

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA

MATRIMONIAL APPEAL NO. 01 OF 2021

*(Originating from the Matrimonial Cause No. 10 of 2018 of the
District Court of Dodoma at Dodoma,)*

ALLY HASSAN MSANGI..... APPELLANT

VERSUS

MWAJUMA S. MBWANA RESPONDENT

JUDGEMENT

Date of last Order: 21/3/2022

Date of Judgment: 12/05/2022

Mambi, J.

The appellant (**ALLY HASSAN MSANGI**) in this appeal that relates to Matrimonial Cause was dissatisfied by both decision and orders of the District Court of Dodoma. The decision was an outcome of the division of matrimonial properties that resulted from the marriage that was irreparably

broken down. It is on the records from the trial court that the marriage between the parties has been broken down beyond repair. The District Court granted divorce on the marriage and ordered the division of matrimonial properties.

Aggrieved by the decision of the District Court, the appellant has now appealed to this court against the decision of the District Court on the following grounds;

1. That, the learned Trial Magistrate misdirected herself in fact and in law in failing to make proper analysis of both oral and documentary evidence which clearly proved that the Respondent failed to prove the marriage is broken down irreparably.
2. That, the learned Trial Magistrate misdirected herself in fact and in law for concluding by awarding the respondent herein the maintenance cost from 2014 to 2020 without any evidence of maintenance from the respondent.
3. That, the learned Trial Magistrate misdirected herself in fact and in law for concluding that the matrimonial house at Makulu be divided equally without considering the evidence given by the Appellant herein regarding the matrimonial properties in dispute.
4. That, the learned Trial Magistrate misdirected herself in fact and in law by relying on the weak, contradictory evidence by the Respondent herein and disregard the strong evidence given by the Appellant .

5. That, the learned Trial Magistrate misdirected herself in fact and in law for not observing the Rules of procedures in handling Matrimonial disputes resulting to denial of Appellant's Rights.

Before the matter was scheduled for hearing, parties prayed to argue by way of Written Submission and court ordered the parties to do so in line with agreed schedules.

The appellant who was represented by the learned counsel Joanitha Paul in her submission dropped the fifth ground of appeal and argued jointly the remaining grounds of appeal. In her submission Ms. Joanitha contended that the lower court in its decision misdirected itself in failing to analyse properly both oral and documentary evidence. The learned counsel contended that the respondent failed to prove that their marriage with the appellant was broken down beyond repair. She argued that it was the respondent who had left their matrimonial home and that the fact that the appellant changing from a normal muslim to extremist muslim was not a sufficient reason that threatened her life to cause the marriage to be broken down beyond repair as per section 107 (1) (a) and (b) of the Law of marriage Act Cap. 29 R.E 2019.

On the issue of maintenance cost awarded at the tune of Tshs. 2,000,000/= from 2014 to 2020 by the trial court, the learned counsel contended that it was not realistic as per the appellant income as he is a small intreprenuer, more so, that the appellant during this time was providing maintenance to his children. The appellant counsel went ahead in criticizing the decision of the lower court on the order of division of the

matrimonial home located at Makulu on equal basis without considering the extent of contribution of both parties. The learned counsel contended that the said plot of land was bought by the appellant in 2000 and the house was constructed in 2002 before marrying the respondent. Ms. Joanitha urged this court to refer and consider S. 114(2) (b) and the decision in **Kibibi Yusuph Makame V Nkerenga Horera Rashidi**, Civil Appeal No. 15/2019. The counsel further submitted that the lower court was wrong in its decision giving sole ownership of a piece of land of one acre(1acre) to the respondent since when the respondent left their matrimonial home she left with all other matrimonial properties.

In response, the respondent who was represented by the learned counsel Mr. Kidando John contended that the appellant conceded to have changed from a normal muslim to an extremist muslim that there are ample evidence that having changed he was threatening to kill the respondent. Mr. Kidando contended that a threat to kill is a form of cruelty falling in the ambit of section 107(2) (c) of the Law of marriage Act, Cap 29 R.E 2019.

It was his further submission that there was ample evidence proving that the parties marriage had been broken down beyond repair. The counsel referred this court to the certificate from the marriage reconciliation board (KHULU Certificate) which is exhibit P2 and P3. Finalizing, on the maintenance order and division of matrimonial properties order, the respondent counsel argued that the lower court decided in line with the evidence adduced by both parties.

I have carefully gone through the submission from both parties including the records such as proceedings, judgment and other records. In my considered view this appeal forms almost two issues that are interrelated as follows:-

- i. Whether the District Court erred in its decision on matrimonial divisions or not.
- ii. Whether the order on division of matrimonial assets and other orders made by trial court were proper or justifiable.

Having summarized the submission by both parties, I will now collectively address two issues namely whether the trial magistrate erred in distributing equally the matrimonial properties to the parties and whether the trial magistrate properly complied with the provisions of the Law of Marriage Act in ordering the distribution of the matrimonial properties. This brings me in determining as to whether the matrimonial assets were distributed in accordance with the law. I have gone through the judgment of the District Court and noted that the trial Magistrate was somehow moved by sympathy on the side of the respondent and made an order for equal distribution of the matrimonial house without considering the extent contribution of each party as required by the law. In my view the court cannot be moved by sympathy instead, it should focus on the requirements of the law and the evidence of both parties. The court in **ELIZABETH STEPHEN AND ANOTHER V. ATTORNEY GENERAL**, [2006] TLR PAGE 404 which held that:

"if you may pose and state this, courts will rarely, and unique situation act on sympathy, usually in matters where the court is required to use its direction in arriving at a decision. Courts will always administer the law, even if heavens fall".

I have gone through the judgment of the trial Magistrate and noted that the District Court properly addressed the issues except the division of the matrimonial house, the plot of half an acre (surveyed) at Makulu and maintenance of the children. Indeed the decision of the trial court magistrate on the division of matrimonial properties was not based on the extent of contribution for each spouse as per such 114(2) (b) of the Law of Marriage Act.

I wish to refer the relevant provision of the law that is Section 114 (1) and (2) (b) of the Law of Marriage Act, Cap 29 [R.E. 2019] which is very clear that the division the division of matrimonial properties should be based on the extent of contribution of each party in the marriage. It provides as follows:-

*(1) 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 the proceeds of sale.*

*(2) In exercising the power conferred by subsection (1), the court shall have regard– (a) to the customs of the community to which the parties belong; (b) to the **extent of the contributions** made by each party in money, property or work towards the acquiring of the assets; (c) to any debts owing by either party which were contracted for their joint benefit; and (d) to the needs of the infant children, if any, of the marriage,*

Reading between the lines on the above paragraph of the Section, it is clear that before ordering the division of the matrimonial assets the court must foresee the extent of the contributions made by each party in money, property or work towards the acquiring of the assets". The word "**Shall**" under the Law of Interpretation Act, Cap. 1 [R.E. 2019] implies mandatory and not optional. I am of the settled view that the trial court didn't properly exercise its power conferred under Section 114(2) (b) of the Law of Marriage Act. It is clear from the evidence adduced by the appellant that the appellant had already acquired some properties before he started cohabitating with the respondent it is obvious that he had more share than his partner. It is clear also from the evidence that the appellant was a business man and the respondent was his wife staying at home, executing her wifely services. However, there is no dispute that the respondent being a house wife has some contribution on the acquisition of the matrimonial assets but that should not plainly mean that she contributed fifty percent (50%) without prove. The respondent failed to

prove the extent of her contribution in the obtaining of the matrimonial house which comprises 8 eight rooms and the plot at Makulu. It is a cardinal principle of the law that in civil cases, the burden of proof lies on the plaintiff and the standard of proof is on the balance of probabilities. This simply means that he who alleges must prove as indicated under section 112 of the of Evidence Act, Cap 6 [R.E2019], which provides that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person".

The court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003) HC DSM***, observed that:-

"The burden of proof in a suit proceeding lies on the person who would fail if no evidence at all were given on either side".

It is trite law that any court dealing with matrimonial cause is empowered to grant a decree of separation or divorce and order the division between the parties of any assets acquired by them during the marriage by their joint efforts if there is evidence to prove **contribution** of each party. Reference can also be made to the decision of the court in **SAMWEL MOYO Vs. MARY CASSIAN KAYOMBO [1999] TLR 197**, where it was held that:

*"...its apparent that the assets envisaged **there at must firstly be matrimonial assets, secondly must have***

*been acquired by them during the marriage and thirdly they must have been acquired by their **joint efforts**. The three conditions must exist before Court's power to divide matrimonial or family assets under s.114 (1) of the Law of Marriage Act is involved..."*

The law under Section 114(2) (b) goes further by requiring the court in exercising its power under the law to have regard to **the extent of the contributions** made by each party in money, property or work towards the acquiring of the assets. I am of the settled view that the trial court did not properly exercise its power conferred under Section 114(2) (b) of the Law of Marriage Act. **GABRIEL NIMRODI KURWIJILA Vs THERESIA HASSAN MALONGO, Civil Appeal No 102 of 2018** (Unreported) where it was held that;

"...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..."

I am of the considered view that the evidence of the parties were not properly considered and the division was not necessarily to be equally but the extent of contribution renders the court to divide on the joint efforts. In this regard, I find that the division was not properly made by the trial court and this court has power to make changes on the orders made by the trial court.

With regard to the assessment of maintenance of the child who is under the custodian of the respondent, I wish to highlight that the amount of money to be paid as maintenance of the children depends on the income of the husband. This means that in determining the amount of maintenance, the source of income of the husband or respondent is normally ascertained in line with the opinion from the social welfare. In considering the amount of maintenance, the Court is also required to consider the other factors such as if the party in which the order is made has other children under his care. See; **JEROME CHILUMBA S. AMINA ADAMU [1989] TLR 117** at page 119 where the court held that:

"where the equality of maintenance is required to all children and dependents of the sued person's income for sake of ability to pay".

In this regard an order for the amount to be paid for maintenance of children depends on the income of the parties and the circumstance of the case.

In the end, since the appellant was the businessman doing business which resulted into the acquisition of the very matrimonial properties, he is entitled to higher share that is sixty percent (60%) than his wife.

It is also on the record that the appellant had some more contribution as compared to his wife. However, in the interest of justice and since the respondent was the legal wife of the appellant, I find that it is more prudent and just that she (the respondent) is entitled to forty percent (40%) and the appellant is entitled to sixty (60%) of the

matrimonial assets since there is no evidence to prove that there was equal joint efforts among the spouses. I thus order the distribution of the matrimonial assets as follows:



- a) The appellant shall have 60% while the respondent shall be entitled to 40% on the house situated at Makulu Mahande Street within Dodoma. This means that the house will be sold and proceeds of the sale be distributed as I ordered above.
- b) The piece of the land located at Makulu shall be under the custody of the respondent as ordered by the trial court.

This court further order as follows;

- a) payment of maintenance at the tune of 150,000 per month to those issues until the attainment of age of majority.
- b) custody of children to the respondent with appellant having right to access children to the parties arrangement basing on the best interest of the children
- c) The appellant to pay 2,000,000/= to the respondent as part of children maintenance costs incurred by the respondent from 2014 as ordered by the trial court
- d) Appellant to provide medical expenses and payment of school fees at the affordable schools until the children complete their studies



With regard to the status of marriage between the spouses, I have no reason to fault the decision reached by the trial court and the order of the trial District court is upheld.

For the foregoing reasons, it is my considered firm view that all the matrimonial properties listed above will be distributed or divided basing on the above order. In the final event this appeal is meritorious and it is accordingly partly allowed. The decision of the District Magistrate Court is set aside save for other matters as I ordered above. Given the circumstance of this case, that the parties are relate, I make no order as to costs.



A. J. MAMBI
JUDGE
12/05/2022

Judgment delivered in Chambers this 12th day of May, 2022 in presence of both parties.



A. J. MAMBI
JUDGE
12/05/2022

Right of Appeal Explained.



A handwritten signature in blue ink, appearing to be "A. J. Mambi", is written over the seal and extends to the right.

A. J. MAMBI

JUDGE

12/05/2022