IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

PC. MATRIMONIAL APPEAL NO. 8 OF 2019

NOTKA BANTEZE.....APPELLANT

VERSUS

SARAH MKUMBO.....RESPONDENT

(Arising from Judgment of the District Court of Dodoma- Kirekiamo, RM)
Dated 29th day of July 2019
In
Matrimonial Appeal No. 03 of 2019

JUDGMENT

17th February, 2022

MDEMU, J.:

This is a second matrimonial appeal. In the Primary Court of Chamwino Urban, the Appellant one Notka Banteze filed a matrimonial petition for divorce against her wife one Sarah Mkumbo. It was registered as Matrimonial Cause No. 36 of 2018. On 12th of December 2018, the Primary Court of Chamwino Urban ordered divorce of the two couples, placed custody of the two issues to the Appellant and further divided matrimonial properties by 75% and 25% for the Appellant and the Respondent respectively.

The Respondent was dissatisfied by the said decision thus, appealed to the first appellate District Court of Dodoma, which enhanced her share from 25% to 35% in the distribution of matrimonial assets and was further given custody of children. The Appellant was also ordered to give prior notice to the Respondent when taking children from 7 to 18 hours during weekend and at least once per month. He was also given right to visit the children at school subject to school arrangement. This arrangement devastated the Appellant hence, this appeal on the following grounds: -

1. *That, the trial Magistrate erred in law and fact by failing to examine the evidence adduced by the Appellant.*
2. *That, the appellate court failed to adhere with the principle of best interest of the custody of the children to the Respondent who cannot by intent and purposes take care of the children.*
3. *That, the appellate court erred in law and fact by disturbing the trial court's decision on the division of matrimonial properties which was properly done.*

The appeal was disposed of by way of written submissions where by the Appellant enjoyed the services of Mr. Fred Kalonga, learned advocate and the Respondent appeared in person.

In his submission, Mr. Kalonga abandoned the first ground of appeal. Submitting on the second ground of appeal, Mr. Kalonga stated that, it was wrong for the District Court to vest custody of children to the

Respondent because she deserted them in the matrimonial house. He added that, since when the Respondent left the matrimonial house, she lost love to her children a fact which she never cross examined the Appellant at the trial court. He supported this argument by citing the case of **Mawazo Anyandwile Mwaikaja vs. DPP, Criminal Appeal No. 455/2017** (unreported) where it was held, thus: -

> *"It is a trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence".*

He argued therefore that, basing on the above principle, all what were said by the Appellant at the Primary Court were accepted by the Respondent and that, she intended the children to be in the appellant's custody. Such acceptance also includes a fact on loss of love to her children.

It was Mr. Kalonga further submissions that, unlike the Respondent, the Appellant is employed and that from 2018 to date, children have been in the hands of the Appellant and never asked the whereabouts of the Respondent. He added that, it was against the best interest of children to vest their custody to the Respondent.

In the third ground of appeal, it was his submissions that, since the Appellant is the sole bread winner(employed) and acquired a loan from National Microfinance Bank (NMB) to repay the debt occasioned by the Respondent so that the car should not be sold and that, since is the only one responsible to pay school fees and taking all affairs of children; the division of matrimonial assets at the trial primary court of 75% to 25% respectively was justified.

In reply, the Respondent submitted that, the first appellate court was correct by granting custody of children to the Respondent as she raised them when the Appellant was away and never abandon her children as alleged by the Appellant.

In respect of the third ground of appeal, the Respondent submitted that, the first appellate court was correct in raising Respondent's share to 35% of matrimonial assets acquired. She said further to have contributed in the acquisition and improvement of all matrimonial assets. She also had earnings from a shop in her name which contributed in construction of a house when the Respondent was abroad.

She added further that, following nature of the Appellant's employment that made him most of the time to be away, she had to take care of their children and supervised construction of matrimonial home in Plot No. 34 Block K, Chidachi West within the City of Dodoma. She bolstered her argument with the decision in **Bi. Hawa Mohamed vs. Ally Seif (1983) TLR 32** stating that, the role she played to her husband, children and management of the acquired matrimonial assets is great and have to be considered. She added further that, the first appellate Court ordered division of matrimonial property to the tune of 35% to 65% and not 50% to 50% as alleged by the Appellant. The Respondent thus prayed the Court to dismiss the appeal with costs.

Mr. Kalonga rejoined briefly in the second ground of appeal by reiterating his submissions in chief. In the third ground; he maintained his submissions in chief that, division of 25% to 75% was proper as the Respondent had no means of income to contribute in acquisition of the matrimonial properties but rather contributed in squandering the same. He also said that, the fact relating to owning a shop in her name raised by the Respondent is a new one and that the shop which they had earlier was closed by the Appellant on his return from Australia and ever since, was the obligation of the Appellant to pay school fees and livelihood of their children.

Having gone through the trial and first appellate courts' records, grounds of appeal and the rival submissions of the parties, the issue for determination is whether this appeal is meritorious.

Revisiting the trial court proceedings on the first ground of appeal, I have noted that, the basis of trial Court's order for custody of children to their father was that, the Respondent deserted them and had lost love towards them. In reversing the decision, the first appellate court held that, since the two issues were below seven years incapable to make independent opinion, thus it was desirable to place custody to their mother (Respondent).

In this issue of custody of children, it is trite law that, the court needs to take into account the best interest of the child when granting an order as to custody of children. It is hard to define such standards, but Courts need to consider other factors common in the best interest of a child such as age; sex; wishes; ability to express a reasonable preference; love and affection; cultural considerations; need for continuation of a stable home environment; support and opportunity for interaction with members of extended family of either parent, to mention a few. See the case of **Mnyonge Idrisa vs. Kiumbe Hussein, Pc. Matrimonial Appeal No. 04 of 2020** (unreported).

Examining the first appellate court's decision, I have to say that, the magistrate considered the issue of age only, that the children were 3 and 5 years respectively in granting custody of children to the Respondent. Other factors as stated above were not considered at all. This court is of the view that, placing custody of children to the Respondent basing on the issue of age alone ignoring other factors, will not be in the best interest of the two issues. The Respondent complained that Mikaeli is suffering from asthma, suffers from want of medical evidence. Furthermore, the fact that Baba Aziza has been telling her that the two children have been suffering from different diseases at school is also not backed by any evidence. Equally, there is no evidence as to where the

Respondent will live with the two children when given custody. Taking into account all these facts, the second ground of appeal is in the affirmative.

In relation to division of matrimonial properties, the position of law is that, before a court orders division of any property in terms of section 114 of the Law of Marriage Act, Cap 29 R.E 2019, it must first be established that, the said property is actually a matrimonial asset and the court should among others, inquire on the extent of contribution of each party in its acquisition. In the case of **Yesse Mrisho v. Sania Abdul, Civil Appeal No. 147 of 2016** (unreported), the Court of Appeal of Tanzania sitting at Mwanza observed the following: -

> *"From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*

The Appellant is lamenting that the 35% shares of matrimonial assets given to the Respondent by the first appellate Court is huge since the Respondent didn't contribute towards their acquisition but simply squandered the same. In resolving this ground, I am persuaded and

indeed guided by the principle enunciated by the Court of Appeal of Tanzania in the case of **Bi. Hawa Mohamed** (supra) and that of **Bibie Maulid vs. Mohamed Ibrahim [1989] TLR 162** that, contribution towards acquisition of matrimonial properties need to be given wider interpretation to include domestic efforts. Essentially, determining contribution towards the acquisition of matrimonial assets, in my view, along with the propounded principles, each case be decided in accordance with its peculiar facts and circumstances.

In the circumstances of this case, the couple lived together for approximately six years and were blessed with two issues. In all those years of matrimonial life, the Respondent herein used all her efforts, energy, love and affection to protect and care for the Appellant and their children while trusting and believing that, whatever they were doing was for the welfare and future of the entire family. Therefore, alleging that the Respondent did not contribute anything in acquiring such matrimonial asset is defeating justice. Being a housewife, as was in this case, should not be regarded as worthless contribution.

Moreover, the Respondent testified to have supervised construction of a matrimonial house when the Appellant was abroad the fact which was not disputed by the Appellant. This court may not casually ignore this evidence. Under the premises, I upheld the decision of the first appellate

court on the division of matrimonial assets at the tune of 65% to 35% for the Appellant and the Respondent respectively.

In the circumstances and for the foregoing reasons, the appeal is allowed on the second ground of appeal as the best interest of the child requires that, the two children be under the custody of the Appellant. The Respondent is at liberty, for a reasonable notice, to visit her children, much as the two children are also allowed to visit the Respondent. Basing on the foregoing circumstances of this matrimonial dispute, I order each party to bear own costs. Order accordingly.

Gerson J. Mdemu
JUDGE
17/02/2022

DATED at **DODOMA** this 17th day of February, 2022.

Gerson J. Mdemu
JUDGE
17/02 /2022