IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO. 08 OF 2023

(Arising from the decision of Temeke District Court One Judicial Centre in Matrimonial Civil Appeal No 90 of 2022 By Hon. Jacob originating from the Judgment of Chanika Primary Court in Matrimonial Cause No 430/2021 Hon. S. Ahazia)

DEOGRATIUS RAPHAEL NSANZUGWAKO.....APPELLANT

VERSUS

ANNA CHIMPAYE..... RESPONDENT

JUDGMENT

Last Order: 10/07/2023
Judgment date: 24/07/2023

M. MNYUKWA, J.

Deogratius Raphael Nsanzugwako and Anna Chimpaye were husband and wife respectively. They contracted Christian marriage on 28/07/2007 and they were blessed with three issues. As per the evidence gathered from the court record, they lived happy marriage for some

months. The misunderstanding arose between the parties which resulted the respondent (the then petitioner) to leave matrimonial home for sometimes and stayed at her uncle's place. That four month later after the respondent left matrimonial home, the parties were reconciled and the respondent came back to her matrimonial home to live together with the appellant (the then respondent) as husband and wife. After returning back to her matrimonial home, as the marriage was consummated, the respondent got pregnancy and it was alleged that the appellant asserted that, the child born was not his which resulted the two to undergo DNA test.

The evidence gathered from the court record shows that during the subsistence of their marriage, the parties acquired properties which are two houses and one plot and that they were running a business of chicken farm which was not materialized. It was the respondent assertion that the appellant was cruel and she was beaten and denied the right to consumation and that she was chased in the matrimonial home that's why she petitioned for a decree of divorce, division of matrimonial assets and custody of three children.

After hearing both parties and their witnesses, the trial court dissolved the marriage by issuing the decree of divorce, divided the matrimonial

properties by 40% of the total value to respondent and 60% of the value to appellant, it placed the custody of the children to respondent and ordered the appellant to pay maintenance for Tsh 300,000 per month for all children.

The above decision was not happily received by the appellant who appalled before the District Court by advancing eight (8) grounds of appeal and prayed before the 1st appellate court to quash and set aside the decision of the trial court. Unfortunately, the appeal did not went as it was expected by the appellant as the same was dismissed.

Dissatisfied with the the decision of the 1st appellate court, he filed the present appeal challenging the decision of the 1st appellate court by fronting seven (7) grounds of appeal as reproduced hereunder;

i. *That, both trial court and appellate court erred in law and fact by ordering and uphold division of the matrimonial properties only 60% to appellant an 40% to respondent without considering contribution in acquiring those properties.*

ii. *That the trial court erred in law and fact by ordering and be uphold by the appellate court that all children to live with respondent without justifiably reason for such a decision.*

iii. *That, both trial court and appellate court respectively erred in law and fact by ordering and uphold that appellant has to maintain children for Tsh 300,000/- without considering appellant station of life and that all spouse has duty to maintain children according to their station of life.*

iv. *That both trial court and appellate court erred in law and fact by entertaining the matter in contravention of section 101 of the Law of Marriage Act [Cap 29 R.E 2019], and be upheld respectively.*

v. *That both trial court and appellate court respectively erred in law and fact by ordering and uphold that all children will stay with respondent without good practice and procedure to involve them in making such a decision.*

vi. *That both trial court and appellate court erred in law and fact when trial court issued decree of divorce without reasonable ground and b upheld by the appellate court*

vii. *That both trial court ad appellate court respectively erred in law and fact by failure to evaluate and scrutiny the evidence on record which resulted to wrong decision which prejudiced the appellant and children's right.*

He therefore prayed the appeal to be allowed and the decision of the lower courts be quashed and set aside, costs of the suit be borne to respondent and any other relief(s) the court may deem fit and just to grant.

When the appeal came for hearing, the appellant engaged the services of Kurubone Paensa, learned advocate while the respondent enjoyed the legal services of Mnyira Abdallah, learned counsel too. The appeal was argued orally.

Arguing in support of the appeal, the appellant's counsel started his submissions with the 1st ground of appeal. In this ground he submitted that, the two courts below erred in dividing the matrimonial properties for 60% and 40% shares on the value of the matrimonial properties for a reason that, the evidence on record does not show if there was joint contribution of the parties to entitle the respondent to get that share. He went on that, when the construction of the house was completed and the purchase of the plot was done in 2018, the respondent was a student. And, there is no evidence which shows that even after the completion of studies, she contributed to the acquisition of the matrimonial properties to entitle her to get share in the matrimonial properties. He retires on this ground by stating that the respondent squandered the chicken farm

project worth Tsh 30,000,000/-, therefore she is not entitled the shares she was awarded.

He further submitted that, during the subsistence of their marriage, each party acquired his/her own property. And that, the record shows that the respondent borrowed milling machine valued Tsh 10,000,000/- and she sold it without involving the appellant. He referred to section 114(2)(b) of the Law of Marriage Act, Cap 29 R.E 2019 and the case of **Bibie Maulidi v Mohammed Ibrahim** 1989 TLR 162 to say that in division of matrimonial assets the court has to consider the extent of contribution of each spouse.

The appellant's counsel argued the 2nd and 5th grounds of appeal altogether, His main complaint is on the issue of the custody of a child. He argued that, the court did not consider the best interest of the child as it is provided under section 125 of the Law of Marriage Act, Cap 29 R.E 2019 and the wishes of the children before placing children's custody to respondent for whom he believes that she is not qualifying. He added that, all children were above seven years of which they could have been consulted. He attacked the judgment of the trial court by averred that the said judgment shows that the opinion of the children were taken while in reality the trial court's proceedings I silent as to when the order of

calling the children to give opinion was issued. He reffered to the case of **Adam Kibona v Absolom Swebe Sheli,** Civil Appeal No 286 of 2017 to upport his argument, He therefore prays these grounds of appeal to be allowed.

The counsel for appellant confronted the lower court's findings on the 3rd ground of appeal on issue of the amount of maintenance ordered by the trial court and upheld by the 1st appellate court. He was of the view that, the evidence on record does not show if the appellant had ability to pay Tsh 300,000/- monthly as a maintenance to all three children. He therefore prayed this ground to be allowed too.

Arguing in support of the 4th ground of appeal he submitted that there is no evidence that was tendered to show that the matter was referred to the marriage conciliation board and that the body has failed to reconcile the parties. He said that, the petition filed in the trial court was incompetent and the court wrongly proceeded to determine the matter in the absence of the evidence which shows that the matter was referred to the board for reconciliation.

In respect to the 6th ground of appeal he contended that, the allegation of cruelty posed by the respondent was not proved through evidence on the trial court. Therefore it was wrong for the 1st appellate court to uphold

the same without any evidence to corroborate that allegation. He prayed the appeal to be allowed.

In regards to the 7th ground, the counsel for appellant averred that, the lower courts did not take into consideration the evidence on record and therefore prayed for this ground to be allowed.

Contesting, the respondent counsel prayed the court to uphold the findings of the two courts below. He submitted that, all the properties listed by the respondent were required during the subsistence of their marriage and they are liable to distribution as it was done by the lower courts. He stated that, the provision of section 114(2) of the Law of Marriage Act, Cap 29 R.E 2019 as referred by the appellant's counsel does not mean only monetary contribution as the same is interpreted to include contributions done by one of the spouse in terms of works.

He supported his argument by referring to the case of **Eliester Philemon Lipangahela v Daud Makuhana,** Civil Appeal No 39 of 2002, HCT at Dar es Salaam which recognize domestic work as part of the contribution. He contended that, the available record shows that the respondent was an employed wife and therefore she financially contributed in the acquisition of the matrimonial properties.

On the assertion that the respondent squandered chicken farm project he submitted that, section 60 of the Law of Marriage Act, Cap 29 R.E 2019 allows a spouse to own property separate during the subsistence of the marriage. He said that, the available evidence in the trial court does not exhibit if the chicken farm project was the sole project of the appellant. And therefore, when invoking the provision of section 110 of the Law of Evidence Act, Cap 29 R.E 2019, it is clear that the appellant failed to prove his assertion and there is no proof to show that the respondent misuse the funds. He therefore, prayed the 1st ground of appeal to be dismissed.

On the 2nd and 5th grounds of appeal he averred that, the records shows that the order to require the children to give their opinion was given on 5/5/2022 and both parties were present in court. He went on that, on 26/5/2022 when both parties were present in court, the children gave their opinion. He added that, it was correctly the custody of the children to be placed to the respondent who stayed with the children for about three years when the parties were in separation. He therefore prayed this ground to be dismissed as it is not merited.

In relation to the 3rd ground of appeal he argued that, it was correct for the lower courts to order the appellant to pay Tsh 300,000/- as a monthly maintenance since he is the Government employee and that the

amount ordered is very low compared with the needs of the children in terms of education, health services and food. He prayed the ground to be dismissed.

Opposing the 4th ground of appeal he contended that, there is no requirement for certificate from the marriage conciliation board to be tendered. That what is important is for the dispute to be referred to the marriage conciliation board. He retired by stating that, the certificate from the marriage conciliation board was attached which show that the parties' dispute was referred to them. He prayed this ground to be dismissed too.

As far as the 6th ground of appeal is concerned, the respondent's counsel submitted that the trial court's evidence shows that the parties were in separation for more than three years and that there is no evidence to show that the parties can live together as husband and wife and that there was no harmony among them. The counsel added that, the appellant accused the respondent for adultery which compelled the parties to undergo DNA test which all these amount to cruelty. He prayed the court to disallow this ground.

Responding to the 7th ground of appeal, he submitted that the evidence were adduced by the parties and the lower courts properly analyzed the evidence on record and reached a conclusion that the marriage between

the parties is broken down beyond repair, ordered the division of the matrimonial assets and placed the custody of the children to the respondent and ordered the appellant to pay monthly maintenance.

In a short rejoinder, he mainly reiterate what he had submitted in chief. He insisted that the chicken farm project was squandered by the respondent.

After hearing the submissions of parties, this court is placed to determine only one issue whether the appeal is merited. In determining the above issue, the court will determine all issues as argued by the parties.

It is important to put the record straight that this is a second appeal. As it is the second appellate court, the law is settled that the court is reluctant to interfere with the decision of the concurrent findings of the two courts below unless there is misapprehension of evidence or violation of the principles of law. The above settled position of the law was stated by the Court of Appeal in the case of **Helmina Nyoni v Yeremia Magoti,** Civil Appeal No 61 of 2020, where it was observed that:

> *"It is trite law that second appellate courts shall be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or*

misapprehension of evidence or violation of some principle of law or procedure or have occasioned a miscarriage of justice."

I find it convenient to start with the 4th ground of appeal as it touched the issue of jurisdiction of the court in entertaining the dispute contrary to the provision of section 101 of the Law of Marriage Act, **[Cap 29 R.E 2012]**. It is the appellant's assertion that there is no evidence which was tendered to show that the matter has been referred to the marriage conciliation board and therefore the petition was incompetent. On his part, the respondent's counsel averred that, there is no requirement for certificate to be tendered, what is important is for the parties to refer their dispute to the marriage conciliation board. The certificate was attached to the petition and the appellant attended the board and that it is not a requirement for the certificate to be tendered as part of evidence.

To begin with, I wish to point out that it is the requirement of the law that prior to the institution of the petition for divorce, the parties must have referred the dispute to the marriage conciliation board as it is provided for under section 101 of the Law of Marriage Act, **[Cap 29 R.E 2019]**. (See the case of **Shillo Mzee v Fatuma Ahmed** (1984) TLR 112

and the case of **Patrick William Magabo v Lilian Peter Kituli,** Civil Appeal No 41 of 2019.

Moreover, section 106(2) of the Law of Marriage Act, **[Cap 29 R.E 2019]** requires every petition to be accompanied with a certificate from the marriage conciliation board. The section provides that:

> *"S. 106 (2) - Every petition for decree of divorce shall be accompanied by a certificate issued not more than six months before filing of the petition."*

I had time to go through the entire court record, and I managed to see Form No. 3 which the certificate from conciliation board of Kisukuru dated 24th March 2022 attached to the Form No 2 of the primary court which is the form initiated the claim for divorce and other reliefs prayed by the respondent. In that certificate form No 3, it shows that the board has certified that it has failed to reconcile the parties. Therefore, it is clear from the record that the respondent complied with the mandatory requirement of section 101 and section 106(2) of the Law of Marriage Act, **[Cap 29 R.E 2019].**

Again, the evidence on record does not show if either of the party disputed on the reference of the matter to the marriage conciliation board. That is to say, even if the evidence is silent on that effect, it does not mean that the matter was not referred. Thus, the argument of the

appellant that there was no evidence tendered to show that the matter was referred to the board is misplaced because the law requires the certificate of the marriage conciliation board to accompany the petition for divorce. If he thought that, the matter was not referred, he should have stated so in his evidence so as to give opportunity for the other party to cross examine on that assertion.

In absence of the oral evidence which was tendered before the trial court, it does not mean that the matter was not referred to the marriage conciliation board. As I believe that each case has to be decided on its own fact, I am satisfied that the matter was referred to the marriage conciliation board before the petition for divorce and therefore I find this ground of appeal is wanting and I therefore dismiss it.

Coming now to the 1st ground of appeal, it was the appellant's assertion that there is no joint contribution of the parties in the acquisition of the matrimonial properties and therefore the lower courts erred to order division of the matrimonial properties in the ratio of 60% to 40% to appellant and respondent respectively. On his part, the respondent's counsel averred that the respondent was an employee who contributed in terms of work and financially.

It is a settled position of law that in exercising its power when ordering the division of the matrimonial property acquired by the parties during the subsistence of their marriage, among other factors the court shall take into account the provision of section 114(2)(b) of the Law of Marriage Act, **[Cap 29 R.E 2019]**, by considering the extent of contributions made by each party in money, property or works towards the acquisition of assets.

The assets which are referred here are the matrimonial assets which is acquired during the subsistence of the marriage. In our country, the apex court of the land through the landmark case of **Bi Hawa Mohamed v Ally Sefu** (1983) TLR 32 defines what constitutes matrimonial assets in reference to section 114 of the Law of Marriage Act, **[Cap 29 R.E 2019]** says that:

> *"The first important point of law for consideration in this case is what constitutes matrimonial assets for purpose of section 114. In our considered view the term "matrimonial assets" means the same thing as what is otherwise as family assets."*

Thus, a property which is acquired by the parties during the subsistence of the marriage or substantially improved by a party as

provided for under section 114(3) of the Law of Marriage Act, **[Cap 29 R.E 2019]** is subject to division.

Nevertheless, it is a trite law that, the contributions of the spouse in acquisition of the matrimonial property can be in form of money, property or works. The Court of Appeal in **Bi Hawa Mohamed** (supra) and in **Bibie Mauridi v Mohamed Ibrahim,** [1989] TLR 162 categorically held that, performance of domestic work amounts to contributions towards the acquisition of the matrimonial assets.

Additionally, in the case of **Eliester Philemon Lipagahela** (supra) recognizes the contribution done by one of the spouse when performing domestic work and in monetary form. Thus, the work canvassed under section 114 of the Law of Marriage Act, **[Cap 29 R.E 2019]**, covers both, the formal and informal work that can be done by the spouse for the welfare of the family.

The evidence on record shows that both the appellant and the respondent are employed. However, the record shows that, the house at Zavala was constructed in the year 2008, while the parties contracted marriage in 2007. By that time the respondent was a student and according to the evidence on record, the house was unfinished, she contributed in finishing the house that is substantially

improving the same. Again, the evidence on record shows that, the other plots were bought in 2012 and 2017 while the parties were living together as husband and wife. It is further on record that the parties had the chicken farm project and the business of milling machine. But the record is not clear on how the above projects did not flourish as the appellant accused the respondent for mismanagement of the chicken farm project although the accusation was not proved by a cogent evidence.

On my part I must say that, I am alive with the provision of section 114 of the Law of Marriage Act, **[Cap 29 R.E 2019]** which gives power to the court to order division of matrimonial assets. However, such power is subject to certain conditions to be considered first as stipulated under sub section 2. The law states;

> *114.-(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order sale of any such asset and the division between the parties of the proceeds of sale.*
>
> *(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.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Apparently in the foregoing provision, it is settled that the assets which are subject to division are those which were acquired during the subsistence of marriage by joint efforts of the parties. For the case at hand, it is on record that the matrimonial houses were acquired during the subsistence of marriage. The question now is, how much parties should get from the assets.

The Court of Appeal in the case of **Gabriel Nimrod Kurwijira vs Theresia Hassani Malongo,** Civil appeal No. 102/2018 had this to say;

"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution.

It is a trite law that property independently acquired before marriage but substantially improved by the other spouse during the subsistence of marriage, the said property is considered part of the matrimonial assets and therefore, subject to division incase parties divorced in **Anna Kanungha v Andrea Kanungha** [1996] TLR 195, it was held that, in terms of section 114(3) of the Law, personal property is liable for distribution when such property has been substantially improved during marriage by joint efforts of the spouse.

Further to that, in this case at hand, as indicated above, the respondent who is a civil servant employed as a state attorney contributed in the acquisition of the mentioned properties in terms of domestic work by rearing children and performing domestic chores as well in monetary contribution which helped in acquisition of the family assets.

The Court of Appeal in the case of **Helmina Nyoni v Yeremia Magoti** (supra) where it was held that:

"It was common ground that the appellant was a wife who, apart from her employment, provided domestic services. She had her contribution in the acquiring of assets and thus entitled to a division of the matrimonial assets."

All said and considered, I don't see the reason to fault the lower courts' finding, I therefore uphold the decision of the lower courts and find that, this ground is not merited and is hereby dismissed.

On the 2nd and 5th grounds of appeal it is the appellant's submissions that, the lower courts erred to award custody to respondent and purported to have taken children's view while the record does not show as to when the children were called to give their opinion. He wonders how come the children gave their opinion while the records does not show if they were called. On the other hand, the respondent's counsel argued that, the children gave their opinion on 26th May 2022 following the order of the court issued on 5th May 2022.

In determining the above issue, I revisited the court record, and I entirely agree with the appellant's counsel that the record does not show if the children were called to give their opinion. I wonder how come did the children went in the court and gave their opinion. For

that reason, it is my finding that the views of the children were not independent taken.

However, despite of holding the fact that the views of the children were not independent taken, that does not preclude me to analyze the other piece of the evidence on record to decide on whether the two courts below rightly decided on the issue of custody of children. I wish to state that, it has to be noted that, in making decision as to whom parent the court should grant custody, the court has to consider the best interest of the child as it is provided under section 125 of the Law of Marriage Act, **[Cap 29 R.E 2019]**. See the case of **Festina Kibutu Vs. Mbaya Ngajimba** 1985 TLR 44.

As per the evidence on record, it shows that the respondent was the one who lived with the children. On his evidence, the appellant testified that he was transferred from Ngorongoro to Kisarawe, then from Mtwara. During all these time it was the respondent who lived with the children of marriage. Again, the evidence on record shows that during the period of separation that is from 2021, the children stayed with the respondent. For that reason, I entirely agree with the decision of the lower courts that placed the children to respondent. However, for the interest of justice, since the children needs care and

love of both parents, the appellant is given the right to access the children. Thus, I find this ground is wanting and it is hereby dismissed.

On the 3rd ground, the parties made rival submissions on the amount of maintenance ordered by the court to the appellant. Both courts ordered the appellant to pay Tsh 300,000 as a monthly maintenance for all three children and payment of their school fees.

I have considered the submissions of the parties on the issue, I hold the view that this issue should not detain me much. The evidence on record shows that both parents are employed. Since maintenance of the children is the shared responsibility, I find the amount ordered to appellant is reasonable to cover daily upkeep. Thus, this ground must fail and it is hereby dismissed.

In respect to 6th ground of appeal, it is the appellant's assertion that the cruelty alleged by the respondent was not proved. While on his part, the respondent testified that the appellant was cruel to her. Again, this issue should not detain me much, as it is provided for under section 107(2)(e) of the Law of Marriage Act, Cap 29 R.E 2019, cruelty is one among the reason which proves that the marriage between the parties is broken down to entitle the court to grant the decree of divorce if satisfied that the broken down is beyond repair. Cruelty can

be either physical or psychological. The evidence on record shows that, the appellant was torturing the respondent psychological for endless accusation of adultery without any proof. The torture became worse when he compelled the respondent to take the DNA test to check whether the child belonged to him while they were still in marriage despite the fact that the law presumed that the child born in the marriage belonged to the spouses.

In addition, in her evidence respondent testified that she was beaten by the appellant and chased from the matrimonial home. For that reason, I agree that it was right for the lower courts to hold that there was evidence of cruelty which suffices to dissolve the marriage between the appellant and the respondent. Thus, this ground is lacking and it is dismissed.

On the last ground, the appellant claimed that the two courts below did not take into account the evidence on record while the respondent's counsel averred that the evidence was properly evaluated. In this ground, it is my humble submissions that the evidence on record was properly considered which in its totality enabled the lower courts to reach the right decision.

Consequently, I upheld the decision of the 1st appellate court. In the final result, I find the appeal is devoid of merit and I hereby dismiss it with no order as to costs.

It is so ordered.

M.MNYUKWA

JUDGE

24/7/2023

Court: Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

24/7/2023

Court: Judgement delivered in the presence of Abdala Nyila Advocate.

M.MNYUKWA

JUDGE

24/7/2023