IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

DC. CIVIL APPEAL NO. 31 OF 2022

(Originating from Dodoma District Court in Matrimonial Case No. 2/2021)

LUCAS NDAHANI .....APPELLANT

VERSUS

NEEMA JACOB WILLIAM .....RESPONDENT

JUDGMENT

Date of last Order: 07/11/2023

Date of Judgment: 21/11/2023

LONGOPA, J.:-

The Appellant and Respondent were husband and wife prior to an issuance of decree of divorce by the District Court of Dodoma on 8th July 2022. The parties got married on 25/6/2011 at Mwegamile village and they were blessed with two issues of marriage namely Wanyenda Lucas Nhonya born on 16/9/2012 and Sifa Lucas Nhonya born on 16/1/2016.

The Respondent petitioned for declaration that marriage between the parties has broken down irreparably thus grant of a decree of divorce,

custody of children be granted to the Respondent, an order for maintenance of the petitioner and her children be borne by the Appellant, and order for division of matrimonial assets acquired during subsistence of the marriage.

At the hearing in District Court for Dodoma, Respondent testified that during subsistence of their marriage the parties acquired several matrimonial properties including two houses at Mwegamile, cattle, goats, bicycle, and piece of land of quarter an acre. Having heard the evidence of both parties, the District Court was satisfied that the marriage between the parties has broken down irreparably thus decree of divorce was granted. The District Court also found those properties were matrimonial properties and ordered division of the same whereby the Respondent got a lesser share compared to that of the Appellant. Despite all that the Appellant is challenging the same on ground that the Respondent was not entitled to a share in division of matrimonial assets.

The Appellant preferred a total of nine grounds of appeal as per Memorandum of Appeal dated 1st August 2022, namely:

1. That the learned trial magistrate erred in law and in fact on ordering division of matrimonial assets and properties. The trial court ought to order that in circumstances the Respondent receives nothing at all.
2. That the learned trial magistrate erred in law and in fact by failure to admit a Village Executive Officer letter dated 26/11/2018. The

trial magistrate ought to admit as it forms part of evidence of the Appellant.

3. That the trial magistrate erred in law and facts by relying on weak evidence of PW1 and PW 2.
4. That the trial magistrate erred in law and fact by failure to take into consideration the weight of evidence adduced by DW 1, DW 2 and DW 3 as well as Exhibits D1, D 2, D 3 and D4.
5. That the trial magistrate erred in law and in fact by holding that the Respondent contributed to acquisition and/or development of the matrimonial assets.
6. That the trial court erred in law and in fact by holding that there was an act of beating and that there was cruelty. The trial court ought to hold that since there was no any strong evidence from the police and the hospital then there was no any kind of cruelty.
7. That the trial court erred in law and in fact by holding that the Respondent participate on farming and business licence and TIN Number then the allegations of that the parties had a business hold nothing.
8. That the trial court erred in law and in fact by holding that the Respondent participated in of ¼ acre of land located at Mwegamile. The trial court ought to hold that since the land was obtained by selling a cow which belonged to the Appellant then the Respondent got nothing.
9. That the trial Magistrate's Judgement lacks the mandatory legal requirements for the proper court judgement.

The Appellant prayed that this Court to allow the appeal and consequently quash down and/or set aside the Judgment in Matrimonial Cause No. 2 OF 2021 at Dodoma District Court delivered on 8th July 2022, the Appellant be awarded the costs of this appeal and any other orders that this honourable court may deem fit and just to grant.

When the appeal was set for hearing, the Appellant appeared in person while the Respondent was represented by Mr. Thomas Nchimbi, Advocate. The Appellant adopted all grounds of appeal to form part of his submission and he reiterated that ¼ acre of land should not be considered as matrimonial asset because it was bought by the Appellant by exchanging with a cow on 2013 with his brother Shedrack Ndahani.

In respect of the house the parties were living, the Appellant stated that he married the Respondent while he had 27 aluminum sheets for roofing and 27 goats. It was Appellant's argument that in 2016 he sold all his goats and a cow and applied the money to buy timber and make some bricks which he used to complete the house which the spouses were living together. The Appellant prayed that he should be given back his dowry in order to move on with his life because it the Respondent who is not willing to continue with that marriage.

The Respondent on the other side states that repayment of dowry back to the Appellant is not tenable in law. It was not among the grounds set forth in the Memorandum of Appeal. Order XXXIX Rule 2 of the Civil

Procedure Code, Cap 33 R,E 2019 requires that Appellant should not advance any new ground that was not set forth in the Memorandum of Appeal except by leave of the Court. It was argued that this was not done.

In alternative, section 71 of the Law of Marriage Act, Cap 29 R.E. 2019 provides clearly on circumstances under which dowry /bride price can be returned. It was argued that this happens only when marriage has not been contracted as decided in the case of Wilbroad Bugambo vs Pius Wilbard, Civil Appeal No. 36 of 2022, at pages 7and 8 where it was held that gifts are not returnable. It was argued that there is no dispute that marriage was contracted in 2011 thus the Appellant does not deserve to recall the dowry or bride price that was paid in contemplation of the marriage.

Some grounds were argued jointly namely the 1st , 5th , 7th and 8th relating to the contribution of the Respondent in acquisition of matrimonial assets and the share in the division of matrimonial assets. The major dispute was said to be in two houses that were constructed in 2012, 2017 and 2018. All these matrimonial homes were constructed during subsistence of the marriage as the Respondent found the first house at construction that was ongoing while the Appellant had purchased ten iron sheets. It was argued that Respondent participated fully.

In respect of the 2nd house, the parties herein participated jointly from the initial stage to final construction stages. At page 7-9 as well as

page 46 of the typed proceedings reflect participation of the Respondent towards acquisition of the matrimonial home in question. It is a further argument that Respondent provided workforce as well as preparation of food for workers who were engaged in the masonry activities.

It was submitted for Respondent that on page 27 of typed proceedings, DW 2 admitted that Appellant and Respondent jointly acquired two matrimonial houses though the first one was at construction stage at the time of marriage. This was evidence that Respondent contributed towards acquisition of matrimonial assets thus deserve a share in division of matrimonial assets.

In respect of the ¼ acre piece of land was acquired jointly in 2016 and page 7 of the proceedings reveals the same and there was Respondent's contribution towards acquisition.

It was argued further that Respondent is aware that the court adhered to section 114(2)(b) of the Law of Marriage Act on criteria of contribution of each party towards acquisition of matrimonial asset in form of monetary contribution or kuiepusha, or efforts towards acquisition. All these criteria were met by the Respondent as she fully participated in all processes and she was taking care of the house, issues of marriage and matrimonial assets while the Appellant was away in Dar es Salaam.

It wa submitted that in those circumstances, trial court was correct to order division of matrimonial assets in a manner that both Appellant and Respondent deserved a share. The case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 CAT was cited to substantiate that the Respondent's contribution should not go unnoticed and unrewarded.

In respect to 2nd ground of appeal on failure to admit a letter from the Village Executive Officer as an exhibit, it was argued that DW 3 failed to identify the letter. He had no knowledge of the letter, he was not the author nor addressee and he failed to state how the same came into his possession as per proceedings in pages 29-30. It was argued that this Court should be guided by case of **Robinson Mwanjisi and three Others vs Republic**, Criminal Appeal No. 154 of 1994 where the court observed that there must be clearance of documents before the admission. That was not adhered to by the Appellant thus the trial court was correct to decline admission of such document given its failure to undergo necessary clearance procedures.

On 3rd ground regarding weak nature of evidence of PW 1 and PW 2, it was argued that the evidence was watertight and acceptable evidence as PW 1 reiterated on acquisition of matrimonial properties and the reasons for decision to petition for decree of divorce as revealed in pages 8-9 of the typed proceedings.

It was further argued that evidence of DW1 one George (Joji) Stanley Ndashani at pages 21-25 of the proceedings. Also, evidence of PW 2 at pages 15-20, corroborated the testimony of PW 1. Given the fact that at page 46 of the typed proceedings, the Appellant did not contest about granting of decree of divorce as there were valid reasons and sufficient evidence on contribution towards acquisition of matrimonial assets.

On 4th ground on failure of trial court to consider the evidence of the Appellant's witnesses and exhibits, it is not correct. Accordingly, Respondent argued that evidence of DW 1 was accommodated to substantiate grant of decree of divorce as stated at pages 27 and 28 of the proceedings. Evidence of DW 2 was necessary to substantiate division of matrimonial assets as his evidence revealed that parties had acquired matrimonial assets. Finally, on this aspect testimony of DW 3 did not contest the grant of divorce except for distribution of matrimonial assets.

Regarding the exhibits, it was argued that they were applied by trial court as summary of minutes at the local Church trying to resolve the matter amicably. This was containing elements of cruelty that assisted the Court to reach to a conclusion of irreparable breakdown of the marriage. Exhibit D2 was a letter from Chalinze Deanery to headquarters of the Anglican church. It was a referral letter. Exhibit D3 is the certificate of birth for children/ issues of the marriage which is not in dispute and Exhibit D4 reflecting the proceedings regarding non-compliance with Reconciliation Board requirement before the institution of petition for divorce. It is argued

that all these exhibits and evidence of the Appellant were accommodated fully in the judgment of District Court of Dodoma.

On 6th ground of appeal share the argument of the 3rd ground of appeal. It was evidence of the Respondent that cruelty was committed by the Appellant to the extent of threatening to kill the Respondent. That evidence was supported/corroborated by evidence of DW 1 who adduced evidence on existence of conflicts and fighting as exemplified in Exhibit D. 1 thus the Court applied correct position to find existence of cruelty.

On the 9th ground regarding the lack of all contents of judgement, it was argued that Order XX Rules 3 and 4 were complied with as all contents of judgment are contained thereat, there are issues of determination, statement on brief as well as reasons for determination thus, presence of all prerequisites of the judgement made the same valid in law.

In rejoinder, the Appellant reiterated that PW 1 failed to adduce sufficient evidence on existence of matrimonial assets. There was no evidence on farming activities was adduced as well as acquisition of acquisition of domestic animals. He prayed that the matrimonial assets should be entrusted to the children/issues of the marriage.

Having heard the submissions by the parties, perused the record of the District Court on the matter and decision of the District Court, I shall address the appeal before me as follows:-

The first aspect submitted and emphasized by the appellant is that respondent be ordered to return the dowry or bride price as it the respondent who is unwilling to continue with the marriage.

This matter is not difficult to answer. The answer on whether the respondent should be ordered to return bride price having stayed in marriage since 2011 to 2022 when the divorce order was granted by the District Court. The answer is in the negative.

The Law of Marriage Act, Cap 29 R.E. 2019 provides for issues on bride price or dowry as part of gifts given to the family of the bride. They are not returnable unless the marriage has not been contracted. Section 71 of the Law of Marriage Act states as follows:-

> 71. A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise.

The Court must be satisfied that gifts/ bride price was given to the bride's family with an intention that marriage will be contracted. It must be proved that such marriage was not contracted as envisaged.

I am persuaded by the decision of the High Court in the **Wilbroad Bugambo vs Pius Wilbard** (PC Civil Appeal 36 of 2022) [2022] TZHC 13033 (23 September 2022), where Hon. Kilikamajenga, J stated that:

> In terms of the above law, a person may only file a suit to claim for gifts, including dowry which were given in contemplation of the marriage where the marriage has not been contracted. But, where the marriage has been contracted, any gift cannot be claimed. In the case at hand, the respondent could only be justified to claim for the refund of dowry and other gifts if the marriage could not have been contracted. As the respondent and appellant's daughter contracted their marriage, the respondent had no right to claim for the gifts that he gave including dowry.

The Court categorically stated that the giver of a gift including dowry is precluded from demanding it back if the marriage was contracted. In the instant case, the appellant and respondent contracted marriage in 2011 and stayed in that marriage for about ten years before the Court dissolved the marriage by granting the decree of divorce.

The dowry therefore cannot be returned as that will be contrary to the law governing marriage in Tanzania which exclude the return of the same once marriage is contracted.

The second aspect shall be on the division of matrimonial assets that the appellant disputes. There are different limbs under which appellant disputes division of matrimonial assets. These include, namely: first, that respondent did not establish that she contributed to the acquisition of matrimonial assets. Second, that respondent deserved nothing to the division of matrimonial assets. Third, the plot of land measuring ¼ acre was acquired in exchange with a cow that belonged to the appellant and not respondent. Fourth, that absence of TIN number or records regarding business licence of the respondent is evidence that she never participated in any appellant's business whatsoever.

Section 114 of the Law of Marriage Act provides for the powers of the Court to order division of matrimonial assets that are acquired through joint efforts of the parties during the pendency of the marriage. Subsection (2) provides criteria to be taken into account in the division of the matrimonial assets. It stated that:

> (2) In exercising the power conferred by subsection (1), the court shall have regard to -
> (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.

The major factors to be considered before division of matrimonial asset order, the Court is enjoined to consider customs of the parties; extent of contribution by each party towards acquisition of the property through monetary contribution, property or work; the debts of the family for joint benefits; and the needs of the children.

In the case of **Yesse Mrisho vs. Sania Abdul**, **Civil Appeal No. 147 of 2016,** (unreported), the Court of Appeal stated that: -

From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. 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.

The extent of contribution forms a critical aspect of the division of matrimonial assets between the spouses of a broken marriage. It is the most important factor for one to be considered for division of matrimonial assets following issuance of decree of divorce or separation.

In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (Civil Appeal 102 of 2018) [2020] TZCA 31 (20 February 2020), the Court of Appeal analysed the impact of a party failing to adduce evidence towards contribution in acquisition of assets in question. It stated that:

> 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. It was expected for him to adduce evidence showing his extent of contribution on each and every property but such evidence was not forthwith coming. 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.

The above being the criteria, I find that Respondent fully adduced evidence before the trial court on her full participation towards acquisition of matrimonial assets. The Respondent was part and parcel of acquisition of all the assets considered to be matrimonial assets by the trial court. The respondent cannot be excluded from entitlement of division of matrimonial assets.

The Appellant argument that the ¼ acre was acquired by selling the goats and a cow he had been keeping cannot exonerate this property from being a matrimonial property. It is on record that the same was acquired during pendency of marriage and the Respondent demonstrated that both parties participated jointly in agricultural activities that helped the family to acquired matrimonial assets in question.

At pages 7-9 of the proceedings as well page 11 and 12, the respondent provided a full narration as to how the matrimonial assets were acquired during pendency of marriage through joint efforts. It is on record that properties listed were acquired by the parties through joint efforts.

The evidence of PW 1 was strong to establish how the matrimonial assets were acquired by joint efforts. The same was corroborated by testimony of DW 2 in respect of the two houses that parties constructed.

DW 3 who is the appellant is not disputing that properties do exist. He is of the view that properties he is owning through purchase from his

siblings in the appellant's family land should not be counted as matrimonial assets. It was DW 3 evidence that some of the properties like goats and cattle he was owning prior to the marriage and continued to own. Thus, those should not be counted and included as part of the matrimonial assets.

In the case of **Helmina Nyoni vs Yeremia Magoti** (Civil Appeal 61 of 2020) [2022] TZCA 170 (1 April 2022), the Court of Appeal stated that:

> It is obvious that the decision and others we have laid our hands on say nothing more than echoing the spirit of the law under section 114 of the Act. All it does and which it has consistently done, is to guide courts in determining the division of assets considered to be matrimonial assets upon dissolution of the marriage to the extent of the share rather than entitlement by individual spouse. This is so because section 114 (2) (b) of the Act enjoins courts to incline towards equal divisions where there is evidence of equal contribution towards acquisition of the matrimonial assets between the parties. Obviously, that case does not have an automatic application for an equal division and indeed that may not be realistic considering that each case has to be decided on its own individual facts.

From this decision, the Court would always order division of matrimonial assets upon satisfaction that the parties participated in joint acquisition of the matrimonial assets. The division should consider contribution of acquisition of assets to determine the share of matrimonial assets.

All these testimonies were considered by the trial court to reach to its decision that those assets are matrimonial assets. They were either acquired during subsistence of the marriage or substantially improved during the subsistence of the marriage. For the two houses in the same compound, one was completed after marriage as parties are not disputing that while the second one was constructed from the initial stage to completion during pendency of the marriage.

It is on account of all these evidence that trial magistrate analysed fully all the evidence from both parties. The Magistrate found that the assets were matrimonial assets and ordered division of the same to the parties. This is provided for on pages 16 to 24 of the judgement of the District Court dated 8th July 2022. It was found that the respondent contributed through work, taking care of the family including two issues of the marriage as well as maintenance of the assets during absence of the appellant. The assets were acquired during the subsistence of the marriage between the parties. As a result, the respondent was entitled to a share of the assets legally acquired through joint efforts of the parties during subsistence of the marriage.

I am satisfied that grounds 1, 3, 4, 5, 7 and 8 lack any merits on account of the observations made above. The District Court was correct and applied proper legal provisions to award division of matrimonial assets that were acquired by joint efforts during pendency of the marriage. I find no reason whatsoever to interfere with the judgement of the District Court in respect to division of matrimonial assets.

In another twist of events, the appellant is of the opinion that matrimonial assets should be left to two issues of the marriage. I need not to re-emphasize that the law recognises spouses who are parting ways as the only beneficiary of the division of the matrimonial assets. The needs of the children come in only in form of assets distributed to one party in terms of getting more share in the division to the matrimonial assets. The law does not require the court to divide the assets to any issues of the marriage. If the appellant wanted the assets to belong to the children, he would have given the same as gifts to the children during subsistence of the marriage. The appellant cannot be permitted to deny the respondent's lawful entitlement to matrimonial assets in pretext of the property being left to issues of the marriage who are under his custody.

In respect of denial by the trial court to admit a letter from the Village Executive Officer (VEO), I am of the view that court applied proper procedure. It availed opportunity to both parties to address it on the admissibility of the document that was objected by the respondent.

Tendering of documents in courts of law is governed by procedure that requires be cleared for admission to prepare the same for admission. It means providing initial information that is connecting the witness who is testifying with the document he is about to tender. The relationship between a person who is tendering a document, and the document must be established. There must be a linkage between the two.

In the cases of **Jumanne Mondelo vs Republic** (Criminal Appeal 10 of 2018) [2020] TZCA 1798 (6 October 2020); and **Geophrey Jonathan @ Kitomari vs Republic** (Criminal Appeal 237 of 2017) [2021] TZCA 17 (16 February 2021), the Court of Appeal emphasized that:

> It is trite principle that when a document is sought to be introduced in evidence three important functions must be performed by the court, **clearing the document for admission**, actual admission and finally, to ensure that the same is read out in court.

Simply stated, clearance for admission entails laying grounds for the evidence to be admitted by the Court. This may include ensuring that the witness who tenders it is competent in form of author of the document, addressee, possessor, custodian owner; it must be original; and it must have been attached to the pleadings or included in the list of documents to be relied upon. In absence of these preliminary issues being stated before

the witness attempts to tender the document made tendering of document face legal challenges.

I have perused the record regarding the tendering of that letter. It was written by the Village Executive Officer directed to Primary Court. DW 3 was neither an author or addressee of the letter. No information was provided how he came into possession of the letter as per pages 29 to 32 inclusive of the proceedings. In the circumstances of the matter, the District Court was entitled under law to reject the same for failure to meet criteria for admission.

The ruling of the Court dated 21st October 2021 indicates that the letter does not indicate that it was copied to anyone. It was authored by Village Executive Officer and the addressee/recipient was Primary Court at Chamwino Ikulu. It was no certain how the same came into possession of the appellant thus the Court declined its tendering as DW 3 was not author, possessor or custodian of the document. I entirely agree with reasoning of the trial magistrate that in absence of evidence on a way the appellant came into possession of a document belonging to public institution was questionable thus not compliant to the requirements of the law. I proceed to dismiss ground 2 of the grounds of appeal.

Another ground relates to failure to prove element of cruelty on the appellant's side before the decree of divorce was granted. This issue shall not detain me. It was the testimony of PW 1 that appellant used to beat

her on several occasions, and she reported to police station though she was not given Report Book (RB) Number. PW 2 corroborated to have participated in resolving the dispute as respondent was beaten and threatened her life by the appellant. DW 2 also testified to have participated in resolving a dispute between parties. That is the reason on page 15 of the proceedings, trial magistrate stated that there is proof of cruelty which was exemplified by beatings inflicted on the respondent by the appellant. This was a major contributor towards establishing irreparably breakdown of the marriage.

The record of trial court on this aspect has established the existence of cruelty on part of appellant towards the respondent. Thus, this ground lacks any merits.

The last ground of appeal relates to the contents of judgement as the appellant asserts that judgement lacks proper content of the judgement. I have perused the judgement of the District Court to satisfy if the same is compliant to the requirements of the law.

Order XX Rule 3 and 4 of the Civil Procedure Code, Cap 33 R.E. 2019 provides for contents of the judgement. They state as follows:-

> 3. The judgment shall be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court

and shall be dated and signed by such presiding judge or magistrate as of the date on which it is pronounced in open court and, when once signed, shall not afterwards be altered or added to, save as provided by section 96 or on review.

4. A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

The judgement is drafted and signed by Hon. I.J Nyantori, Senior Resident Magistrate and it is dated 8th July 2022 as per the requirements of Order XX Rule 3 of the CPC. Page 1 and 2 provides for the summary of material facts (concise statement), at page 2 there is a list of issues for determination, from page 13 to 26 inclusive contain decision on each point of determination and reasons for such decision on each of the point of determination.

From the observation above, it is not disputed that the judgement of trial court complied with all the requirements of the judgement. There is nothing to fault on this decision. I proceed to dismiss the 8th ground of appeal for being devoid of any merits.

Having dismissed all grounds for reasons that they are destitute of merits, I find that the judgement and decree of the District Court is in order. There are no cogent reasons to interfere with it. It based its finding

on the available evidence on record and both judgment and decree are in accordance with the law.

In the circumstances, I uphold the decision of the District Court of Dodoma in Matrimonial Case No. 2 of 2021 dated 8th July 2022. I dismiss the appeal for lack of merits. No order as to costs.

It is so ordered.

DATED and **DELIVERED** at Dodoma this 21st day of November 2023

E.E. LONGOPA

JUDGE

21/11/2023.