

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MATRIMONIAL APPEAL NO. 22 OF 2021

(Arising from DC. Matrimonial Appeal No. 15 of 2020 of the district court of Ilemela, originating from Ilemela Primary Court Matrimonial Cause No. 11/2019)

EVARIST MALIMA.....APPELLANT

versus

PENDO ALPHONCE.....RESPONDENT

JUDGMENT

14th Sept & 18th October, 2021

RUMANYIKA, J:.

The 2nd appeal is with respect to judgment and decree dated 09/04/2021 of Ilemela district court with respect to shares on a matrimonial house the court having had varied an order dated 02/11/2020 of Ilemela primary court (the trial court) thus 80% and 20% for Evarist Malima and Pendo Alphonc (the appellant and respondent) respectively.

When, by way of audio teleconference the appeal was called on 14/09/2021 for hearing, Ms. O. Sarungi learned counsel appeared for the

appellant, the respondent appeared in person. I heard them through mobile numbers 0755 368 319 And 0763 893 279 respectively.

The appellant had three (3) grounds of appeal which may boil down only to one essentially that in terms of validity of the marriage and contribution by the parties to acquisition of the property the 1st appeal court improperly analysed the evidence on record.

Ms. O. Sarungi learned counsel in a nutshell she submitted that had the lower court properly evaluated the evidence it should not have ordered 80%-20% shares on the house as it was solely purchased in 2006 by the appellant and the parties only lived in a concubine relationship much as the respondent stayed away also appellant's Christian therefore monogamous marriage with another woman still subsisted which fact also was on record realized by the trial court. And, now that between the parties in law there was no marriage, unless there was a decree of divorce or separation the court should not have ordered division of the property (case of **Bi Hawa Mohamedi v. Ally Seif** (1983) TLR 24, that concubine relationship was not legal in Tanzania (case of **Antony Felician v. Shani Kakulu** Civil Appeal No. 16 of 2020 Hc. at Mwanza (unreported)).

On her part the respondent submitted that the 1st appeal court was right given the evidence on record that their customary marriage (therefore no formal certificate) had lasted for seven years the appellant having had paid dowry of shs. 150,000/= two heads of cattle, two goats etc.

The evidence on records reads as follows;-

The respondent stated that they cohabited in 2004 then contracted a traditional marriage and the appellant paid dowry two years later but the latter deserted her in 2010 after she conceived and the appellant denied being the responsible father. That the appellant urged her to commit abortion but she refused hence the matrimonial dispute and case.

The appellant stated that after a couple of years of their concubine relationship he paid dowry on 5/11/2008 but the respondent stayed away at Sengerema and were blessed with four (4) issues the first born on 26/04/2011 on such basis his first wife having had fled from the Christian marriage therefore monogamous marriage. That there were no four but only three houses which he acquired before he cohabited her.

The central issue could be whether or not the appellant and respondent were husband and wife but in his testimony the appellant cut

the long story short that having had cohabited her, he paid dowry on 5th January, 2008 (exhibits P1, P2 and P3). It is common knowledge that dowry was not paid for concubines or mere lovers but for wives. If anything, lovers only exchanged gifts. The parties having had their first born on 26/04/2011 and were blessed with 4 issues. It means all the children were not born out of wedlock and the issue of presumptive or constructive marriage therefore it should not have been raised but, as the respondent rightly so called it customary marriage.

As for Christian, therefore potentially monogamous marriage, not only Lilian Muhate (the alleged wife) did not appear in court with respect to marital status to support the appellant's case but also the certificate of marriage (exhibit "P1") recognized the groom as Evalist Majuto (not Evaristo Malima) therefore the possibilities of the certificate not being true and real they were not eliminated.

Moreover, even assuming that kind of marriage subsisted between the parties, it sounded both too absurd and exploitative if the respondent was to leave the court empty handed one having had spent and toiled for 7 good years unless in favor of the respondent matrilineal system applied the four children all belonged to the appellant. I am now settled that with

respect to Ibungilo house 60% - 40% shares for the appellant and the respondent respectively it could meet justice of the case. The appeal is only to that extent dismissed. Other orders remain intact. Each party shall bear their costs. It is so ordered.

Right of appeal explained.

S.M. RUMANYIKA

JUDGE

02/10/2021

The judgment delivered under my hand and seal of the court in chambers this 18/10/2021 in the absence of the parties.



S.M. RUMANYIKA

JUDGE

18/10/2021