**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 212 OF 2020**

*(Arising from decision in Civil Appeal No. 89/2017 of the District Court of Ilala at Samora Avenue by Hon. F. Mujaya , RM, delivered on 13th August, 2018; Origin Matrimonial Cause No. 113 of 2017 Ukonga Primary Court)*

**ASIA JAMAL..... APPELLANT**

**VERSUS**

**AIDAL ATHUMAN.....RESPONDENT**

# EX-PARTE JUDGMENT

*Date of Last Order; 02/7/2021*

*Date of Judgment; 08/03/2022*

**S.M. KULITA, J;**

This is the second appeal by Asia Jamal, the appellant, who was aggrieved with the court's findings in Civil Appeal No. 89 of 2017 Ilala District Court at Samora Avenue. She unsuccessfully appealed at that District Court against the decision of Ukonga Primary Court in Matrimonial Cause No. 113 of 2017. In that original case, the appellant alleged that she cohabitated with the respondent as husband and wife from 2003 to 2017. That, in the

said relationship they were blessed with two issues, the elder one being 5 years and the younger is 3 years old at a time the suit was filed at Ukonga Primary Court. However, in weirdly manner their names were never disclosed. That, it was alleged that the two also acquired several properties including two houses, one motor vehicle and house holdings.

The appellant alleged further that, their relationship went on well until 2016 when the respondent started to neglect issuance of maintenance to both the appellant and her children, something which lead her to sickness (TB). The appellant had testified that the respondent instead of taking care of her, he was segregating her to the extent of shifting from their bedroom and condemned her to leave the house. It appears their relationship went to sour due to their endless misunderstandings despite some few efforts to settle the disputes between them through amicable means by involving relatives. The appellant alleged to have been evicted from their matrimonial house and the respondent got married to another woman. Feeling that she could not stomach the bitter any longer, the appellant herein petitioned for reliefs of divorce, custody, maintenance of the issues and division of matrimonial properties.

After completion of hearing, the trial Court deliberated that there was neither marriage nor presumption of marriage between the

parties and the appellant who left her matrimonial home was ordered to return back and live with the respondent as well the respondent was ordered to provide maintenance to the appellant and the issues.

Aggrieved, the appellant unsuccessfully appealed to the District Court where she had raised the following grounds;

1. *That the magistrate Court erred in law and fact by failure to consider the evidence adduced by the appellant that there were marriage between the appellant and the respondent.*
2. *That, the trial Magistrate Court erred in law and fact by failure to consider the evidence adduced by the appellant which clearly disclosed that the respondent did not provide maintenance to the appellant and children.*
3. *That the trial magistrate Court erred in law and fact by holding that the appellant was not evicted by the respondent in the matrimonial house.*
4. *That the trial magistrate Court erred in law and fact by failure to consider the evidence and reasons adduced by the appellant that the marriage has broken down irreparably hence failure to grant divorce judgment and decree.*

5. *That the trial magistrate erred in law and fact by holding that the appellant should proceed to stay in the matrimonial house and at the same time holding that there is no evidence that the parties were married.*

After hearing the parties, the first appellate Court did uphold the trial Court's decision and dismiss all the grounds of appeal something which resulted to this instantaneously appeal. In her petition of appeal before this Court, the appellant has preferred two (2) points of grievances namely;

1. *That the District Court Magistrate erred both in law and fact by failing to consider the evidence adduced by the appellant on the issue of presumption of marriage.*
2. *That the District Court Magistrate erred both in law and fact by failing to consider the contribution of the appellant towards the acquisition of the matrimonial property.*

When the matter stood for appeal determination, the appellant was assisted under the *pro bono* panacea by Tanzania Women Lawyers Association (TAWLA) through Lightness Raimos, Learned Advocate whilst Mr. Rutagatina, Learned Advocate appeared to represent the respondent. In preposterous manner neither the respondent nor his advocate appeared in Court despite them being aware on the existence of this appeal. For that reason, the Court ordered the matter to proceed *ex parte*

and granted leave for the appellant to submit in support of this appeal by way of written submission. The appellant filed her submission respectively.

To support the first ground of appeal; it was submitted that the two Courts below had failed not to hold that there was a presumption of marriage between the parties. According to the appellant's counsel, Lightness Raimos, there was clear evidence that the two had lived together for more than two years which is a minimum period for the unmarried couple to be recognised as husband and wife under the Presumption of Marriage. She said that the parties had acquired a reputation of being husband and wife, hence it was contended that the two were shielded under the presumption of marriage.

It was further submitted that, the respondent had not contested that the two did live together since 2003. As well, the two were blessed with two issues. To expound more, it was the appellant side contention that even a witness who was paraded by the respondent at the trial, one Revocatus Mombeki (SM2), did testify that he knows the parties, that they were living together since 2003 and that they have been living together with their children. The Counsel submitted that for that reason, it was steadily argued by the Appellant during trial that ever since the two lived together for more than 2 years, and that whenever

they had squabbles, the two tried to settle their disputes so as to save their relationship. She said that they were considered as married couples. To bolster their proposition, the Court was invited to refer the provisions of ***section 160 (1) of the Law of Marriage Act***, **[Cap 29 RE 2019]** and the case of ***John Kirakwe vs. Idd Siko*** [1989] TLR 215.

In respect of the second ground of appeal, it was vehemently submitted by the appellant's counsel that when the presumption of marriage is proved, the woman acquires the status of a legal wife and she can petition for the custody of children and herself, division of matrimonial properties acquired by the parties during their relationship and that the Court has power to order separation and any other relief. To cement on such contention, she cited the provision of ***section 160 (2) of the Law of Marriage Act*** *(Supra).*

It was further accentuated by the Appellant's Counsel that the appellant being a legal wife, she was entitled to all rights as protected under section 160 (2) of the Law of Marriage Act, just like a married couple which includes division of the properties so acquired during cohabitation basing on her contribution. To support the same, she cited the case of ***Bi Hawa Mohamed vs. Ally Seif*** (1983) TLR 32 together with ***section 114 (1) of the Law of Marriage Act*** *(Supra).* The appellant concluded by

praying the appeal to be allowed and the decision of the first appellate court be quashed and set aside.

I have dispassionately considered the grounds of appeal in the light of the submission by the appellant. Having so done, the issue for determination that comes out of the two grounds is ***Whether the decision of the First appellate Court was faulty.***

I have painstakingly examined the evidence on records and the submission of the appellant. Therefrom, I am convinced to enlighten the following;

**One,** the first appellate court had upheld the decision of the trial court which was to the effect that the appellant and respondent were not living under presumption of marriage due to the fact that there was no proof given by the appellant that the two had acquired the reputation of being husband and wife from the society. With all due respect to the learned trial magistrates, this was an erroneous approach as apart from the appellant herself, the records of the trial court reveal that Appellant's witness one Revocatus Mombeki (SU2) who is a member of the society from a place where the two were living testified that, in some occasions, SU2 himself as well as relatives from both parties, attended at Social Welfare Office and tried to reconcile the

parties when they had disputes, just like how other couples are always assisted.

The records also transpire that the respondent while testifying he always used to refer the Appellant as his wife, and the witnesses who testified in the matter had been referring the parties herein as couples. This fact being undisputed cannot be left blindly. I believe this was enough to prove the reputation so acquired by the parties of being husband and wife. My learned sister Hon. Rose Ebrahim J, when confronted with a similar circumstance in ***Ladislaus Mutashubirwa Vs. Edna Josephat Ruganisa***, PC. Civil Appeal No. 144 of 2020, HCT at DSM (Unreported), had this to say at **page 13-14** which I am embraced with and I prefer to subscribe;

> *"The trial court held that the two were not under presumption of marriage due to the fact that there was no proof given by the petitioner (herein the respondent) that the two had acquired the reputation of being husband and wife. With all due respect to the learned trial magistrate, this was an erroneous approach since the records reveals that respondent's witness (PW3) who was the respondent's mother testified that the appellant went to introduce himself at the respondent's family,* ***in number of occasion she had tried to reconcile them whenever***

***they had disputes just like how couples are assisted***, *she advised them to go to court after she had failed to resort their squabbles and* ***whenever she was testifying she referred the appellant as a husband to her daughter and respondent as a wife of the appellant***. ***This was to be considered as proof and not denying it blindly***. *For that reason, the provision of* ***section 160 (2) of the Law of Marriage Act****, Cap 29 was appropriately invoked to order division of matrimonial properties and custody of the issues."*

Basing on the above, I believe even in our case at hand, the parties had indeed acquired a husband/wife reputation from the society. Again, the fact that, it was undisputed that the two had been living together for more than two years as explicated by the witnesses including the parties (petitioner and respondent) themselves (herein the appellant and respondent) that the two had been living together since 2003, that is about 13 (thirteen) years period before their relationship became sour in 2016, it is an obvious fact that the presumption of marriage was proved to the satisfactory.

Presumption of Marriage is governed by section 160 (1) and (2) of the Law of Marriage Act. The said section provides;-

*(1)* ***Where it is proved that a man and woman have lived together for two years or more****, in such circumstances as to have acquired the reputation of being husband and wife,* ***there shall be a rebuttable presumption that they were duly married.***

*(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and* ***such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefor either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation,*** *as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings*

*for and orders of maintenance and other reliefs under this section.* ***[Emphasis is added]***

Following the above provisions, it is clear that the court is empowered to make orders for division of matrimonial asserts once the presumption is proved that the parties had lived together and acquired a reputation of being regarded husband and wife. Mwalusanya J (as he then was), outlined the important elements that constitute a presumption of marriage in ***John Kirakwe vs. Idd Siko*** *(Supra)*. He mentioned them being;

1. *That the parties have cohabitated for at least two years.*
2. *That the parties have acquired a reputation of being husband and wife.*
3. *That there was no formal marriage ceremony between said couple.*

Keenly looking on the above elements, it is apparent, as expounded above that the two had been living together as husband and wife for more than the prescribed period of two years, the people surrounding them have considered them as husband and wife though they had never had a marriage ceremony. Therefore, there was a presumption of marriage between the parties.

**Two,** as far as section 160 (2) of the Law of Marriage Act is concerned, the Courts are mandated to divide the matrimonial

properties once dissolving the union of the parties who were living under presumption. See the cases of ***Harubushi Seif vs. Amina Rajabu*** [1986] T.L.R. 22, ***Zacharia Lugendo vs. Shadrack Lumilangóma*** [1987] T.L.R. 3, ***Hemed Tamim vs. Renata Mashayo*** [1994] T.L.R. 197, ***Zaina Ismail vs. Said Mkondo*** [1985] T.L.R. 239, ***Francis Leo vs. Pascahal Simon Maganga*** [1978] L.R.T No. 22 and ***Gabriel John Musa vs. Voster Kimati,*** Civil Appeal No. 344 of 2019, CAT at Dodoma (Unreported).

It is apparent from the records that, contrary to the above said position of the law, both lower courts did not invoke the principles of presumption of marriage in the matter at hand. As it was so done by the Primary Court, the District Court ended up to compel the parties to live together something which is contrary to the Law. ***Section 140 of the Law of Marriage Act*** is clear that the Court cannot compel the couple to live together as husband and wife. This was also a position of this court in ***John David Mayengo vs. Catherina Malembeka,*** **PC Civil Appeal No. 32 of 2003, HCT at Dodoma (Unreported).**

From the circumstantial view point in the case at hand, the lower Courts ought to have invoked the powers vested to it under the

provisions of section 160 (2) of ***the Law of Marriage Act*** something that was ignored.

I am alive with the principle that this being a second appeal this appellate court is refrained to interfere the lower courts' concurrent findings of fact. However, there are exceptions to this general rule which includes; misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. [See ***Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel,*** [1980] T.L.R. 31]. From the factual view point of our case, division of properties was not done by the Magistrates of the trial nor the 1st appellate court, just for a belief that the two had never acquired a reputation of being husband and wife. They both concluded that there was no proof of existence of a presumption of marriage which is a wrong finding. For this reason, I am constrained to interfere accordingly.

The fact that presumption of marriage has been proved, each party deserves division of the matrimonial assets as per **section 114(1) of the Law of Marriage Act [Cap 29 RE 2019]** which states;

> *"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".*

As rightly submitted by the counsels of both parties that division of the matrimonial assets acquired during the subsistence of marriage should base on the efforts of each party in their acquisition. That is a position of law as per subsection (2)(b) of section 114 of Law of Marriage Act [Cap 29 RE 2019]. Subsection 2(d) provides that the needs of the infant children is a matter to be considered as well in the division of the matrimonial assets. The said Section 114 of Law of Marriage Act [Cap 29 RE 2019] provides;

*"In exercising the power conferred by subsection (1), the court shall have regard–*

*(a) ……Not Applied ……*

*(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*

*(c) ……Not Applied ……*

*(d) to the needs of the infant children, if any, of the marriage"*

This position of the law was also stated in **BIBIE MAURID V. MOHAMED IBRAHIM [1989] TLR 162** in which it was held;

> *"There must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets"*

The law is settled under the provisions of section *114 (2) (b) of the Law of Marriage Act,* [Cap 29 RE: 2019] as affirmed in the prominent case of ***Bi hawa Mohamed vs. Ally Seif*** *(supra)* and ***Bibie Mauridi vs. Mohamed Ibrahimu*** [1989] T.L.R 162 (HC), which explicitly provide that, the extent of contribution determines the amount of division. The contribution by a spouse in acquisition of material asserts includes domestic duties and other works including house wifely duties, engagement in agriculture for family's welfare, rearing cattle and supervision and maintenance of home premises.

Therefore, the Appellant being a house wife contributed to the acquisition of the properties that had been acquired during their marriage life, hence she deserves a share. Upon perusing the trial Courts' records, I noticed that the parties herein had acquired several properties including two houses, one motor vehicle, one farm and house holdings.

As for the issue of custody of the infant children, I have this to say; the trial court's record transpires that the parties were

blessed with two issues, though their genders were not stated, but they were 3 and 5 years old by that 2017 when the parties were testifying at the trial court. It means the said issues are now 8 and 10 years old respectively. **Section 125(3) of the Law of Marriage Act** provides;

> *"There shall be a rebuttable presumption that it is for the good of an infant below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the infant by changes of custody"*

As they are over 7 years old, according to that provision those infants have the right to opt the parent whom each of them intends to live with, but the same provision suggests the undesirability of disturbing the life of the infant by changes of custody. Impliedly the said section gives the court a mandate to vacate from relying on the requirement of that provision, if by doing so the best interest of the child will be affected. **Section 39 of the Law of the Child Act** requires the court to consider the best interest of the child while deciding on a place of custody for the infant. It also makes preference that the infant should stay with his/her mother. The said section 39 of the Act states;

*"(1) **The court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody** or access.*

*(2) Subject to subsection (1), the court shall also consider;*

*(a) **the rights of the child under section 26;***

*(b) **the age and sex of the child;***

*(c) that it is preferable for a child to be with his parents except if his right are persistently being abused by his parents;*

*(d) the views of the child, if the views have been independently given;*

*(e) that it is desirable to keep siblings together;*

*(f) the need for continuity in the care and control of the child; and*

*(g) **any other matter that the court may consider relevant."***

The statute has put much consideration on the best interest of the child. That issue has been referred in several provisions as the matter to be considered when the court makes decision which touches the welfare of the infant children. Among those provision is the above mentioned one, Section 39 of the Law of

the Child Act [Cap 89 RE 2002]. The section itself stipulates at subsection (1) that among the things to be regarded when the marriage is broken is to place the child under custody of his/her mother.

In the matter at hand the lower court records do not transpire some matters which are necessary for the court to consider on the issues of custody of the infant children and division of matrimonial assets. Under Order XXXIX, Rules 27 and 28 of the Civil Procedure Code [Cap 33RE 2019] this court ordered the Appellant, Asia Jamal to give additional evidence about those things.

According to her testimony the additional evidence the Appellant stated that their 1st born is a boy namely Hasney Aidal, he is 10 years old. She further said that their 2nd born is a girl aged 8 years, her name is Hassana Aidal. She said that both children live with their father in one of their two houses located at Gongolamboto Majohe in Dar es Salaam.

As for the properties that they acquired during their marriage tie, the Appellant stated that they have 2 (two) houses, both located at Gongolamboto Majohe , Dar es Salaam. She clarified that the 1st house is one-rotion building with 8 (eight) bedrooms, all of them being hired. The 2nd house which is also located at is Gongolamboto Majohe has 4 (four) bedrooms. The Appellant

said that it is the one that she had been living with the Respondent. It is now inhabited with the Respondent and the two children after she had been evicted. Another property mentioned by the Appellant is one Motor Vehicle, saloon car with Registration No. T 275 AQB make Toyota Starlet which was bought in 2005 at a price of Tsh. 5,500,000/=. She further testified that they also have a farm, sized 2 (two) acres located at Jaribu Mpakani in Mkuranga District, Pwani Region. The appellant concluded her additional evidence by stating that the Respondent is a Businessman holding a shop at Kariakoo, Dar es Salaam. She said that before that the Respondent was a Taxi Driver.

In her testimony for the additional evidence and the submissions she had made, the Appellant has not shown if she is interested to live with the infants if the marriage is broken. The Respondent also never suggested that issue at the trial court. According to paragraph (g) of Section 39(2) among the ground to consider in making orders for the best interest of the child is "**any other matter that the court may consider relevant."** On this, I prefer to consider section 4 of the Law of the Child Act which states;

> ***"4.-(1) A person below the age of eighteen years shall be known as a child.***

***(2) The best interest of a child shall be the primary consideration in all actions concerning a child*** *whether undertaken by public or private social welfare institutions, courts or administrative bodies".*

In the plain meaning priority on the custody of the infant child should be given to his/her mother. But upon considering the fact that the said children are under custody of their father (respondent), in compliance with **section 125(3) of the Law of Marriage Act** which requires the court to consider the undesirability of disturbing the life of the infant by changes of custody, I find it convenient for a male infant who is 10 years old to continue staying with his father than shifting him to the custody of his mother (Appellant). However, the position is different for the female infant who is 8 years old now. It is preferably she stays with her mother as per the suggestion inserted under **section 39(1) and (2)(b) of the Law of the Child Act.** In that sense, the said female issue should live with her mother, appellant.

The above findings make me to order the division of the houses as follows; each party should acquire one house in which he/she may live in it with the infant he/she holds or use it in whatever means he/she will find convenient as the sole property owned by him/her.

Upon considering the distribution of Matrimonial assets regarding the rate of contribution for each party, as per the evidence in records and that added by the Appellant there is no doubt that contribution of the Respondent was greater as compared to that of the Appellant. I therefore award the one-rotion house with 8 (eight) bedrooms located at Gongolamboto Majohe in Dar es Salaam to the Respondent (Aidal Athuman) while the 2nd one, ie. the 4 (four) bedrooms house located at Gongolamboto Majohe in Dar es Salaam should be handled to the Appellant, which means that the Respondent has to vacate that premise.

Another provision of the law that I wish to consider on this matter is **Section 129(1) of the Law of Marriage Act** which states;

> ***"(1)*** *Save where an agreement or order of court otherwise provides,* ***it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education*** *as may be reasonable having regard to his means and station in life or* ***by paying the cost thereof" (emphasis is mine)***

The said section provides a duty to maintain the children to a man whether he lives with them or they are under custody of somebody else.

Upon considering the aforesaid analysis, I hereby make division of the remaining matrimonial assets as follows; the Motor Vehicle, saloon car with Registration No. T 275 AQB make Toyota Starlet is given to the Respondent to assist him in his business, whether as a Taxi Driver or a Businessman. The 2 (two) acres farm located at Jaribu Mpakani, Mkuranga District in Pwani Region should be equally divided between the Appellant and the Respondent.

In upshot the appeal is allowed to the following extent;

1. The marriage is regarded to have been broken down irreparably, that is beyond repair.
2. One-floor rotion house with 8 bedrooms located at Majohe, Gongolamboto in Dar es Salaam is given to the Respondent (Aidal Athuman).
3. The 2nd house with 4 bedrooms located at Majohe, Gongolamboto in Dar es Salaam should be handled to the Appellant. The Respondent is ordered to vacate the said premise.
4. Custody of the male Infant (Hasney Aidal) is placed to the Respondent (father)

5. Custody of the female Infant (Hassana Aidal) is placed to the Appellant (Mother)
6. Each party is allowed to visit the infant whom he/she does not live with, upon the arrangement that will be made by the parties themselves.
7. The Respondent who is the Father to the infants has to provide Tsh. 100,000/= per month for maintenance of the female infant.
8. Provision of the basic needs like clothing, medication and school is upon the Respondent, Father.
9. The Motor Vehicle, saloon car with Registration No. T 275 AQB make Toyota Starlet is given to the Respondent.
10. The 2 (two) acres farm located at Jaribu Mpakani, Mkuranga District in Pwani Region to be equally divided between the parties.
11. The house utensils/households to be equally divided between the parties.

This being the family matter, I grant no order as to costs.

**S. M. KULITA**

**JUDGE**

**08/03/2022**


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY