

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB-REGISTRY)

AT KIGOMA

DC. MATRIMONIAL APPEAL NO. 3 OF 2023

FAINES DANIEL APPELLANT

VERSUS

NOEL IGIMA RESPONDENT

(Appeal from the Judgment and decree of the District Court of Kasulu at Kasulu)

(I. E. Shuli, SRM)

Dated 21st day of July 2023

In

(Matrimonial Cause No. 7 of 2022)

JUDGMENT

Date: 30/04 & 31/05/2024

NKWABI, J.:

If I were, for any extenuating reason(s), to beguile that I am a prophet, I would be forced to simulate to prophesize that the trial court relied in the decision of the Court of Appeal to decided that parties to this appeal had acquired the status of having a presumed marriage. That decision is no other than the case of **Hamis Said Mkuki v. Fatuma Ally**, Civil Appeal No. 147 of 2017 where the Court of Appeal quoted with approval the decision of this Court in **Salum Itandala v. Ngusa Sonda** [1982] T.L.R. 333 where it was stated that:

"The parties lived together as husband and wife for five years, and their union has been blessed with three children. ... Those factors raise a very strong presumption of marriage that the appellant and the respondent's daughter were lawfully married. In the circumstances those circumstances, the respondent needed to adduce the strongest possible evidence to rebut that presumption."

Then the Court of appeal went on to categorically hold that:

"In the instant case, the respondent and the late Omary Said Mkuki lived together as husband and wife for nine years, and their union was blessed with two issues; Khanifa and Ibrahim ... As far as we are concerned, that raises a rebuttable presumption that they were duly married ... this Court must decide in favour of the union and whoever wants to rebut that presumption must bring weightier evidence to succeed."

In this Court, no party tried to say that there was no presumption of marriage, despite the fact that the respondent had not paid dowry. The facts of the case prove that there is a presumption of marriage because the facts show that the appellant and the respondent had stayed under the same roof

for more than two years and have acquired a reputation of husband and wife in the neighborhood they were residing. That is proved by the respondent himself in his defence.

About the matrimonial properties jointly acquired, the appellant testified that:

"I pray to attain my rights of child maintenance, division of matrimonial properties which is one house located in Tanesco, farms one hector located in Nyumbigwa, home appliances three fridges, one motorcycle, one bicycle, one bed with a mattress, one television and cooking utensil."

The grievances of the appellant against the decision of the trial court in a Matrimonial Cause Number 7 of 2022 are articulated by the appellant in memorandum of appeal which is comprised of three rationales of appeal thus:

1. The trial court magistrate erred in law and in fact for granting the custody of the issues to the respondent, without affording the said issues an opportunity to suggest by themselves to whom between the appellant and the respondent they would prefer to have custody.

2. That the trial court magistrate erred in law to have not found that the appellant adduced credible and cogent evidence to prove her contribution to the acquisition of the matrimonial properties, especially a house in question. Hence uncalled order for unequal division of the said matrimonial properties.
3. That the district court magistrate erred in law and in fact for not taking into account the performance of domestic duties by the appellant which formed an integral part in acquisition of the matrimonial properties, a house inclusively.

The is asking this Court to allow the appeal while I quash the decision of the district court and set aside its orders. She is also praying for costs and any other relief(s) this Court may deem just and fit to grant. The respondent replied thereto in a bid to resist the appeal on merit with a notice of preliminary objection. But the preliminary objection was later on withdrawn.

The background of the matrimonial cause is that the respondent started cohabiting with the appellant in the year 2010 but in 2018 their cohabitation came to an end due to quarrels. They are blessed with two children. The elder child is aged 13 while the younger one is aged 11. No doubt that parties

to this appeal are litigating for division of matrimonial properties and custody of the issues of the union.

The appeal was heard by way of oral submissions. Both parties appeared in person, unrepresented. Their submissions were brief. The appellant maintained that when the plot where the house was built, and the motor cycle were bought when they were together. She added that currently she is in custody of the issues of the marriage. She finally beseeched this Court the matrimonial properties be redistributed fairly.

The respondent contested the arguments of the appellant while explaining how the house and the motor cycle were acquired. In the premises, he disputed the appeal and beefed up that the house is the property of the children.

In witty remark the appellant restated her grounds of appeal. I have considered the grounds of appeal which essentially are two, the complaint about custody of the issues of the marriage and the complaint about the division of the matrimonial properties.

I will start deliberating the 2nd ground of appeal which also covers the 3rd ground of appeal which is that the trial court magistrate erred in law to have not found that the appellant adduced credible and cogent evidence to prove her contribution to the acquisition of the matrimonial properties, especially a house in question. Hence uncalled order for unequal division of the said matrimonial properties.

My own revisiting of the evidence which is in the record, I find that there is no any evidence as to not only acquisition of the matrimonial assets which are allegedly jointly acquired but also there is no any evidence as to how such properties were acquired and when. The respondent citing his job as a teacher when he was about to be sworn to give his testimony is not evidence. He did not testify on his employment and the salary he is paid. In the premises the trial court reached at its finding regarding the division of the matrimonial properties arbitrary. It is legendary law that citing personal particulars when about to testify does not amount to evidence, see **Andrea Francis v. Republic**, Criminal Appeal No. 173 of 2014, CAT, (unreported) and **Jafari Musa v. DPP**, Criminal Appeal No. 234 of 2019, CAT, (unreported) where it was held that:

"Guided by the above authorities, it is clear that the age of the victim shown in the charge sheet and in the recording of the personal particulars of the victim witness before he/she testifies in court is not proof of her age."

In addition to the above stated, and with overwhelming respect to appellant, I do not accept her further assertions on the 2nd and 3rd grounds of appeal. This is because, proof of joint efforts towards the acquisition of the matrimonial assets in dispute is very crucial. That is the position in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 CAT (unreported) where it was clearly held:

"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. ...

It is clear therefore that extent of contribution by a party in a matrimonial proceedings 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.”

Lastly, the question of custody of the issues of the union which is the 1st ground of appeal suffers the same problem. Lack of evidence. There is no any evidence to suggest between the appellant and the respondent who would be better placed with the custody of the children for their best interest. The decision of the trial court to place custody onto the respondent was arbitrary. This Court cannot as well place custody of the children into any of the parties in this appeal because I would be doing the same mistake of arbitrariness in decision making. This reminds me of the position held by this Court in **Saidi v. Msamila** [1970] H.C.D. No. 228 (PC), in which Makame Ag. Judge, as he then was, held that:

*“Respondent was responsible for the maintenance of the child. However, the figure the primary court magistrate fixed, Shs. 150/- per month was **arbitrary** in the absence of any knowledge of the respondent’s salary.”* [Emphasis mine].

It should also be reminded here that submissions by the parties to this appeal do cannot be substitute of evidence however eloquent, see **Registered Trustees of the Archdiocese of Dar-es-Salaam v. The Chairman Bunju Village Government**, Civil Appeal No. 147 of 2006:

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

For avoidance of doubt, I have re-evaluated the evidence that is available in the case file under the authority of **Selle & Another v. Associated Motor Boat Company Ltd & Others** [1968] 1 E.A. where it was underlined that:

"... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions ..."

By virtue of section 43(3) of the Magistrates' Courts Act, Cap. 11 R.E. 2019 I revise the decision of the trial court regarding division of matrimonial assets and custody of the issues of the marriage. The parties to this appeal are advised that any party may make an application for division of the matrimonial properties acquired by joint efforts and custody of the issues of the union in the trial court where the trial court would hear the evidence and make findings thereof.

In the upshot, I partly allow the appeal as indicated herein above. The orders for division of the matrimonial properties jointly acquired and custody of the children made by the trial court are set aside. Each party shall bear their own costs. It is so ordered.

DATED at **KIGOMA** this 31st day of May, 2024.




J. F. NKWABI
JUDGE