

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

**SONGEEA SUB-REGISTRY**

**AT SONGEEA**

**PC. CIVIL APPEAL NO. 15 OF 2023**

*(Originating from Mbinga District Court in Matrimonial Appeal No. 09 of 2022, Original Matrimonial Cause No. 07 of 2022 at Langiro Primary Court)*

**GERMANA ADOLF NDOMBA ..... APPELLANT**

**VERSUS**

**ONESPHORY KAPINGA ..... RESPONDENT**

**JUDGMENT**

Date of last Order: 08/09/2023

Date of Judgment: 13/09/2023

**U. E. Madeha, J.**

This is a second appeal arising from the decision made by Mbinga District Court. The Appellant was aggrieved by the decision of the Court which set aside the decision made by Langiro Primary Court which granted a decree for divorce and other ancillary orders thereto. In his petition of appeal, the Appellant has two grounds of complaint, namely:

- 1. That the first appellate Court erred in law and in fact by making an order for retrial while the original trial was neither illegal nor defective.*
- 2. That the first appellate Court erred in law and in fact by holding that the trial Court failed to consider the extent of contribution made by each spouse when granting an order for division of matrimonial properties.*

Briefly, the background of this appeal goes as follows: the Appellant and the Respondent started living as wife and husband in the year 2003. In 2018 they legally married each other through a Christian marriage. In their life the parties were blessed with four children. Later on, their marriage was encountered with difficulties which were unsuccessful referred to the Marriage Conciliation Board. The Appellant filed matrimonial petition at Langiro Primary Court praying for the decree for divorce, division of matrimonial properties and the maintenance order for one child from the Respondent. The reasons adduced by the Appellant before the trial Court are sexual abuse, insult and threat by the Respondent. She told the trial Court that she thought that divorce was the best way to leave the Respondent peacefully. The Appellant tendered Marriage Certificate and Form No. 3 as exhibits.

After full trial, the trial Court granted decree for divorce and ordered for division of matrimonial properties among the parties. The Respondent was also given custody of the children and the Appellant was granted with the right to have access to the children in holidays.

Dissatisfied with the decision of the trial Court, the Respondent filed his appeal before the District Court of Mbinga in which the decision of the trial Court was set aside and ordered for retrial of the case before another Magistrate. The Appellant was dissatisfied with that decision hence this appeal.

At the hearing of the appeal before this Court, the parties were unrepresented, they appeared in person and it was disposed by way of written submission.

Submitting in support of the first ground of appeal, the Appellant contended that the first appellate Court ordered for retrial of this matter on the ground that the trial Court did not consider the extent of contribution of the matrimonial property while giving an order for its division. He went on by citing the decision of the Court of Appeal of Tanzania in **Fatehali Manji v. Republic** (1966) E. A 346, in which the Court held that retrial

may be ordered only when the original trial was defective. He further stated that this stance has been amplified in a number of the Court of Appeal in other decisions including the case of **Selina Yambi and Others v. Republic**, Criminal Appeal No. 94 of 2013, and **Christian Mwinuka v. Republic**, Criminal Appeal No. 263 of 2018 (unreported). He went on contending that he has passed through the trial Court records and found there is no any illegality or defect warranting for an order of retrial.

On the second ground of appeal, he argued that both parties to this matter are peasants and the trial Court orders for division of matrimonial properties were based on that fact and its orders were correctly made. He prayed for this Court to set aside the retrial order made by the first appellate Court and the decision and orders of the trial Court be restored.

Resisting the appeal, the Respondent submitted that the first appellate Court decision of setting aside the decision of the first appellate Court and an order of retrial was correctly made since in division of matrimonial properties the trial Court did not consider the contribution made by each party.

On the second ground of appeal, the Respondent submitted that the first appellate Court was correct in deciding that the trial Court failed to consider the extent of contribution made by each spouse when giving an order for the division of the properties. He contended that the evidence adduced by the Respondent during trial didn't prove the extent of contributions made in acquisition of the matrimonial properties. He added that proving the extend of contribution is a legal requirement and he invited this Court to be guided by the decision of the Court of Appeal of Tanzania made in the case of **Gabriel Nimrod Kurwijila v. Theresia Hasan Malongo**, Civil Appeal No. 102 of 2018, which provides guidance in ordering division of matrimonial.

He went on submitting that proving the extent of contribution in matrimonial proceedings is a matter of evidence and without evidence there will be no fair and just decision. He invited this Court to be persuaded by the decision made by this Court in the case of **Gasto Mchemba v. Yudith Magimba**, DC. Civil Appeal No. 1 of the 2021, in which it was held that there must be sufficient evidence showing the extent of contribution. Finally, he prayed for this appeal to be dismissed with costs.

It is worth considering the fact that, I have gone through the submissions made by both parties and the original records of the lower Courts. On the first ground of appeal that the trial Court erred in law in ordering for retrial of the case while the decision or proceedings of the trial Court was neither illegal nor defective, the Appellant has argued that the order was not properly made and she prayed for this Court to set aside that order. The Respondent submitted that the first appellate Court decision of setting aside the decision of the first appellate Court and an order of retrial was correctly made since in division of matrimonial properties the trial Court did not consider the contribution made by each party.

It is a trite law that, retrial order should only be given where the interest of justice requires. See the decision of the Court of Appeal of Tanzania in **Selina Yambi and Others v. Republic** (supra). The main factors which guide the Courts in granting an order of retrial is the illegality and defectiveness of either the proceedings or judgment of the lower Court. Refer to the decision made by the Court of Appeal of Tanzania in **George Claud Kasanda v. DPP** (Criminal Appeal 376 of 2017) [2020] TZCA 76 (27 March 2020: TanzLII).

In the present appeal, I find there was no an illegality or defects in the proceedings or judgment of the trial Court to warrant for an order of retrial. Therefore, an order for retrial is unnecessary and will not serve the interest of justice rather than wasting time and resources to the parties and the Court. In that regard, I find the first ground of appeal has merit.

Taking into consideration of the second ground of appeal, on the extent of the contribution made by each spouse, I am of the view that the first appellate Court erred by setting aside the decision made by the trial Court and ordering for retrial since the parties in the instant case are both peasants and they had no other means of getting income other than farming. The evidence given by the parties suggest that the only way which enabled the parties to acquire properties was through agricultural activities. Therefore, division of matrimonial properties were to be determined based on their evidence as peasants as the trial Court did. Thus, I differ with the holding of the first appellate Court and I find the division of the matrimonial properties made by the trial Court was proper. There was no omission in ordering for division of the matrimonial properties, considering the fact that the parties are peasants and their properties were acquired through agricultural activities.

Conclusively, in view of what has been stated above, I strongly agree with the Appellant and I proceed to quash and set aside the judgement and orders of the first appellate Court. The decision of the trial Court is restored and upheld. Appeal allowed. I give no order as to costs. Order accordingly.

DATED and DELIVERED at **SONGEA** this 13<sup>th</sup> day of September, 2023.



A handwritten signature in blue ink, appearing to read "U. E. Madeha".

**U. E. MADEHA**

**JUDGE**

**13/09/2023**

**COURT:** Judgment is read over in the presence of the Appellant and the Respondent. Right of appeal is explained.



A handwritten signature in blue ink, identical to the one above, appearing to read "U. E. Madeha".

**U. E. MADEHA**

**JUDGE**

**13/09/2023**