

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(IN THE DISTRICT REGISTRY OF SHINYANGA)**  
**AT SHINYANGA**

**P.C CIVIL APPEAL NO. 45 OF 2022**

*(Originating from shauri la madai No. 99/2021 and hence from judgment of kahama District court on matrimonial Appeal No. 14 of 2021 delivered by Hon D.D Msalilwa-SRM)*

**MUSA CLEMENT .....APPELLANT**

**VERSUS**

**HERIETH STIVIN PAUL.....RESPONDENT**

**JUDGMENT**

*28<sup>th</sup> February & 14<sup>th</sup> April 2023*

**MASSAM, J.**

This appeal under discussion is against the decision of Kahama District Court in Matrimonial Appeal No. 14/2021 which originated from Shauri la Madai no 99/2021 from Kahama Urban Primary Court.

Brief of facts of this matter were that respondent at Urban Primary Court of Kahama at Kahama petitioned for division of matrimonial assets following the decree of divorce issued by the trial court on 19<sup>th</sup> January 2016.

At the trial court after heard all parties trial court found out that the parties acquired one house located at Nyakato, a motorcycle ,two beds ,two refrigerators, two cupboards sofas, two dinner sets, a sewing machine, one radio, Two television sets, and other things, Also they had two issues namely Albert Musa (15) years old and Anety Musa (9) years old.

At the end of the trial, the trial court distributed the said assets as follows in terms of the house at Nyakato appellant was given shares of 75 percent and respondent a share of 25 percent. Interm of the other domestic's assets and motorcycle the trial court ordered appellant to pay respondent amount of Tshs 900,000 to compensate all. Lastly to the issue of the said issues the custody was given to appellant as respondent did not object it as her interest was not the custody but the order of visitation which she was given.

Appellant seems aggrieved and appeal to the Kahama District Court challenging two issues on the trial decision (1) the order of distribution of matrimonial house of 25 to 75 percent (2) order of appellant to pay respondent Tshs 900,000/=being her share on the motorcycle and the furnitures, at the District decision it decided that in the issue of house of Nyakato appellant to have a share of 65 percent and respondent to 35 percent, and the order of the appellant to pay respondent amount of Tshs 900,000/=the court ordered that the appellant is not duty bound to pay the respondent the said amount of Tshs 900,000/=as the trial court ought to have ordered distribution in respect of properties, lastly in the respect of the custody of children the same was ordered to remain undisturbed.

Aggrieved again with the decision of the district court decision appealed to this court with two grounds of appeal as follows that;

*(1) That the appellate magistrate erred in both in point of law and facts for ordering 35% of the distribution of the matrimonial house in favour of the respondent without proof of her contribution towards acquisition of the said house.*

*(2) That the appellate magistrate erred both in point of law and facts for misdirecting and misconceived himself for importing new facts which was not adhered in trial court.*

When this appeal was called for hearing on 28/2/2023 the appellant was represented by Mr. Rwangombe learned counsel whilst the respondent was in person unrepresented.

Supporting his appeal the advocate for appellant submitted that the parties got married on 2005, and blessed two issues Albert and Annety. He added that in their marriage ceremony they were given three bundles of iron sheet, Tshs 100.000/= and other domestic stuffs as gifts.

On 2014 the respondent absconded her family to unknown place and appellant tried to look for her in vain, so he decided to file a divorce at Kahama Primary Court ,by that time their house were in earliest stage (foundation) so he finished up that house alone and continued to live with his children.

On 2021 respondent returned and found appellant was already finished up that house and he was living inside, after that respondent filed



a case at Kahama Primary Court for division of Matrimonial assets and the trial court distributed the same by ordering the appellant to have a share of 75% and respondent to get 25%.

Appellant was aggrieved and appealed to the Kahama District Court which distributed that the appellant to get a share of 65% and respondent to have share of 35%.

Appellant was aggrieved again in that decision and appeal to this court complaining that the distribution was not fair as he built the said house alone. He continued by stating that he pray to reproduce the held in the trial court decision which saying that "kwa mujibu wa ushahidi uliopo kwenye jalada haibishaniwi kwamba wakati ndoa yao bado inaishi wadaawa walipata nyumba iliyopo Nyakato mtaa wa Mtakuja, pikipiki moja na vitu vya ndani fungu la 114(2)(b) sheria ya ndoa linaweka takwa la ulazima kwamba kuamua mgao wa mali ni lazima mchango wa kila mwana ndoa kwenye upatikanaji wa mali uthibitishwe,mdai katika ushahidi wake amesema kwamba ukiachana na majukumu yake kama mama wa nyumbani alikuwa pia ana duka la kuuza CD na cherehani pia ambayo alikuwa anashonea nguo na hivyo alikuwa na mchango katika upatikanaji

wa mali hizo". Also he prayed to reproduce the words in the judgment of 1<sup>st</sup> appellate court at pg 11 which said that "yes there is another piece of evidence from respondent during the trial that she had a shop at CDT and her contribution in terms of domestic duties entail her contribution to the acquisition of matrimonial assets consistent with section 114(1)(2)(b) of cap 29 which empowers the court grant division of matrimonial assets as insisted in the case of **Bi Hawa Mohamed vs. Ally Seif** 1989 TLR 32.

He added again that in the 1<sup>st</sup> appellate court decision there was some facts added concerning the location of the shop something which nowhere in the trial court was shown, it is trite law that it is not allowed to add a new facts in appellate stage, as elaborated in the case of **Flora Christopher vs. Violet Magani** Land Appeal No. 65 of 2019 Gwae J High court Arusha in pg 9-10 held that "*the act of raising a new issue at appeal stage is legally prohibited ,the same was to be raised in the trial tribunal and not at this appeal stage*". So appellant insisted that the adding of the said location of shop help respondent to be added some percentage of shares.

Again appellant said that in the case of **Bi Hawa Mohamed** Court of Appeal pointed three points to consider before distribution of matrimonial assets among them are ;

(1) Proof of acquisition of such assets which were acquired jointly by the parties.

He added by saying that the case of **Samweli Moyo vrs Mary Kasian Kayombo**, 1999 TLR 197 High, court of Mbeya insisted the issue of testifying how the parties contributed in acquiring the matrimonial assets, so appellant in this case insisted that the distribution given by all courts was not proper as there was no evidence given to show how did respondent participate in acquiring that house as she was not around when that house was built.

He stated that respondent came on 2021, so there was no doubt that respondent abandon her family and that's why the parties filed two cases one for divorce which filed by appellant and another one for division of matrimonial properties which filed by respondent, so respondent failed to brought a proof to show that , she distributed in acquisition of the said house.

Lastly he prays to this court to allow the appeal and decisions of both courts to be reversed.

Respondent in her reply to the appellant submission stated that she is saying the truth that the decision of trial court was proper as the evidence which testified to this court was all lies. So she prays to this court to adopt the decision of the trial court.

Appellant counsel in his rejoinder stated that he pray to this court to quash and set aside the decision of both courts and the issue of distribution to be reversed.

I have considered the arguments by the learned counsel for the appellant and respondent the issue to determine is **whether this appeal has merit**

This court on perusal of the trial court evidence find that respondent testified that she contributed in the acquisition of the said house because she had a shop of selling CD and she had a sewing machine, also as a wife she contributed in domestic works so she prays to division of the said house and some domestic properties which they were given in their



wedding also she prays for visitation of her two kids Albert and Annety who are living with appellant ;appellant in his testimony said that he started to build that house when respondent was not around and when she came back she find him inside the house with kids. In concerning the other domestic properties he said that he had it before marrying respondent, but three bundles of iron sheet and money amounted to Tshs 100000 was given to them and some other domestic stuffs to the wedding ceremony, so this court has no doubt that the parties were blessed two issues, no objection that in their wedding ceremony they were given three bundles of iron sheet money and other domestic stuffs, as there are supported by both parties the objection raised here is if there was enough proof that respondent contributed in acquisition of the said house.

This court will look in section 114(1) of the law of marriage Act Cap 29 which gave court power to distribute properties jointly acquired by the spouses during subsistence of their marriage, also this court is aware on section 114 (2) (b) of the same law which among other things require court to recognize the contribution to each party in acquiring of matrimonial assets in terms of domestic work and money.

Coming to this case at hand there was evidence from respondent who said that as a wife she contributed in terms of domestic work and in terms of money she had a shop of CD, this court finds out that the said facts was not objected but supported by the appellant that respondent by using her business of CD and of sewing clothes helped him in issues like food and other small things.

So according to that evidence this court is in support of the decision of both courts that respondent deserves a share in that house, as she managed to proof that by using that business she helped appellant to put food on table.

Also there was a piece of evidence which show that respondent helped in construction of that house as she helped keeping water to bricks to make it wet to strengthen them, that evidence supported by appellant and the same add some proof that respondent contributed in acquisition of the said house

So the evidence from appellant that he built that house alone becomes weak and unsupported. So this court finds ground no 1 of appellant appeal has no merit and it's hereby dismissed.

In respect of the order given by the trial court that the appellant to pay respondent Tshs 900,000 to compensate the motorcycle which were sold by appellant and furniture this court finds a piece of evidence which show that appellant sold that motorcycle to help him to build of the said house so this court as the same view with 1<sup>st</sup> appellate court that the trial court erred by ordering the appellant to pay respondent that amount, as respondent got share in that house but the issue of furniture's and other domestic stuffs the trial court parties required to give order of division on it order each party to have it, so according to the said reasons this court find ground no 2 of the appellant appeal has merit and its hereby allowed it.

So according to the foregone reasons this court find no reason to disturb the finding of the trial court in the issues of the division of the said house and its shares, custody of children and visitation of respondent to the children, but in the issue of appellant to pay respondent Tshs 900,000/= as compensation on the sold of motorcycle, furniture's and domestic stuffs this court is reversing it and order the said furniture's and other domestic stuffs to be divided equally to the parties. And for the decision of the 1<sup>st</sup> appellate court its hereby quashed and set aside.

It is so ordered.

**DATED** at **SHINYANGA** this 14<sup>th</sup> day of April, 2023.



  
**R.B. Massam**

**JUDGE**

**14/04/2023**