

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**CIVIL APPEAL NO. 17 OF 2023**

(Appeal from the decision of District Court of Kinondoni, at Kinondoni, in Matrimonial  
Cause No. 68 of 2020)

**MARY GASPER LYARUU..... APPELLANT**

**VERSUS**

**COSTANTINO REVOCATUS KABADI..... RESPONDENT**

**JUDGMENT**

06<sup>th</sup> February & 27<sup>th</sup> March, 2024

**BARTHY, J.:**

The appellant feeling aggrieved by the entire decision, as well as the judgment and decree of the District Court of Kinondoni in Probate Appeal No. 68 of 2020, delivered on the 13<sup>th</sup> of October 2022 appeals to this court on the following grounds;

- 1. That, the learned trial Magistrate erred in law and fact by ordering the distribution of matrimonial properties which is not equivalent from what the appellant contributed.*

- 2. That, the trial magistrate erred in law and facts by failure to consider the best interest of the child and welfare of the children who are below 8 years.*
- 3. That, the trial magistrate erred in law and facts by placing the child below 8 years to the appellants and ignored the basis of the welfare of the child principle.*
- 4. That, the trial magistrate erred in law and fact for failure to record and assess properly the evidence adduced by putting much weight on the respondent's case ignoring the appellant evidence.*
- 5. That, the trial magistrate erred in law and facts for relying on the contradictory will which was tendered by the respondent advocate which was not similar to the one which was tendered by the respondent at the trial court in the first instance.*

Wherefore, the appellant prays for the following orders; that this appeal be allowed; that an equal division of matrimonial properties acquired during the subsistence of the marriage be ordered; that the custody order be varied, and the children be placed with the appellant;

that costs for the appeal be provided for; and that any other reliefs deemed fit to be granted by this court.

The case at hand revolves around a divorce petition initiated by the respondent in the District Court of Kinondoni under Matrimonial Cause No. 68 of 2020. The respondent sought the dissolution of their marriage, along with the prayer for the distribution of assets acquired during the marriage and custody arrangements for their children.

Subsequently to the hearing of the matter, the court issued the decree of divorce and an order regarding the division of matrimonial property. This division allocated 25% of the matrimonial property to the appellant herein and 75% to the respondent. Additionally, custody of one of the children was awarded to the respondent, with further evaluation pending recommendations from social welfare services.

The hearing of this matter was conducted by way of written submission. The appellant was represented by learned counsel Ms. Jane Kapufi, who prayed to abandon the fifth ground and consolidate the second and third grounds. For the respondent's side, the appearance was by Mr. Dickson Mtogesewa.

Addressing the first ground, Ms. Kapufi argued that the distribution of matrimonial assets made by the trial court was not equivalent to the appellant's contribution. She argued the trial magistrate erred in law and

fact by ordering the distribution in the ratio of 75% to the respondent and 25% to the appellant without considering the testimony and evidence presented by the appellant regarding their contribution to the acquisition of properties during the marriage, as stipulated in section 114(1) of the Law of Marriage Act [Cap 29, R.E 2002], to be referred to as the Law of Marriage Act.

It was further stated that the court should have taken into account joint effort towards acquisition of matrimonial assets, citing the case of **Mohamed Abdallah v. Halima Lisangwe**, High Court of Tanzania, 4<sup>th</sup> November 1988.

Furthermore, it was submitted that the appellant's contribution towards the acquisition of properties was evidenced by exhibits D3 to D13, including exhibit P3, the minutes of the family meeting, which indicated the appellant's complaints regarding properties jointly acquired through equal efforts, but documented solely in the name of the respondent. It was asserted that the learned magistrate overlooked this evidence.

Ms. Kapufi was firm that the appellant contributed to the acquisition of those properties and therefore entitled to an equal division, as established in the cases of **Bi Hawa Mohamed v. Ally Seif** [1983] TLR 32 and **Charles s/o Man Kasare & Another v Apolina**

**w/o Manoo Kasare**, Civil Appeal No. 84 of 1998, Court of Appeal of Tanzania.

Furthermore, Ms. Kapufi argued that the appellant made a significant contribution to the plot on which they built their matrimonial home, as evidenced by exhibit P3, which was purchased jointly. The documents bear the name of the respondent, a fact that was never disputed.

Contrary to being a housewife, the appellant's employment contract, as shown in exhibit D5, attests to her active employment status. Her contribution was substantial, evidenced by her involvement in acquiring various loans, as per exhibits D8, D9, and D10. However, all of these contributions were disregarded.

Addressing the second and third grounds of appeal, Ms. Kapufi submitted that the issue of custody was not adequately evaluated. The children in question were minors, and it was argued that they should not solely stay with their father, especially considering that the appellant was primarily responsible for their care. The children were not given an opportunity to express their preferences regarding custodial arrangements, contrary to the provisions of section 37(4) of the Law of the Child Act, Cap 21 of 2009.

Additionally, it was stated that the respondent's instability, evidenced by his alcoholism and frequent changes of residence, further supported the appellant's claim for custody.

Moreover, the appellant's financial capacity was highlighted, juxtaposed with the appellant's meager allocation of 25%, leaving her lacking in essential amenities and unable to provide adequate care for the children, while the respondent remained financially capable.

The fourth ground of appeal concerns the trial court's failure to properly assess the evidence. It was argued that the court disproportionately favored the respondent's case while disregarding crucial evidence presented by the appellant. Notably, the appellant received monthly income of USD 1950, as evidenced by exhibits D5 and D6, which were never disputed.

Conversely, the respondent's purported employment with Shelys Pharmaceutical Limited, along with his alleged income of 15 million and his loan of 120 million for house construction, lacked substantiation. The only evidence presented by the respondent was the family minutes, as per exhibit P3, upon which the magistrate heavily relied

Resisting the appeal, Mr. Dickson Mtogesewa, advocate for the respondent, contended that regarding the first ground, neither before the trial court nor in the present appeal did the appellant prove equal

distribution warranting equal distribution. The claims of salary earnings did not translate into quantifiable contributions to property acquisitions.

He maintained that, it remained unchallenged that the appellant had all her employment benefits sent to her fixed deposit account at Exim Bank Tanzania Limited, and none were used to develop a house at Goba.

Furthermore, three months after the marriage, the appellant's employment was terminated. As the evidence of PW2, one Haji the contractor remained unchallenged, stating that it was the respondent who employed him and paid for everything.

It was further stated that one cannot justify equal contribution merely by citing exhibits without narrating their probative evidential value. To this ground he cited the case of **Gabriel Kurwijila v. Theresia Mallongo**, Civil Appeal No. 102 of 2018, Court of Appeal.

Mr. Mtogosewa added that it is undisputed that the respondent is still indebted at the bank on the loan purchased as per exhibit P8, thus it would be unfair for the appellant to demand equal division.

On the second and third grounds, concerning the failure to consider the welfare of the children who are below 8 years old, it was argued that the claims that the respondent is a drunkard and a busy businessman have never featured or been evidenced in the trial court.

He also stated, the circumstances of this case differ, and placing the children with their mother, where per exhibit P5 deliberated by the trial court at page 13 of the judgment proves the appellant had refused the respondent the shared custody during holidays and even denied him accessing the children.

He further contended that the children have been living with their father amidst their mother's abandonment; thus, it is not better to disturb their life station. The appellant's whereabouts and life station are unknown, and it is not considered in the best interest of the children.

Furthermore, it was stated the appellant has started another relationship, and according to section 39(2) (c), (e), and (f) of the Law of the Child (supra), as the children have the right to live with their biological parent. He also stated that best interest of the child should include security, safety, and provisioning. It was further stated that the court has the discretion to direct the trial court to obtain social workers' opinions, although that opinion is not binding.

On the fourth ground, Mr. Mtogosewa stated that the sanctity of the court records cannot rightly be challenged. All also strongly responded that the cases cited by the appellant's counsel have not been attached to their submission, and others are distinguishable and not supportive of the appeal.



In the rejoinder, the appellant's counsel reiterated her submission in chief and added that what has mostly been replied by the respondent is extraneous matter that cannot be rightly entertained by this court.

Having reviewed the submissions from both parties and with the abandonment of the fifth ground by the appellant's counsel, is now tasked with determining the merit of this appeal, or otherwise.

Before I commence my deliberations on the grounds of this appeal, it's essential to note that, as the first appellate court, I am entitled to re-evaluate the evidence afresh and arrive at my own findings if there was a lack of proper evaluation of evidence and misapplication of the law. This principle was affirmed by the case of **Registered Trustees of Holy Spirit Sisters T. vs January Kamili** (Civil Appeal 193 of 2016) [2018] TZCA 32.

With regards to these grounds of appeal, the 1<sup>st</sup> and 4<sup>th</sup> grounds will be consolidated into one. The court will proceed to address the issue of whether the trial magistrate erred in law by failing to assess and evaluate the evidence presented, thereby reaching an incorrect determination regarding the extent of contribution to jointly acquired matrimonial properties.

With respect to this issue, having reviewed the proceedings of the trial court at page 24 of the typed proceedings, the respondent admitted that the appellant made contributions to properties such as the house at Goba, the plot at Bunju, and Mwabepande.

Furthermore, the respondent acknowledged that the appellant had advanced 16 million for the house at Goba and plot at Mwabwepande, with the plot she contributed being the one with the house (as seen on page 25 of the typed proceedings).

The trial court, in its decision, also considered that there was misconduct on the side of the appellant for leaving a matrimonial home and getting pregnant while still married. Hence, her share towards the division of joint assets was reduced.

However, according to the evidence on record, it is clear that both parties leveled serious allegations against each other regarding misconduct, particularly on adultery. The evidence indicates that the parties were separated since the year 2020, and during the trial, the appellant was found to be pregnant by another man.

Considering the arguments related to this issue and the provision of section 114(2) (b) of the Law of Marriage Act, which mandates the court

to determine the extent of contribution, substantial evidence is required. Mere employment does not automatically grant an equal right to matrimonial property division; rather, the contribution towards property acquisition must be clearly stated and demonstrated. As it was pointed out in the case of **Yesse Mrisho v. Sania Abdul** (Civil Appeal 147 of 2016) [2019] TZCA 414.

The court has noted that the appellant attempted to prove her contribution towards the acquisition of joint matrimonial assets. She provided detailed accounts before the trial court, demonstrating that she took loans that helped her contribute towards the matrimonial assets, as evidenced by exhibits tendered in court.

Nonetheless, it is evident that most of the exhibits over the title for landed properties submitted in court by both sides bear the name of the respondent. However, there was evidence the appellant had to sell her plot and the money was used in acquiring the matrimonial asset plus other contributions made. The assets to be determined by court are also those which may have been owned by one party, but improved by the other party during the marriage on joint efforts.

In this matter, neither of the party providing evidence on the exact period the house at Goba was built, yet both sides are in agreement that the appellant has made contribution on its acquisition.

Moreover, there is evidence on record that the appellant as the wife had to quit her job to look after her family, her contribution towards domestic work cannot be overlooked. As the records of the trial court reveal that the appellant was employed at the time she got married in the year 2014 up to 2017 when she had to quit for her job and not only worked for three months as claimed by the counsel for the respondent.

In alignment with the court's recognition of the value of a wife's domestic work, as stated in the case of **Bi. Hawa Mohamed** (supra), the appellant's sacrifices and contributions, albeit not in a primary role, hold significance, not necessarily leading to 50% as decided in the case of **Bibie M aulidi v. Mohamed Ibrahim** [1989] TLR 162.

Furthermore, the respondent has demonstrated to the trial court that he held a higher-paying employment and had also secured a substantial loan for acquiring assets. He emphasized that a greater portion of these assets were acquired independently before entering into marriage with the appellant. On the other hand, acknowledging the

contribution of the appellant in acquiring their matrimonial house and buying two plots.

In determining contribution made towards acquisition of matrimonial assets, the court then has to look on party's contribution which is the determining factor of what share one should.

Considering the contributions of both financial and domestic nature made by the appellant, the court finds it appropriate to adjust the extent of the share given by the trial court. After evaluating the debts owed by the respondent and the needs of the infant children of the marriage, the court varies the order for division for the house at Goba to the following shares, 35% for the appellant and 65% for the respondent.

Additionally, since the respondent acknowledged in his evidence that they had jointly acquired two plots, the court divides Plot No. 789 Block 2 at Mabwepande to the appellant and Plot No. 46 Mpiji Majohe to the respondent.

Regarding other assets, the court finds that there was no evidence to prove the appellant's contribution towards their acquisition. Therefore, the first and fourth grounds of appeal are deemed to have merit to the extent shown above.

Turning to the second and third grounds of appeal which are centered on the issue of custody of children, with regard to the records of the trial court it clearly states that;

*"I found it wise for the custodian of the first child Amani Costantino Kabadi be under the custodian of the petitioner and the second child Baraka Constatino Kabadi be under the custodian of the respondent. This court direct the Social Welfare (Ustawi wa Jamii) to make assessment as to who should keep custodian of the children considering a well-being and best interest of all children. Then, after such assessment, the recommendations from social welfare shall be followed as direct to whom custodian of the children be place under. But currently, the aforesaid position shall be followed until the determination from Social Welfare after being directed so by this court"*

From the wording of the trial court's decision, as evidenced on pages 13 and 14 of the judgment, it becomes apparent that the issue of custody was not definitively addressed. Instead, the court opted to defer custody decisions pending the submission of a Social Welfare report. However, as of the present appeal, no such report has been filed to

address and resolve this outstanding matter as required under section 136 of the Law of Marriage Act.

Reviewing the records, it's notable that Amani's age was recorded as 7 years old. Upon examining the trial court proceedings, it's apparent that the court did not consider the wishes of the child. This raises concerns about how the forthcoming Social Welfare report will address this crucial aspect.

To properly ascertain the child's wishes, from the child. Such procedures are mandated by Section 125(2) (b) of the Law of Marriage Act. Additionally, Section 11 of the Law of the Child Act, Cap 13 R.E. 2019 underscores the child's right to express opinions on matters affecting their well-being, including custody matters.

As the first appellate court, it refrains from intervening in matters that the trial court did not decide. The appellate court's function isn't to supplant or duplicate the role of the trial court. Instead, it is to assess the trial court's findings by examining the evidence and arguments presented during the trial This was stated in the case of **Jafari Mohamed v. Republic** (Criminal Appeal 112 of 2006) [2013] TZCA 344 where the court held that;

*We take it to be settled law, which we are not inclined to depart from, that "this Court will only look into matters*

*which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal...*

In resolving anomalies like this, it is now the trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter. As it was so stated in the case of **Mantra Tanzania Ltd v. Joaquim Bonaventure** (Civil Appeal 145 of 2018) [2020] TZCA 356.

With the noted procedural irregularity concerning the failure to consider the independent wishes of the child, as well as the absence of social welfare report, I hereby remit the matter back to the trial court solely for the purpose of determining the issue of custody. This determination must strictly adhere to procedural requirements and be conducted in accordance with relevant laws and regulations.

In conclusion, this appeal is partly allowed, with the order for division of assets adjusted to 35% for the appellant and 65% for the respondent to the house at Goba. Additionally, Plot No. 789 Block 2 at Mabwepande is awarded to the appellant, while Plot No. 46 Mpiji Majohe is allocated to the respondent.



Furthermore, it's crucial to highlight that all other orders issued by the trial court remain undisturbed. Considering the relationship between the parties, no costs shall be awarded

It is so ordered.

**Dated at Dar es Salaam** this 27<sup>th</sup> day of March, 2024.



A handwritten signature in blue ink, appearing to read "G. N. Barthy", is written over a horizontal line.

**G. N. BARTHY**

**JUDGE**

Delivered in the presence of the Respondent in person, Ms. Jane Kapufi  
Learned Advocate for the Appellant and in the absence of the Appellant  
in person.