IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 39 OF 2022

(Originating Matrimonial Cause No. 13 of 2022 of the District Court of Arusha)

NICHOLAUS THOMAS MOREWA.....APPELLANT

VERSUS

PETRONELA IBRAHIM SWALEHE.....RESPONDENT

JUDGMENT

17th August & 13th October, 2023

TIGANGA, J

In this case, the parties were husband and wife respectively following their Christian marriage which they celebrated in the year 1996. After living for decades in that marriage and having five issues in their relationship, their once lovely life turned sour the result of which the respondent successfully petitioned before the District Court of Arusha, for the following orders:

(i) Divorce as the marriage between them was found to be irreparably broken down.

(ii) The custody of one issue of the marriage who was a minor,

(iii) Maintenance of one minor issue to the tune of Tsh. 200,000/= per month and to pay for her education and medical health insurance

(iv) The appellant visitation to the child during holidays and weekends save during sickness when he will be allowed at any time.

(v) Distribution of Matrimonial assets between the parties to be 50/50 after valuation by the government valuer except for three rooms for shops frems and two rooms with tenants joined together with frems located at Banda Mbili Street, Sombetini Ward which will be distributed 70/30 that is the respondent to take 70 and the petitioner to take 30 percent after valuation by authorized government valuer.

(vi) Declaration that a motor vehicle makes Toyota Land Cruiser with registration No. T963 BML is solely owned by the respondent.

(vii) The petitioner to take all her personal effects and each party was to bear their own costs.

Disgruntled by that decision, the appellant filed four grounds of appeal as follows:-

(a) That the trial Magistrate erred in law and fact by holding that the house at Kitowo Marangu is a matrimonial property and thus erroneously ordered its division to the parties at the tune of 50/50. The respondent only gets to know the existence of the house at Kitowo Marangu through her child.

(b) That the trial Magistrate erred in law and fact by ordering the house at Sombetini Banda mbili to be divided among the parties at the tune of 50/50 without considering the efforts made by the party in acquiring the same.

(c) That the trial Magistrate erred in law and fact by holding that the appellant should maintain the child at the tune of Tshs. 200,000/= per month, pay her school fees and cater for health expenses while knowing that, he is not unemployed, and his means of income cannot meet that order.

(d) That, the trial Magistrate erred in law and fact by holding that, the marriage between the parties had been broken irreparably and beyond repair without any apparent reasons.

With leave of the Court, the appeal was argued by way of written submissions. At the hearing, the appellant was represented by Mr. Richard Patrice Mosha, while the respondent was represented by Mr. Cyprian

Hebert Mwaimu, both learned Advocates. Submitting in support of the appeal, the appellant abandoned the fourth ground of appeal thereby remaining with three grounds.

In respect of the 1st ground which raises a complaint that, the trial Magistrate erred in law and fact by holding that the house at Kitowo Marangu is a matrimonial property thus erroneously ordered its division to the parties at the tune of 50/50 he said house was not matrimonial as the respondent only got to know the existence of the said house through her child. The counsel for the appellant submitted that the defence evidence before the trial court proved that the house at Kitowo Marangu was built on the plot which was bequeathed to the late Thomas and that every member of the family contributed to its construction. PW2 for example gave evidence that her father the late Thomas Morewa, left 50 iron sheets and Tshs. 150,000/= for timbers. She further said the appellant also contributed to construction of the toilet, that contention was also supported by PW3 Peter Thomas Morewa, who said that the house at Marangu was built by the family of Morewa as reflected on pages 27 and 30 of the proceedings.

To prove that the plot and the house were not the matrimonial property, PW3 said Daudi was buried on the Plot, and in law whatever is

attached to the land is part and parcel of the said land. Therefore the said house belonged to Upendo the daughter of the late Thomas Morewa as the whole house was of her father the late Thomas Morewa. He said the appellant came to know about the house after the same was completed and she only went there for funerals as can be noted on pages 21 and 22 of the typed proceedings. He also said it was never shown how the respondent contributed to the acquisition of the house at Kitowo in Marangu.

Further to that, he submitted that, the fact that the house was built on the inherited plot has not been disputed therefore there was no justification for the trial Magistrate to order the division 50/50. In the counsel's view, the trial magistrate did not consider the principle enshrined in sections 114(1) & (2)(a)(b)(c) of the **Law of Marriage Act** [Cap 29 R.E 2019] and the case of **Yesse Mrisho vs Sanai Abdul**, Civil Appeal No. 147 of 2016 CAT- Mwanza in which the court held to the effect that, the extent of contribution is a prime factor in determining the division of the matrimonial properties. He said since there is no evidence proving the said house to be matrimonial, then the trial Magistrate erred and should be faulted in the appeal at hand.

Submitting in support of the second ground which raises the complaint that, the trial Magistrate erred in law and fact by ordering the house at Sombetini Banda mbili to be divided to the parties at the tune of 50/50 without considering the efforts made by the parties in acquiring the same. He submitted that the respondent being merely a housewife had a very minimal contribution in the acquisition of this house as the appellant purchased the said property using his retirement money, after his premature retirement due to the chaos caused by his wife, the respondent. He insisted for the importance of the court to consider contribution before a party to the marriage has been declared to be entitled to the division of the properties. In support of that contention, he cited the case of **Bibie Maulid vs Mohamed Ibrahim** [1989] TLR 162. He also said that even those household labour, as recognized in the case of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32, was not proved. He said the respondent did not have any contribution because all she knew was to create chaos and filing numerous cases. In conclusion of his submission on this ground, he said since there is no dispute that it is the appellant who maintains the family and was the one who built the houses, there was no justification for the trial Court to divide the properties 50/50 without proof of the contribution by the respondent. He also asked the house not to be declared as the matrimonial house.

Submitting in support of the 3rd ground of appeal, which raises a complaint that, the trial Magistrate erred in law and facts by holding that the appellant should maintain the child at the tune of Tshs. 200,000/= per month, pay her school fees, and cater for health expenses while knowing that the appellant's means of income cannot meet that order. He submitted that the amount of Tshs. 200,000/= plus the school fees and medical expenses to maintain one child whose custody has been placed to the respondent as decreed for the appellant to maintain the child is unreasonably very huge and was granted by the Court without ascertaining the reliable source of income of the appellant.

She reminded the court that he is a retired employee who spent all his pension to purchase the house and who currently hardly earns his own living. He said the evidence that the appellant retired in 2015 has not been disputed by the respondent which makes it a fact that he is now unemployed. In his view, the amount ought to have been reduced to Tshs. 50,000/= which can be met by the appellant for both the appellant and the respondent are bound to maintain their child.

Lastly, he said had the appellant properly used the evidence of DW2 and DW3 he would not have decided that, the house at Kitowo is the matrimonial property, and the distribution of the Banda mbili house would

not have been 50/50 and the maintenance of the child would not have been Tshs. 200,000/= plus school fees and medical expenses. He asked the court to base on the submissions he made to allow the appeal.

In the reply, the counsel for the appellant acknowledged the principle that this being the 1st appellate court, it can do its business by way of rehearing, and by re-evaluating evidence and coming to its own conclusion. Attacking the evidence of DW2 he said the same is self-contradicting and full of hearsay. In support of that contention he made reference to page 29 of the proceedings where DW2 said, it was PW1 who told him that her late father left the iron sheet to build the house at Kitowo Marangu while on page 27 she said before her father died he bought 50 iron sheets and left the money to Peter Tsh, 150,000/= to Peter to purchase timber.

The other evidence is at page 28 regarding the frequencies of her going to Kitowo where he at once said she does not go there frequently because she live in Dar Es Salaam and soon thereafter the same witnesses said on several time when she went there she found Peter Thomas Morewa who was the supervising the construction.

Regarding the ownership of the plot on which the house at Kitowo was built, while DW2 said the plot was of her late further, while on that page DW1 said she was given the plot by her late grandfather.

Regarding the evidence of DW3 at page 30 he said his brother only left iron sheets while contradicting the statement by DW2 who said he left the iron sheet and money for timber. He asked the court to evaluate the evidence and find that the evidence was contradicting each other and that it wholly based on the hearsay.

He thus asked the court in considering that evidence to be guided by the decision of the case of **Vumi Liapenda Mushi vs The Republic,** Criminal Appeal No. 327 of 2018 to the effect that hearsay evidence is of no evidential value, therefore should be discarded. On the other hand, the respondent told the court how he contributed towards the acquisition of the matrimonial properties. She said she was employed as electrician and was earning more than Tshs. 108,000,000/= per year was supported by DW1. She also said, the fact that the money to build the house at Kitowo was from the sale of Scania vehicle which was one of a matrimonial property. These argument were also advanced in respect of the second ground of appeal.

Regarding the complaint against the maintenance order, he reminded the court that under section 129 of the **Law of Marriage Act,** it is always the duty of the father to maintain his children whether they are in his custody or the custody of any other person, having regard to his means and station in life or by paying the cost thereof. In the Counsels view, the amount assessed in the order for maintenance is reasonable and in the dictate of the law. He prayed the appeal to be dismissed with costs.

In the rejoinder the Counsel for the appellant reiterated what he submitted in chief save for few issues which were raised in the reply by the counsel for the respondent where he said the case of **Vumi Liapenda vs The Republic**, Criminal Appeal No. 327 of 2018 is distinguishable and in applicable in the circumstance of this case as that case was a case of rape while the one at hand is a matrimonial matter. He said even if the court find that the evidence of the respondent and her witnesses was not contradicted at the trial Court, therefore it cannot be contradicted in appeal, still the evidence shows that, the respondent contribution of the building of the house at Kitowo Marangu is zero if not negative. He said the evidence that the house at Marangu was built using the proceeds obtained after selling Scania, is a mere sham because there is no evidence

to prove that the said Scania has ever existed. He said the court was not supposed to rely on such allegations without supporting evidence as doing so prejudiced the appellant.

Furthermore, he seriously contradicted the allegations that the respondent was employed and was earning Tsh. 120,000/= per week to be unfounded and without any support of any evidence. He said there was no salary slip tendered and logic leads to the conclusion that a mere labourer of the year 1990 could not be receiving that amount per week, while the appellant who was in a permanent employment was earning Tshs. 370,000/= per month in the year 2008. He insisted on the facts that the trial court did not abide to the directives of section 114(1) & (2)(a)(b)(c) of the Law of Marriage Act and the decisions in the case of **Bi. Hawa Mohamed vs Alli Seif** (supra) and **Bibie Maulidi vs Mohamed Ibrahim** (supra) on the importance of the court to satisfy itself on the contribution of the party to prove his/her contribution before he/she is entitled to the division of the matrimonial properties.

Last that the court had no evidence to prove that the appellant had means to provide for the maintenance of the children to the tune of the amount ordered. He asked the court to allow the appeal.

Considering the grounds of appeal, the original record and the submissions advanced by the parties in support and opposition of the appeal, only one main issue for determination can be framed, that is "**whether this appeal has merits**". This issue will be resolved after determining the grounds of appeal preferred which I will deal with in their sequential order. Now, looking at their phraseology, the 1st and 2nd grounds of appeal raises a similar complaint as they are complaining about the division of matrimonial properties. Starting with the division of the house at Kitowo in Marangu at the tune of 50/50 while there was no evidence to prove that the same was a matrimonial property. The second limb is that the house at Sombetini Banda Mbili which was divided to the tune of 50/50 without considering the efforts made by the parties in acquiring the same, for that reasons, I will determine these two grounds jointly.

In these two grounds of appeal, the appellant is challenging the division of matrimonial properties. As already stated by the parties above, the order of division of matrimonial property is a consequential normally given after the marriage has been declared to be broken down irreparably. In dividing the matrimonial properties acquired during the subsisting of the marriage, the paramount consideration by the court is the contribution

by each party towards the acquisition of such properties. This position is provided under section 114(1) and (2)(a)(b)(c) and (d) of the **Law of Marriage Act**, [Cap. 29 R.E 2019] which has been interpreted in a number of decisions by the Court of Appeal of Tanzania one of those decisions being 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."*

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)

In essence, under the above provision and authorities cited herein above, the petitioner in the matrimonial case needs to prove two things, **One**, that the property in question is matrimonial in that it was acquired during their marriage, or that it was acquired before but substantively renovated or improved during the tenure of the marriage. **Two,** what did he/she contribute in the acquisition of the said properties. In this case while the respondent says the house at Kitowo -Marangu is a matrimonial property the appellant says that was not a matrimonial property because it is a family house built on the joint effort of the family members of his late father's family and the same was built on the clan land with an enormous contribution of his brother the late Thomas.

It is the principle of law as provided under sections 3(2)(b) and 110 of the Evidence Act that, the standard of proof in civil cases including the matrimonial is on the balance of probability and the burden to so prove is on the shoulder of the person who wants the court to decide in his or her favour. Before the trial court, the complainant was the current respondent, therefore the burden of proof was squarely on her shoulder to prove every allegation including that the houses at Sombetini and that in Kitowo Marangu are matrimonial properties. Secondly, she was also duty bound to prove that she contributed towards the acquisition of the

said properties either in cash or in kind i.e. the two houses. I have toured and scanned through the evidence presented by the respondent before the trial Court, there is no evidence proving the respondent's direct contribution towards the acquisition of the house at Sombetini. I hold so because the respondent said that, she was earning a salary and later an income from the business, but did not say the value of the house and how much she contributed either in cash or efforts like supervision of construction or household works which created the conducive environment for the appellant to concentrate and earn money to build the said house. Failure to prove contribution entitles no person who so fail to do so the 50% division of the matrimonial assets. The only available evidence is oral without the support of any documentary evidence, that the respondent worked briefly with A-Z, her evidence is that she was doing a number of business but she did not tender any proof to prove that, the only business which was supported by the evidence of PW2 and that of DW1 was of selling the ice-cream. By any stretch of imagination unless it is proved that the ice-cream business was the one so professional which proof has never been shown which could be taken to have generated an enormous income to contribute in building the house.

There being no material contribution of the Respondent in acquisition of the properties, the only evidence of contribution should base on the house hold works which in terms of the decision in the case of **Tumaini M. Simoga vs Leonia Tumaini Balenga (supra)** is also recognised. Moreover, in my view, that cannot entitle the respondent 50% division. I hold so because, she did not give evidence to prove what she did as a house hold activities which may account to contribution towards acquisition of the assets, he did not prove with evidence that she supervised the masons in their work, she cooked for them or created the peaceful environment for the appellant comfortability in earning. To the contrary, on the last aspect, the appellant complained of her being a peace breaker and trouble marker, which facts, had never been disputed by evidence. In my view considering all these facts, instead of 50%, she may justifiably be entitles to 35% of both houses at Sombetini, while the appellant who has produced the proof that he was employed, therefore had a source of income both when he was employed and when he retired and go terminal benefits, he be entitled to 65% of the division of both houses at Sombetini.

Now regarding the house at Kitowo in Marangu, the respondent did not give any evidence of the same being the matrimonial property, she

did not say how the plot on which the house was built was obtained, how the house was built, how much did she contribute in terms of materials and effort. As rightly submitted by the counsel for the appellant she only new the existence of that house after being informed by her son. That means not only that applicant did not contribute but also that she had no knowledge of its existence. That said the respondent therefore failed to prove that the said house was one of the matrimonial assets therefore she has no any contribution towards its acquisition. That said the ground therefore succeed as the house cannot be categorised as a matrimonial subject to division.

On the third ground of appeal which raises the complaint that, the trial Magistrate erred in law and fact by holding that the appellant should maintain the child at the tune of Tshs. 200,000/= per month, pay her school fees and cater for health expenses while knowing that, the appellant is currently not employed, and his means of income cannot meet that order.

It is true that, under section 129 of the **Law of Marriage Act** (supra) the general rule is that it is the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with necessities such as accommodation,

clothing, food and education as may be reasonable. That duty however, should have regard to his means and station in life or by paying the cost thereof.

Under subsection (2), that duty may only shift to the mother only when the father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them. In this case, the appellant who is the father has not suggested to be unable to maintain the child, but has complained that he has no means of paying that amount. It is true that there was no inquiry made on the appellants financial position to ascertain as to whether he has such the capacity to pay or not. It should be noted that, the order for maintenance made particularly on the amount of Tshs. 200,000/= did not cover education and medical health insurance.

Therefore, in the circumstances where the economic muscles of the appellant have not been ascertained and having regard to the fact that the respondent who was the petitioner did not give evidence to prove that, then that failure operates in the favour of the appellant, the amount for maintenance is thus reduced from Tshs. 200,000/= to Tshs. 120,000/= plus the medical and education expenses. 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 13th day of October 2023

J. C. TIGANGA

JUDGE