

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

**PC CIVIL APPEAL NO 130 OF 2020**

(ARISING FROM CIVIL APPEAL NO 115 OF 2018 AT TEMEKE DISTRICT COURT, ORIGINATING FROM  
MATRIMONIAL CAUSE NO 387 OF 2017)

**JUMA KIPANDE .....APPELLANT**

**VERSUS**

**AMINA YUSUPH SHASHA..... RESPONDENT**

**JUDGMENT**

29/12/2021 & 3/03/2022

**N. R. MWASEBA, J.**

Before the primary court of Mbagala, the respondent initiated the matrimonial proceedings against the appellant herein seeking for divorce, division of matrimonial assets and maintenance of three children. Its decision did not please the respondent particularly on the division of matrimonial assets then she appealed to the district court of Temeke where her appeal was partly allowed by adjusting the percentage of division of the proceeds of the house from 30% which was ordered by the primary court to 50%. And maintenance of the child was uplifted from 50,000/= to 70,000/= per month.

This time the appellant was not satisfied with the appellate court's decision, hence this appeal with the following grounds:

- 1. That the trial magistrate erred in law and facts by pronouncing equal distribution of matrimonial property without considering unequal efforts of the parties in preserving the matrimonial property.*
- 2. The trial magistrate erred in law and facts by ordering a higher amount of maintenance allowance of the respondent without considering the unfortunate financial situation of the appellant.*
- 3. That the trial magistrate erred in law and facts by ordering a higher amount of the maintenance allowance of the respondent without considering that the appellant is vested with the custody of two children of the party's union.*

Unfortunately, before this court the respondent never appeared due to the fact that the appellant failed to locate her. She was served by publication in Mwananchi Newspaper dated 10<sup>th</sup> June 2021 but in vain. Even the service by the process server did not bear fruit, consequently the appeal was determined ex parte.

The appellant enjoyed the representation of Mr Khalfan Msumi learned counsel and the appeal was disposed of by way of written submission.

Submitting on the first ground of appeal, Mr Msumi learned counsel referred this court to **Section 114 (1) of the Law of Marriage Act**, Cap 29 R.E 2019 that a matrimonial property is liable for distribution when it is proved to have been acquired by joint efforts of the spouses. He says in ordering the division of matrimonial assets the court may consider other important factors which may affect the proportion of division of such property among parties. For instance, in the case of **Bi Hawa Mohamed v. Ally Sefu**, (1983) TLR No 32 the court held that where a spouse commits a matrimonial misconduct he or she may not be entitled to a share in the property. And in the same spirit the trial magistrate ought to have considered the fact that the appellant was the one who solely pulled the most of economic muscles to preserve the property in question, hence equal distribution thereof would be unfair and unjustifiable on the appellant's part.

He further submitted on the second and third grounds of appeal that the trial magistrate erred in law by ordering higher amount for maintenance without considering the unfortunate financial situation and the fact that he is vested with the custody of the two children of the party's union. He argues that parental responsibility is a shared responsibility, and no parent has superior right or claim against the other in exercising

parental responsibility. The counsel says they understand the position under **Section 129 (1) and (2) of the Law of Marriage Act** that the father has the primary duty to maintain the children according to his means but if the means of the father are insufficient the law does not prohibit the mother to contribute. And under **Section 44 (a) (b) and (c) of the Law of the Child Act**, CAP 13 R.E 2019 in ordering maintenance the courts are supposed to consider factors like the income and wealth of both parents of the child, any impairment of the earning capacity of the person with a duty to maintain a child, and the financial responsibility of the person with respect to the maintenance of other children.

He referred this court to its decision in the case of **Aloyce Masalu Mapembe v. Paulina Romanus Masonga**, PC Matrimonial Appeal No. 3 of 2021, High Court of Tanzania at Mwanza (Unreported) at page 8 that if the means of the father are insufficient to maintain the children, and since a mother is also earning some income then both of them should contribute to maintenance of their children. He submits that since it is on record that the respondent is working for gain and considering the appellant's unfortunate financial situation and having been vested with the custody of other two children, it is clear that the maintenance

allowance of Tshs 70,000/= per month is too high to the appellant. So, they pray for it to be revised.

After having the submission from the appellant's counsel and looking at the grounds of appeal, then the issues for determination are:

1. Whether the matrimonial asset was fairly divided among the parties.
2. Whether the maintenance order was properly considered.

Starting with the first ground of appeal the appellant is challenging the distribution of matrimonial property to be unfair. He claims that the trial magistrate ought to have considered the fact that the appellant was the one who solely pulled the most of economic muscles to preserve the property in question, hence equal distribution thereof would be unfair and unjustifiable on the appellant's part. He referred this court to the case of **Bi Hawa Mohamed v. Ally Sefu (supra)** that, where a spouse commits a matrimonial misconduct he or she may not be entitled to a share in the property. However, the appellant has not disclosed any matrimonial misconduct committed by the respondent which renders her not to be entitled to the share of the property. **Section 114 (2) (b) of the Law of Marriage Act**, CAP. 29 R.E 2019 which was referred in the case of **Mariam Tumbo v. Harold Tumbo**, (1983) TLR 293 (HC) it

was insisted that in exercising its power of division of assets, the court ought to consider the extent of contributions made by the spouses in terms of money, property or work in acquisition of the property. See also the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No 102 of 2018 in which the Court of Appeal insisted that the extent of contribution is of utmost importance in determining the division of matrimonial assets.

In the case at hand the record shows that the appellant was a businessman while the respondent was a housewife. In her evidence the respondent told the court that she contributed towards the acquisition of the properties by advising her husband. The record shows that they were blessed with three issues of which it goes without saying that the respondent had been taking care of them. In our jurisprudence, taking care of the family amounts to contribution towards the acquisition of their properties. This was well stated in the case of **Bi. Hawa Mohamed v. Ally Sefu (supra)** where the court came out with two major factors to be considered as to what amounts to contribution as to a matrimonial property, namely:

*"(i) Since the welfare of the family is an essential component of the economic activities of a family man or woman it is*

*proper to consider a contribution by a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets.*

*(ii) the "joint efforts" and 'work towards the acquiring of the assets have to be construed as embracing the domestic "efforts' or "work" of husband and wife."*

That being the legal position, the respondent deserves a share of the matrimonial property. At which ratio? There is no way we can measure the extent of contribution specifically between the husband who was a businessman and the wife who was taking care of the welfare of the family. **Section 114 (2) (d) of the Law of Marriage Act** stipulates that in exercising the power conferred by subsection (1), the court shall have regard to:

*"The needs of the children, if any, of the marriage, and subject to those considerations, **shall incline towards equality of division.**"* (Emphasis added)

Being guided by the above provision, I concur with the decision of the first appellate court that the matrimonial house be equally divided. Having said so, the first issue is answered in affirmative.

Coming to the second and the third grounds of appeal, the trial court ordered the appellant to pay Tshs 50,000/= per month for maintenance of his little child. At the first appellate court the amount was elevated to 70,000/= per month of which the appellant is challenging to be excessive for him keeping in mind that the other two children are in his custody. So, he prays for it to be revised.

**Section 44 of the Law of the Child Act** provides that a court shall consider the following matters when making a maintenance order:

- (a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
- (b) any impairment of the earning capacity of the person with a duty to maintain the child;*
- (c) the financial responsibility of the person with respect to the maintenance of other children;*
- (d) the cost of living in the area where the child is resident;*
- and*
- (e) the rights of the child under this Act.*

Unfortunately, in the record there is no evidence regarding the income and wealth of both parties to assist the court to ascertain the amount suitable for maintaining the child. It is revealed that the appellant is a



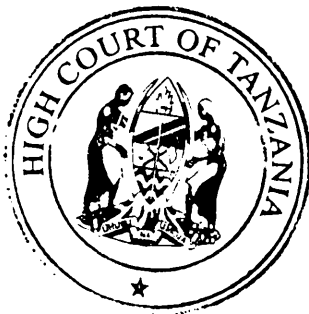
businessman but his approximate earnings per month are not known. On her part, the respondent is merely a housewife. Seemingly, the appellant is in better financial position compared to the respondent. Keeping in mind that the appellant has other financial responsibilities with respect to the maintenance of the two children who are in his custody, I find it worth to maintain the amount ordered by the primary court which is Tshs 50,000/= per month. It should be noted that considering the current cost of living this amount is not satisfactory to maintain a child who is under five years per month. Nonetheless, considering the fact that despite being a mere housewife the respondent has no impairment of earning capacity, she is obliged to look for other means of income so that she contributes to the maintenance of the child in her custody in case of any deficit.

I am aware that the said child is approaching the school age. And the Tshs 50,000/= does not suffice all necessities for the child as indicated under **Section 8 (1) of the Law of the Child Act**. Thus, for the best interest of the child, education expenses should be borne by the appellant. The appellant should make sure all his children acquire education at his affordable schools.

In the upshot, this appeal is partly allowed. The decision of the district court regarding equal distribution of matrimonial asset is upheld. The order for maintenance of the little child is reviewed. The appellant will have to pay Tshs 50,000/= per month and will have to bear education expenses of his children. This being a matrimonial case I give no order to costs.

It is so ordered.

**DATED at DAR ES SALAAM** this 3<sup>rd</sup> day of March, 2022.



*N.R. Mwaseba*  
**N.R. MWASEBA**

**JUDGE**

**03/03/2022**

**Court:** Judgment delivered this 3<sup>rd</sup> day of March 2022 in the presence of Mr Innocent Mayage legal officer on behalf of the appellant, in the absence of the respondent.

*M.A. Moyo*  
**M.A. MOYO**

**DEPUTY REGISTRAR**

**03/03/2022**