IN THE HIGH COURT OF TANZANIA

MOROGORO SUB-REGISTRY

AT IJC MOROGORO

PC MATRIMONIAL APPEAL NO.22 OF 2023

(Arising out of Matrimonial Appeal No.17/2023 in the District Court of Morogoro which originated on Matrimonial Cause No. 02 /2023 in Ngerengere Primary Court.)

GODWIN AYUBU MUSHI..... APPELLANT

VERSUS

DIANA HASSAN..... RESPONDENT

JUDGEMENT.

09th of May, 2024

MANSOOR, J.

This is a second appeal by the appellant Godwin Ayubu. The respondent had petitioned for divorce and distribution of matrimonial property in Matrimonial Cause No. 02 of 2023 before the Ngerengere Primary Court at Morogoro (herein "The trial court"). While the trial court made a finding that there was no formal marriage between the parties, it was nevertheless satisfied that a presumption of marriage had been established. It therefore dissolved the marriage and ordered distribution of matrimonial property. Whilst the

respondent was awarded a tank (simtank) of 5000 liters, clothes wardrobe, a sofa set, flat television of 42 inches, radio, refrigerator, bed, and domestic appliances, on his part the appellant was awarded a car named Toyota Brevis, a plot, shops and a located at Kibulumo in Ngerengere Ward house. Similarly, the appellant was ordered to both compensate the Respondent to the tune of Tshs. 3,000,000/= for supervising the renovation of the house and pay Tshs. 200,000/= monthly for maintenance of their two children.

Dissatisfied, the respondent appealed to the District Court of Morogoro (herein "The first appellate court") via Matrimonial Appeal No. 17 of 2023 against the decision of trial court. After considering the appellant's complaints the first appellate court exercising its appellate powers, in the first place held that the presumption of marriage was irrebuttable meaning that there was a formal marriage between parties contrary to what was established by the trial court and consequently the court awarded 50 % of the matrimonial assets to the respondent and went on further awarding ¼ of the appellant's salary to the respondent for her maintenance and their children.

As it appears, this time it is the appellant who was dissatisfied with the whole judgement of the first appellate court and thus he appealed to this Court

raising three grounds of appeal couched in layman language as reproduced hereunder;

1. That, the district court of Morogoro while exercising its appellate jurisdiction, erred in law and in fact by failing to analyze proceedings and the judgement of the trial court, as a result it orders the division of matrimonial assets at rate of 50% without proof of contribution, and maintenance of the respondent and infant children at the rate of ¼ of the appellant's salary without any proof of the amount of the salary and contrary to the law.
2. That, the district court of Morogoro while exercising its appellate jurisdiction, erred in law and in fact by holding the presumption of marriage between the appellant and respondent is irrebuttable without proof and proper analysis of the proceedings and judgement of the trial court, and without giving any reason, hence the orders of matrimonial division and maintenance were made without justifiable cause.
3. That, the district court of Morogoro while exercising its appellate jurisdiction, erred in law and in fact by ordering the maintenance of the respondent herself from the appellant from 11.04.2023 to the time

she will be married to another man if any at the tune of Tsh. 100,000/= from the date of the judgement for three months only was ambiguous and contrary to the rules of ordering maintenance to the spouse herself.

With the leave of the Court, the hearing of the appeal was canvassed by way of written submission by the order of this Court dated 10th day of January, 2024. The appellant was represented by Salim Gogo the learned advocate, whereas on his part, the respondent enjoyed the legal service of Advocate B. Tarimo.

Mr. Gogo was the first one to start the discussion. Arguing in support of the appeal, Mr. Gogo submitted by covering all grounds of appeal. He argued the 2nd ground separately and the rest were taken jointly.

Beginning with the second ground, Mr. Gogo lamented that, the first appellate court held the marriage between parties irrebuttable without proof and proper analysis of evidence of the trial court. He also faulted the trial court findings that the presumption of marriage between the parties was rebutted. Supporting his contention, he referred this court to page 1 and 2 of the trial court judgement and submitted that the respondent testified to have met the appellant on the year 2017 where they started living together

up until the year 2018 when the appellant moved to Songea. Counting the days, since they started to live together until the departure of the appellant to Songea the learned counsel argued that the parties lived together for less than two years in the same household and added that there is no evidence neither in the proceedings nor in the judgement of the trial court which proves the circumstances that the parties acquired a reputation of being a husband and wife.

To add weight on his stance Mr. Gogo cited the provision of section 160(1) of the Law of Marriage Act (Cap 29 R.E 2019) which provides on the thresholds for a presumption of marriage to be rebutted. Highlighting on the cited provision Mr. Gogo stated that there must be evidence on record which prove that parties lived together for two or more years and in circumstances of acquiring the reputation of a husband and wife.

Submitting on the 1st and 3rd grounds the learned counsel's focus was on the division of matrimonial assets, order for maintenance of the two children and maintenance of the respondent.

Faulting the division of matrimonial assets by the first appellate court Mr. Gogo's claims were predicated on the fact that there was neither reason nor analysis of the trial court decision and proceedings in respect of the evidence

which support the amount of the contribution made by the respondent for her to be entitled 50% of the matrimonial assets. He demonstrated further that the only reason relied by the first appellate court to order the division of matrimonial assets was because the appellant didn't dispute the list of matrimonial properties presented by the respondent during the hearing of the trial at the trial court.

To strengthen his position Mr. Gogo was fortified with the provision of section 114(1) of the Law of Marriage Act [CAP 29 R.E 2019] which mandate the court to order the division of matrimonial assets acquired by spouses during the subsistence of their marriage by their joint efforts, he also referred this court to subsection (2) (b) of the same provision, which require the court in distributing matrimonial properties to have regard to the extent of contributions made by spouse in terms of finance, property or work towards the acquiring of properties.

He reasoned that, since the matrimonial home and shops were owned by the appellant before he met the respondent the first appellate court was supposed to consider the contribution of the respondent in respect to the substantial improvements made on it. Mr. Gogo added further that the trial court considered and found it fair and sensible to compensate the

respondent to the tune Tsh. 3,000,000/= owing her supervision during renovation of the matrimonial home.

To buttress his contention, he put his reliance on the case of **Yesse Mrisho V. Sania Abdul, Civil Appeal No. 147 of 2016,** Court of Appeal of Tanzania at Mwanza (unreported) at page 12 where the Court of Appeal stated as follows;

> *"the principle drawn from the case of **Bi Hawa Mohamed Vs Ally Seif (1983)TLR 32** is unambiguous, stating that the efforts made towards the acquisition of the said matrimonial property must be assessed and determined, and as also discussed in **Bibie Maulid Vs Mohamed Ibrahim (1989) TLR 162** the contribution granted should not necessarily lead to 50% share each, since it is independent on a party's contribution which is a determining factor of what share one should receive and each case has to be considered on its own circumstance".*

Linking the above authority to the impugned judgement Mr. Gogo concluded that, the order of the first appellate court on division of matrimonial assets at rate of 50% was made without any proof of contribution.

Criticizing the order for maintenance of the two infant children amounting to ¼ of the appellant's salary, Mr. Gogo submitted that the orders were wrong

due to absence of proof of the appellant's salary. He also faulted the order of the first appellate court against the appellant for maintenance of the respondent to the tune of 100,000/= monthly reasoning that there were no sufficient reasons adduced thereto. To support his contention, he cited section 115(1) of the Law of Marriage Act [CAP 29 R.E 2019] which require the special reasons to be adduced for the wife to be entitled maintenance from his husband on dissolution of marriage.

Responding to the appellant's arguments, the respondent's counsel started by confirming the misdirection's of trial court on application of section 160(1) & (2) of the Law of Marriage Act [Cap 29 R. E 2019]. He referred this court to page 2,3 and 5 of the typed copy of the trial court judgement and stated that, the trial magistrate did not direct his mind on the above section and misdirected himself on the period of time that their marriage was already in dispute. To fortify his position, the learned counsel cited the case of **John Kirakwe v. Iddi Siko [1989]** TLR 215, where the court listed the prerequisites for rebutting the presumption of marriage.

Connecting the above authority with the marital relationship between the parties in the instant case, the respondent's counsel argued that, the

prerequisites were not met between the parties for the presumption of marriage to be rebutted.

Answering the argument on division of matrimonial properties the learned counsel submitted that, there was no dispute that the appellant still resides in their matrimonial home, the 3 roomed house that was built, improved and reconstructed into 5 rooms in the year 2018 by the parties. To support his contention, he cited section 2(1) of the Law of Marriage which categorically defines matrimonial home and also he reffered this court to the case of **Samwel Olung'a Igogo and two others v. Social Action Trust Fund and Others** (2005) TLR 343.

In relation to the orders for maintenance of two infant children and the respondent Mr. Tarimo argued that the salary of the appellant will be disclosed by his employer because the appellant denied to disclose the same throughout the proceedings.

At the end the learned counsel urged this court to find the instant appeal non-meritorious and to dismiss it, he also prayed this court to uphold the decision of the first appellate court.

I have objectively gone through and considered the records of both the trial Court and the first appellate court as well as the rival submissions made by the parties. The crucial issue for consideration, determination and decision thereon is whether or not the instant appeal has merit.

For purpose of convenience and smooth determination of the fronted issue, I will start my deliberation with the second ground of appeal. I have made a carefully perusal of the lower court's records. It is undisputed that the appellant and the respondent started to live together in November 2017, they have two children and in 2018 the appellant was transferred to a new workstation at Songea, whereas the respondent remained at their matrimonial home in Ngerengere, Morogoro. What I grasped from the evidence tendered at the trial court is that, the appellant wants to use the umbrella of his transfer to Songea to prove that he did not live with the respondent for two years or more. He wants this court to believe that section 160(2) of the Law of Marriage can be invoked only in the circumstances when the subjected parties live under the same roof. Likewise, he wants me to believe that the provision cannot serve a purpose where these parties are living a part even when the circumstances forces them to live separately. What shocks the most is that, the appellant tries to force this honorable court

to believe that just because the respondent worked as a house maid or a shopkeeper for his shop during the time he brought her at his home, therefore their relationship shall remain to be that of a master and a servant despite the fact that he impregnated the respondent who had borne him two children and she still lived in his house.

With due respect I find misconception on the appellant's interpretation of section 160(2) of the Law of Marriage as I am of a firm opinion that the intention of the provision was not only to cover spouses who are living under the same roof but I am convinced that it also covers the spouses who are forced to live separately as it has happened in the instant case.

Again, I do not accept the appellant's assertion that their relationship shall remain to be that of a master and a servant while there is sufficient evidence on record that the two began to live together in the year 2017 and they had two children and until to date the respondent is living in the appellant's house.

Basing on what I have endeavored to discuss it is my objective judgement that the two lived for more than two years counting from 2017 to the moment when the respondent instituted the case at the trial court on 2023

and they have acquired the reputation of husband and wife as there is sufficient proof that the appellant paid dowry for the respondent likewise the two have children together and up to date the respondent is living in the appellant's house.

That being said and done I agree that there was no any formal marriage celebrated between the appellant and the respondent, I also stress, as rightly held by the trial court, that those two had cohabited for at least two years which has brought their relationship within the purview of section 160 of the Law of Marriage Act (Cap 29 R.E 2019) entailing that there was a rebuttable presumption of marriage existing between the parties.

Considering the issue of distribution of matrimonial properties, the appellant lamented on the District Court for allowing division of matrimonial assets at the rate of 50% between parties on a sole reason that, the list of matrimonial properties presented by the respondent during the hear of trial was not objected by the appellant.

It is trite law that before embarking into dividing the matrimonial property, the court must consider the extent of each party's contribution by examining the evidence adduced before it. See the case of **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) which was cited with

approval in **Gabriel Nimrod Kurwijila** (supra) where the Court of Appeal held that:-

> *"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 above position was also restated in the case of **Gabriel Nimrod Kurwijila** (supra) when the Court of Appeal observed that:-

> *"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. 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."*

In the present case the properties alleged to be the matrimonial properties were as follows; a tank (simtank) of 5000 liters, clothes wardrobe, a sofa set, flat television of 42 inch, radio, refrigerator, bed, and domestic appliances a car named Toyota Brevis, a plot, shops and their matrimonial house.

The trial court on dividing the properties awarded the respondent with the (simtank) of 5000 liters, compensation to the tune of Tshs. 3,000,000/=, clothes wardrobe, a sofa set, flat television of 42 inch, radio, refrigerator, bed, and domestic appliances and the appellant was awarded of a car named Toyota Brevis, a plot, shops and the house located at Kiburumo within Ngerengere ward.

Having examined the evidence adduced by the parties before the trial court, I find that the only evidence rendered on the extent of contribution to the matrimonial properties was the evidence on the house located at Kiburumo Ngerengere. However, neither the appellant nor the respondent produced evidence on their respective extent of contribution on the rest of properties in question. In that regard, it is not known as to how the trial court made a finding on awarding the appellant and the respondent their shares in the said properties.

When the matter reached the first appellate court, the share was changed to equal share of 50% in favour of the appellant and respondent, respectively. The factors considered by the first appellate court are reflected at page 4 of the judgment as quoted hereunder: -

"Mr. Tarimo also noticed and argued that respondent did not dispute some assets mentioned by the appellant during the hearing. Reading page 1 last typed judgement shows that the appellant and respondent rebuild the house and resides together for some years."

.....

2)Division of matrimonial assets to 50 % be awarded to appellant.

On my part, I agree with the appellant that the first appellate court erred to make such a holding. I say so because there was no evidence referred by the court to substantiate the division made.

Reverting back to the evidence tendered on the extent of contribution to the acquisition of the house located at Kiburumo Ngerengere the respondent established to have advised the appellant on renovation of the house located at Kiburumo Ngerengere. She also confirmed to have contributed 700,000/= for its renovation. Similarly, she affirmed to have supervised the renovation until when the house was finished. To me that was enough for her to be entitled the share of 50% on the house considering also the fact that she was also awarded with the custody of their children.

Being noted that neither the appellant nor the respondent gave evidence on the extent of contribution to acquisition of the rest of the properties, orders

made by the trial court and first appellate court in respect of division of said property cannot stand. The Court of Appeal instructively aired in the case of ***Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo (supra),*** 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"*

As Regards to the orders for maintenance of the respondent on dissolution of marriage, the appellant complained that the first appellate court ordered mantainance to respondent without adducing special reasons. In determining this issue, I will put regard on the provision of section 115(1) of the Law of Marriage Act [CAP 29 R.E 2019] which provides as follow;

> ***115.*** *(1) The court may order a man to pay maintenance to his wife or former wife—*
> *(a) N/A*
> *(b) N/A*

(c) N/A

(d) N/A

(e) N/A

(f) N/A

(g) N/A

(2) Provided that, where the marriage has been dissolved, the wife shall not, ***unless the court for special reason so directs, be entitled to maintenance for herself for any period following the date when the dissolution takes effect.***

The above section underscores that the wife will not be entitled to be maintained by her husband unless the court for special reason so directs.

On close scrutiny of the record, I noticed that the learned magistrate straight ordered for the maintenance of the appellant without stating the reason therof. For ease of reference, I propose to reproduce the order as reflected on page 5 of the impugned judgement as I hereby do;

4.Mantainance of the appellant from 11/4/2023 to the time that she will be remarried to another man if any to the tune of TZS 100,000/= from the date of this judgement for three months only.

Owing to the above observation, it suffices to say that, the learned magistrate didn't assign reason for his maintenance orders and thus he contravened the above authority. It can therefore, be judged that the learned magistrate acted erroneously.

Regarding the amount of money ordered for maintenance of the children, I will be guided with two provisions which should be read together; section 129 (1) of the Law of Marriage Act which at first impose the obligation to maintain children on the male parent. The section provides;

> *'129. -(1) 'Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as maybe reasonable having regard to his means and station in life or by paying the cost thereof. '[Emphasis added].*

Whereas section 44 of the Law of Child Act [CAP. 13 R.E. 2019], outlines the circumstances to be considered when issuing a maintenance order, it states;

> *'44 The court shall consider the following matters when making a maintenance order-*
>
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*

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

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

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

Considering the above provision, it is evident that the maintenance order has to be issued in consideration of the above factors. The maintenance order by the first appellate court decrees the appellant to provide for his children's maintenance, yet it delineated the precise amount of maintenance costs the appellant could bear and indicated the cost to be ¼ of the appellant salary without even proof of the exact amount of the same. I agree with the appellant that the first appellate court erred in making such a holding. I say so because the order cannot be enforced. As reasoned by the trial court, I am of the strong view that, the award of 200,000/= for maintenance of the two children was fair basing on the reason that the appellant was established to be a military man. As such I find merit on this ground too.

Consequently, and based on the above, the Appeal is allowed to the extent stated above. The Judgment and Decree of the Morogoro District Court in Matrimonial Appeal No.17 of 2023 is set aside. That notwithstanding, the decision of the trial court on Matrimonial Cause No. 02 of 2023 remains intact

save for the order on division of matrimonial properties which is reversed to the extent that the parties will be entitled to the equal share at the rate of 50% each to their matrimonial house located at Kiburumo Ngerengere. The orders on the rest of properties are set aside as there was no evidence on the extent of contribution to acquisition thereof. Having reached into the foregoing findings, I therefore order the following;

1. Presumption of marriage between the appellant, Godwin Ayubu Mushi and the respondent Diana Hassan has been rebutted as correctly held by the trial court and I confirm there was a presumption of marriage and that the marriage has irreparably broken down.
2. Both the respondent and the appellant will have equal share of 50% on their Matrimonial house located at Kiburumo area, within Ngerengere ward;
3. The division of the remaining alleged matrimonial properties is set aside for want of evidence on the extent of contribution to acquisition thereof so both the decision of the trial court and the first appellate court are set aside on this issue;

4. As there was no contention as regards to the custody of the issues of marriage, the order of the Trial Court is upheld that the children are placed in the custody of the respondent;
5. The children's maintenance order issued by the trial court to the tune of Tshs 200,000/= remains undisturbed;
6. The order for the maintenance of the respondent by the appellant as ordered by the 1st appellate court is set aside.

As the matter involves a matrimonial cause, I order that each party shall bear its own costs.

It is so ordered.

DATED AND DELIVERED AT MOROGORO THIS 09TH DAY OF MAY, 2024.

L. MANSOOR.

JUDGE

09.05.2024