

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**PC. MATRIMONIAL APPEAL NO. 3 OF 2020**

(C/O PC Matrimonial Appeal No.8 of 2020 Sumbawanga District Court,  
Original Matrimonial Case No. 58 of 2019 – Sumbawanga Urban Primary  
Court)

**ABEL MWANDENGA ..... APPELLANT**

**VERSUS**

**ESTER MARTIN MWANANZICHE ..... RESPONDENT**

Date: 25/08/2021 & 27/09/2021

**JUDGMENT**

**Nkwabi, J.:**

At the outset, I would comment that the complaint form, which the respondent signed and filed in the trial court seems confusing. In paragraph 7(a) she claimed for divorce, while on paragraph 8 the prayer is for separation for a while. The certificate from the Lwiche Ward conciliation board advised that the marriage be dissolved. Nevertheless, the evidence on record indicates that divorce is the aim of both parties in the dispute.

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According to the respondent, in her testimony in the trial court, she started living with the appellant since 07/09/2016. She averred the appellant became troublesome in October, 2018. She attested the appellant bought a plot and showed her. They constructed the house and started living therein. He later got electricity connection. He later stated beating her and on 11/10/2019 he beat her up and threw her properties outside the house. She further asserted in the trial court that the properties they jointly acquired are, the house, the spare parts shop having the value of T.shs 3,000,000/=, and household utensils being one set of chairs, two mattresses, two gas cylinders, food utensils, bicycle, one bed and two TV sets. She prayed for custody of their child who was aged about two years and maintenance of the infant child at T.shs 20,000/= per week as the appellant is an insurance broker, a motorcycle seller and he has a spare parts business. Her contribution towards the acquisition of the matrimonial properties was that she was cooking and washing clothes for him, she explained.

The appellant, in his testimony in the trial court, revealed he started living with the respondent in the year 2016 but later he discovered that the respondent had been married hence the misunderstanding. The respondent

started telling him invectives and threatening to kill him and to date his life is in danger. He denied possessing a house and a shop. He admitted that they own one TV set, a subwoofer, one bed, two gas cylinders, two mattresses and one set of coaches. He concurred that the division of the jointly acquired properties be done by the trial court. He demanded for custody of their issue as he could not provide for the amount of maintaining him and he does not trust her on the manners she would teach the infant child.

On being examined by the first court assessor, he replied that the house is the property of his brother Twanga Jackson Mandenga who gave them just to reside therein. He declared he was able to maintain his child at T.shs 10,000/=. He admitted living with the respondent for three years.

Following hearing both parties, the trial court held that the parties had not contracted any form of marriage but lived under presumption of marriage after living as husband and wife for more than two years and they had gained the reputation of husband and wife in the community. Presumption of marriage between them is established, they could separate any time and the

court cannot issue divorce, it stated. It further found that their relationship had come to an end. Moreover, it declared that the respondent failed to prove acquisition of the house and the motorcycle spare parts shop. Finally, it ordered:

1. Division of matrimonial assets as per the judgment, thus:
  - a. For respondent to have one gas cylinder, one TV Set, one mattress, one bed, two small coaches and a half of the food utensils.
  - b. The appellant had to have one gas cylinder, sub-woofer, one mattress, one large coach, and a half of the food utensils
2. Custody of the child be in the respondent in this appeal.
3. Appellant to maintain his child at T.shs 10,000/= per week and pay for education expenses, treatment expenses and clothing for their child.

Piqued by the decision of the trial court, the respondent successfully appealed to the District Court. I note here that there was no cross appeal in the district court. In the first appellate court, the respondent table her three resentments which are 1. The trial court erred in law and fact in excluding the house and a motorcycle spare parts shop from matrimonial property, 2. The trial court erred in law and fact for ignoring completely the evidence of

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the appellant and 3. That the monthly rate of T.shs 40,000/= as maintenance of a child is minimal as the appellant is homeless. She then prayed for the appeal to be allowed, the house and shop be equally distributed between the parties and T.shs 100,000/= for maintenance of the child and the appellant per month be ordered, among other reliefs prayed for.

The first appellate court partly allowed her appeal, declared the parties duly married, it was further satisfied that their marriage had irreparably broken down, issued a decree of divorce, the house was declared a matrimonial asset and an order for it being sold and the market price be divided between the parties 40% to the appellant and 60% for the respondent. Maintenance order of the trial court was undisturbed. For the motorcycle shop it was not proved, the district court held.

This time, the respondent in the trial court became affronted with the decision of the 1<sup>st</sup> appellate court. He submitted four grievances to this court in his petition of appeal, but after going through them in essence they are just two I found:

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1. *That the trial magistrate erred in law and fact in holding that the disputed house is a matrimonial home in absence of evidence on the part of the respondent while there was strong evidence on the appellant that the house is not a matrimonial home and erred in ordering a distribution of the same.*
2. *That the District Magistrate erred in law and fact when he wrongly based on the altered and incorrect uncertified secondary documents attached to petition of appeal by the respondent at appellate stage hence the wrong decision of the appellate court.*

The appellant in this court prays this court to allow his appeal and orders:

- (i) *This court partly quashes the decision and set aside the orders imposed by the district court, and uphold the decision of the trial court.*
- (ii) *Costs of this appeal b provided for.*
- (iii) *Any other reliefs that this Honourable Court may deem fit and just to grant.*

6. *OKala*

The Respondent offered a tough resistance to this appeal in her reply to the petition of appeal. Nevertheless, the appellant filed his rejoinder to the petition of appeal. I have sharply considered all of them while reassessing the evidence in the trial court.

When the appeal was called up for hearing both parties appeared in person, unrepresented. The appellant argued that the decision of the district court was not based on evidence. He insisted he is not the owner of the house that was ordered to be sold. The Respondent said she did not have anything in submission and left it to this court to decide. She prayed her reply to the petition of appeal be adopted as her submissions. Nothing was submitted in rejoinder by the appellant as he had nothing so far.

I kick off with the 2<sup>nd</sup> ground of appeal which is *that the District Magistrate erred in law and fact when he wrongly based on the altered and incorrect uncertified secondary documents attached to petition of appeal by the respondent at appellate stage hence the wrong decision of the appellate court.*

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I agree with the respondent that this ground is ill reputed. The first appellate court at page 4 of the typed judgment categorically stated that it found no reason given by the appellant (respondent in this appeal) be given the right to produce additional evidence at its stage. This came after having the view that the documents indented to be produced were secondary evidence and the appellant was not competent to tender them. She had sufficient time to produce them at the trial, it further decided. The second lamentation goes down swinging.

I regress to discuss the 1<sup>st</sup> provocation of appeal which is that the trial magistrate erred in law and fact in holding that the disputed house is a matrimonial home in absence of evidence on the part of the respondent while there was strong evidence on the appellant that the house is not a matrimonial home and erred in ordering a distribution of the same.

As I have indicated above, the appellant, in the trial court, in his evidence denied possessing a house and a shop. When examined by the 1<sup>st</sup> court assessor, the appellant replied that the house is the property of his brother Twanga Jackson Mandenga who gave them just to reside therein.



I support the first appellate court's view that, if the appellant were keen about his claim that he does not possess the house, he would have cross-examined the respondent who testified that the appellant bought the plot during the pendency of their marriage and constructed the house, then, they started living therein. This is very strong evidence on the respondent side purely given during her case. To rebut that, the appellant ought to have called his brother to come to give evidence and even prove by documentary evidence (the contract on connection of electricity). This ground of appeal too is meritless and it is accordingly dismissed. The decision of the first appellate court on this is firmly grounded on the evidence. The claim, is merely an afterthought.

Despite my decision explained above, I have noted two misdirection on the part of the first appellate court in respect of the defence of the appellant in this appeal. At page 8 of the typed judgment the learned first appellate magistrate indicated that, *"In his defence the respondent admitted to have entered into agreement with TANESCO for power supply in the house."* I have inspected the testimony of the appellant in the trial court, I have not

seen such admission. The misdirection however, did not occasion miscarriage of justice.

The second misdirection is in respect of the amount awarded as maintenance of the issue of the doomed marriage by the trial court to be T.shs 40,000/= while the order of the trial court was, *appellant to maintain his child at T.shs 10,000/= per week and pay for education expenses, treatment expenses and clothing for their child*. Since the misdirection did not cause the order of the trial court to be disturbed, this misdirection too did not occasion miscarriage of justice. The order for maintenance issued by the trial court as I have shown above is justified so it is left undisturbed.

To finish, the respondent proved her case on the balance of probabilities. The first appellate court was justified in reaching at the decision it reached at in respect of the house. The appeal, in this court is as well kicked out for being empty. In the circumstances of this case as parties were husband and wife respectively prior to the decree of divorce issued by the first appellate court, each party to bear their own costs.

It is so ordered.

DATED and Signed at MPANDA this 27<sup>th</sup> day of September, 2021



  
**J. F. Nkwabi**  
**JUDGE**