

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

**(IN THE DISTRICT REGISTRY OF TANGA)**

**AT TANGA**

**MATRIMONIAL APPEAL NO. 11 OF 2020**

*(Arising from the Judgment of Lushoto District Court in Matrimonial Appeal No. 2 of 2020 delivered on 23<sup>rd</sup> July, 2020, originating from Matrimonial Cause No. 03/2020 before Soni Primary Court)*

**HALIMA KULANGWA..... APPELLANT**

**-VERSUS-**

**ISMAIL JUMA KANIKI..... RESPONDENT**

**J U D G M E N T**

*Date of last order: 21/03/2022*

*Date of Judgment: 25/03/2022*

**AGATHO, J.:**

Before examining the grounds of appeal in support of the petition of appeal I should state briefly the background of this appeal. The Respondent petitioned for divorce against the Appellant at the Primary Court of Soni, Lushoto in Matrimonial Cause No. 03/2020. The Primary Court granted the divorce petition. It was satisfied that the marriage between the parties was irreparably broken down for reason of desertion on the part of the Appellant. Thereafter, the Primary Court continued with division of matrimonial properties as per Section 108 of the Law of Marriage Act [Cap 29 R.E. 2002]. The division of matrimonial

properties was almost fifty fifty. The custody children of was given to the Respondent. The Appellant was aggrieved by that decision of the trial Court and filed an appeal at the District of Lushoto where the decision of Primary Court was upheld. Dissatisfied further, the Appellant preferred a second appeal to this Court raising three grounds of appeal as shown below:

1. That the Appellate Court grossly erred in law and in fact by upholding the decision of Soni Primary without clear evaluation on the acquisition on the acquisition of the matrimonial properties and the extent of contribution among the spouses.
2. That the Appellate Court grossly erred in law and in fact by blessing the decision of the trial Court without considering that the matter was not first referred to the Marriage Conciliation Board.
3. That the Appellate Court grossly erred in law and in fact by being biased against the Appellant hence reached an erroneous judgment.

The present appeal was uncontested by the Respondent. He failed to appear before the Court despite several summons being issued and served upon him. This prompted the Court to issue order of service of

summons via publication in newspapers, which was effected on 12<sup>th</sup> October 2021 in Mwananchi Newspaper. The Respondent failed once again to appear before the Court. Consequently, the Court ordered the appeal to heard ex parte. The Appellant was thus granted her prayer to conduct hearing of the Appeal by way of written submission. She complied with the schedule set by filing the submissions timely.

In disposing the present appeal, let me begin with the first ground of appeal. The Appellant claims that the first appellate Court grossly erred in law and in fact by upholding the decision of Soni Primary without clear evaluation on the acquisition on the acquisition of the matrimonial properties and the extent of contribution among the spouses.

This ground of appeal was also raised in the first appellate Court (District Court), where the Court was satisfied that the trial Court's decision was proper. In the trial Court, it was clear that the parties were married for 18 years from 2002. It was until 2018 when the marriage became sour. The Appellant deserted her husband. However, while the marriage between the parties was subsisting they acquired some properties. These were 10 goats, 7 cattle, 2 houses, 1 at Kwemiviu, Turiani, Kongoi ward. They also had 5 children one of them is deceased.



The Appellant submitted that the Court is empowered under Section 114 of the Law Marriage Act [Cap 29 R.E. 2019] to distribute matrimonial properties following dissolution of marriage. In the division of matrimonial properties, the Court should consider extent of contribution of each spouse towards acquisition of matrimonial properties. This was also stated in **Bibie Maulidi v Mohamed Ibrahimu [1989] TLR 162.**

The Appellant argued that at the trial Court and at the Appellate Court the Respondent failed show how he contributed to the acquisition of the matrimonial properties. What he did at the trial Court was simply stating or listing the properties acquired during existence of the marriage.

Looking at page 2 and 3 of trial Court judgment, the Appellant showed how the properties were acquired. The Appellant got money to build the house from dowry paid for her children born in her first marriage. She was also living at the plot which she rented, and later the landlord sold it to her in exchange of two goats. She asked the Respondent to build the house on that the plot, but he said he did not have any money. The Appellant told him that she will give him money. On the same page (page 2) of the trial Court judgment she said that she gave him TSH. 75,000/=, the Respondent bought tins for TSH. 20,000/= and the rest of money they used to build the house. The Respondent also committed

an offence and was fined to pay 5 goats. Following that he was left with no livestock. The Appellant also stated as on page 3 of trial Court judgment that she bought a farm from the Respondent's father by exchanging with six (6) goats.

The Appellant also testified as visible on page 3 of trial Court judgment that she built two houses by the loan she took from BRAC. But no evidence was given to prove that the Appellant took such loan.

SU1 (Abrahamu Kulangwa 60 years) and SU2 (Swaibu Idd 28 year) and SU3 (Shakira Idd 32 years) testified that the Appellant had one house she built it out of the town. They also testified that the farms and livestock belong to the Appellant's elder children, that were from her first marriage. This apparent of page 3 of the trial Court judgment. Four elder children of the Appellant were at the time of trial already married and dowry was paid including livestock.

What is gathered from the above testimony is that the parties had five children born in the wedlock and one is deceased. But it is also clear that the Appellant had Six other children from her first marriage. Where when the trial was conducted in 2020 four of them were married and dowry was paid.

The testimonies of the Respondent side did not show how the matrimonial properties were acquired. The Respondent on page 1 of the trial Court judgment simply listed the properties acquired during subsistence of marriage. The law under section 114 the Law of Marriage Act [Cap 29 R.E. 2019] is unambiguous that where division of matrimonial properties is to be done, the Court has to consider contribution of each spouse towards acquisition of the said properties. I wish to reproduce the said provision of Section 114 of the Law of Marriage Act [Cap 29 R.E. 2019]

***114.-(1)** 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.*

*(2) In exercising the power conferred by subsection (1), the court shall have regard to -*

*(a) The customs of the community to which the parties belong;*

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

*(c) Any debts owing by either party which were contracted for their joint benefit; and*

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

*(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.*

The trial Court proceedings and the judgment are clear that the Respondent did not contradict or discredit the testimony given by the Appellant on acquisition of the properties. Indeed, there are matrimonial properties and separate properties owned by the spouses individually. It is not the law that every property that is acquired during subsistence of marriage even where there is evidence that it was acquired by one spouse only then it automatically becomes a matrimonial property. If that would have been the case, Section 114 (2) (b) of the Law of Marriage [Cap 29 R.E. 2019] requiring the Court



to examine extent of contribution of each spouse during division of matrimonial properties would be superfluous.

From the foregoing, it follows that the trial Court and the first Appellate Court did not pay keen attention to the evidence given by Appellant on acquisition of the properties. I agree with the Appellant that there are several properties that are not matrimonial properties. They are separate properties of the Appellant. They include the house built out of the town, farms, and the livestock. As seen from the record of proceedings at the trial Court, the Respondent did not provide any evidence to show his contribution. Worse still when the Appellant gave her testimony the Respondent did not discredit or contradict the same during cross examination. In **Emmanuel Saguda @ Sulukuka and Another v Republic**, Criminal Appeal No. 422 "B" of 2013, the Court of Appeal of Tanzania held that failure to cross examine a witness on a crucial point is taken to be the party's admission of that fact.

Therefore, the Appellant is entitled to the house built outside the town, 50% of the house built in town, livestock (8 goats and 4 cattle) and all five (5) farms. The Respondent on his side, he is entitled to 50% of the house built in town, and two (2) cattle. As per the



evidence on record, none of the farms belongs to him. Regarding the houses, there is evidence that the house built in town was built with contribution of both spouses. But the house outside the town was built by the Appellant on her own or her elder children from the first marriage. The Respondent did not make contribution towards its acquisition. As for the livestock: the Respondent did not contribute anything on acquisition of the goats. As for the Cattle there is no clear-cut evidence how they were acquired. But it seems that both parties contributed. Nevertheless, there is evidence that dowry was paid for some of the Appellant's children. Therefore, some of these cattle were acquired that way. Hence, the Appellant is entitled to all five (5) farms, eight (8) goats and a big share of cattle, that is four (4) out of seven (7). Similarly, regarding the farms, the evidence (both oral testimony and documentary evidence) on record shows that all six farms were bought by the Appellant. Although the trial Court did neither examine the exhibits regarding the acquisition of farms neither brought by the Appellant nor evaluate the evidence adduced by the Appellant's witnesses on the acquisition of properties, the said evidence is in the record of proceedings at the trial Court. I have also seen farms purchase documents in the court file. The first appellate Court did not take interest to evaluate the evidence on record. It

simply confirmed the decision of the trial Court. Even though the Appellant might be the cause of the dissolution of the marriage due to her desertion of the Respondent, that cannot be a reason for equal division of matrimonial properties between the parties. The Respondent had submitted at the first appellate Court that the Appellant did not bring any evidence. I should make it clear that evidence may be direct oral testimony or documentary. The oral testimony is best evidence if it is direct as per Sections 61 and 62 of the Evidence Act [Cap 6 R.E. 2019]. Similarly, documentary evidence is also admissible in our Courts as per Sections 63, 64, 65, 66 and 67 of the Evidence Act [Cap 6 R.E. 2019]. In the present case the Appellant brought both witnesses who gave oral testimonies and there were documents evidencing her acquisition of farms. She thus discharged her burden of proof that he who alleges must prove as per Section 110 of the Evidence Act [Cap 6 R.E. 2019]. Also as was held in the case of **Karim Haji v Raymond Nchimbi & Joseph Sita [2006] TLR 420**. As seen on pages 1-2 of the trial Court judgment, and pages 1-11 of the trial court proceedings dated 31/03/2020 (handwritten and unpaginated proceedings), it is the Respondent who failed to substantiate his claim that the matrimonial properties jointly acquired were ten (10) goats, seven (7) cattle, two (2) houses, and

five (5) farms. There ought to be evidence from both parties substantiating their contribution towards acquisition of matrimonial properties. Unlike the Respondent, the Appellant gave evidence on the extent of her contribution in acquisition. Her testimony and evidence adduced by her witnesses is visible on pages 2-4 of the trial Court judgment, and pages 11 – 30 of the trial Court proceedings (handwritten and unpaginated proceedings). Her evidence is strong and credible. It was held in **Goodluck Kyando vs Republic [2006] TLR 213** that every witness is entitled to credence unless there is reason to disbelief and discredit his testimony. Both the trial Court and the first Appellate Court did not explain whether they found the Appellant's evidence to be incredible. I am of the view that her evidence was credible. She is in law entitled to a big share of properties as I have held hereinabove.

Regarding the second ground of appeal that the appellate Court grossly erred in law and in fact by blessing the decision of the trial Court without considering that the matter was not first referred to the Marriage Conciliation Board. This ground of appeal is unfounded because at both District Court and trial Court it became apparent that the matter was referred to the Marriage Conciliation Board, that is



BAKWATA, prior to petition being filed at the trial Court. Therefore, the second ground of appeal is dismissed.

As for the third and last ground of appeal that the appellate Court grossly erred in law and in fact by being biased against the Appellant hence reached an erroneous judgment. This ground of appeal is baseless. I reject it.

I thus find this appeal to have merits especially with respect to the first ground of appeal. I allow it to that extent stated herein above. No order for costs is given.

**DATED** at **TANGA** this 25<sup>th</sup> Day of March 2022.



  
**U. J. AGATHO**  
**JUDGE**  
**25/03/2022**

**Date: 25/03/2022**

Coram: Hon. Agatho, J

Appellant: Absent

Respondent: Absent

B/C: Zayumba

**Court:** Judgment delivered on this 25<sup>th</sup> day of March, 2022 in the presence of the Appellant.





**U. J. AGATHO**

**JUDGE**

**25/03/2022**

**Court:** Right of Appeal is available as per the law.



**U. J. AGATHO**

**JUDGE**

**25/03/2022**