

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CIVIL APPEAL NO. 21 OF 2022

(Arising from the Judgment of the District Court of Kahama in Matrimonial Appeal no. 21 of 2021 and originating from Lunguya Primary court in matrimonial Case no. 38 of 2021)

MARIA SAFARI.....APPELLANT

VERSUS

DOTTO MALISELI.....RESPONDENT

JUDGMENT

11th October, 2022

A. MATUMA, J.

The appellant sued the respondent at Lunguya Primary Court for divorce and division of matrimonial assets.

After a full trial, the trial Court was satisfied that the marriage between the parties was irreparably broken down. It proceeded to dissolve it by granting a decree for divorce. It subsequently divided matrimonial assets in the following manner;

The respondent who was the complainant thereat was decreed to get, Nyumba Moja at Bugarama Centre, one Sola, one Tv, Two Wooden table,

two Mattresses, one Bed, one satellite dish, one sofa, turubai moja, big sufuria and Tshs. 1,000,000/=

The Appellant was decreed to get; nyumba moja at Igalagalila, one sola, one motorcycle boxer, one Tv, one sabulfer, two Wooden table, one mattress, one bed, Chuma cha umeme, one satellite dish, one sofa, one turubai, one big sufuria, meza ya kioo, Tshs. 1,000,000/=

The trial Court further ordered equal distribution of house utensils. The selling of the so called boma, Kiwanja and Ng'ombe and division of its proceeds at 60% to the Appellant and 40% to the Respondent. Such decision aggrieved the appellant and thus appealed to the District Court against the dissolution of the marriage and division of matrimonial assets.

About the dissolution of their marriage, the appellant contended at the 1st appellate Court that their marriage was not broken down irreparably. There was still a hope to resolve the dispute throwing blames to the respondent that she used to travel severally to unknown places. About the Distribution of matrimonial assets he contended that most of those which the respondent mentioned at the trial are not in existence. He acknowledged existence of only two houses, one piece of Land at Bugalama, one Motorcycle and the home utensils.

The learned appellate magistrate was satisfied that indeed the marriage between the parties was broken down beyond repair and thus determined that the decree for divorce was properly issued by the trial court. It however varied the distribution of matrimonial assets on the ground that some of



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them were not established, and there was no evidence leading to the extent of contribution. It thus decreed to the respondent by then the appellant one house at Bugarama Center, a plot at Bugarama Center, a Tv set and its Satellite Dish which he uses for his business of a football arena.

The appellant who by then was the respondent was decreed to get one house at Igalalila, one Tv set located at home, one mattress, the motorcycle and one table. The home utensils were ordered to be divided equally between the parties.

The appellant was aggrieved hence this appeal with three grounds of appeal but all relating to the distribution of matrimonial assets. In the circumstances, the dissolution of marriage, custody and maintenance of the four issues of marriage is not in dispute. Three elder children are residing with the respondent while the last born is with appellant. I will thus determine the grievances tabled before me in relation to the distribution of matrimonial assets.

At the hearing of this appeal both parties were present in person. The Appellant submitted the grounds of appeal collectively arguing for an order of equal distribution on the ground that they jointly acquired them. She repeated mentioning the properties to be distributed. The respondent in reply contended that it would not be fair to order equal distribution because it was him who acquired the properties and that the appellant was a mere house wife without any job for acquisition of the properties. He further submitted that he acquired the properties when he was working in the mineral company and buying the properties through his salary.

He further submitted that some of the named properties are not in existence such as Tshs. 2,000,000/= allegedly contributed by the appellant in the acquisition of the properties. He disputed any such contribution. He further stated that the alleged cow was just a calf which the appellant herself sold at Tshs. 80,000/= seven years ago. She later bought a sack of maize for food at home.

He further submitted that the motorcycle is mortgaged to one Mashaka at Tshs. 500,000/= for the money he borrowed to repay the loan which the appellant had borrowed from her **Vikoba group** and disappeared without repaying back. He thus mortgaged the motorcycle to rescue home properties which were about to be forfeited as he stood as guarantor to the said loan.

He also argued that they have only one TV at their home as the other TV at the Center in the football arena belongs to Bundala Boniphace who bought it on credit and still not yet paid fully the purchase price to Mobison company. Also, that the solar is part of the TV because those TV are solar TV sets and are sold as complete set with their respective Solar. He disputed to have two satellite Dishes stating that they have only one make azam and the one at home is using cable. He finally prayed the appeal to be dismissed.

In rejoinder the appellant submitted that the TV at center in the football arena, is not the property of Bundala but they bought it in the names of Bundala. She conceded that the TV at that football arena is still indebted as they are yet to finish paying for it.

She admitted the loan at the Vikoba but stated that it was not her who took it but the respondent. She expressed unawareness of whether there are really two satellite dishes but contended that she once saw them fixed at the football arena. For determination of this appeal there are only two questions for determinations;

- (i) Whether the properties listed by the appellant are really in existence as a whole.
- (ii) Whether the circumstance and evidence on record dictates equal distribution between the parties, if not then how should the distribution be.

Starting with the first issue, it is without doubt that the appellant listed a lot of properties some of which are not in existence and or not subject to distribution. Thus for instance she has admitted that the cow was sold for years ago, the motorcycle is mortgaged for the loan be it was her who took the loan or it was her divorced husband the respondent. In the circumstances the motorcycle is not free from encumbrances, she is not sure of the presence of two satellite dishes. She stated that she merely seen them affixed to the football arena which is operated by the respondent. She admitted categorically at the hearing of this appeal that she once saw the two dishes at that place and if there is only one, she cannot tell. She is thus not sure of the presence of two dishes as claimed at the trial. And even if it would have been proved that the two dishes are in fact existing, she does not know how one of them was acquired and by who. Her claims is merely because it is the respondent who is running the football arena.

In that respect, a cow, a TV and its accessories i.e solar at the football arena, the motorcycle and one un-existing satellite dish were wrongly distributed by both the trial court and the 1st appellate court. Had the two courts below considered thoroughly the evidence on record, they would have abstained from making distribution of those properties. The cow and one satellite dish are not in existence while the TV and its solar at the football arena and the motorcycle are not free from encumbrances. If the TV was bought by the parties in the name of a third part as contended by the appellant, the same is yet to be their property. It belongs to Mobison Company and they are yet to repay for it. It is uncertain whether they will finish paying for it to make the same their own property or it will be taken back by the credit company (Mobison) and if it is the property of Bundala Boniphace then it was not a matrimonial asset. There was no clearance of such TV and it solar as being a matrimonial property. Likewise the motorcycle which both parties agree that it is mortgaged. I therefore set aside the order making distribution to these properties.

In respect of the second issue on whether an equal distribution is called for, I find it that the law is settled as far as distribution of matrimonial assets is concerned.

The learned first appellate magistrate Hon. E.P. Kente properly determined that in distribution of matrimonial properties, the evidence establishing the extent of contribution is of utmost importance. That is indeed the requirements of the law and authorities he cited in his judgement that of ***Gabriel Nimroad Kurwjila versus Theresia Malongo, Civil Appeal no.***

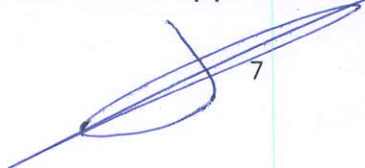
102 of 2018 (CAT) and Sophia Mgalla Versus Alolph Mgalla, Civil Appeal no. 33 of 2005.

In this case the parties did not properly lead evidence towards their extent of contribution but at least they are in agreement that the appellant was a house wife and the respondent was employed by the mineral company. There is no evidence contradicting the fact that the properties were acquired through the earring income by the respondent. In that regard the contribution of the appellant towards acquisition of such properties is domestic works as she personally contended at the hearing of this appeal.

"Yes, it is true I was a house wife but I used to do home activities,"

In the circumstances, I agree with the respondent that an equal distribution would not be fair and just. Such distribution would not be in accordance to the law but in accordance to activism (Ugawaji wa kiharakati). I therefore order the distribution of the existing properties as ordered by the 1st appellate court serve for those I have determined herein above that they are not in existence and those which are not free from encumbrances.

To put it certain, the appellant Mariam Safari shall take a house at Igalagalilo and its adjacent farm which they used to cultivate, one mattress, one wooden table, one bed and half of home appliances/utensils. The respondent shall take a house at Bugarama Center and a plot thereat which he is using as a football arena, one Azam satellite dish, two mattresses, one bed, two tables and half of home appliances utensils.



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Whoever interested with the motorcycle or TV and its solar at the football arena should relieve it from encumbrances herein above named. If it would be the appellant to relieve the same, she would be required to refund the Respondent all the amount he has already incurred as part payment to the TV and its accessories, and in respect of the motorcycle she would after relieving it pay the Respondent 30% of the value of the said motorcycle.

The TV and its solar at home be evaluated its current value which shall be divided at 70% to the respondent and 30% to the appellant. Either party may pay the requisite share to the other and take away such TV and its solar. Serve for the alterations and adjustment in the distribution made herein above this appeal stands dismissed in its entirety. Rights of appeal is hereby explained to the parties subject to the relevant guiding laws for appeals to the Court of Appeal of Tanzania.

It is so ordered.



A. MATUMA

JUDGE

11/11/2022