondent should proceed with the education knowing that, after she completed her studies, there would be good improvement of their marital life in terms of financial status and marital relationship. To ignore the contribution of the sacrificing spouse, the appellant for that matter, would work an injustice on his part, the course this court cannot venture into.

Accordingly, the 4th and 5th grounds should be allowed.

As to placing the children in the custody of the appellant, Counsel for the respondent contended that it was not one of the grounds of appeal and that the District court has already made the decision that the record be dispatched to the

Primary Court to hear where the children wished to stay but the appellant who had appealed, abided not by the said court's order.

On this aspect, I agree that the question of custody of the children was not one of the grounds of appeal but I decline to hold that the appellant is to blame on this.

According to the record, the trial Primary Court after finding that the infant children had been all along in the custody of the respondent desisted from disturbing the placement. Before the District Court, the appellant's complaint was that the Primary Court did not hear the wishes of the children in whose custody they preferred to be placed. The District Court ordered the file to be returned to the trial court so that the infant children were heard on their wishes. It seems, this was not done and it is not proper to apportion the blame to the appellant as the dispatching of the file back to the Primary Court was none of his business. However, this court, being aware that the law mandated the infant children to express their independent opinions and after satisfying itself that the said children were of an age to express an independent opinion, summoned them and in the presence of the appellant, Ms Anisa Mziray and Mr. Issa Chiputula, learned Advocates for the respondent, heard them on 14th day of July, 2021.

After hearing them, I am satisfied that the decision of the trial Primary Court on the custody of the children cannot be faulted. In the first place, the children have, all along, been staying under the custody of the respondent. Second, they categorically and openly expressed that they wished to stay with the respondent, their mother. Third, I am alive to the provisions of sub-sections (1) and (2) of Section 125 of the Law of Marriage Act. Indeed, the Court in **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293 observed that, *'in matters of custody, the welfare of the infant is of paramount consideration, but where*

the infant is of an age to express an independent opinion, the court is obliged to have regard to his or her wishes'. This means, placing them in the custody of the appellant would not meet their welfare which is a paramount consideration. Fourth, the children are schooling herein Mtwara while the appellant resides in Morogoro placing the children in custody of the appellant will be estranging them. Fifth, this was not one of the appellant's grounds of appeal.

In summary, I dismiss the appellant's 1st ground of appeal by ordering the house at Railway area within the Mtwara Mikindani Municipality to be valued by an independent valuer acceptable to both parties and the proceeds to be equally distributed to each party. However, either party to have the liberty to buy out the share of the other party.

I allow the 2nd and 3rd grounds of appeal by quashing and setting aside the decision of the District Court which ordered the appellant to pay Tshs. 100,000/- per month as maintenance and also quash the District Court's order on the appellant taking a sole responsibility of paying school fees for the infant children. Instead, I restore the order of the trial Primary Court that the appellant should pay Tshs. 200, 000/- per month as maintenance of the children commencing from June, 2020 and both parties should collaborate in defraying school expenses for the infant children. Parties can make arrangement how that amount of Tshs. 200, 000/= will meet the desired purpose of maintenance.

The 4th and 5th grounds of appeal are allowed. It is ordered that no division on the rest assets should be made. Those pieces of land were acquired at the time the respondent was at studies and the appellant defrayed expenses for the studies the respondent was pursuing the respondent attained the education, she got employment in the public service and the appellant contributed much to her achievement. She left matrimonial home and went to live with her parents. The marriage is no longer and the appellant's expectations

have not been realised. Ignoring his contribution through his sacrifice would not only amount to injustice on his part but would engender unfair advantage to the respondent and this would be tantamount to unjust enrichment.

On the aspect of visitation, since the children remain in the custody of the respondent, the appellant shall have access to them and be at liberty to visit them as the occasion would demand.

For the reasons stated, the appeal is allowed to such extent. Each part to bear its own costs.

THE HIGH COURT OF TANZANIA

W. P. Dyansobera

Judge

15.7.2021

This judgment has been delivered today in the presence of the appellant in person and Ms Anisa Mziray, learned Counsel for the respondent.
The rights of appeal to the court of Appeal explained.

THE HIGH COURT OF TANZANIA

W. P. Dyansobera

Judge