IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

PC. MATRIMONIAL APPEAL NO. 11 OF 2021

EDWARD MBELE.....APPELLANT

VERSUS

MAGDALENA JACKLINE MBELE .....RESPONDENT

(Arising from the Judgment of Dodoma District Court-P.F.Mayumba, RM)

Dated 30th day of November, 2020
In
Matrimonial Appeal No. 29 of 2020

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JUDGMENT

12thMay&22ndJuly,2022

MDEMU, J:.

This is a second matrimonial appeal. In the Primary Court of Makole, the Respondent one Magdalena Jackline Mbele filed matrimonial suit for divorce and division of matrimonial assets against her husband one Edward Mbele. It was registered as Matrimonial Cause No. 41 of 2020. On 17th of August 2020, the Primary Court of Makole ordered divorce of the two couples and further divided matrimonial properties equally. The trial Court's decision did not please the Appellant particularly on the division of matrimonial assets. He appealed to the District Court of Dodoma vide Matrimonial Appeal No. 29 of 2020 where the decision of trial Court was

upheld. Aggrieved again. the Appellant has appealed to this Court on the following grounds: -

1. *That, the Honourable trial Magistrate erred in law and fact to order an equal distribution without considering the fact that the Appellant has greater contribution towards the acquisition of said matrimonial properties than the Respondent.*
2. *That, Honourable Magistrate erred in law and fact to order an equal distribution of matrimonial properties basing on the weak evidence from the Respondent on how two houses have 50% right of distribution.*

On 12th May 2022, the appeal was heard. Both parties appeared in person unrepresented. To support his appeal, the Appellant submitted that, the division of matrimonial properties by 50% was unjustified because **one**, he personally renovated the house by his own sources of money (terminal benefits). **Two**, the other house was incomplete when the Respondent left the matrimonial home. **Three**, the shop, commonly referred to as "frame ya duka" which he said was a matrimonial asset but was given to the Respondent. **Four,** the house which the Respondent constructed alone is in the plot they acquired during matrimonial life.

In reply, the Respondent submitted that she was married to the Appellant while he neither had a job nor houses in 1982. They were blessed with one issue. She argued that, the money used in renovation of houses was from the Appellant's terminal benefit after the Respondent left the matrimonial house. She added that, "frame ya duka" is not a matrimonial property as she constructed it through loan and that, the house she is living now belongs to her daughter.

I have considered the grounds of appeal, the records and submissions of both parties. The issue for determination is whether the division of matrimonial assets made by the primary Court was fair and just regard being taken to the requirement of Section 114 of the Law of Marriage Act which reads: -

> *114 (1) The Court shall have power when granting or subsequent to the grant of a decree of separation or divorce to the division between the parties of matrimonial 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 the proceeds of sale.*
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> *2. In exercising the power conferred by sub section (1), the Court shall have regard to-*

(a) the customs of the community to which the parties belong;

(b) the extent of the contribution made by each party in money, property or work towards the acquisition of the assets;

(c) any debts owing by either party which were contracted for their joint benefit;

(d) the needs of infant children, if any, of the marriage and subject to those considerations, shall incline towards equality of division.

The position of the law as set above is that, division of matrimonial assets follows the decree of separation or divorce. This has been done in the instant matrimonial dispute. Now, in the division, the law has set out some conditions or principles to be followed namely, **one** it must be established that the said property is actually a matrimonial asset. **Two,** the Court must have regard to the customs of the community. **Three,** the Court must be guided by the contribution made by each of the parties in the acquisition of matrimonial assets. **Four,** Courts must address its mind to the debts of the family, if any. **Five,** Courts must take into account the needs of the infant children if any. When it comes to placement of percentage in the distribution, the benchmark is on the extent of

contribution in acquisition of such matrimonial assets. In the case of **Yesse Mrisho vs. Sania Abdul, Civil Appeal No. 147 of 2016,** (unreported), the Court of Appeal observed the following on this assertion: -

> *"From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that, a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*

The case of **Bi. Hawa Mohamed v. Ally Seif [1983] T.L.R. 32** did not state that matrimonial assets be divided 50% each without establishing extent of contribution. All what it said is that, domestic services of a woman rendered to the family have to be taken into account as part of her contribution in the final assessment of division of matrimonial assets.

The issue now is whether there was evidence showing that the Respondent made a contribution giving her a right to be given 50% shares to the matrimonial assets. The Appellant is lamenting that, the 50%

shares of matrimonial assets given to the Respondent by the trial and first appellate Courts is huge since she didn't contribute towards their acquisition. In considering this ground, I am persuaded and guided by the principle enunciated by the Court of Appeal of Tanzania in the case of **Bi. Hawa Mohamed** (supra) and that of **Bibie Maulid vs. Mohamed Brahim [1989] T.L.R. 162** that, matrimonial properties need to be given wider interpretation to include domestic efforts. Essentially, in determining contribution towards acquisition of matrimonial assets, each case has to be decided in its own peculiar facts and circumstances.

In the circumstances of this case, couples lived together for thirty-six years and were blessed with one issue. In all those years of matrimonial life, the Respondent herein used all her efforts, energy, love and affection to protect and care for the Appellant and their child while trusting and believing that, whatever they were doing was for the welfare and future of the entire family. Furthermore, the Respondent testified that she was doing small businesses and the proceeds acrued was used in acquisition of their matrimonial assets. This, in my view, is evidence that the Respondent, apart from being a house wife, she was also engaged in some other businesses. Now, does this evidence towards the extent of contribution entitles her to equal distribution?

In the evidence, the Appellant sold part of "frame za duka". The transaction was during their matrimonial life. So far there is no evidence that the Respondent wasn't aware of the transaction. That means, the sold properties now do not fall within the meaning of matrimonial properties for purposes of distribution. Therefore, order of the court towards equal distribution should minus the sold properties ("frame za duka").

This Court being the second Appellate Court cannot generally interfere with the concurrent findings of the two lower Courts. It is trite law that, interference is permissive where it is satisfied that the two Courts below misapprehended the evidence in such a manner as to make its conclusions premised on incorrect interpretation of evidence. In the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H Jariwalla t/a Zanzibar Hotel [1980] T.L.R 31** the Court of Appeal stated that: -

> *"Where there are two concurrent findings of facts by two Courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that, there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure".*

On that account, I find no reasons to interfere with the concurrent findings of the two lower Courts taking into account the years' parties have stayed together and that, each one contributed to the acquisition of matrimonial properties.

I should finally comment on one thing; the Appellant introduced new facts on appeal that he used his terminal benefits in renovating and completion of their matrimonial house. This is bad in law. The Court of Appeal in the case of **Farida and Another vs. Domina Kagaruki, Civil Appeal No. 130 of 2006** (unreported) held that: -

> *"It is the general principle that Appellate Court cannot consider or deal with issues that were not canvasses pleaded or raised at lower Court. For that reason, they are dismissed."*

From the reasons set forth above, this appeal is hereby dismissed. Matrimonial assets be divided equally as ordered by the two courts below, save for the sold "frame za duka". I order each party to bear own costs.

It is so ordered.

Gerson J. Mdemu
JUDGE
22/07/2022

DATED at **DODOMA** this 22nd day of July 2022

Gerson J. Mdemu
JUDGE
22/07/2022