

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**  
**AT SHINYANGA**

**PC. CIVIL APPEAL NO. 15 OF 2022**

*(Arising from Matrimonial Appeal No. 3 of 2021 of Kishapu District Court dated 03/03/2022, Original from the Judgment in Matrimonial case No. 16/2021 of Kishapu Primary Court dated 03/11/2021)*

**SATO SHINGWA.....APPELLANT**

**VERSUS**

**EDWARD MAFUNGWA.....RESPONDENT**

**JUDGMENT**

*29<sup>th</sup> September & 10<sup>th</sup> October 2022*

**A. MATUMA, J.**

The parties were married couples since 1996 and blessed with several issues of their customary marriage.

In the due course of their marriage some misunderstandings arose between them in which the respondent alleged of domestic violence against him by his wife the Appellant.

He alleged that his wife the appellant denied and refused him conjugal rights and used to threaten killing him with weapons which necessitated them to leave apart though he used to visit his home everyday to inspect the welfare of his family and his properties including cows.

They tried to resolve their disputes through clan meetings, village authorities and to the social welfare authority but in vain.

The respondent decided to petition for divorce, distribution of matrimonial assets and custody of children.

The trial Court was satisfied that the marriage between the parties has broken down irreparably and therefore granted a decree for divorce, distributed the matrimonial properties and ordered for the custody of children.

The matrimonial properties distributed were 34 cows each got 17 cows, two house each got one house, 1200 cement bricks each got 600 bricks.

One tembe house was left undistributed for the use of the whole family and there was one cattle hoe commonly known as *plau or jembe la ng'ombe* which was given to the respondent.

There were other 15 cows which the parties disputed as to whether they formed part of matrimonial assets. The appellant alleged that they formed part of matrimonial properties while the respondent alleged that they were his own properties which he was given by his father way back in 2002 when his father decided to distribute his cows and farms to his children.

The trial Court was satisfied by the evidence of the respondent in respect of those cows as he got supported by his father SM5 and exhibit P1 the distribution paper dated 12/8/2002 before clan chairman showing how Mafungwa Kasindi distributed his cows and farms to his children including the Respondent herein.

The appellant was dissatisfied with the findings of the trial Court particularly the denial to distribute the 15 cows and 20 acres of land as part of matrimonial properties.

After the hearing of the appeal the District Court found that the appeal had no merit hence dismissed it maintaining the trial court decision serve for the tembe house which was not distributed. The District court distributed it whereas it ordered the Appellant to get 30% and the Respondent 70%.

The appellant is further aggrieved hence this appeal with two grounds namely;

- i) That the 1<sup>st</sup> Appellate Court erred in law and in fact by failing to consider that the 15 heads of cattle was among of the matrimonial properties and the exhibit P1 was recently fabricated with the intention of depriving the Appellant's rights.
- ii) That the 1<sup>st</sup> Appellate court erred in law and in fact by disregarding the evidence adduced by the Appellant at the trial Court that the Respondent is the one who abandoned his family for many years and decided to marry another wife.

At the hearing of this appeal, the appellant was present in person and had the legal service of Mr. Geoffrey Tuli learned advocate. The respondent was present in person unrepresented.

The learned advocate for the appellant submitting on the first ground of appeal argued that the district Court erred to have not found that the fifteen cows were matrimonial properties and that exhibit P1 was manufactured for the purposes of denying the appellant a share to the 15 cows which are matrimonial properties.

To justify that the 15 cows were matrimonial properties he argued that the respondent's evidence and that of his father SM5 contradicted as to when those cows came into the possession of the respondent because while the respondent testified that it was in 2002, his father

stated that it was way back before the respondent married the appellant.

Responding on this ground, the respondent submitted that he was given those cows by his father who came to support him as SM5 and exhibit P1.

In the second ground Mr. Geoffrey Tuli learned advocate argued that the district court erred for failure to appreciate the evidence of the appellant that the respondent deserted his family and went to marry another wife.

The respondent replying to this ground submitted that it is not true that he deserted his family. He submitted that he is maintaining it and all of his properties are settled there only that he lacks conjugal rights for having been denied the same by the appellant.

Having heard the parties for and against the grounds of appeal, I will start determining the second ground.

I find that such ground even if it would be true that the respondent deserted his family would serve no useful purpose at this time because it would only add weight to the cause for divorce which was in fact granted by the trial court but the appellant did not challenge the same neither in the first appellate Court or in this Court. There is no further remedy for desertion other than a divorce decree which was in fact granted to the parties.

Even though, I am far away to purchase the arguments of the learned advocate that the respondent deserted his family. There is no evidence on record to support that allegation. The appellant apart from stating in evidence that the respondent; **"aliondoka katika mji wake"** did not lament any desertion by the respondent. She did not claim that

the respondent refused to maintain his family and or that it was her who maintained the family. She did not give sufficient explanation to warrant the interpretation that the respondent deserted his family.

It is on record from the evidence of the appellant herself that on 12/09/2021 the respondent was at home counting for the cows and found one missing when he asked her the whereabouts of that cow she referred him to the respondent's brother; *"alikuta ng'ombe mmoja hayupo, aliponiuliza nilimwambia amuulize kaka yake aliyeongea naye"*.

That appellant's evidence supports the evidence of the respondent that he used to attend the welfare of his family every day and inspect the cows. Their cause of living apart is well known. It is on record that the appellant used to be furious holding weapons against the respondent threatening to kill him. To avoid problems, the respondent took refuge somewhere but that did not cause him to abandon his family. He frequently visited and attending it. That is why he did not take anything with him from his family but used to supervise the welfare of his family including inspecting their cows every day. On the material day 12/09/2021 the respondent indisputably found one cow missing. He asked his wife now the appellant but she refused to give a straight answer while she was the one in custody of the same.

In the circumstances, the appellant was not decent enough to her divorced husband now the respondent. She is the source of her husband running away of the family to avoid problems and necessitated him to seek for divorce. The Appellant is thus enjoying staying alone in the family compound pretending to have no problems with her husband and ready to continue living together but when they get that opportunity she turn into mistreating the respondent.

Under the doctrine of ***constructive desertion*** as was stated in the case of ***Mariamum Tumbo versus Harold Tumbo (1983) TLR 293***, it is the Appellant the deserter for her indecent acts, mental and physical cruelty against her husband which necessitated him to run away.

The appellant on her side did not allege any cruelty or mistreatment by the respondent against her. She did not allege anything bad against the respondent.

I recommend the respondent for having not decided to revenge and or fight the appellant as many men used to do which would turn into bigger and serious problems including criminal outcomes.

Even though, the complaint that the respondent had deserted his family was not brought to the attention of the first appellate Court. It was not among the grounds of appeal. It is thus brought before this court as an afterthought. I accordingly dismiss it.

Back to the first ground of appeal, I find that the concurrent findings of the two courts below to the effect that the fifteen cows are the properties solely owned by the respondent to be sound and well founded which should not be disturbed.

I have several grounds to reach on that decision. First of all the evidence on record shows that the respondent is more credible than the appellant. He is the one who petitioned for divorce and mentioned all matrimonial properties including cows to the effect that they possessed 34 cows as joint matrimonial properties and he owned 15 cows which he was given by his father.

This evidence was not challenge by any question during cross examination. The respondent with her seven questions during cross examination did not challenge the evidence of the respondent that

fifteen out of the 49 cows at their compound were the respondent's own properties given to him by his father.

Then came SM5 Mafungwa Kashinje (70 years old) the father of the respondent. His evidence was centered on the 15 cows. He tendered in evidence exhibit P1 which is the document through which he distributed his cows and farms to all his children in the presence of the clan chairman. The document is stamped by the stamp of **Mwenyekiti wa ukoo wa Bagolo**. The said document exhibit P1 is very clear that the Respondent's father on the 12/08/2002 decided to distribute his properties to his children. He gave his male children farms and 15 cows each while his female children were each given only 8 cows without farms.

His evidence went unchallenged by the appellant. When the Court gave her a chance to cross examine her father in law SM5 she clearly indicated to had no question against his evidence and thus the trial Court recorded that there was no questions for cross examination (Hakuna hoja zozote).

It is a well settled principle that failure to cross examine a certain fact implies admission of such fact and the party who admitted the fact would not be allowed to challenge it later. That for instance in the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), the Court of Appeal held as follows:

*"As a matter of principle, a party who fail to cross examine a witness on a certain matter is deemed to have accepted that matter and Will be estopped from asking the trial court to disbelieve what the witness said."*

It is as well the principle of the law that every witness is entitled to credence and have his evidence accepted unless there is good and cogent reasons for not believing him. See; ***Goodluck Kyando versus the Republic (2006) TLR 363***. In the instant matter we have no any reason to disbelieve the evidence of the respondent and that of SM5 as far as the 15 cows is concerned. As I have said herein above their respective evidences on that account went unchallenged anyhow.

Not only that but also during her defence testimony as SU1, the appellant did not state anything to challenge the evidence of the respondent and his father in respect of those 15 cows.

In that respect, the two courts below were justified to find out that the 15 cows belonged to the respondent as his own properties which are not liable for distribution as matrimonial properties.

I find the argument of Mr. Geoffrey Tuli learned advocate that exhibit P1 was a manufactured document as speculative views which do not have any support from the records at hand. It is the advocate who challenges the respondent's evidence relating to the 15 cows without any back up evidence from the records of the case itself.

The contradiction as to when exactly the respondent was given the cows is immaterial in the circumstances of this case when the appellant did not dispute the evidence of the respondent and his father in respect of those cows. Even though such contradiction was technically resolved out by the evidence on record itself.

The respondent testified that he married the appellant in 1996. When his father testified as to when he gave the cows to the respondent, he merely stated that it was before the respondent to have started to live with the appellant;



*"Mdai nilimpatia ng'ombe hao yeye kabla hajaanza kuishi na mke wake anayedaiana naye."*

He then tendered in evidence exhibit P1 the document which shows that he distributed his cows to his children on 12/08/2002. In that respect to SM5 by 12/08/2002 the respondent and the appellant had not started to live together as a husband and wife no matter whether they had already started love affairs. The respondent during the hearing of this appeal stated that he do not recall when exactly he married the appellant. When I perused the original record of the trial primary court I noted that the year 1996 is annotated which shows that even during trial the year these parties married was not certain.

SM5 was not cross examined as to whether he knew when exactly the respondent married the appellant. Neither the parties testified that such old man participated in their marriage ceremony and knew when the two married.

In his evidence the respondent stated that when he married the appellant he paid dowry of twenty cows. He did not say whether his father participated to the said marriage. The appellant likewise did not give any evidence associating SM5 to their marriage. In law the marriage is a contract of a man and a woman to live together for their life time. In that respect the marriage can be contracted in the absence of the parents of the couple.

In this case the respondent's father cannot be faulted to have known that by 12/8/2002 the parties herein had not started to live as husband and wife. Ruling to the contrary would be nothing but speculating.

I therefore find that this ground as well is devoid of any merit.

I accordingly dismiss this appeal without an orders as to costs.

Whoever aggrieved has the right to further appeal to the Court of appeal.



It is so ordered.

A handwritten signature in blue ink, appearing to read "A. MATUMA", is written over the printed name.

**A. MATUMA**

**JUDGE**

**10/10/2022**