

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.25 OF 2023

*(Arising from the decision of Kibaha District Court in Matrimonial Appeal No. 15 of 2022
before Hon. J. Lymo, SRM)*

WILLIAM NGAGI KASEMBO.....APPELLANT

VERSUS

MESIANA ELISANTE MOLLA.....RESPONDENT

JUDGMENT

16th March, 2023 & 3^d April, 2023.

MWANGA, J.

This is a second appeal. The appellant, **WILLIAM NGAGI KASEMBO** appealed against decision of the District Court of Kibaha in Matrimonial Civil Appeal No. 15 of 2022, which has a root in Matrimonial Cause No. 71 of 2022 from Mkuza Primary Court. The trial court, *inter alia*, granted divorce and custody of the child to the respondent. It also ordered the matrimonial properties to be divided at the ratio of 50% to the appellant and respondent. Further orders were for payment of expenses for maintenance of the child

by the appellant including provisions for food at the cost of Tshs. 70,000/= per month. Lastly, the appellant was given access to the child.

Being aggrieved with the decision, the respondent appealed partly against the decision of the District Court in respect of division of matrimonial properties where it was ordered as follows: -

"Therefore, the court is in line with this ground of appeal and allow the matrimonial assets be divided; 25% for respondent and 75% to the appellant."

The appellant was dissatisfied with the above decision. Therefore, he appealed to this court on five grounds as summarized hereunder: -

1. The trial court erred in law and fact by awarding the appellant herein 25% of the matrimonial property without considering his contribution.
2. The Trial magistrate erred in law and fact by giving decision basing on the weak evidence adduced by the respondent herein.
3. The trial magistrate erred in law and fact by giving judgement in favour of the respondent without assessing the source of income of the respondent.
4. The trial court erred in law and fact by accepting the receipts adduced by the appellant which had name of the child who the appellant claims not to be his.

5. The trial court erred in law and facts by not putting into consideration the evidence adduced by the appellant.

With the above grounds of appeal, I have found it importance to state brief facts of the case. The appellant and respondent got married on 2017 and they were blessed with one issue namely Elisha William @Juniour. The duos had acquired one house and a plot both located at Kibaha District. They lived happily until when the appellant became suspicious of respondent's adulterous affair with other men. They attempted to resolve their dispute at the reconciliatory board, the process which led to separation of the two.

Above all, the alleged adulterous behaviors of the respondent became nonstop and consistently being refused to conjugal rights. As a result, the appellant was fed-up with such actions of the respondent and decided to petition for divorce. Amongst the prayers sought were order for divorce, distribution of matrimonial properties, maintenance and custody of the child.

After a full trial, the trial court was satisfied that the marriage had broken down irreparably. Consequently, it was dissolved and the matrimonial properties were divided accordingly.

During the hearing, the appellant was represented by Ms. Ritha Ntagazwa, learned advocate, and the respondent was represented by Mr. Tumaini Mgonja, also learned advocate. In the course of submission, the learned counsel Mr. Tumaini Mgonja abandoned 2nd and 5th grounds of appeal.

In essence, both grounds of appeal were argued together. When arguing the 1st ground of appeal, the counsel Ms. Ntagazwa submitted that, the appellant showed his extent of contribution in acquisition of the matrimonial properties. The counsel cited Section 114(2) of Law of Marriage Act, Cap. 29 R.E 2019 to the effect that, courts should consider extent of contribution by each side in the acquisition of matrimonial property when deciding on such issue. The counsel referred page 6 of the typed proceedings which showed that the appellant contributed the sum of Tshs. 5,000,000/= to buy a plot and, that he also took loan from NBC and CRDB which supported construction of the house. The counsel added that, the appellant had gone to Darfur- Sudan in a peace keeping mission where he got some allowances that were injected in the construction of the matrimonial house.

With reference to the second ground of appeal, the appellant contended that the trial magistrate erred in law and fact by giving judgement

in favour of the respondent without assessing the source of income of the respondent. According to the counsel, the appellant, being a civil servant, had a source of income which is the monthly salary of Tshs. 1, 200,000/=. Therefore, basing on the authority in **Gabriel Nimrod Kurwijira Vs Theresia Hassan Malongo, Civil** Appeal No.102 of 2018(HCT) the court shall make its decision relying on the evidence adduced by the parties.

On the third ground of appeal, the counsel was of the view that the court erred to rely on the receipts tendered by the respondent as the said receipts did not constitute the amount claimed as part of the contribution in the acquisition of the matrimonial property. Also, that the receipts reflected the name of "mama Junior" while they do not have a child with the name "Junior". The counsel argued that, the only child that couples were blessed with is Elisha William Kasembo.

Per contra, the learned counsel raised an issue that grounds of appeal No. 1, 3 and 4 which the appellant proceeded to argue focused on challenging the decision of the primary court and not the district court. Nevertheless, he contended that, extent of contribution is utmost importance in the division of matrimonial properties. According to him, contribution is a matter of evidence. He contended further that, the appellant had adduced

no evidence to support his case as there was no evidence that the appellant took a loan from NBC, CRDB and NMB.

Apart from that, the question of allowances obtained by the appellant in his peace mission in Darfur was not raised at the trial court, hence it was submission from the bar. On his part, the respondent tendered receipts as evidence of purchasing building materials and, the same were tendered and admitted as exhibits C, D, E. Additionally, that supervision in the construction of the house by the respondent was another form of contribution.

As regard to the name of the child, the counsel contended that the name appearing in the receipts "mama junior" is the name of the child of the appellant and respondent which is known at the local areas where they lived and, that a clinic card was also tendered and admitted as exhibit. It was his further assertion that, in the circumstances, the appellant was not supposed to blame the court because he had no proof if he contributed to the acquisition of the matrimonial assets.

In conclusion, the counsel stated that the appeal is baseless and it shall be dismissed. It was his submission that, the decision of the 1st Appellate Court shall remain undisturbed.

In rejoinder, the counsel for the appellant reiterated that the receipts were not valid ones as they bared the name "Junior". Again, that the same receipts contain less sum of amount compared with the value of constructed matrimonial house. It was the counsel view that, the records at page 6 of the proceedings indicates that even the receipts tendered do not have the value of about Tshs. 10,000,000/=. In that regard, oral evidence of the appellant was not considered.

Before I start analyzing the evidence available on records and submission of the learned counsels, let me address the issue raised by Mr. Mgonja that, by looking at grounds of appeal filed by the appellant it may connote that he was challenging the decision of the primary court. However, without applying technicalities, the one who appealed to the District Court was the respondent herein. Again, looking at the 1st, 3rd and 4th grounds of appeal which are being contested are all seek to challenge decision of the district court and not the primary court. Therefore, I consider the grounds of appeal as rightly placed before this court.

Be that as it may, I have evaluated the available evidence and considered submission by both counsels with respect to the decision of the 1st appellate court. As a matter of principle, the court has held that in a

second appeal, the court has to be cautious to vary the findings made by the court below. That was the position in the case of **Director of Public Prosecutions Vs Norbert Enock Mbunda**, Criminal Appeal No. 108 Of 2004(Unreported) where at page 5 the court had this to say: -

"Needless to repeat, this is a second appeal. In a second appeal the court is always cautious to reverse findings of fact made by courts below unless they are, on the face of it, unreasonable or perverse". (Emphasis is mine)

Indeed, the present appeal is a second appeal. The issue now is whether the varied decision of the district court is, on the face of it, unreasonable or perverse. When giving the decision, the district magistrate court had the following view: -

"I am of the view that, both parties tried to prove their contributions. However, I do rely on the evidence of the appellant that her contribution was greater than that of the respondent. She tendered various receipts to show how she kept all in the house. The respondent on the other hand, failed to be specific for this court to assess his contribution. He stated to have received Tshs. 30,000,000/= when he went to Darfur of which some went to the house but failed to say the amount until the appellant told the court that it was Tshs. 5,000,000/=. Also, he alleged to have borrowed loans from the bank so as to construct the house, yet he failed to tender any documentation from the banks mentioned. All what was agreed and proved by the respondent to have been his

contribution is the Tshs. 5,000,000/= as stated by the appellant. Therefore, the court is in line with this ground of appeal and allow the matrimonial assets to be divided; 25% to the respondent and 75% to the appellant"

The primary court decision considered the fact that, the appellant has a salary of Tshs. 1,200,000/=, while the respondent has monthly income of 540,000/= from her businesses. The appellant also contended that he bought the plot with money obtained as a result of his peace keeping mission in Darfur. Though not specifically stated, he also took loans from NBC and NMB for construction of the house and also took a loan from CRDB to buy a second plot. Additionally, he used to send money to the respondent to buy the construction materials.

What was glaring is that, during cross examination, the respondent did not question the appellant on the truthfulness or correct version of the appellant testimonies. That means, thought, the appellant provided no breakdown of how much were injected in the matrimonial house and purchase of the plot, the same is taken as being admitted. In the case of **Goodluck Kyando Vs Republic**, [2006 TLR] 363 at page 366, the court held that, failure to cross examine witnesses leaves the evidence unchallenged. That was also the position in the case of **Damian Luhele**

Versus Republic, Criminal Appeal No. 50 of 2007 quoted in the case of **Yosefu Timotheus Mapunda Vs Republic**, Criminal Appeal No. 53 of 2022(Unreported) where it was held that:-

"It is trite law that, failure to cross examine a witness on an important Matter ordinarily implies the acceptance of the truth of the witnesses' evidence"

On top of that, when he was examined by the court the appellant confirmed his earlier position as in examination in chief.

On the other hand, the respondent told the trial court that she was doing business, as a result, though no mentioned of specific place or license where the business were being conducted, she contributed to the acquisition of matrimonial properties. According to her, the monthly business income was Tshs. 540,000/= from the businesses. She also tendered various receipts which in total had the estimated value of Tshs. 7,893,500/=. Again, she also told the court that she sold her plot located at Kilimanjaro Region at a price of Tshs. 14,500,000/= which were also injected in the construction of the matrimonial house. Further to that, that she also injected Tshs. 17,000,000/= where its source was also not revealed or supported by any evidence.

On perusal of the available records, it can be seen that, neither the appellant nor the respondent had submitted correct mathematical calculations as to the extent of contributions in the acquisition of matrimonial assets. They both produced evidence which essentially required support of some documentary evidence but none of them produced the same. The little which was produced had also some issues to be resolved. Furthermore, the district court varied the decision based on financial aspects of contribution only while in actual facts it required more than that. According to the trial court, the decision considered all aspects of finance, work and advise of the parties. In fact, the trial court had this to say:-

"Katika mgawanyo wa mali Mahakama inaangalia machango wa pamoja katika upatikanaji wa mali husika kwa mujibu wa kifungu 114 (2) (b) cha Sheria ya ndoa. Na mchango huo unaohesabika kuwa nguvu ya Pamoja ambayo wana ndoa wamechangia katika upatikanaji wa mali unaweza kutafsiriwa kujumuisha fedha, mali au kazi wanazofanya au yote kwa Pamoja kama ilivyofafanuliwa katika shauri la Zawaid Abdallahdhidi ya Ibrahim Idd, Civil Appeal No.10 of 1980, HC- Dar es salaam Registry"

The trial court considered the fact that, the appellant used the money obtained from Darfur mission, salary, loans and the respondent did not object that. And that, he went to Darfur, and upon his return he bought plots and gave the respondent Tshs. 5000,000/= which was injected in

construction. Eventually, it was held that, parties contributed equally in the acquisition of the matrimonial properties.

In light of the above, it is my considered view that the findings of the District Court were, on the face of it, unreasonable or perverse. There was no justification whatsoever to justify variation of the primary court's decision on the ground that, the respondent had greater contribution than the appellant. The court should have directed itself properly to the well-established principle under Section 114 of the Law of Marriage Act, Cap. 29 R.E 2019 and in the elaborated case of **Gabriel Nimrodi Kurwijila Vs Theresia Hassan Malongo**, (Supra) where it was held that;

"...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..."

Likewise, in the authority in **Samwel Moyo Vs. Mary Cassian Kayombo [1999] TLR 197**, where it was held that;

"...its apparent that the assets envisaged, there at must firstly be matrimonial assets, secondly must have been acquired by them during the marriage and thirdly they must have been acquired by their joint efforts. The three conditions must exist before Court's

power to divide matrimonial or family assets under s. 114 (1) of the Law of Marriage Act is involved..."

Apart from that, in the case of **Gabriel Nimrod Kurwijira vs Theresia Hassani Malongo, (Supra)**, Court of Appeal - Tanga it was held;

"The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property". (Emphasis is mine).

In the end, I allow the appeal to the extent of upholding the trial court's decision in terms of division of matrimonial properties at the ratio of 50% to the appellant and respondent. In the upshot, the District Court's decision is quashed and set aside.

Being a matrimonial cause, each party should bear its own costs.

Order accordingly.



H. R. MWANGA

JUDGE

03/04/2023

COURT: Judgement delivered in Chambers this 3rd April, 2023 in the presence of the appellant in person and advocate Tumaini Mgonja for the respondent.



H. R. MWANGA

JUDGE

03/04/2023