IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC MATRIMONIAL APPEAL NO. 62 OF 2021

(From Matrimonial Appeal No. 25 of 2020, in the District Court of Kilombero, at Ifakara; Original - Shauri la Talaka Na. 41/2020 from the Primary Court of Mngeta)

ENOCK TALAKA SEME ..... APPELLANT

VERSUS

DIANA CHARLES KANYENYE..... RESPONDENT

JUDGMENT

Last Order: 29/12/2021
Date of Judgment: 17/03/2022

This is the second appeal. The matter stemmed from the decision of the Primary Court of Mngeta (the trial Court) where it was registered as **Shauri la Talaka Na. 41/2020**. According to the Court record, the respondent, Daina Charles Kanyenye successfully sued the appellant, Enock Talaka Seme for divorce and division of matrimonial properties. Aggrieved by the decision of the trial Court, the appellant preferred an appeal to the District Court of Kilombero at Ifakara where he lost. Disgruntled with the decision of the first Appellate Court, the appellant appealed before this Court armed with seven grounds of appeal.

The background which gave rise to this matrimonial appeal is as follows; the appellant and respondent contracted customary marriage in 1996 through Nyakyusa customary rites. The two had a joint happy life for quite a long time. They were blessed with five (5) issues, all female by sex. Three of them are minor as they fall under eighteen (18) years

old. The parties also earned two farms, one house and domestic utensils as their joint properties.

The lower Court records reveals that, from the year 2010 their marriage went under tribulation. They went through trouble and anguish, which forced the respondent in September, 2020 to knock the door of the trial Court seeking for divorce and division of matrimonial properties. She professed that cruelty and desertion are the main grounds which triggered her to petition for divorce. At the end of hearing, the trial Court was satisfied that the marriage between the spouse has broken irreparably. It therefore, proceeded to issue divorce and ordered for division of matrimonial assets. In addition, it ordered that, since all the Children were above seven (7) years old, each Child is at liberty to choose either to stay with the appellant or respondent.

As enlightened above, the appellant was unhappy with the trial Court decision. He thus presented his appeal before the District Court versed with seven (7) grounds of appeal which were listed in her petition of appeal as follow: -

1. *That, both lower courts erred both in law and facts in deciding that the marriage of parties is irreparable broken down without sufficient evidence to prove the same;*
2. *That, the appellate court erred in law by upholding the decision of trial court despite the presence of clear contradictory on provision/section of the law considered in dissolution of marriage;*
3. *That, both lower courts erred in law and facts by ignoring the evidence tendered by appellant's side;*

4. *That, trial court erred in law and facts by failure to analyse and take into consideration evidence/explanation of both parties, hence reached to wrong decision;*
5. *That, trial court erred in law and facts in ordering that matrimonial house of the parties be sold and proceeds to be divided and respondent to be given 60% and appellant 40% despite the presence of strong resistance from the parties that the same should remain for their children.*
6. *That, the trial court and appellate court erred in law and fact by ordering that respondent be given 60% and appellant 40% after selling the matrimonial house without any justifiable reasons on the contribution of each party.*
7. *That, the lower courts erred in law by ordering that piece of land situated at Mbingu area be divided equally while there without considering the contribution of appellant on the acquisition of the same.*

At hearing of this appeal, the appellant was represented by Ms. Donatila Teemba, learned advocate whereas the respondent appeared in person, unrepresented.

At the commencement of hearing, the learned counsel prayed t withdraw the second, third and seventh grounds of appeal. She thus remained with four grounds. Basically, the appellant in the remaining grounds of appeal is complaining that both lower courts erred in law and facts in deciding that the marriage of parties has broken irreparably and in ordering that the matrimonial house of the parties had to be sold and the proceeds thereof be divided to the appellant and the respondent at the ration of 60% and 40% respectively without considering the contribution of the appellant on the acquisition of the same.

Arguing in support of the 1st ground of appeal, the learned advocate submitted that the respondent claimed to have been beaten up and tortured by the appellant whereas there was no such proof and none of witness testified to that effect. The learned advocate contended further that since there is no any evidence to prove that the respondent had instituted a criminal case against the appellant or even producing the PF3 suggesting that she was seriously assaulted, her evidence should not be given weight. It is Donatila's contention that this ground of appeal did not prove that the marriage of the spouse was broken down beyond repair.

Submitting in respect of the 5th ground of appeal, the learned advocate contended that the trial Court erred both in law and fact when it ordered that the matrimonial house had to be sold and the proceeds thereof be divided by the spouses thus, the respondent, Daina Charles Kanyenye to be given a portion of 60 % and the appellant, Enock Talaka Seme to acquire 40% of the proceeds of sale. She attacked the decisions of both lower Courts contending that they didn't consider the welfare of the Children. She argued that the lower Courts should have left the matrimonial house for the Children. She added that if the house will be sold, the welfare of the Children will be adversely affected and probably be unable to access good shelter, food and education. Moreover, the trial Court didn't take into account the fact that the appellant and respondent have five (5) Children and three (3) of them are below eighteen (18) years and are still depending on their parents. He urged this Court to consider and highly pay attention to the welfare of the Children and maintenance as well.

Arguing in support of the 6th ground, the learned council submitted that the respon'dent did not advance any evidence to prove that she built the matrimonial home with the support from her relatives. Further, the lower Courts did not consider the appellant's contribution to the construction of the said house. She argued that the spouse bought 50 iron sheets in 2010 and the construction started in 2012.

On her part, the respondent replied by submitting that the evidence was fully adduced before the trial Court and her evidence was supported by the testimony of ten cell leaders within her locality and one person called Samwel Kassim Njela. She submitted further that, Samwel Kassim Njela testified to have witnessed the quarrels and fight by the appellant, where he succoured for rescue. She insisted that the appellant deserted her for about six (6) years because of giving birth to baby girls, the fact which was proved by the ten cell leaders.

Regarding division of matrimonial assets, she supported the finding and decision reached by the lower Courts. She underlined that the appellant is still occupying the matrimonial house and leasing to tenants for his own benefits. She therefore, prayed that the lower Court's decision to be up held. In her brief rejoinder, Ms. Teemba challenged the decision reached by the trial Court without asking Children as to whom they wished to stay with.

Having heard the rival submissions of both parties, I now proceed to determine the grounds of appeals preferred by the appellant. However, before determining whether, the two lower courts were right in deciding that the marriage the spouse has broken irreparably, I find it very crucial to commence with some remarks made by the trial court

magistrate while trying to establish whether the marriage between parties did exist.

The trial court magistrate in his decision made the remarks which was to the effect that the marriage between the appellant and the respondent was a presumed marriage. At the trial Court, the appellant did notify the trial Court that they celebrated their marriage in Nyakyusa customary rites way back in 1996. On this facet, the respondent did not deny the fact that they duly contracted customary marriage. The trial court however, concluded that the appellant and the respondent lived under presumption of marriage. It appears both lower Courts have misinterpreted the provision of the law which provides for various mode of celebration of a marriage. Section 25 (1) of the Law of Marriage Act [Cap. 29 R.E. 2019] (the LMA) recognizes for marriages celebrated in customary rites. It has to be noted that a marriage celebrated in customary rites is not a presumed marriage. Thus, the remarks "*Hivyo kwa kuwa ndoa za kimila zinatambulika kisheria za nchi ndoa yao inaonyesha kuwepo kwake, na ni kweli walikuwa na ndoa kati yao kupitia kifungu cha 160 (1) Sura ya 29, mapitio ya 2/2002 kama aina ya Ndoa dhaaniwa,"* is misconceived.

I say so because the marriage celebrated in customary rites is legally recognized under the provision of Section 25 (1) of the Law of Marriage Act. That being the position of law, the marriage between the parties doesn't fall under presumption of marriage as pronounced by the trial Court. With the observation above, I proceed to determine whether both lower Courts were right in determining that the marriage between the appellant and the respondent has broken irreparably.

The learned counsel for appellant contended that there was no sufficient evidence adduced at the trial Court to prove that the marriage between the appellant and the respondent has broken down beyond repair. On the other side, the respondent contended that the appellant has been assaulting the respondent. Her evidence revealed further that the appellant removed her front teeth and deserted her for a period of six years. The lower Court records, reveals further that, efforts to settle the dispute with the appellant through amicable means, ended in vain. The certificate issued by the Conciliation Board of IGMA, proved that the Conciliation Board failed to reconcile the appellant and the respondent. At the end of the day, it issued a certificate to the effect that the complainant, herein the appellant had to be accorded with the right to be heard. From there, the respondent left their matrimonial home.

The appellant, however, did not refute the allegations expounded by the respondent at the trial court. The appellant didn't deny to have physically assaulted the respondent. Notably, during cross examination he admitted that he was arraigned before the same court in a criminal case related to that serious assault, but the respondent forgave him. Rule 2 (3) of **The Rules of Evidence** provides inter alia that:

> ***"Rule 2 (3)*** *- Where the defence to any civil case is that there are other facts than those proved by the claimant and that such other facts will excuse him from liability to meet the claim, or where any fact is especially within the knowledge of the defendant, the defendant must prove those other facts".*

In light of the above provision of the law, the respondent was expected to have denied or challenged the allegations at the trial Court, but he did not deny the allegations that he has been thrashing the respondent

to the extent of removing her teeth. In deciding whether or not a marriage has been broken down irreparably, **Section 107 of the LMA** (Supra) has outlined several grounds that can be considered by the Court as ground for divorce if the same is proved by the petitioner. Cruelty and desertion are among the grounds for divorce identified in the said provision. Since there is ample evidence which shows that the appellant deserted the respondent for a period of six years and assaulted her, I am satisfied that there was sufficient evidence which incited the trial Court to issue divorce. Save for the said misleading remarks made by the trial Court regarding the kind of marriage contracted by the spouse, I am satisfied that the two Courts below were right to have concluded that the marriage between the parties has broken irreparably. In that regard, I found the first ground to have no merit.

As regards to the 5th and 6th grounds of appeal, both appears to revolve around one issue on division of matrimonial properties. The gist of the appellant's complaints in these grounds is that both lower Courts failed to consider the contributions made by the appellant during substance of their marriage. On the other hand, the appellant contended that the trial magistrate erred in law and fact in ordering that the matrimonial house of the parties be sold, and the proceeds thereof be divided as hinted above, despite the presence of strong resistance from the parties that the same should remain for their Children.

The evidence adduced by the respondent at the trial Court was to the effect that, the appellant left the respondent in a rented house. It is her testimony that they acquired the plot jointly, but while the appellant was away, she constructed the house on the said plot. Evidence reveals

further that, the dual bought 16 iron sheets way back 2010 and the same was used by the respondent for roofing the matrimonial house built by the respondent while the appellant way away. The appellant didn't refute all these facts at the trial Court. I am mindful of the provision of **Section 114 (2) (b) of the LMA as** interpreted in **Bi. Hawa Mohamed vs. Ally Sefu** (1983) TLR, 32 and **Yesse Mrisho vs. Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported) that in determining the division of matrimonial assets, the contribution of each party in acquiring them must be considered. In **Yesse Mrisho vs. Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported) the Court held that:

> *"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"*

In the instant case, both spouses contributed in purchasing the Plot of Land and 16 iron sheets, but the respondent contributed further by building the said house while the appellant was away. If at all the appellant contributed than what have been stated by the respondent, he would have stated before the trial Court. The assertion of the counsel for the appellant that the respondent contributed in buying 50 iron sheets while the appellant didn't adduce those facts at the trial Court, is an afterthought which cannot be accepted by the Appellate Court as it amounts to new evidences.

In the light of the above analysis, I find that the trial magistrate had fairly and reasonably divided matrimonial properties in line with the

provision of Section 114 (2) (b) of the LMA. I thus find no reason to reverse his decision.

As to the question whether or not the Court should order division of matrimonial because of the welfare of Children, I am of the view that, while I agree that disposition of the properties may affect the welfare of the Children as submitted by the counsel for the appellant, the same should not be used as ground to bar the Court to divide properties acquired during substance of the marriage to the spouses. I say so because Section 114 (2) (b) of the LMA provide clearly that the division of matrimonial properties is between the spouses.

Lastly, I wish to comment on issue regarding custody and maintenance of Children. Records of the lower courts reveals that, there was no specific ground raised by the appellant challenging custody or maintenance order, save that during hearing of this appeal, the counsel for the appellant, claimed that the trial Court was wrong in ordering that Children should choose a parent to stay with. It is apparent that even though the parties may have not pleaded or prayed for custody or maintenance of the Children, where the marriage is dissolved, Children must be placed under custody of a fit person having regard to Sections 125 and 129 the LMA read together with the provisions of the law under Sections 4, 7, 8, 9 and 26 of the Law of the Child Act [Cap. 13 R.E. 2019].

Owing to the circumstances of this case, the trial magistrate ought to have given his decision in line with the provisions of the law stated above and the facts asserted by the respondent. I say so because, it was the respondent's contention at trial that the appellant abandoned his family for six years on the ground that she, the respondent birthed

baby girls while he desired to have baby boys. **In my opinion, the alleged facts entice further inquiry to find out whether the appellant is a fit person to stay with Children he once neglected.**

Since the trial magistrate didn't address the issue of custody and maintenance of the Children as required by the law, I have no option other than to remit back the case file to the trial Court in order to make the necessary orders regarding custody and maintenance of the Children.

In the results, save for the above variation made by this Court, all orders issued by the trial Court remain undisturbed. Each side shall bear its own costs.

It is so ordered.

DATED at **MOROGORO** this 17th day of March, 2022.

M. J. Chaba

Judge

17/03/2022

Ruling delivered at my hand and the Seal of this Court in Chambers today on the 17th March, 2022 in the presence of the appellant and respondent, who appeared in persons.

M. J. Chaba

Judge

17/03/2022

Rights of the parties fully explained.

M. J. Chaba

Judge

17/03/2022