

IN THE HIGH COURT OF TANZANIA
TEMEKE HIGH COURT SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. NO 31 OF 2022

*(Arising from Matrimonial Cause No.29 of 2019 from Resident Magistrates Court's at Kisutu
before Hon. J.H. Mtega -PRM)*

ABUNERY ELIBARIKI SAIDIAAPPELLANT

VERSUS

NINA NIMWESIGA RUTAKYAMIRWA..... RESPONDENT

JUDGMENT

Date of last Order: 01/11/2022
Date of Judgement:29/11/2022

OMARI, J.:

The Appellant herein one Abunery Elibariki Saidia was the Respondent in Matrimonial Cause No. 29 of 2019 in which the Respondent herein one Nina Mwesiga Rutakyamirwa filed a petition of divorce. The relationship between the two began in 2002, and in 2004 they were blessed with one issue; Terrence. The couple officiated the relationship into a marriage in 2006. From the onset of the relationship the two lived in separate dwellings as the Appellant was living in his family's home in Temeke while the Respondent

was living in an apartment at Kisutu. Their encounters entailed the Appellant going to the Respondent's apartment and leaving thereafter. In 2009 the Appellant moved to a residential house (one of the subjects of this Appeal) in Mbwani Malindi. Their arrangement remained the same, they continued to live apart; with the Respondent visiting Mbwani Malindi during weekends and on holidays. This state of affairs went on until 2014 when the misunderstandings between the two begun.

In the Petition and in the trial court; the Respondent alleged that the Appellant's behaviour started to change, he among others things, was beating her, having illicit sexual affairs and had children with other women. Upon being confronted, the Appellant threatened the Respondent with a gun. The Respondent then went and reported this incident to the Wazo Police Post and a report book entry was adduced as evidence in the trial court. When she returned from the Police Post she was refused access to the Mbwani Malindi property by the appellant being informed that she should not even approach it. She has not gained access to the said house up to the time of this appeal.

She petitioned for divorce seeking seven reliefs, in its decision on page 32 and 33 the court clearly stated that:

'...the petitioner has successfully proved the 1st, 2nd and 3^d issues hence the parties are entitled to the following reliefs: i). The Marriage between the parties had broken down irreparably and hence a decree of divorce is granted to the petitioner against the respondent. ii). A house on Plot No. 621 Block B located at Mbweni Malindi which is in the name of the petitioner is awarded to the petitioner. iii). A motor vehicle with Registration No. T 690 BBP which is in the name of the petitioner is awarded to the petitioner.'

It is these reliefs that were granted by the trial court that made the Appellant knock on the doors of this court procuring an appeal on three grounds which for ease of reference I will produce as follows:

- i. That the learned Magistrate erred in law and fact to warrant a divorce for wrongly ascertaining adultery and cruelty purportedly committed by the Appellant without credible and conclusive evidence.*
- ii. That the learned Magistrate erred in law for awarding the Respondent a matrimonial house on Plot No. 621 at Block B located at Mbweni Malindi in Kinondoni District which was jointly built after marriage.*
- iii. That the learned Magistrate erred in law and fact for awarding the Respondent a motor vehicle number T 690 BBP which was the matrimonial property acquired jointly after marriage.*

On the basis of the above grounds that the Appellant prays for the Appeal to be allowed and any other reliefs that this honourable court shall deem fit, just and equitable to grant.

At the hearing the Appellant was represented by Teddy Mwakifuna learned advocate while the Respondent enjoyed the services of Stanslaus Ishengoma learned advocate.

Mr. Mwakifuna sought to combine and argue jointly ground two and three of the appeal. As regards the first ground he submitted that the lower court erred in granting the divorce on the ground of adultery and cruelty without evidence of the same. He contended that in the lower court, adultery and cruelty were neither presented nor was there evidence adduced in that regard. Therefore, the court erred in finding that the two existed. On the second and third grounds as combined; Mr. Mwakifuna submitted that the matrimonial home at Mbweni Malindi and the car are all matrimonial properties obtained after and during the course of marriage. It was therefore wrong for the lower court to give the same to the Respondent (then Petitioner) without considering they were obtained during the course of marriage. He ended his brief submission by praying that the appeal be allowed as the court shall deem fit and appropriate.

When it was his turn, Mr. Ishengoma submitted that the findings and ultimately the judgement of the lower court was based on the defence given by the Appellant. He prayed that this court goes through the record to see the defence given by the Appellant in the lower court, in his view the Appellant just made mere statements no documents or any evidence to dispute the allegations raised in the Petition were adduced.

As regards to the first ground of appeal the learned counsel submitted that on page 26 of the Judgment it is shown that the Appellant confirmed to sire two children out of wedlock. This is evidence that there was adultery on the part of the Appellant. As for cruelty, it is also shown clearly in evidence and the Judgment how the Appellant threatened to kill the Respondent and this was not disputed in court. He went on to say that the Judgment and Decree were given on the basis of testimony and pleadings before the court and therefore cannot be faulted. He prayed for this ground to be dismissed for being devoid of merit.

Mr. Ishengoma then went on to submit on the second and third grounds as combined by the learned counsel for the Appellant. He commenced by averring that the two grounds are also devoid of merit then submitted that the plot for the Mbweni Malindi property was acquired by the Respondent

through a loan from her employer before the marriage. The learned counsel submitted that there was evidence adduced as to how the said house was constructed, including that the Respondent had take out several loans some of which she is still repaying. He added that in addition to servicing the mortgage she was the one paying land rent and all other government dues albeit not occupying the house since 2015. He submitted that there was evidence adduced as to how the Appellant ended up living in the said house; that is, he was invited to stay by the Respondent after she finished constructing the house. In the circumstances, the learned advocate refuted that the Appellant's claim of joint efforts in either acquiring the plot or constructing the house.

Concerning the ownership of the car, the learned advocate vehemently argued that both parties had cars. In the Petition, the Respondent did not claim the distribution of two cars; a Toyota Noah and Suzuki Carry for they were the Appellant's. She was only concerned with the Suzuki Escudo as it was her car, registered in her name and she is the one who bought it. The car has been locked up in the Mbweni Malindi Property, forcing the Respondent to use public transport.

The learned advocate concluded his submission by stating that the Appeal was taken as a delay tactic to prevent the Respondent from accessing her properties. He prayed for the two grounds of appeal to be dismissed because there is nothing substantial explained to the court to fault the decision of the lower court; and for the appeal to be dismissed with costs.

The question before me to determine is whether the appeal preferred through the two grounds has merit.

On ground one, the Appellant's counsel submitted that there was no evidence adduced in the trial court and neither were the issues of adultery and cruelty presented as part of the evidence. The trial court's record and Judgment tell a different story. On page 22 of the Judgment there are four issues listed to have been agreed to by the parties *inter alia* whether the Respondent has committed adultery, cruelty and deserted the Petitioner. On this ground it is evident from the trial court's judgement that the Appellant had not disputed the allegation of having two children, born in 2008 and 2011 respectively, out of wedlock. The two children's Certificates of Birth were tendered as evidence and both bear the Appellant's name as their father. During the hearing for this Appeal the Respondent alluded to the Appellant living in the Mbweni Malindi property with another woman with

whom he has children with and this was not disputed. The trial court analysed the issue and rightly relied on the cases of **Maraim Tumbo v. Harold Tumbo** (1983) TLR 4 and that of **Mengy Rashidi v. Chiku Kibira**, Civil Case No. 62 of 2020 TZHC 2399. Both of these cases are grounded on the fact that a marriage can be irreparably broken down by reason of adultery as provided for in section 107 (2) (a) of the Law of Marriage Act, CAP 29 R.E 2019.

As for cruelty, which the Appellant is also contenting there was no credible and conclusive evidence of the same; in the trial court's judgment at pages 24 and 25 the trial court gives an account of how cruelty by the Appellant manifested. In the trial court the Appellant testified to owning a shotgun, which he later surrendered to the police. A police report of an altercation between the Appellant and the respondent where he is alleged to have threatened to kill her were tendered as evidence. There was nothing from the Appellant as a defence other than that the Respondent was ordered by the Police Gender Desk not to go to the Mweni Malindi property without permission from the police; which is in itself very telling for a married couple as regards to what is claimed as a matrimonial home. The trial court also relied on the cases of **Magori Mbanda Kihiri v. Stividana Kegeyo**

Webiro, Matrimonial Appeal No. 2020 TZHC 5816, **Jenifer Damian v. Sheria Bukene**, Matrimonial Cause No. 4 of 2019 TZHC and that of **Asha Wambura Marwa v Marwa Keranyo Magahu**, Matrimonial Appeal No. 8 of 2020 TZHC 2594. In all the above cases the court dealt with the issue of cruelty as evidence that the marriage has broken down irreparably as provided for in section 107 (2) (c) of the Law of Marriage Act, CAP 29 R.E 2019.

The incidence of adultery and cruelty as pleaded and evidenced by the then Petitioner, are what prompted the trial magistrate to find that the marriage had broken down irreparably. In view of the above, I see no fault with the decision of the trial court as regards the first ground of appeal, which allows me to segue into the remaining ground.

The second ground of appeal which is the combined second and third grounds and argued jointly centres on the Mbweni Malindi property and the Suzuki Escudo vehicle. Matrimonial property was dealt with by the trial court as issue number 3 that the parties had agreed on that is whether the matrimonial assets were acquired by joint efforts of both parties. The trial court judgement as well as the proceedings give a detailed account of how the Respondent herein was raising money, taking out loans and purchasing

some of the properties and more specifically Plot No. 621 Block B, that is the Mbweni Malindi property and the Suzuki Escudo with Registration No. T 690 BBP. The testimony of the Appellant in the trial court was that he gave the Respondent TZS 700,000/= for buying the various plots she had bought. He testified was then being paid a salary of TZS 900,000/= as opposed to her meagre TZS 40,000/=.

The Respondent adduced various documents including salary slips and bank statements; to prove her financial capabilities and how she raised the money for the said properties. The Appellant did not produce anything in court, instead he said they were being paid in cash. In effect he failed to explain what his contribution in the acquisition of the said properties was. The trial court then concluded that the Respondent herein contributed a lot to the acquisition of the matrimonial assets during the subsistence of the marriage.

In its analysis the trial court relied on several cases including that of **Gabriel Nimrod Kuwrijila v. Theresia Hassan Malongo**, Civil Appeal No 102 of 2018 TZCA 31 where the court referred to **Bi. Hawa Mohammed v. Ally Seif**, 1983 TLR 32 where it was held that equality in division cannot arise where there is no evidence to prove extent of contribution. The trial court also made reference to the case of **Justine Kimweri Mandoma v.**


Magreth Michael Mtey, PC Civil Appeal No. 7 of 2020 HC Mtwara Registry where the court was of the view that division of a matrimonial house requires proof of contribution of each one in its acquisition.

Before I conclude on the second ground I would like to comment on the repetitive reference to "which is in her name" with regards to property; specifically, the car that is a subject of this appeal; by the trial court and the Respondent's counsel. Whereas I agree with the trial magistrate that the car (or anything else for that matter) bears the name of the Respondent making it essentially hers, it is also my considered opinion that property bearing a name of a spouse does not make it acquired solely by the respective spouse. What makes the said properties subject to a rightful claim by the Respondent is not the name they bear but the extent of contribution by her as evidenced by her testimony in court. Nonetheless, I see no reason as to fault the decision of the trial court as regards to the second ground of appeal which appear as the second and third grounds of appeal in the Memorandum of Appeal.

In the event, I am satisfied that the trial Magistrate properly analyzed the evidence availed before the court and reached an appropriate conclusion hence there is no justification to interfere with the said decision. The appeal

is dismissed. Being that it is a matrimonial matter I make no order as for costs. Order accordingly.




A.A. OMARI
JUDGE
29/11/2022

Judgment pronounced and dated 29th day of November, 2022 in the presence of the Appellant and the Respondent both in person.

Sgd. A.A. OMARI
JUDGE
29/11/2022