

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CIVIL APPEAL NO. 33 OF 2021

*(Arising from Matrimonial Cause No. 1 of 2020 Ulanga District Court at
Mahenge)*

HUSSEIN HASSAN NAMULA.....APPELLANT

VERSUS

HALIMA HABIBU LYANA..... RESPONDENT

JUDGMENT

Date of Last Order: 23/8/2021

Date of Judgment: 31/5/2022

S.M. KULITA J;

This is an appeal from Ulanga District Court at Mahenge. Dissatisfied with the its decision delivered on 16/12/2020, the Appellant lodged this appeal relying on the following four grounds;

1. That, the trial court erred in law and in fact by failure to accord the Appellant a fair trial by denying Appellant the right to be heard.
2. That, the trial court erred in law and in fact by granting divorce and division of matrimonial properties relying only on the evidence adduced by the Respondent.

3. That, the trial court erred in fact and law in ordering distribution of the Matrimonial properties without any proof of their existence.
4. That, the trial court erred in law in granting divorce and distribution of the Matrimonial properties relying on the fact that the Appellant failed to provide maintenance to the Respondent without any proof.

The appeal was disposed of by way of written submissions. While the Appellant is represented by Mr. Gelas B. Severine, Advocate from Kameku Advocate, the Respondent is enjoying the legal assistance of Womens' Legal Aid Centre (WLAC) Dar es Salaam through Mr. Richard Godlisten Kimaro, Advocate.

In his written submission in support of the 1st ground of appeal, Advocate for the Appellant, Mr. Gelas B. Severine submitted that the trial court conducted hearing in a situation that the Appellant had no capacity to speak regarding the fact that he was paralyzed to the extent that he was incapable to speak and walking properly. The counsel stated that the Appellant who was in that healthy status since 2018 had no Advocate to represent him during trial before that court.

The Appellant's counsel further submitted that it was fatal for the trial court to conduct hearing of the case without considering the fact that the Appellant herein was unable to make a follow up. He said that it was contrary to the guidance of the Persons with Disabilities Act, of 2010.

Mr. Severine said that before instituting the Matrimonial Cause No. 1 of 2020 at Ulanga District Court the Respondent had referred the matter at the Conciliation Board, BAKWATA and the same commented that the Appellant was a person with disabilities that he was unable to speak. The said board recommended the court to proceed with its necessary orders.

The counsel stated that it was something strange to see the matter was scheduled for defence on the 10/12/2020 and the Appellant proceeded to defend his case without the Advocate nor next friend while he was unable to speak. He said that what transpires as the Respondent's (Appellant herein) testimony in the lower court's records are not the words of the Appellant. It is the submission of Mr. Severine that, as the Appellant was not able to speak he could have not defended his case.

As for the 2nd ground of appeal that, the trial court erred in law and in fact by granting divorce and division of matrimonial properties

relying only on the evidence adduced by the Respondent, the Appellant's Counsel submitted it was improper for the trial court to grant a divorce just for the reason that the Appellant was not providing conjugal rights to the Respondent, while there is an ample evidence that that was not intended by the Appellant, but it was due to the illness (paralyzing) that the Appellant has been suffering for a long time.

The counsel added that the trial court also failed to take into consideration that the Appellant's illness for a long time is also the source of the Appellant's failure to provide maintenance to the Respondent and the issues. He said that the trial court was wrong to regard the Respondent's false allegations as among the grounds for issuing a divorce. He asserted that under the circumstance that the husband (Appellant) is incapable to provide maintenance, under section 63(b) of the Law of the Marriage Act [Cap 29 RE 2019] the wife (Respondent) has to undertake that responsibility.

As for the issue of division of the Matrimonial assets which falls under the 3rd and 4th grounds of appeal, the Appellant's Counsel submitted that it was resolved without ascertaining on their existence and contribution of each party in their acquisition. He said that section 114(1)(2)(b) of the Law of Marriage Act [Cap 29 RE 2019] which provides that distribution of assets should regard

the rate of parties' contribution, was not considered by the trial court in deciding on the division of matrimonial assets.

That was the end of submission by the Appellant's Counsel who concluded by praying the appeal to be allowed with costs.

In his reply in respect of the 1st ground of appeal the Respondent's Counsel, Mr. Richard Godlisten Kimaro submitted that there is no dispute that in 2018 the Appellant was paralyzed but there is nowhere it is shown or proven that such paralysis affected his ability to speak and to perform conjugal rights to the Respondent. The counsel cited section 110(1) of the Tanzania Evidence Act [Cap 6 RE 2019] arguing that the one who alleges must prove.

It is the submission of Mr. Kimaro, Advocate that during the hearing the Appellant never cross-examined the Respondent which tantamount to acceptance of the facts submitted by the Respondent before that court.

The counsel further submitted that the court's proceedings are the reflection of what truly happened in court. He said that any claim asserting inaccuracies should not be taken lightly.

The Respondent's counsel stated that, for his submission in this appeal the Appellant seeks for retrial. He avers that the Appellant

just intends to fill the gaps in his evidence in order to deny the Respondent of her share in the matrimonial assets.

Submitting on the remaining grounds of appeal collectively, starting with the issue of division of the matrimonial properties, the Counsel submitted that the properties that the parties herein hold which include seven houses and farms, were jointly acquired by them. He added that the Respondent testified to that extent at the trial court as transpired at page 15 of the typed judgment. He said that the Appellant never cross-examined the Respondent on that fact. He alleged that the appellant's submission on that issue is an afterthought.

Mr. Kimaro, Advocate prayed for the appeal to be dismissed with costs.

Upon going through the rival submissions of both parties as well as the original records, I hereby find that the issue to be determined is whether the appeal has merit.

Starting with the issue of analysis of evidence by the trial court; I have noted from the records that, in reaching into the decision he had made, the trial Magistrate was led by the findings he had reached upon while composing his judgment. The issue is whether

the analysis was properly made in relation with the facts and evidence that had been adduced.

One of the basis of the case at the trial court was the issue of matrimonial assets. It is alleged by the Appellant's Counsel that there was no proof on the existence of the properties that the trial court had distributed to the parties. Not only that, but it was also challenged by the said Advocate that the division did not consider the rate of contribution for each party in their acquisition.

I went through the trial court records and noticed that, it is only the testimony of the Respondent which transpires the properties that the parties hold in collective. Page 15 of the lower court's typed proceedings transpire that the Respondent mentioned those properties being seven houses; 3 of them being Guest Houses located at Itete in Malinyi District; the other 4 houses are residential, 2 of them are located at Itete Njiwa while the other 2 are located at Ifakara. In his reply the Respondent never admitted nor disputed on the existence of those properties. He also never made any clarification as to the status of those houses, apart from saying that the two houses located at Ifakara are unfinished and have no tenants. The fact that the existence and status of the mentioned matrimonial properties are uncertain, it was wrong for the trial court to order their distribution.

It is my considered view that division of Matrimonial Properties is among the crucial issues to be considered in Matrimonial Causes. The trial Magistrate ought not to have left any of the parties concluding his/her testimony without thorough explanation in respect of properties, particularly on their existence and status.

Basically, if it happens that there is any necessary issue remained untouched by the party(s) during testimony, it is the duty of the court to ask that said party(s) to address on it, after closer of his/her testimony. This act is termed "court examination". Alternatively, the court can itself to call witness(s) whom it finds fit for clarification of the issue(s) which is/are necessary for determination of the case but remained unresolved.

In the matter at hand the issue of division of the Matrimonial Assets was not thoroughly addressed by the parties, hence not properly analysed by the trial Magistrate who just divided them to the parties at the ratio of 50% for each of them without considering the rate of contribution by each party. The record also transpires no proof of the existence and status of those said properties.

Basically, each party deserves division of the matrimonial assets acquired in the joint efforts. This is according to **section 114(1) of the Law of Marriage Act [Cap 29 RE 2019]** which provides;

"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".

However, the said division of the matrimonial assets acquired during the subsistence of marriage should base on the rate of the efforts that each party had engaged in their acquisition. That is a position of the law as per **subsection (2)(b) of the said section 114** which provides;

*"In exercising the power conferred by subsection (1), the court shall have regard to the **extent of the contributions made by each party in money, property or work towards the acquiring of the assets"** (emphasis is mine)*

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"

It was also narrated in the case of **BI HAWA MOHAMED V. ALLY SEFU [1983] TLR 32** and that of **MARIAM TUMBO V. HAROLD TUMBO [1983] TLR 293**.

As for the issue of the infringement of the Appellant's right to be heard at the trial court, there is no direct proof on that as the record transpires that he defended his case on the 10th day of December, 2020. However, in his testimony at the trial court the Appellant did not touch the key issues of the case and that the trial Magistrate didn't take trouble to interfere the proceedings by putting the "court examination" questions or by "summoning the court's witness(s)" so as to get clarities on the issue of certainty of the properties alleged to have been jointly acquired by the parties and contribution of each party on their acquisition.

I can also see in the record that the ground on which the trial Magistrate relied on in dissolving the marriage is the allegation that the Appellant denied to have conjugal rights with the Respondent, the fact which was not successfully proved by the Respondent. Page 4 of the typed judgment shows that the trial Magistrate relied on that in dissolving the marriage. On that I find the trial Magistrate was wrong for not considering the fact that the Appellant was sick of Paralysis as it can be so read in the certificate of the Conciliation Board (BAKWATA) where the matter was referred to, before the

petition being filed at the District Court. In the said document which is attached with the Petition for Divorce, it has been stated that the Appellant has disabilities, and that he was unable to speak. It was thus evident that the Appellant had paralyzed to the extent that he was incapable to speak and walking properly as alleged.

Under that circumstance, even if he had managed to speak before the trial court, it was wrong for that court to decide for the Respondent that the Appellant was wilfully refusing to have conjugal rights with the Respondent, while in real sense the Appellant was sick and was incapable to have sexual intercourse.

In upshot the trial Magistrate had skipped several matters which were necessary for the good ends of justice. That being the case I hereby quash the whole proceedings and judgment of the lower court. I also set aside all orders that had been made therefrom. It is hereby ordered that the matter be retried (*trial de novo*) by another Magistrate with competent jurisdiction.



S.M. KULITA

JUDGE

31/05/2022

