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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL APPEAL NO. 38 OF 2022**

(Matrimonial Appeal No. 14 of 2022 at Arumeru District Court, Originating from Matrimonial Cause No. 2 of 2022 at Maji ya Chai Primary Court)

**FLORAH MICHAEL MKANDAWILE.....APPELLANT**

**VERSUS**

**GIDION STEPHANO PHIRI.....RESPONDENT**

**JUDGMENT**

25th April & 02nd June 2023

**TIGANGA, J**

This is a second appeal preferred by the appellant who was the losing party before Arumeru District Court (1st appellate court). Going by the records of the lower courts, the parties herein were under cohabitation from the year 2011 until the year 2022 when what joined them suffered deficiency. The record shows that, they had been so cohabiting under the presumption that, they were married as husband and wife and that such a relationship was regulated by the provision of section 160 (1) of the Law of Marriage Act [Cap 29 R.E 2019].

Out of the said relationship, they were also blessed with two issues, the girls aged 21 and 10 years old respectively. It was further established

that the parties herein had acquired a house located at Nasholi – Mtaa wa Mlimani.

The relationship has turned sour on reasons of adultery and cruelty, the appellant petitioned for a decree of divorce together with orders for the division of matrimonial properties and maintenance of the children. The matter was filed at Maji ya Chai Primary Court (the trial court), where the appellant alleged that, the respondent was unfaithful to their marriage as he had other children out of their relationship the fact which was also not disputed by the respondent. The other complaint is that he was so drunkard and violent as he also used to beat her.

After hearing the evidence from both parties, the trial court found that the marriage between the parties had broken beyond repair but since it was sufficiently proved that the parties lived under the presumption of marriage the decree of divorce was not issued.

As to the division of matrimonial properties, the appellant testified that she contributed to the building of the house located at Nasholi – Mtaa wa Mlimani as she was working at Export Trading. She stated that she contributed Tshs. 500,000/= She also opened a stationery with a capital of tshs. 5,000,000/= which she obtained after selling her house in Mbeya.

She went further to state that she also paid the school fees of her daughter from form one to form four.

The respondent on the other hand disputed the contribution of the appellant in the acquisition of the said house, he stated that the contribution of the appellant was only to the tune of Tshs. 2,000,000/=. In its finding, the trial court ordered for equal division of said property between the parties. As to the maintenance of the children, it ordered the respondent to maintain her child Vivian who is still a minor, to the tune of Tshs. 150,000/= per month and the custody of that child was placed to the appellant.

Dissatisfied by the decision of the trial court, the respondent filed an appeal to the Arumeru District Court, the first appellate court to challenge both, the division of the matrimonial property and an order for maintenance of the child. In reversing the trial court decision, the 1st appellate court ordered that, the extent of contribution of the appellant in the acquisition of the said matrimonial property is only limited to 14% of the total value of the property. As to the amount ordered for maintenance of the child, the 1st appellate court was of the view that, there was no evidence as to the financial status of the respondent for him to be compelled to pay this. 150,000 as the maintenance to his child, therefore

the 1st appellate court quashed the said order and replaced it with an order that the respondent be provided with food, medical care, and education facilities as per the means and station of his life.

Aggrieved by the decision of the 1st appellate court, the appellant had filed this appeal with a total of five grounds of appeal appearing as follows;

1. That the first appellate court erred in law and failed to appreciate the whole concept of the equal distribution of matrimonial property as a result the impugned decision was pronounced.
2. That, the first appellate court erred in law and in fact when awarded ¼% to be distributed to the appellant while the appellant vividly elaborates on her contribution towards the acquisition of their matrimonial properly as the result the shoddy decision was pronounced.
3. That, the first appellate court erred in law and in fact by treating the matter as a civil case by requiring parties to prove the existence of their fact through documents and failed to understand that in matrimonial cause spouses do not rely on

the documents rather on love and trust among them thus bad decision was given.

4. That the first appellate court erred in practice by battling an oral submission given by the respondent (unrepresented person) with that of the legal written submission of the appellant (drafted by an Advocate) as a result the scheduling order for submissions was not honoured hence a shoddy decision was pronounced.
5. That, the first appellate court erred in law and in fact by failure to evaluate the evidence adduced by both parties in trial court that the respondent is a teacher therefore he is capable to provide for the amount of tshs 150,000/= for the maintenance of the child thus the bad and unenforceable decision was pronounced.

When the matter came for hearing, Mr. Richard Manyota, learned counsel appeared for the appellant, on the other hand, the respondent appeared in person unrepresented and the appeal was disposed by way of written submissions.

Supporting the grounds of appeal with exception to ground number four which was dropped, the appellant submitted on ground number one

and two jointly as follows; that the 1st appellate court failed to appreciate the whole concept of equal distribution of matrimonial property as per the requirement of section 114 (2) of the Law of Marriage Act (supra) that in the division of the matrimonial properties, the paramount consideration is on the extent of contribution by the spouse towards the acquisition of the said property. In support of this argument, the appellant's counsel cited the case of **Mariam Tumbo vs Harold Tumbo,** (1983) TLR 293, **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018, and **Victoria Sigala vs Nalasco Kilasi,** PC Matrimonial Appeal No. 1 of 2012. The appellant thus prayed that the decision of the 1st appellate court be reversed and property is equally divided.

Submitting on the 3rd ground of appeal the appellant erred by requiring proof of the existence of facts through documents while the same is not required in matrimonial proceedings. To support his arguments, the appellant cited the case of **Victor Sigala vs. Nalasco Kilasi (Supra).** The appellant went further to state that, proof of acquisition of the property during the subsistence of their marriage should be guided by love and trust and not documentary evidence as it was observed by the 1st appellant.

As to the 5th ground of appeal, the appellant submitted that, the 1st appellate court failed to properly evaluate the evidence that, the respondent herein is a teacher and that he is capable to provide the amount of Tshs. 150,000/= for maintenance of his child as was decided by the trial court.

The respondent on the other hand maintained that the 1st appellate court was correct in arriving at its decision and added that, at one point in time, the appellant deserted the home for consecutive two years. More so, he contended that the court was proper to refer to the documentary evidence to ascertain the extent of the contribution of the appellant. As to the cited cases, the respondent was of the view that, the same stress on the contribution of the spouse in the division of matrimonial properties something which was done by the 1st appellate court by considering the extent of contribution of the appellant and thereupon came up with the share of ¼% of the total value of the property.

According to him, the above-cited cases are mostly used where a party has been denied a share in the matrimonial property but this is not the case in the present matter as the appellant was given her shares as per the evidence on record.

The respondent went on to submit on the 3rd ground that, it is a cardinal principle that the court should among other things, rely on evidence on record, and this matter being of a civil nature, the proof is on the balance of probabilities. Therefore, he was of the view that the court was correct to rely on the documentary evidence tendered in court.

As to the 5th ground of appeal, the respondent replied that, his salary is subject to deductions such as PAYE, NHIF, Financial Institution loans and that he also has other dependents to take care and that he has no other income. Moreover, the order of payment of Tshs. 150,000/= was in line with maintaining the child, therefore the 1st appellate court was correct to have reversed the order of maintenance from that of the trial court.

Having considered the record of appeal and the submissions advanced by the parties, it is now time to determine the grounds of appeal in their sequential order. As ground number one and two were argued together this court shall also determine them jointly. In these two grounds of appeal, the appellant is challenging the division of matrimonial property. As already stated by the parties above, the issue of division of matrimonial property is a subsequent order after the marriage has been declared to be broken down irreparably. In dividing the properties

acquired during the subsisting of the marriage, the paramount consideration by the court is on the contribution by each party to the acquisition of such properties. This position is well elaborated under section 114 of the Law of Marriage Act, [Cap. 29 R.E 2019] and was reiterated by the Court of Appeal of Tanzania in the case of **Regnard Danda vs Felichina Wikesi,** Civil Appeal No. 265 of 2018 (Unreported) where the Court stated;

> *"In the circumstances, while we are mindful of the provision of section 114 (2) (b) of the **LMA** as interpreted in **Bi. Hawa Mohamed's** case (supra) 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, we reserve no doubt that the appellant and the respondent in the instant appeal, directly contributed on equal basis in acquiring the house under discussion."*

In essence, there is no dispute to the fact that the said house was acquired jointly by the parties during their cohabitation, however, the controversy between them is on the ratio of the division. While the appellant strongly argue that said house be divided equally among them as it was decided by the trial court. The respondent contend that equal

distribution was unjust because the evidence did not prove equal contribution.

Upon considering the evidence on record, this court fully subscribes to the holding in **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32, that the appellant qualifies to have a share in the said matrimonial house as the respondent also admitted her contribution towards its acquisition. Moreover, the appellant also contended that she was working and also, she opened a stationery business a fact that was also acknowledged by the respondent. Furthermore, while cross-examined by the appellant, the respondent, admitted that he was aware of some of the loans taken by the appellant, and more so, the respondent also admitted the contribution of Tshs. 2,000,000/= by the appellant to the building of the said house.

In addition to the above, it has also been the position of the law that, the extent of the contribution made by each spouse is not restricted only to material or monetary contribution, it extends to either matrimonial obligation or work or intangible considerations such as love, comfort, and consolation of wife to her husband, the peace of mind and the food prepared by the wife for her husband. See the decision of the Court of Appeal in the case of **Tumaini M. Simoga vs Leonia Tumaini Balenga** (Civil Appeal No. 117 of 2022) [2023] TZCA 249 (12 May 2023) (Tanzlii)

Moreover, that should be looked at in the context of contribution and it should be reflected by the evidence to justify equal division of the matrimonial property. Having passed through the evidence of the respondent as presented before the trial court and as assessed by the first appellate court, the evidence proving other services could not entitle the District Court to award the respondent equal division of the property. In my further view, the same would have been 40% of the house while the appellant be entitled to 60% of the said house.

Following the current decision of the Court of Appeal of Tanzania in the case of **Sixbert Bayi Sanka vs Rose Nehemia Samzugi** (Civil Appeal No. 68 of 2022) [2023] TZCA 227 (4 May 2020) (Tanzlii). In this case, the option of selling the house should not be preferred where the other party (spouse) is ready to buy out the share of the other. In this circumstance the valuation of the house should be done and an interested and capable spouse may pay the other his or her share. And where no spouse is ready to exercise such right of buying the share of the other, and the property needs to be sold, the costs for valuation must be deducted from the proceeds of the sale before division. The 1st and 2nd grounds are disposed to that extent.

Coming to the third ground that this is not a civil matter which requires proof through documentary, with due respect, this is a misconception of the fact, it is clear that this is a matrimonial cause, therefore, it is civil in nature and as it is the case with civil cases its proof is on the balance of probability depending on the evidence adduced by each party. That said, this ground of appeal is bound to fail.

As to the last ground of appeal, this court finds no reason to fault the finding of the 1st appellate court as it is evident that the trial court did not sufficiently scrutinize enough evidence on the awarded amount to be paid by the respondent as maintenance. Therefore, it is my view that the respondent maintains his child in the manner prescribed by the 1st appellate court. That said this ground is devoid of merit.

In the event, this appeal succeeds to the extent explained above. Taking into account the relationship of the parties this court refrains from making an order as to costs.

It is accordingly ordered.

**DATED** and delivered at **ARUSHA**, this 02nd day of **June** 2023

HIGH COURT OF TANZANIA

**J. C. TIGANGA**

**JUDGE**