IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC. MATRIMONIAL APPEAL NO. 13 OF 2021

(Appeal from the judgment of the District Court of Nyamagana at Mwanza (Ryoba, RM) in DC Matrimonial Appeal No. 27 of 2020 dated 15th of January, 2021)

MOSHI SHABANI ..... APPELLANT

VERSUS

VERONICA PETRO ..... RESPONDENT

JUDGMENT

29th June, & 9th August, 2021

ISMAIL, J.

The appellant and the respondent were spouses whose marriage was contracted in 1993. In the course of their marriage, they were blessed with six children, three of whom are still at the age of minority. Besides the children, the parties hereto acquired properties, including landed properties. Going by the respondent's account of facts, such assets include four houses, two located at Buhongwa Mwanza, one at Ibanda Relini, the other one in Geita. They also owned two milling machines.

Their marriage became sour, culminating in a petition of divorce, preferred by the respondent. The Primary Court of Mkuyuni at Nyamagana, before which the matter was placed, ordered a dissolution of the marriage. Simultaneously, the trial court ordered that the respondent be given 20% of the total assets, acquired in the subsistence of the marriage. The appellant was also ordered to pay TZS. 60,000/- as monthly maintenance sum for three children whose custody was placed in the respondent's hands.

At the instance of the respondent, this decision was reversed by the District Court of Nyamagana at Mwanza (1st appellate court). With respect to distribution of assets, the respondent's share was enhanced to 50% of the total value of the assets. These included all houses and milling machines that the appellant argued that they were acquired before he married the respondent. The monthly maintenance amount was also enhanced to TZS. 200,000/-.

The 1st appellate court's decision was not well received by the appellant. He chose to challenge it by way of appeal to this Court. The petition of appeal has four grounds, reproduced as hereunder:

1. *That the appellate District court erred in law and in fact in distributing to the respondent a matrimonial dwelling house situated at Buhongwa area in Mwanza City, while the said house was*

acquired during the appellant's matrimonial life with his first to whom he was married in 1993.

2. *That the appellate District court erred in law and fact in ordering that two houses and two milling machines be evaluated, sold and proceeds thereof distributed to spouses without involving the appellants three other wives who are entitled to equal share of the proceeds.*

3. *That the appellate District court erred in law and fact in ordering the appellant to pay the respondent the sum TZS. 200,000/- per month, being maintenance without considering that the respondent is collecting a monthly income of TZS. 460,000/- being rent of the house which was wrongfully distributed to the respondent.*

4. *That the appellate District court erred in law and fact in ordering division of matrimonial property to the respondent who is caused the matrimonial problems when she conspired with bandits and murderers who killed the appellant in cold blood while inside the matrimonial house whose doors were left open by the respondent.*

Hearing of the appeal was through the parties' written submissions. In his submissions in chief, Mr. Masoud Mwanaupanga, learned counsel for the appellant, held the view with respect to the first ground of appeal, that the house given to the respondent was built before the appellant and the respondent got married. He relied on the testimony of SU 3, SU 4 and SU 5, all of whom allegedly testified that the house was acquired in the subsistence

of the appellant's marriage with the 1st wife who he divorced in 2000. The counsel argued that, after all, the respondent did not prove that she substantially contributed to the improvement of the house, to be able to get a slice in the contribution.

Submitting on ground two, the argument by the counsel is that, leaving aside the Buhongwa house, the rest of the houses, in Ibanda (relini), Mwangalanga and Geita, were acquired through the joint efforts of all three wives and that their distribution was subject to proof of extent of contribution by all of the appellant's three wives. In Mr. Mwanaupanga's view, this contention is in line with section 57 of the Law of Marriage Act, Cap. 29 R.E. 2019, and that, distribution of the matrimonial assets ought to have factored in the efforts of two other wives. It was the counsel's assertion that, when the first wife left the appellant one of houses had been completed, while the other was semi-finished, meaning that these were in existence prior to the appellant's marriage with the respondent.

With regards to ground three, the argument is that the sum of TZS. 200,000/- ordered as monthly maintenance is on the high side, considering that the appellant has a big family to look after. The counsel argued that the 1st appellate court ought to have taken that into consideration before it gave the order.

Regarding ground four of the appeal, the argument by Mr. Mwanaupanga is that the respondent's alleged involvement in the conspiracy to attack and harm the appellant, coupled with the alleged misappropriation of the sum of TZS. 900,000/- ought to have been considered in the distribution. The appellant's counsel further argued that the respondent sold goats which were at the Buhongwa house, and that in view of all this, the decision in ***Bi Hawa Mohamed v. Ally Seif*** [1983] TLR 32 ought to be used to reduce the respondent's share in the division of the matrimonial assets. The counsel argued that the respondent's alleged misconduct was not challenged by the respondent.

He urged the Court to allow the appeal and set aside the 1st appellate court's decision.

The respondent's equally formidable submission was made by Mr. Frank Kabula, learned advocate, who began by strongly opposing the appeal for what he alleges to be baseless and misconceived. Reacting with respect to ground one of the appeal, the counsel's contention is that the 1st appellate court's reasoning was justified, and there is nothing faulty in the distribution of the matrimonial assets. The counsel contended that, having lived as husband and wife since 1993, and; taking into account the best interests of

the children, the decision to order the respondent to take hold of the house was in order.

With respect to the second ground of appeal, Mr. Kabula's argument is that page 4 of the judgment bears a testimony that there were no other wives besides the respondent.

Submitting on ground three of the appeal, the argument by the respondent's counsel is that the same is baseless and misconceived. He argued that TZS. 200,000/- translates to about TZS. 67,000/- per month, per each of the three children, and that that works out to a paltry TZS. 2,000/- per day. The counsel took the view that the sum awarded is quite reasonable.

With respect to ground four, the respondent's take is that it is unfair to term the respondent as the author of the matrimonial problems. He argued that the allegation on the respondent's dalliance with the bandits never featured in any of the lower courts' proceedings. He argued that, whereas the attack occurred in 2009, their matrimonial tribulations that led to the divorce occurred in 2018. The counsel further submitted that there is no evidence that the respondent was involved in planning and executing the attack. He urged the Court to play down what he termed as a subtle argument.

In sum, the respondent prayed that the appeal be dismissed.

Mr. Mwanaupanga's rejoinder submission was, by and large, a reiteration of his submission in chief. With regards to the testimony of SU3, SU4 and SU5, he argued that the appellant's estranged wife is the one with whom they acquired the Buhongwa house. He added that there is no evidence that this house was subsequently improved by the respondent as to entitle her to a share. On ground two, the counsel's view is that the appellant's own testimony and that of SU7 proved that the appellant had another wife with whom he lived at their Geita home.

Regarding the maintenance, the counsel urged the Court to halve the amount to TZS. 100,000/- because all other amenities are catered for by the respondent, except food. With respect to ground four, the counsel's contention is that there was evidence that the respondent was responsible for the night invasion against the appellant. He argued that the squandering of TZS. 900,000 and sale of goats is an issue which was not controverted. This meant that the respondent is responsible for payment for the misconducts committed by her.

The broad question that awaits the Court's resolution is whether the appeal is meritorious. I will address this issue by tackling the grounds of appeal in the same sequence they were argued.

Ground one and two of the appeal query the 1st appellate court's decision to order an evaluation and sale of two houses, two milling machines, and distribution of the proceeds evenly. The argument by the appellant is that some of these assets, especially the Buhongwa house, were acquired prior to the marriage with the respondent. With respect to acquisition and distribution, the contention is that such distribution was done without taking cognizance of the presence of two other spouses. This, in the counsel's view, infracted section 57 of Cap. 29 and the fact that there was a contribution by two other wives. To be able to appreciate the import of the appellant's contention, it is apposite that the substance of section 57 be reproduced here. It states as follows:

> *"For the avoidance of doubt, it is hereby declared that, subject to the express provisions of any written law, where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law."*

My reading of this provision does not convey the meaning advanced by Mr. Mwanaupanga. Apart from introducing an equality in the treatment and equal status of the said wives in their marriage life, this provision does not bar an estranged wife from claiming what is considered to be her share

in the matrimonial assets, provided that the key conditions set under section 114 (1) are met. The substance of the said provision states as hereunder:

> *"The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the 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 proceeds of sale."*

The position enshrined in the cited provision has been underscored in numerous decisions. These include the groundbreaking case of ***Bi Hawa Mohamed v. Ally Sefu*** [1983] TLR 32. Subsequent decisions have followed the foot marks set in the cited decision. In ***Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo***, CAT-Civil Appeal No. 102 of 2018 (unreported), the Court of Appeal of Tanzania guided as follows:

> *"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution."*

The cumulative effect of the provision and the decisions cited above is to set important conditions precedent that must be conformed to before

distribution of the matrimonial assets is ordered. Firstly, it must be sufficiently proved that the such assets were acquired in the subsistence of the marriage; and secondly, that the acquisition of the assets was a result of the spouses' joint efforts. With respect to the proportion of the assets to be shared, the guiding principle is that the party who desires that the said asset be shared must prove that the extent of his or her contribution, in the acquisition, warrants that the said proportion be shared. For instance, a demand for equal distribution must go with proof that the claimant's extent of contribution is even.

In this case, the distribution between the spouses was equal and this is where the appellant's dissatisfaction resides. In my considered view, existence of other wives and their extent of contribution are both matters of fact and they both ought to have been proved satisfactorily. The onus in this respect rests on the appellant's shoulders. My own assessment is that this fact was not convincingly proved. It, therefore, rules out the possibility of getting the other wives in the frame and share the spoils.

Reverting back to the question of proportion of the distribution, the issue here is, was the respondent's extent of contribution proved as to entitle her to a 50% share of the matrimonial assets? My unflustered answer to this question is NO! There was nothing suggestive of the fact that what is

considered to be the respondent's contribution translated into a quantifiable proportion, let alone the feeling that such proportion translates into the parity of contributions by the parties. With respect to the 1st Buhongwa house and the milling machines, the uncontroverted testimony by SM3, SU1, SU3 and SU4, as found at pages 11, 14, 16 and 18, is that these assets were acquired before the respondent's marriage with the appellant. This means, in the absence of any testimony to the contrary, that these assets were not jointly acquired. They are, for all purposes and intents, not matrimonial properties that are eligible for distribution between these erstwhile spouses.

This leaves the rest of the assets. With respect to the houses in Geita, the appellant's contention is that same were built out of proceeds of the sale of the farms he inherited from his deceased father. This account of facts has not been contradicted. It is fair to conclude that these too are out of the equation. This leaves the other house in Buhongwa which is rented out and the other in Ibanda Relini and other assets whose existence has been evidenced. These are mostly the farms they were cultivating while in Mwanza, if they are still in existence. Noting that the appellant's contribution was greater than that of the respondent, I order that the house that is rented out in Buhongwa be given to the respondent as her share of the matrimonial assets while the appellant will - besides keeping the assets which were not

jointly acquired with the respondent – take hold of the house in Ibanda Relini. This will mean that the respondent will move from the house she is currently occupying. These grounds of appeal partly succeed and the 1st appellate court's decision is varied to that extent.

Ground three of the appeal decries the 1st appellate court's decision to award maintenance to the tune of TZS. 200,000/- every month. The argument by the appellant is that the amount is way too much to bear. The respondent's view is opposed to this contention. To be able to resolve this issue it behooves me to preface my analysis by stating that issues relating to maintenance subsequent to dissolution of the marriage are governed by the provisions of section 29 (1) of the Law of Marriage Act, Cap. 29 R.E. 2019 which provide as hereunder:

> *"(1) Save where an agreement or order of court otherwise provides, 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."***
> [Emphasis is added]

The imperative need in quoted provision is in sync with what is provided for by section 44 of the Law of the Child Act, Cap. 13 R.E. 2019 which states as follows:

> *"The court shall consider the following matters when making a maintenance order-*
>
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
>
> *(b) any impairment of the earning capacity of the person with a duty to maintain the child;*
>
> *(c) the financial responsibility of the person with respect to the maintenance of other children;*
>
> *(d) the cost of living in the area where the child is resident; and*
>
> *(e) the rights of the child under this Act."*

The amount of compensation ordered by the trial court was TZS. 60,000/- per month. This sum was challenged by the respondent when she took her appeal to the 1st appellate court. The latter enhanced the said sum by more than threefold, to TZS. 200,000/-. No reason or any semblance of a formula was given to inform on how the said figure was settled on. It is also certain that the choice of the quantum followed the footsteps of the trial court that felt that TZS. 60,000/- was adequate to meet the monthly maintenance costs. Needless to say, such choice was without any scientific

workings, and it was not informed by the appellant's station of life, which is one of the decisive factors in in determining the sum to be paid as maintenance. It is why the appellant felt hard done by the 1st appellate court's decision. In my view, this was not in order and I understand the appellant's discontentment in this respect.

Having firmed up that the 1st appellate court settled on the sum of TZS. 200,000/- on a subjective basis, there comes a question. This touches on the sufficiency of the said sum, taking into account the number of children amongst whom the benefits of the said sum are to be shared. This question can be best solved by invoking the Court's reasoning in ***Sharifu Saimoni v. Madina Abasi***, HC-Matrimonial Appeal No. 4 of 2020 (MZA-unreported), in which it was held:

> *"Whilst it is clear, in my view, that the imposition of this quantum was subjective, a reality dawns on me that, compared to the cost of living that obtains in Mwanza at the moment, the sum of TZS. 60,000/- that is hotly contested by the appellant is nothing better than a paltry sum that can hardly last a dozen days for two children. Ordering a sum lower than that, irrespective of the appellant's station of life, would certainly appeal to and appease the appellant.* ***That, however, would consign the children to a misery lifestyle, thereby affecting their wellbeing.*** *In that regard, I find that the sum of TZS. 60,000/-, ordered by the*

trial court, constitutes an irreducible minimum that should be sustained." [Emphasis added]

Considering all factors and circumstances as they obtain in this case, I am inclined to accede to the appellant's prayer to have the sum awarded reduced to TZS. 150,000/- per month, as maintenance. This is mainly because the appellant has other dependants to look after. These include his other children and spouse. The current economic realities militate against placing a burden that may prove unbearable to the appellant, as doing that may result in the failure to abide by the order because it is considered to be prohibitive. Consequently, this ground of appeal is allowed.

Ground four of the appeal need not detain us. This is outrightly a baseless claim which is neither devoid of any tangible evidence nor is it relevant to the matter that is at stake. As rightly argued by Mr. Kabula, the events of 2009, if they truly occurred, would not have any bearing on the squabbles that the parties were involved in, close to a decade later i.e. in 2018. It defies logic that these alleged events would have the bearing on the rights that the respondent would have in the matrimonial assets. I hold the view that this contention deserves nothing better that an outright rejection. I dismiss this ground of appeal.

In sum, this appeal is partly allowed to the extent stated in each of the grounds of appeal. For avoidance of doubt, the following specific orders are issued:

(i) That, having chalked off some of the assets whose acquisition was not joint, the respondent is given the house located at Buhongwa and currently rented out;

(ii) That the house that the respondent is currently occupying shall be kept by the appellant and the respondent shall vacate as soon as practicable;

(iii) That all other assets shall be in the ownership of the appellant;

(iv) That the appellant shall pay TZS. 150,000/-, every month, being maintenance of the children whose custody is under the respondent;

(v) No order as to costs.

Order accordingly.

DATED at **MWANZA** this 9th day of August, 2021.

M.K. ISMAIL

JUDGE

Date: 09/08/2021

Coram: Hon. C. M. Tengwa, DR

Appellant: Absent

Respondent: Bernard, Advocate

B/C: J. Mhina

Court:

Judgment delivered today in the presence of the Counsel for the respondent.

THE HIGH COURT OF TANZANIA
MWANZA

C. M. Tengwa
DR
09.08.2021