IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC MATRIMONIAL APPEAL NO. 6 OF 2023

(C/f Originating from Matrimonial Cause No. 3 of 2022 of Himo Primary Court and Matrimonial Appeal No. 10 of 2022 of the District Court of Moshi)

PETER MGOGO ..... APPELLANT

VERSUS

NEEMA CHAGONJA ..... RESPONDENT

JUDGMENT

16/08/2023 & 29/09/2023

SIMFUKWE, J.

This appeal originates from Himo Urban Primary court (trial court). In the said court the Respondent herein successfully petitioned for divorce, division of matrimonial property, custody of the three issues and maintenance.

Briefly, Peter Mgogo and Neema Chagonja were husband and wife having celebrated Christian Marriage on 27th April, 2013. They were blessed with three issues namely: Magreth 9 years, Rahel 7 years and Paulo 1 year. Before the trial court, the Respondent petitioned for divorce; prayed for

division of matrimonial properties which were: one car made Toyota Allion and plot measured one-acre located at Singida Itigi. The respondent also prayed to be awarded Tshs 200,000/- as maintenance.

After hearing the parties, the trial court magistrate granted the divorce and awarded the respondent the said motor vehicle and the plot was distributed to the appellant herein. Also, the appellant was ordered to pay to the respondent Tsh 150,000/= as rent per month.

The Appellant herein was aggrieved with the decision of the trial court. He unsuccessfully appealed to Moshi District Court (first appellate Court). Still aggrieved, the Appellant appealed before this Court on the following grounds:

1. ***THAT,*** *the 1st Honorable Appellate Court erred in law and fact for failure to consider the submission of the Appellant on the point that the Honorable trial Court failed to analyses the evidence on record especially, on the exhibits by the Appellant. (sic)*
2. ***THAT,*** *the 1st Honorable Appellate Court erred in law and fact for failure to consider the submission of the Appellant on the ground that the Appellant and the Respondent has the same source of income and that the Appellant is unable to contribute 250,000/= every month.*
3. ***THAT,*** *the 1st Honorable Appellate Court erred in law and fact for failure to consider the Loan statement tendered by the Appellant at the trial Court as his money which*

contributed on the acquisition of the motor vehicle with registration No. T157 CWB.

4. ***THAT,*** *the 1st Honorable Appellate Court erred in law and fact for failure to considered the fact that the Respondent did not prove how she acquired the motor vehicle with registration No T 157 CWB at the trial Court or even on her submission at the 1st Appellate Court.*
5. ***THAT,*** *the 1st Honorable Appellate Court erred in law and fact for failure to consider the rejoinder submission of the appellant for a slight sleep of pen and without considering that the submission was properly written that it originated from Himo HIMO PRIMARY COURT below the case number.*

Both parties appeared in person (unrepresented) and the matter was ordered to proceed through written submissions.

On the 1st and 3rd grounds of appeal, generally the appellant condemned the Appellate court for failure to analyse evidence on record especially the appellant's exhibit (Loan statement) tendered which shows his contribution on the acquisition of the said motor vehicle. The appellant submitted that during the trial, he established how he obtained the said motor vehicle on his own by tendering Exhibit D1. That, even in his submission before the first appellate court, he explained the same. However, the 1st Appellate court in its judgment did not consider the evidence adduced by the Appellant during the trial or even the submission and the cases/authorities on his written submission in chief.

The appellant went on to state that it is a principle of law that in the distribution of matrimonial properties the court should consider the contribution of each spouse on obtaining the matrimonial property. That, at the trial court, he proved his contribution unlike the Respondent who did not explain her contribution towards acquisition of the said motor vehicle. The respondent did not cross examine him on the tendered Exhibit D1 or challenge the evidence of the Appellant at the trial which could have shaken the evidence of the Appellant.

The appellant continued to submit that at page 10, 3rd line of the trial court's judgment, the trial magistrate referred to the provision of **section 114 (2) of the Law of Marriage Act 1971** but did not consider exhibit D1 which was tendered as evidence to support his case. Also, he faulted the findings by the first appellate court at page 7 paragraph 2, 3 and 4 where it was stated that the bank statement alone was not sufficient evidence showing that the Appellant had bought the said motor vehicle alone as he was required to bring legal receipt or the invoice of the same amount to prove that he bought the motor vehicle. The appellant challenged this finding on the reason that such statements were new and were not said by the trial magistrate in her judgment. Also, during the trial the respondent did not raise the said issues or even cross examine or dispute Exhibit D1 when tendered by the appellant. He stated that, it is settled law that failure to cross-examine a witness on a relevant matter connotes acceptance of the veracity of the testimony as stated in the case of **Juma Kasema @ Nhumbu Versus Republic, Criminal Appeal No. 550 of 2016 (CAT)** at page 14 and 15.

The appellant emphasised that the 1st appellate court failed to analyze evidence (Exhibit D1), the weight of the evidence adduced during trial and during submissions.

On the 2nd ground of appeal, the appellant challenged the findings that the Appellant and the Respondent have the same source of income and that the Appellant is unable to contribute 250,000/= every month. He explained that it is the duty of a man to maintain his children and the Appellant does not dispute that fact or deny his obligations as a man and a father. What he disputes is the amount imposed to him by both courts without considering his financial capacity and other dependants. He referred to **section 129 of the Law of Marriage Act [CAP 29 R.E 2023]** to support his argument.

The appellant submitted further that the law is very clear that the court should consider the financial status of the man when considering the issue of maintenance of the child. That, in this case, the 1st Appellate Magistrate did not consider his financial capacity since he is not capable to pay Tsh 250,000/= per month for maintenance of children. That, in his judgment the appellate magistrate at page 9 last paragraph and page 10 paragraph 1, did not fault the orders of the trial court but considered the fact that the Respondent is taking care of five issues of marriage, while it is not correct as the parties have three issues only who are under the custody of the respondent. He referred at page 11 on the 4th order where the trial magistrate states that:

*"AMRI ZA MAHAKAMA ·

Mdaiwa abaki na watoto wote watatu na mdaiwa atatoa kodi Tsh 150,000/= kila mwezi hapa mahakamani."

The appellant was of the view that the 1st Appellate court Magistrate misdirected himself on the issues of marriage and did not consider the financial capacity of the Appellant as he addressed it in his submission in chief.

It was submitted further that the Appellant and the Respondent had an account in which they use to save money whereas every month the appellant is deducted Tsh 100,000/= from his salary to the savings of the children. He disputed the amount of Tshs 150,000/= ordered by the trial magistrate by stating that as a police office of lower rank, his salary is below 500,000/= per month. Thus, he cannot afford paying Tsh 250,000/= every month since he had another child before marriage and other dependants who depends on him.

On that basis, the appellant prayed this court to order him to pay Tsh 50,000/= per month together with the said amount of Tshs 100,000/= per month which he contributes in the children saving account or else the court to order him to pay Tsh 150,000/= per month and withdraw himself from contributing the children saving account of Tsh 100,000/= per month.

On the 4th ground of appeal, the appellant blamed the appellate court for failure to consider the fact that the Respondent did not prove how she acquired the motor vehicle with registration No. T.157 CWB during the trial. That, she did not explain how she contributed either by domestic

works at home or by monetary contribution. Yet, the 1st Appellate court proceeded to grant her the said Motor Vehicle. He argued that if she had contributed, then it could have been good to distribute it by way of percentage by considering the contribution of each spouse. He referred to the case of **Gabriel Nimrod Kurwijila versus Theresia Hassani Malongo, Civil Appeal No. 102 of 2018 (CAT) at page 12 and 13** where it was held that:

> *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. In Yesse Mrisho v. Sania Abdu, Civil Appeal No. 147 of 2016 (unreported) this Court stated that,*
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> *"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets.*
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> *It is clear therefore that extent of contribution by* a *party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot*

arise also where there is no evidence to prove extent of contribution."

Basing on the above position of the law, the appellant submitted that the 1st Appellate court could have considered the contribution of the spouse on reaching the fair decision.

On the last ground of appeal, the appellant faulted the first appellate court for failure to consider his rejoinder submission for a slight slip of a pen and without considering that the submission was properly written that it originated from Himo Primary Court below the case number.

Explaining his rejoinder before the first appellate court, the appellant submitted that the name of the court in the first line of the 1st paragraph was written Mwika Primary Court instead of Himo Primary Court but the contents of the submission from the second line refers to the appeal originating from Himo Primary court. Also, immediately after the case number he referred to Himo primary court as the court which he is aggrieved with its decision. The appellant commented that it was a slip of a pen which is curable. He cemented his argument by citing the case of **Yakobo Magoiga Gichere Vs. Peninah Yusuph, Civil Appeal No. 55 of 2017 (CA)** which expounded the overriding Objective principle which requires Courts to deal with cases justly and to have regard to substantive justice. Also, he referred to **the Constitution of the United Republic of Tanzania, 1977 under Article 107 A (2)** which provides that Courts should decide cases without being tied up with technicalities. He urged the court to see that failure to consider his rejoinder was not fair.

The appellant prayed this court to allow the appeal with costs.

The Respondent strongly disputed the submission in chief of the appellant. In reply to the arguments advanced under the 1st and 3rd grounds of appeal particularly on failure to analyse the appellant's evidence, particularly documentary evidence; the respondent submitted that it is clear on the records that the appellant presented the loan statement of 8,700,000/=. However, he failed to analyze and evaluate the evidence he tendered in respect of the said motor vehicle. She averred that, the fact that the appellant secured a loan from the Bank is not the genuine evidence to show that he had bought the said motor vehicle alone. That, the bank statement was not good evidence before the court to prove that the appellant bought the motor vehicle alone but the same was good evidence to show that the appellant had secured a loan from the bank of which there is no further evidence before the court on how the appellant had spent the said amount.

Also, the respondent disputed the allegation of the appellant that she did not contribute anything toward acquisition of the said motor vehicle. She argued that the appellant and the respondent are civil servants with monthly salaries. That, the respondent had monetary contribution and had also taken care of the house and the children which enabled the appellant to perform his duties at the office, comfortably and raise income to himself and the family.

The respondent insisted, that the 1st Appellate court and the trial court did not fail to analyze the evidence and exhibit adduced by the appellant.

The said evidence proves nothing about the appellant being the only owner of the motor vehicle. She elaborated that the fact that she took care of the house and the children, amount to contribution towards the acquiring of the said motor vehicle.

Responding to the 2nd ground of appeal on the argument that the 1st appellate Court did not consider the submission of the Appellant particularly the appellant's financial capacity; the respondent referred to **section 129(1) of the Law of Marriage Act** [CAP 29 R.E 2019] which provides that:

> " *It shall be the duty of the man to maintain his children, whether they are in his custody or the custody of other person either by providing him with such accommodation, clothing, food, education as maybe reasonable having regard to his means and station in life or paying the costs thereof."*

The Respondent continued to state that the appellant in his submission agreed with the respondent to have contributed 100,000/= per month to be deducted directly from their salaries to be deposited to the children bank account. That, the court order is clear that the appellant was supposed to pay Tsh 150,000/= only every month and the other 100,000/= is not from the court order.

The Respondent submitted further that, by considering the costs of living, it is very difficult to maintain three issues of the union for shelter, accommodation, food, school fees, medications and other necessities by

only 50,000/= which the appellant invite the court to order. She prayed this court to maintain the decisions of the lower courts which are to the effect that the appellant should pay Tshs.150,000/= for maintaining the three children.

Responding to the 4th ground of appeal that the 1st Appellate Court failed to consider the fact that the respondent did not prove how she acquired the motor vehicle; the respondent reiterated that the appellant and the respondent are civil servants with income from the monthly salaries. Thus, the respondent had monetary contribution. Also, she was taking care of the house and the children that enabled the appellant to perform his duties comfortably.

The respondent invited this court to maintain the order of the 1st appellant court and the trial court that the motor vehicle with registration number T. 157 CBW be given to the respondent so that it can help her to take care of the union issues.

In her conclusion, the respondent prayed this Court to dismiss this appeal.

I have carefully considered the submissions of both parties and the entire records of the lower courts. Before dealing with the grounds of appeal, I wish to state that since there are concurrent findings of the two lower courts, I am duty bound not to disturb the same unless it is found that there is misapprehension of evidence, violation of some principles of law and/or practice, miscarriage of justice, existence of obvious errors on the face of the record or misdirection or non-directions of the evidence. *See*: **Amrathlar Damadar and Another v. A.H. Jariwalla [1980] TLR 31.**

Turning to the grounds of appeal, it is clear that the dispute between the parties in this appeal is centred on evaluation of evidence, division of matrimonial assets and maintenance of the three issues. Issue of division of matrimonial properties and evaluation of evidence are covered under the 1st, 3rd, 4th and 5th grounds of appeal; while the issue of maintenance of children is covered under the 2nd ground of appeal.

Starting with the parties' debate on the division of matrimonial property particularly the motor vehicle; on the first ground of appeal, the appellant blamed the first appellate court for failure to consider his exhibits particularly the loan statement (exhibit D1) which shows that he acquired money for buying the said motor vehicle. On the 4th ground of appeal, he faulted the respondent for failure to prove how she acquired the said motor vehicle and failure to cross examine the appellant especially on the exhibits tendered.

On the other hand, the respondent while replying to these grounds of appeal, blamed the appellant for failure to explain how the said loan was used to buy the said motor vehicle alone without her contribution. She was of the view that the bank statement was not good evidence to show that the appellant acquired the said motor vehicle alone. The respondent noted that the appellant and respondent are civil servants and so, she had monetary contribution. Also, she used to take care of the house and children that enabled the appellant to work comfortably and earn money.

While dealing with the issue of contribution of the matrimonial property, after quoting the provision of **section 114(2) of the Law of Marriage Act** (supra) the trial court at page 10 found that:

> *"Kwa kuzingatia kwamba watoto wote watano wanaishi na mdai na Mdaiwa amekiri hilo ikiwepo watoto wao watatu wa ndoa, mtoto wa mdaiwa aliyezaa kabla ya ndoa na mwanamke mwingine na mtoto wa mdai aliyezaa kabla ya ndoa na mwanaume mwingine, na mdaiwa hana ubishi wa mali alizochuma.*
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> *Mahakama inagawa mali hizo kama ifuatavyo, gari moja aina ya Toyota Alion namba za Usajili T157 CWB amegaiwa mdai (Neema Chagonja) ili aendelee kulitumia na kumrahisishia kuhudumia watoto anaoishi nao. Mdaiwa amegaiwa kiwanja nusu heka kilichopo Itigi Singida."*

The first appellate court at page 7 of its judgment had the following opinion in respect of the said motor vehicle:

> *"In other words, the bank statement alone before the court was not an evidence (sic) to show appellant had bought the said motor vehicle alone but was a good evidence to show appellant had secured the loan from the bank Tshs 8,700,000/= of which the court was not informed how did appellant had spent the same amount.""" (sic)*

To be realistic I could be impressed if I could see an invoice at the lower court brought by appellant accompanied by legal receipt of Tshs. 8,700,000/= acknowledging the monetary transaction appellant had bought alone the said motor vehicle.

At page 8 the appellate magistrate continued to state that:

"In line of the above authority, I am convinced to believe trial magistrate in the first trial court knew from the evidence that appellant and respondent were all civil servants with income however from their monthly salaries so to speak she had monetary contribution, but of essence she had so taken care of the house and the children that enabled the appellant to be comfortable in performing his duties at the office and rose income to himself and the family, to that I am convinced trial court did analyse and evaluate the evidence before it and satisfied correctly that since respondent was given custodian of the issues of the union therefore, the said motor vehicle with reg. No. 157 CWB was properly given to her so that could assist her with the issues of the union, while the plot measuring half an acre located at Itigi Singida allocated to appellant."

The law is very clear on the factors to be considered by the court while ordering the division of matrimonial properties. The said factors are

explicitly provided for under **section 114(2) (a) to (d) of the Law of Marriage Act** (supra) as follows:

> *(2) In exercising the power conferred by subsection (1), the court shall have regard to -*
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> > *(a) The customs of the community to which the parties belong;*
> >
> > *(b) The extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
> >
> > *(c) Any debts owing by either party which were contracted for their joint benefit and*
> >
> > *(d) The needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division*.

Guided by the above provision, when ordering distribution of the matrimonial properties, the factor of extent of contribution is not the only factor to be considered. There are other factors as listed under **subsection (a) (c) and (d) of section 114(2) of the Law of Marriage Act** (supra).

Basing on the noted concurrent findings of the lower courts, I find no reason of disturbing the distribution made by the trial court. In her decision, **first,** the trial magistrate considered the needs of children as

she argued that since the custody of the three issues were placed to the respondent, the said motor vehicle will help the respondent. Thus, the said reason fit **section 114 (2)(d) of the Law of Marriage Act** (supra).

The **second** reason is that, due to the fact that the appellant was left with the farm measured one acre which the Appellant is not disputing to be matrimonial property (as per page 14 of the typed proceedings of the trial court); while the respondent was given the said car then, it makes equal and fair distribution as provided for under **section 114(2)(d) of the Law of Marriage Act** (supra)

Thirdly, according to the evidence of both parties, I have learnt that neither the appellant nor the respondent did adduce sufficient evidence to prove the extent of contribution towards acquisition of the said motor vehicle. The appellant relied on the loan statement only. However, as rightly decided by the first appellate court, he did not establish whether he used the said money to buy the said motor vehicle. Also, he did not tender sale agreement of the said motor vehicle or state when he bought the same to prove that indeed he used the said loan to buy the car. Therefore, in absence of sufficient evidence to prove the extent of contribution from both parties, I am of considered opinion that the lower courts correctly considered other factors as envisaged under **section 114 (2)(a) to (d) of the Law of Marriage Act** as discussed herein above.

Regarding the argument advanced on the last ground of appeal that the 1st appellate court did not consider the rejoinder made by the appellant

without considering that it was a slight slip of a pen instead of writing Himo Primary Court, he wrote Mwika Primary Court.

This issue will not detain me, since in rejoinder, the appellant is expected to reiterate and explain what he has already submitted in his submission in chief in relation to the reply and not new facts. Looking at the said rejoinder before the first appellate court, I find that he only reiterated his submission in chief. There was nothing in addition which if not considered, would prejudice the appellant. Thus, this ground has no merit.

The next ground for consideration is in respect of maintenance as raised on the 2nd ground of appeal. The appellant averred that he is unable to contribute 250,000/= per months as maintenance. He said that the 1st appellate court did not consider his financial capacity and the evidence that his salary is deducted Tshs 100,000/- per month which is remitted to the saving account of children.

On the other hand, the respondent submitted that the said Tshs 100,000/= is not from the court order. The respondent averred that considering the living costs, the awarded amount is reasonable.

As rightly stated by the respondent in her submission, **section 129(1) of the Law of Marriage Act** (supra) places the duty to the father to maintain his child. In addition, **section 44 of the Law of the Child Act**, Cap 13 R.E 2019 requires the court before issuing the order of maintenance to consider the following factors:

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;

(b) any impairment of the earning capacity of the person with a duty to maintain the child;

(c) the financial responsibility of the person with respect to the maintenance of other children;

(d) the cost of living in the area where the child is resident; and

(e) the rights of the child under this Act.

The said factors were discussed in the case of **Jerome Chilumba vs. Amina Adamu [1989] TLR 117.**

In the present matter, the trial court ordered the Appellant herein to give the respondent Tshs 150,000/= as rent expense each month. The school fees for the issues were ordered to be paid by both parties. The first appellate court confirmed the said order.

Basing on the fact that the three issues were placed under the custody of the appellant and bearing in mind that the said issues need not only food but also shelter and clothes, I am of considered opinion that the awarded amount of Tshs 150,000/= per month as rent, is reasonable to accommodate the three issues.

With due respect to the appellant, financial status is not the only factor to be considered when issuing the order of maintenance. There are other factors as listed under **section 44 of the Law of the Child Act** (supra)

In light of the above discussion, I find no reason to fault the concurrent decisions of the two lower courts. Consequently, I hereby dismiss this appeal with no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 29th September 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

29/09/2023