

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC. MATRIMONIAL APPEAL NO. 15 OF 2023

*(Arising from Civil case No.10 of 2022 arising from Bariadi district court,
and the same originating from Matrimonial Cause No. 6 of 2021 at
Nyashimo Primary Court)*

ESTER PAULINE.....APPELLANT

VERSUS

MPAGATI NYUNJIWA.....RESPONDENT

JUDGMENT

13th July & 29th September 2023

MASSAM, J.:

The Appellant filed Matrimonial Cause No. 6 of 2021 before Nyashimo Primary Court claiming against the respondent, a decree of divorce, division of matrimonial properties jointly acquired, custody and maintenance of infant children. The matter was heard firstly ex-parte but the respondent applied before the same court to set aside the ex-parte judgement, the same was granted and the matter was heard inter parties and the court ordered the properties which acquired jointly to be divided, also the order of custody and maintenance to remain as ordered before in exparte judgment.

Aggrieved by the said decision appellant appealed to Bariadi District Court, where the court uphold the decision of the Trial Court, Appellant aggrieved again, thus this second appeal, with the limbs of three grounds of appeal namely;

1. *That the trial court and the 1st appellate court erred in law and fact by disregarding that, the respondent failed to state the extent of contribution towards the acquisition of two acres of land and one plot which are not part of matrimonial assets.*
2. *That, the trial court and the 1st appellate court erred in law and in fact by disregarding that, the divided matrimonial assets do not exist and without evidence that proved their existence.*
3. *That, the trial court and the 1st appellate court erred in law and in fact by disregarding that, the respondent failed to call the material and key witnesses to prove the same.*

During the hearing of this appeal, both parties appeared in persons unrepresented, and by the court consent they both agreed to be heard by way of written submission.

In support of her appeal, the appellant argued on the first ground that, the respondent failed to state the extent of contribution of each part towards the acquisition of the matrimonial assets which is mandatory according to Section 114(2)(b) of the Law of Marriage Act

[CAp 29 R.E 2019], she referred this court the case of **Gabriel Nimrod Kurwija v Theresia Hassani Malongo, Civil Appeal No. 102 of 2018.**

She added by stating that, from the whole evidence nowhere she stated the extent of contribution towards the acquisition of the mentioned assets, also she said that two acres and one plot of land which belong to the appellants mother who is the respondents mother in law so the appellant's mother is not part of the marriage between the appellant and the respondent, So the court had no power to divide the matrimonial properties which were not in dispute between the parties.

To support her urgement she said that under section 114(1) of the law of marriage Act cap 29 R.E 2019, the court had powers in granting separation or divorce to order division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such assets and the division between the parties of the proceeds of sale.

On the second ground, she submitted furthermore that, since the said properties are not part of matrimonial assetes between the appellant and the respondent then such properties do not exist, hence were not subject to the distribution,since it belong to another marriage of the appellant's mother, and the respondent failed to prove the said to

be matrimonial properties, she referred this court to the case of **Masumbuko Nhandi v Halima Mohamed, Matrimonial Appeal No 13 of 2014, Mwanza (Unreported)**. So, she said that, the trial court was wrong to divide the said properties which does not exist.

On the last ground of appeal, the appellant complained that, the respondent failed to call material witness to prove the matter at hand such as the person who wrote the sale agreement or witness who were present on the sale of the said plots. She cited the case of **Director of Public Prosecution v Sharif Mohamed @ Athuman, Criminal appeal No. 74 of 2016**, where the court defined the meaning of material witness to be a person who has information or knowledge of the subject matter which is significant enough to affect the outcome of a trial. She continued to state that the court should not rely on speculative views from the respondent.

Therefore, she prayed this court to allow the appeal with costs and the ist appellate court's decision be declared nullity as the extent of distribution is of paramount important to be stated by the both parties, failure to state that is fatal.

On response to the appellant's submission the Respondent brought this court to the attention that the raised grounds of appeal are in astray because the appellant raised new grounds of appeal that were not raised

in the 1st appellate court which offended the rule of procedures governing appeals.

He contended that, the grounds raised in the 1st appellate court are totally different from the present grounds of appeal of which the appellant is seeking legal redress. He said, that in the 1st appellate court appellant complained that the trial court erred in law and fact in determining the matrimonial dispute while the respondents application to set aside was not read over against the appellant. Also the trial court erred in law by continued to take evidence of both parties while the appellant closed her evidence on the 13th may 2022, Again it erred by adding exhibit A without being read out to the appellant, all were different from the present grounds of appeal .

He referred this court to the case of **EFC Tanzania Microfinance Bank Ltd vs DMK Legal, civil appeal No. 82 of 2020, HTC at Dar es salaam, (Unreported)** at page 4 while citing the case of **Samwel Sawe v Republic** Hon. Itemba J, held that

"As a second appellate court, we cannot adjudicate on a matter which was not raised as ground of appeal in the first appellate court. The record of the appeal at page 21 to 23, shows that this ground of appeal by the appellant was not among the appellants ten grounds of appeal

*which filed in the High Court. In the case of **Abdul Athuman vs R (2004) TLR 151** the issue on whether the court of Appeal may decide on the matter not raised in and decided in the High Court on first appeal was raised. The court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore struck out."*

The Respondent pressed this court to dismiss the appeal with costs on the mentioned discovery since it has no legs to stand.

He further replied to the submission in support of appeal by the appellant that it has no merit as its trite law principle that where there are concurrent findings of the facts by the courts below, as in the present case, the appellate court cannot interfere with such findings, unless there are sufficient grounds to do so. He cited the case of **Amratilal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs A.H.Jariwall t/a Zanzibar Hotel [1980] T.L.R 31.**

He argued on the first ground complained by the appellant that, the respondent failed to state the extent of his contribution towards the acquisition of two acres of land and one plot which are not part of matrimonial assets. In that allegation he maintained that the same does not hold water since the appellant is misleading the court by saying the

two plots belongs to her mother while the evidence at page 4 of the judgment shows that, the respondent tendered sale agreement between him and Susana Kasongi. He also averred that the case of **Gabriel Nimrod Kurwija v Theresia Hassani Malongo, Civil Appeal No. 102 of 2018** and the provision of section 114 (2) (b) of the Law of Marriage Act [CAP 29 R.E 2019] are distinguishable in the circumstance.

On the second ground he contended that, the record of the trial court shows that no party to the present suit did contested nonexistence of any of the properties that was alleged to have been acquired during existence of their marriage. So in absense of the said proof in respect thereof the same negates the appellant's assertion and remain to be after thought and the mentioned case of **Masumbuko Nhand vrs Halima Mohamed** Matrimonial appeal no 13 of 2014 is distinguishable.

He submitted on the last ground that; this ground is misplaced because it is canon principle of law that no specific number of witnesses are required to prove the existence of certain facts but rather prove of case on the balance of probabilities. He referred Section 3(2) (a) (b) of the Evidence Act [Cap. 6 R.E 2022] and further stated that, the case cited by the appellant's of **Director of Public Prosecution v Sharif Mohamed @Athuman, Criminal appeal No. 74 of 2016**, is distinguishable.

He therefore prayed to this court that this appeal be dismissed with costs for want of merit, and upheld the decision of 1st Appellate court and trial court.

I have carefully taken into consideration the submissions from the appellant and the respondent. I have also perused the records available in the court's file, I have to agree with the respondent that the appellant's raised grounds of appeal are different from the grounds raised in the 1st appellate court.

By looking the court records from the 1st appellate court shows that the appellant had four grounds of appeal which were as follows: **firstly** that, the trial court erred in law and in fact and determining the matrimonial dispute while the respondent's application to set aside was not read over against the appellant, therefore the appellant was not afforded opportunity to admit the facts or deny them. **Secondly** that, the trial court erred in law and in fact by hearing the matrimonial dispute without first setting aside the Ex-Parte judgement. **Thirdly**, that the trial court erred in law and in fact by continuing to take evidence of both parties while the appellant closed her evidence on the 13th May, 2022 and **lastly** the trial court erred in law in fact by admitting Exhibit "Ä" without being read out to the appellant.

I have compared these four grounds with the three grounds of appeal raised by the appellant in her petition of appeal, it came to my attention that, they were not raised and considered by the District Court, so they are totally new grounds in this court. Therefore the duty of this court is to determine the issue on **whether this court can determine the ground(s) of appeal which was not raised in the 1st appellate court**

The issue like this has been addressed by the superior court on various cases including the case of **Galus Kitaya v. Republic, Criminal Appeal No. 196 of 2015, TZCA (unreported)**, as was referred in the case of **Godfrey Wilson v. The Republic, Criminal Appeal No. 168 of 2018 at Bukoba, (unreported)**

"On comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the case of Nurdin Musa Wailu v. Republic supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will

***not consider grounds number one to number five
of the appellant's grounds of appeal....."***

It's clear from the cases above that, the jurisdiction of second appellate courts is confined to matters which were raised and determined by the lower court. See also **Jafari Mohamed v. The Republic, Criminal Appeal No. 112 of 2006, Hassan Bundala @Swagav.TheRepublic,Criminal Appeal No. 386 of 2015.** (All unreported), The Court was confronted with a similar situation and stated that,

*"Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that the first and third grounds were not raised in the first appellate court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought. Indeed, as argued by the learned Principal State Attorney, if the High Court did not deal with those grounds for reason of failure by the appellant to raise them there, **how will this Court determine where the High Court went wrong?** It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and*

were decided not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal.” (Emphasis is mine).

Therefore, this court expected that the appellant could bring the grounds of appeal which she was not satisfied by its decision in the 1st appellate court, hence this court would be in a position to know where the District Court erred in law or in facts in determining the same in order to this court to rectify the same but, her act of bringing the new grounds of appeal in 2nd appellate court is afterthought and this court can entertain the same.

For the foregoing reasons, this appeal was wrong framed, I consequently dismiss it for want of merit. Considering the nature of the case each party shall bear its own costs.

It is so ordered.

DATED at SHINYANGA this 29th day of September, 2023.



R. B. Massam
JUDGE
29/09/2023