

**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM REGISTRY)**

**AT DAR ES SALAAM**

**PC. CIVIL APPEAL NO. 76 OF 2021**

*(From Matrimonial Appeal No. 58 of 2020 originating from  
Matrimonial Cause No. 97 of Kawe Primary Court)*

**LYDIA JOSEPH KARABA..... APPELLANT**

**VERSUS**

**KEFASI WILLIAM SWILA.....RESPONDENT**

*Date of first order: 23/11/2023*

*Date of Judgment: 24/3/2023*

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

**MGONYA, J**

This is the second Appeal. This Appeal originated from the decision of **Matrimonial Cause No. 97 of 2020 at Kawe Primary Court.** By virtue of section 160 of the **Law of Marriage Act Cap 89 [R. E 2019]** the trial court rebutted the presumption of marriage between the Appellant and the Respondent, distributed the jointly acquired assets such as a house **80%** to the Respondent, and **20%** to the Appellant, the rented house at **60%** to the appellant and **40%** to the Respondent and an equal share of **50%** to the Appellant and **50%** Respondent of the plot at Nyakwangwi. The decision which aggrieved the appealed who Appellant at the District Court of Kinondoni in **Matrimonial Appeal No. 58 of 2020** where the

decision of trial court was upheld. It is that decision which gave rise to this appeal. The appeal has nine grounds namely;

- 1. That, the Appellant court erred in law and facts by upholding the decision of trial court while the court improperly disregarded and neglected to receive the documentary evidence of the Appellant proving her contribution towards the acquisition of the matrimonial assets;***
- 2. That, the Appellant court erred in law and facts by upholding the decision of trial court without re-evaluating the evidence of the trial court which based on hearsay evidence;***
- 3. That, the Appellant court erred in law ad facts by upholding the decision of trial court that SM-2 was a wife of respondent and declared to be wife and husband based on oral evidence;***
- 4. That, the Appellant court erred in law and facts by upholding the decision of trial court which illegally distributed the matrimonial assets based on hearsay evidence of the Respondent on how contributed to the acquisition of the said properties and disregarded the documentary evidence of the Appellant;***

- 5. That, the appellate court erred in law and facts by giving the Appellant 40% of the matrimonial house (in which they used to live) while the Respondent agreed that the said house was jointly obtained;***
- 6. That, the Appellant court erred in law and facts by relying on the documentary evidence tendered by SM2 while had no capacity to tender for the document and the said documents had anything to prove with regard to the dispute between the Appellant and the Respondent;***
- 7. That, the Appellate court erred in law and facts by distributing one of the matrimonial home to the appellant and Respondent while the said house was demolished by the Respondent and the Appellant is living in demolished house;***
- 8. That the Appellate court erred in law and fact by entertaining the appeal in which had no jurisdiction to entertain the same; and***
- 9. That, the Appellate court erred in law and facts by not distributing the rent collected from matrimonial house by the Respondent since 2019 to 2020.***

Submitting in support of the appeal, Ms Regina Herman, Advocate for the Appellant silently abandoned the **5<sup>th</sup>** and the **9<sup>th</sup>** grounds.

On the 1<sup>st</sup> ground, Ms Regina faulted the trial court's distribution on the matrimonial assets of **20%** and **80%** of the house without proof on the part of the respondent, contrary to **Section 110 (1) and (2) of the Evidence Act** Cap 6 of 2019. Further, some of the evidence to prove the Appellant's contribution on the matrimonial house was rejected by the court. To support her submission, the case of **THE DPP V MIRZAI PIRBAKHSI & 3 OTHERS, CRIMINAL APPEAL NO. 493 OF 2016, CAT WAS CITED**. It is submitted further that in the absence of the Appellant's evidence it was inappropriate for the trial Magistrate to order a division of property. Therefore, the appellate court erred in law and facts by upholding the decision of trial court without re-evaluating the evidence of the trial court which based on hearsay evidence. However, the evidence shown by the Respondent when the construction of the house started by him and one Upendo Harrison as agreement tendered and admitted as K-1 which does not show her contribution nor the marriage between them.

On the 2<sup>nd</sup> ground, it is submitted that in the absence of reasoning and evaluating of the evidence of marriage of the

alleged party nullify the decision of the trial court. The contribution of her 2<sup>nd</sup> wife in the matrimonial assets was not demonstrated and when was the house built. The case of **GABRIEL NIMROD KURWIJILA V THERESIA HASSAN MALONJO**, Civil Appeal No. 102/2018 (Unreported) was cited in support.

Regarding the 3<sup>rd</sup> ground, that the appellate court erred in law and facts by upholding the decision of trial court which illegally distributed the matrimonial assets based on hearsay evidence of the Respondent on how he contributed to the acquisition of the said properties and disregarded the documentary evidence. Ms. Regina is of the view both the trial and Appellate court did not evaluate evidence on contributions on the acquisition of the said property. That it was prudent for the trial court to prove the subsistence of the respondent with his 2<sup>nd</sup> wife. The case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo,(supra)** where CAT held:

***"the extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property in resolving the issue of extent of contribution, the court will mostly rely***

***on the evidence adduced by the parties to prove the extent of contribution”.***

The Counsel submitted that, at the trial court, the Respondent did not adduce any proof of his contribution on the matrimonial assets. The ratio of **80%** to **20%** was not justified by the evidence, contrary to the principle laid down in ***BIBIE MAULID V. MOHAMED IBRAHIM*** [1998] TLR 62. Therefore, the Appellate court disregarded the provision of ***Section 114 (1) of the Law of Marriage Act***. It was further submitted that, the trial court ought to have considered section 114(3) on the property acquired by a spouse before marriage but was substantially improved by the other.

On the 6<sup>th</sup> ground, the trial court relied on **Exhibit K1** the Sale Agreement, tendered by Upendo Harrison who had no capacity to tender it. It is further submitted that she had no knowledge of the seller nor witnessed the sale. The Counsel submitted that, the law is clear that matrimonial asset cannot be disposed of without the consent of the other as provided under section **59(1) of the Law of Marriage Act**. Further, the court disregarded the fact the Respondent collected rent from their house since 2019 without giving the Appellant a share.

In regard to 7<sup>th</sup> ground, that the Appellate court erred in law and facts by distributing one of the matrimonial home to the

Appellant and the Respondent while the said house was demolished by Respondent and the Appellant living in demolished house. The respondent admitted that the rented house was a matrimonial property. After the judgment, the Respondent demolished the said matrimonial home and hired a woman purporting to be his wife.

On the last ground, the Appellant faulted the Appellate court for failure to consider the issue of custody and school fees of the issues of marriage to the Appellant without stating any reasons contrary to **section 129(1) of the Law of Marriage Act.**

The respondent sternly opposed the appeal on the reason that ground 1,5,6,7 and 9 are new grounds not raised in the first appeal. It is a trite law that new grounds not raised in the first appeal cannot be dealt upon in the second appeal, this as illustrated in ***MWANAIDI MABURA STEPHANI V RAMADHANI SAID***, Matrimonial **Appeal No. 10 of 2020.** Therefore, he urged this court to dismiss the 1, 5, 6, 7 and 9 grounds.

In regard to the 2<sup>nd</sup> ground of appeal is of the effect that, the appellant court erred in law and facts by upholding the decision of trial court without re-evaluating the evidence of the trial court which based on hearsays evidence. The Counsel said,

the Appellant's counsel alleged that the Appellate court based on the hearsay evidence. However, it is said that, two issues were determined in the second appeal being; distribution of matrimonial properties and maintenance of the child. Further the court it upheld the decision of the trial court after the re-evaluation of the trial court evidence at page 6 and 7 of the Judgment, regarding the distribution of the rented house where the Appellant got **40%** and Respondent **60%** and the plot at Nyakasangwe and demonstrated that either party proved their contribution on the acquisition of the plot. Therefore, the 2<sup>nd</sup> ground be dismissed.

Regard to the 3<sup>rd</sup> ground, the Respondent Counsel submitted that it is a new ground, it was not an issue in the first appeal. The issue before the trial court were whether there is presumption of marriage. If yes whether their marriage has broken down beyond repair and distribution of matrimonial of matrimonial properties and custody and maintenance of the child. The issue whether the respondent and one Upendo Harrison were husband and wife was not addressed at the trial court. Therefore, this ground has no merits.

In the 4<sup>th</sup> ground, it is submitted that the first Appellate court was right to uphold the decision of the trial court since it distributed the matrimonial assets fairly basing on the evidence



of each party. That the Respondent before living with the Appellant acquired a plot of land and a house, they later built a house and bought a farm at Nyakasagwa as shown at page 2 of the trial court's Judgement where the evidence was not challenged by the appellant. On the other hand, the Appellant failed to prove her contribution, she brought only two receipts dated **10<sup>th</sup> October 2011** and **7<sup>th</sup> October 2016** with **Tshs. 912,200/=** and **Tshs. 996,000/=** making a total of 1,908,200/= as her contribution. Therefore the Respondent counsel is of the views that, the allegation that the distribution was illegal as it based on hearsay evidence is unfounded.

The Respondent faulted the first appellate court for lack of jurisdiction to entertain the appeal pursuant to **Section 80 of the Law of Marriage Act Cap 89 RE 2019** that the Appeal emanating from the Primary court, District Court or Resident Magistrate Court shall go direct to the High Court.

I have heard submission of both parties and the lower courts records which I have thoroughly read. My task is to determine seven grounds of appeal.

In the 1<sup>st</sup> ground of appeal, the faulted the first appellate to uphold the trial court while the court neglected documentary evidence proving her contribution of the matrimonial assets. It is crystal clear that his ground of appeal is a new issue not raised

at the first appellate court which is the impugned decision in this appeal. However, the trial court admitted the receipt tendered by the appellant on 21 July 2021. It is trite law that in the second appeal the court deal with the grounds raised on the first appeal. This is well illustrated in ***SAMWELI SAWE VS. REPUBLIC, Criminal Appeal No. 135 of 2004*** (both Unreported), the Court of Appeal pointed out that:

***"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court."***

Basing on the principle above, I agree with the respondent's submission that the **1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ground** of appeal were not raised at the first Appellate court; **thus the same have failed.**

In regard to the 2<sup>nd</sup> ground, the Appellant challenges the 1<sup>st</sup> appellate court for upholding the decision of the trial court without re-evaluating the evidence which based on the hearsay. It is trite law that hearsay evidence is not admissible. A party wishes to challenge the hearsay evidence must do so during the tendering of such evidence. In **Ramesh Rajput Vs. Mrs. Sunanda Rajput [1988] T.L.R 96 (CAT)** held:

***"By not objecting to admissibility of the counter affidavit at the trial court the Appellant, on the basis of something in the nature of an equitable stoppel, had waived his right to object to the admissibility of hearsay evidence in this appeal".***

In such circumstance, I find no merit in the 2<sup>nd</sup> ground for two reasons. One, the Appellant did not object it at the trial court and two, it was not one of the grounds at the first appellate court. In the event therefore, **this ground fails.**

On the 3<sup>rd</sup> ground, the Appellant submitted that the evidence of SM2, Upendo Harrison the purported ex- wife of the Respondent did not prove her contribution to the house or the marriage subsisted between her and the Respondent. Responding, the Respondent submits that this ground should not labour this court as the marriage between Upendo Harrison and the Respondent was not the issue at the trial court or the first Appellate court.

SM3 Upendo Harrison supported the evidence of the Respondent that the Applicant found him with the house, which was built when living with SM3. The first Appellate court in this regard upheld the decision of the trial court that the Appellant found the Respondent with the house which the Appellant made some improvement. The first Appellate court was not duty

bound to deal on the validity of their marriage but on the contribution of the Respondent pertaining the matrimonial house. **This ground of appeal can not stand by its two feet. It lacks merit.**

Regarding the ground of jurisdiction of the 1<sup>st</sup> appellate court to entertain the appeal pursuant to **section 80 of the Law of Marriage Act Cap 89 RE 2019** which reads;

***Any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal there from to the High Court”.***

It is true that through the provision of **section 80** a person aggrieved may file his appeal to either the District Court or the High Court. The marriage Act does not expressly or implicitly purport to repeal, replace, amend or in any way affect a single provision of the Magistrate Courts Act which lays down the order of courts through which appeals are to be taken. **Section 80(10)** does not provide for appeals from primary courts to go directly to the High Court. **This ground of appeal is devoid of merit.**

In the foregoing, **I find no merit in this appeal. The same is dismissed accordingly.** The decision of the District Court of Kinondoni is hereby upheld.

Due to the nature of the appeal, I make no order to cost.

It is so ordered.

Right of Appeal explained.



**L. E. MGONYA**

**JUDGE**

**24/3/2023**