

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF ARUSHA**  
**AT ARUSHA**  
**CIVIL APPEAL NO. 18 OF 2019**  
***(C/f Matrimonial Cause No. 6/2017)***

**SALVATORY EUGEN ..... APPELLANT**

**Versus**

**RITHA MSHIKI ..... RESPONDENT**

**JUDGMENT**

*28/07/2021 & 10/09/2021*

**MZUNA, J.:**

**Salvatory Eugen**, the appellant herein, is challenging the judgment of the District court of Arusha which awarded **Ritha Mshiki**, the respondent herein, a house and custody of their two children, while the appellant was given a shop. The said house and shop, are the matrimonial assets which were jointly acquired during the subsistence of their marriage. Their marriage which commenced since 22<sup>nd</sup> December, 2003 turned sour, leading to the decree for divorce in Matrimonial cause No. 6/2017, which was instituted by the respondent.

The background story is that the respondent accuses the appellant for infidelity and cruelty, while the appellant accuses the respondent for mistrust. Reading from the respondent's case, as per the record, she said that since 2014, the appellant was cruel to her. This emerged after getting another wife. He used to chase her away after beating her. This necessitated them to be

separated for one year. Efforts to reconcile them proved futile despite the efforts made by PW2 Joseph Kimaro, DW2 Eugen Mahedi and DW3 Alfred Mroso as well as their best man and matron. It is from these events which led her to institute this matter, to which this appeal relates.

On his part, the appellant said that the misunderstanding was caused by the respondent. That, she obtained a bank loan of Tshs 3,500,000/-, then left with the money and went to stay with her parents despite the fact that the appellant was the guarantor. This notwithstanding, he paid for the loan despite the fact that she refused to hand over the money to him.

The trial court after the decree for divorce, made an order that the respondent be awarded a house situated at Moshono Kati while the appellant was given a shop situated at Mwanama relini together with home furniture's and utensils. The custody of two issues of the marriage a daughter born 2004 and a son born 2010 was placed to the respondent. Both parties were ordered to maintain the children in terms of food, clothing and education.

The appellant being dissatisfied with the judgment and decree of the District Court of Arusha preferred this appeal on the following grounds: -

- 1) That the Honourable Trial Magistrate Erred in law and in fact by failure to consider the value of matrimonial properties for distribution during the trial hence reached in to erroneous decision.*
- 2) That the honourable trial magistrate erred in law and in facts for failure to consider the evidence adduced by the appellant's witnesses.*

*3) That the honourable trial magistrate erred in law and in fact for failure to account the mismanagement of matrimonial property done by the respondent while ordering the division of the matrimonial property.*

Hearing of the appeal proceeded by way of written submissions. During hearing, the appellant was represented by Mr. Peter Njau (Advocate) while the respondent appeared in person but Mr. Happiness Mfinanga, the learned advocate from Tanzanian Women Lawyers' Association, was engaged for drafting the submissions only. Both parties filed their submissions as scheduled. The appellant did not prefer to file any rejoinder.

Based on the above grounds of appeal, three issues are subject for determination:- **One**, whether the division of the matrimonial properties was fairly done based on the principle of how each spouse contributed to its acquisition? **Two**, whether the custody of the children should be reversed, if so why? **Three**, what is the outcome of the appeal.

Let me start with the second ground of appeal on the failure to consider the appellant's evidence.

The learned counsel purport to raise in his submission, a point which did not feature in the trial court. Mr. Njau says, there was no proof that the marriage had been broken down irreparably because it is the respondent who refused to come back home while the appellant was still in need for her. That, the decree for divorce was issued prematurely without certificate from the Reconciliatory Board as proof that the marriage was beyond repair.

It was Mr. Njau's view that an order for separation ought to have been made in lieu of a decree for divorce. In response, Miss Mfinanga stated that, the respondent left home after being humiliated and oppressed. That the brutalities were intolerable.

As above noted, this point did not feature in the grounds of appeal. It is out of respect that I will touch on it, just briefly. I am alive to the requirement of the law under section 101 of the Law of Marriage Act, Cap 29 RE 2002 herein after, the Act, that before one institutes petition for divorce "he or she has first to refer the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties." Exception to that prerequisite requirement includes among others:-

*"Where the respondent has been required to appear before the Board and has wilfully failed to attend."*

This case is well covered under section 101 (c) of the Act. The respondent said that the appellant wilfully and unjustifiably failed to attend to the conciliatory board, alleging that they should go to the Church first. The defiance of the appellant to attend as well as the separation for almost one year supports the proposition that indeed the marriage had broken down irreparably. The appellant did not cross examine the respondent on this aspect. He is estopped to raise it on appeal. This ground would fail because it is not for the court to force parties to live together because under section 9 of the Act, marriage is a voluntary union of a man and a woman, intended to last for their joint lives.

I revert to the first and third grounds of appeal. **The main issue is whether the division of the matrimonial properties was fairly done.** The question to ask is, was the division based on the principle of how each spouse contributed to its acquisition as well as contribution to the breakdown of the marriage?

The evidence on record shows, both the appellant and respondent agree that they acquired a house at Moshono Kati and a shop during the subsistence of their marriage although the appellant says he is the one who bought a plot in 2003. That he had two shops since 2000 which were then merged into one shop.

Submitting for the first ground of appeal, Mr. Njau submitted that looking at the proceeding the appellant adduced evidence at trial court that he started construction of the alleged house during the absence of the respondent. By then she had already left to her parents. That the respondent squandered Tshs 3,500,000/= received as a loan by both parties which was meant for constructing their house. That even the appellant said that they were staying in a rented house. On the issue of mismanagement of the funds, the learned counsel cited the case of **Omar Chikamba V Fatuma Mohamed Malunga** [1989] TLR 39 was cited to cement his argument.

Mr. Njau also added that, the respondent was entitled less since she did not contribute anything in the construction of the house. Section 114(2) of the Law of Marriage Act, Cap 29 R. E 2019 was cited to buttress his submission.

The respondent says, the alleged money Tshs 3,500,000/- is not known to her. She insisted that the appellant was the cause for the breakdown of the marriage after marrying another woman whom he sired a child with her while their marriage was a monogamous marriage, a Christian marriage. That the appellant does not contribute anything in terms of money for the children's upkeep and school fees.

Reading from the evidence on record, the respondent admitted that when the appellant harassed her she slept with other tenants. At the time when she left from home the appellant had never married the said woman. What the respondent said was based on the information she received. However she said that they built a house at Moshono kati and they had a shop at Mwanama. The appellant did not ask question in relation to the joint acquisition of the said house. Similarly, even the respondent did not ask questions on the allegation that she left with the money, above mentioned.

I find as did find the trial court that the house as well as the shop were acquired during the subsistence of their marriage. Of course, the respondent has relied on the domestic contribution based on the decision in the famous case of **Bi Hawa Mohamed v. Ally Sefu** [1993] TLR 32.

Reading from the record, both parties were at fault. The appellant committed infidelity as well as cruelty to the respondent whereas the respondent committed mismanagement of the money (loan Tshs 3.5 Million). There was no justifiable reasons for the court to place the house on the respondent alone.

It was held in the case of **Bibie Mauridi V Mohamed Ibrahimu** [1989]

TLR 162 where it was held inter alia that:-

- i) there must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets.*
- ii) Performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%*

I set aside that order, instead I direct that the said house should be sold. The appellant should receive 60% of its value while the respondent should get 40% of its value including the house items and utensils. As for the shop, they should divide 50% for each.

I revert to the issue of custody of children. The said children the oldest is aged 17 years while the youngest is aged 11 years. They are above 7 years. They can express their wishes, a fact which was not considered by the trial court. That omission notwithstanding, I find that it is for the best interest of the said children that they should not be disturbed. They should continue to stay with the respondent, their mother. The appellant has the liberty to visit them anytime at day time. Similarly, the children have similar rights to visit their father. The order for both parents to maintain the children in terms of food, clothing and education remain undisturbed.

Appeal on the division of matrimonial assets is allowed. No order for costs.



**M. G. MZUNA,**  
**JUDGE.**  
**10/09/2021**