

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 6342 OF 2024

(Arising from the decision of District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 101 of 2022 before)

ALPHONCE M. KAGOMA.....APPELLANT

VERSUS

RENALDA E. SALLARESPONDENT

JUDGMENT

24/04/2024 & 26/06/2024

M. MNYUKWA, J.

This is the first appeal. An order of the District Court of Temeke One Stop Judicial Centre (the trial court) on division of matrimonial properties was the main controversy which provoked the appellant to prefer this appeal. However, the appellant also challenged the findings of the trial court on dissolving parties' marriage based on the evidence of cruelty though in his evidence, he supported the divorce to be granted.

Records show that appellant and respondent contracted Christian marriage on 19/01/2002. They were blessed with one issue where at the time when appellant petitioned for divorce, he was of the age of majority.

It was alleged that the duo lived a happy marriage for about three years before their marriage turned sour and intolerable. It was the

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complaint of the respondent that appellant was cruel to her as he used to beat her, bullying which resulted into bodily harm, to the extent that she caused her physical disability. She, therefore, petitioned for a decree of divorce and among other things she prayed for division of matrimonial properties upon dissolution of their marriage, custody of the issue of marriage, maintenance of the issue of marriage at the tune of Tsh 500,000/per month and compensation to the tune of Tsh 100,000,000/- for permanent disability caused by appellant's cruelty.

At the trial, both parties were represented. It was the respondent (the then petitioner) who testified as PW1. In her testimony, she tendered the marriage certificate to prove her marriage with appellant (the then respondent) and the said certificate was admitted as exhibit P1. She adduced evidenced on cruelty where she alleged that she was beaten by appellant who caused physical injury to her and she tendered Police Form No 3 (PF3) which was admitted as Exhibit P2. Along with PF3 she also tendered the discharge form from Sinza hospital where she was medically attended and the said discharge form was admitted as Exhibit P3.

Respondent also adduced that they have failed to reconcile their matrimonial dispute and they have referred the same to the marriage conciliation board where the board certified that it has failed to reconcile

the parties and issued certificate to that effect and the same was admitted as Exhibit P4.

In respect to her contribution in the acquisition of the matrimonial assets she asserted that, she contributed more than appellant since she was once employed as a primary school teacher and she resigned from her work after they have reached consensus with appellant that she should resign in order to get ample time to supervise family business. This fact was disputed by appellant who said that respondent was never employed as a primary school teacher. Respondent did not tender any evidence to prove that she was a primary school teacher and that she resigned from her employment. Respondent further testified that all properties were acquired during the subsistence of their marriage and she had contributed in terms of works and money in its acquisition.

On his part, appellant testified that, he was employed with Tanzania Bureau of Standard (TBS) and resigned in 2016. This fact was not cross examined by respondent. He denied the allegation of beating and causing physical injury to respondent and being cruel to her. He said that all properties were acquired by him that's why they bear his name and that respondent did not contribute anything in its acquisition. To support his evidence, appellant tendered Exhibit D1 which are the motor vehicle registration card which bears his name and the same shows to be



acquired during the subsistence of their marriage. He also tendered Exhibit D2 which is the sale agreement of the farm at Kimara Temboni where it is proved that the same was bought on 15/07/2000. This farm bears the appellant's name too. He also tendered the sale agreement of the farm at Malamba Mawili dated 01/10/2014 which was admitted as Exhibit D3. He then tendered Exhibit D4 which is the sale agreement of the farm at Msingwa, Temboni within Kinondoni Municipal.

In a way to convince the trial court on the sole acquisition of the assets alleged to be the matrimonial properties he also tendered Exhibit D5 which is the TIN Number of pharmacy, its business licence and other related documents which all bears his name. Lastly, appellant tendered Exhibit D6 and D7 which shows that the business mentioned therein belonged to a company known as Granite and that the same does not belonged to the parties and it is not the matrimonial assets. Neither of the party call any witness to adduce evidence on his/ her favour during the trial.

After hearing both parties the trial court was satisfied that parties' marriage was irreparably broken down. And therefore, proceeded to issue a decree of divorce, distributed the matrimonial properties to wit; respondent got a house located at Malamba Mawili Mbezi within Ubungo Municipality, 50% of the value of the motor vehicle make Toyota Coaster



with Registration Number T 658 BJM, 50% of the value of Toyota Carina with Registration Number T 990 DDD, 50% of the value of the pharmacy located at Kibangu Ubungo Municipality, 50% of the value of the plot located at Msingwa , Singida Street and 50% of the household furniture.

It was also ordered that appellant should get a house located at Kimara Temboni within Ubungo Municipality, 50% of the value of the motor vehicle make Toyota Coaster with Registration Number T 658 BJM, 50% of the value of Toyota Carina with Registration Number T 990 DDD, 50% of the value of the pharmacy located at Kibangu Ubungo Municipality, 50% of the value of the plot located at Msingwa , Singida Street and 50% of the household furniture.

The trial court did not make an order for custody and maintenance of a child since the child was of the age of majority. It did not also order compensation to respondent for what it considered that the relief sought is governed by different law and procedure. The trial court also refrained from making an order on the distribution of the company which deals with selling of bricks since the said business belonged to a company known as Granite Block Limited.

Appellant was not happy with foregoing orders of the trial court. He therefore knocked the doors of this court armed with four grounds of appeal that;

1. *The trial Magistrate erred in both law and facts in ordering that the properties be divided equally while the respondent has not contributed whatsoever to the acquisition.*
2. *The trial Magistrate erred in both law and facts in relying on incredible and insufficient evidence in balancing of probabilities.*
3. *The trial court erred in law and fact by allowing the respondent's petition in which the petitioner's name differs with the original names which appeared in the marriage certificate.*
4. *The trial Hon. Learned Magistrate of the trial court erred in law and fact by failing to analyse and evaluate properly evidence adduced by the appellant in the trial court hence reached unfair decision.*

He then prayed for the appeal to be allowed with costs, the decision of the trial court be quashed and set aside and this court should grant any other relief(s) which may find it to be just to grant.

At the hearing both parties were represented. The appellant afforded the services of Mr. George Yudas Msangi, learned advocate while respondent enjoyed the legal representation of Mr. Sisty Massawe, learned advocate too. The appeal was argued by way of oral submissions. During the submissions, appellant abandoned ground three of appeal and argued jointly ground one and four. He also argued separate the second ground of appeal.



Supporting the appeal, Mr. Msangi started his submissions with ground one and four of appeal. He submitted that, for a party to be entitled equal distribution of the matrimonial assets she must prove her contribution in acquisition of properties as it is provided for under section 114 (2) (b) of the Law of Marriage Act, **[Cap 29 R.E 2019] (the Act)**. He added that, in our case at hand, respondent did not tender anything to prove her contribution in the acquisition of the matrimonial properties as she testified in her evidence which is reflected on page 24 of the trial court's proceedings.

Mr. Msangi went on that, the appellant was the main contributor in the acquisition of the assets acquired during the subsistence of marriage as he was employed by the TBS, which enabled him to acquire those properties unlike the respondent who failed to prove that she was employed as a primary school teacher. Mr. Msangi was of the view that, if respondent claimed that she contributed to the extent that she is entitled to equal share of the matrimonial property then she ought to have proved it as the law requires that, the one who alleges must prove as it is provided for under section 110(1) of the Law of Evidence Act, **[Cap 6 R.E 2019]**. To support his argument, he cited two decisions of the Court of Appeal of **Bibie Mauridi v Mohamed Ibrahim** 1989 [TLR] 162 and **Bi Hawa Mohamed v Ally Seif** 1983 [TLR] 32 to cement that respondent



had to prove the extent of her contribution. He retired on this ground by stating that the respondent contribution is very minimal in the acquisition of the matrimonial properties to entitle her a share of 50%.

In respect to ground two of appeal the appellant's counsel faulted the trial court's findings on dissolving parties' marriage based on cruelty. He submitted that, respondent evidence is doubtful since she reported to the police that the incidence of beating which caused her physical injury occurred on 21 /07 /2021 as proved by Exhibit P2 but she claimed that she was admitted at Sinza hospital for treatment on 04 /08 /2021 as proved by Exhibit P3. He was of the view that it is doubtful as to why the person who is seriously injured to be admitted at hospital after lapse of 15 days. He submitted that, Exhibit P3 does not show that in the course of treatment her uterus was removed as alleged. He retired on this ground by stating that the trial court erred in dissolving this marriage by relying on the evidence of cruelty that was not proved before it. He thus prayed the appeal to be allowed.

Contesting, in the outset Mr. Sisty Massawe argued the grounds of appeal as they were submitted by appellant's counsel and prayed the appeal to be dismissed. He contended that, respondent worked as a primary school teacher at the time when she contracted marriage with appellant who was working with TBS before he resigned in 2016. He



averred that, respondent worked as a primary school teacher before she resigned following the agreement between her and appellant that she should resign for her to get ample time to supervise family business.

The respondent's counsel further submitted that, respondent supervised all family business which enabled them to acquire more properties since the income of the appellant alone could not suffice to acquire all the properties they have acquired during the subsistence of their marriage. Thus, he was of the view that, it is respondent's hardworking which enabled them to generate income to acquire all the matrimonial properties.

He retires on this ground by contending that, respondent's testimony as reflected on page 13 and 14 of the trial court's proceedings show that, she supervised family business while on page 20 of the same trial court's proceedings revealed that she was employed as a primary school teacher and this fact was not cross examined. He thus prayed these grounds to be dismissed for lack of merit since the evidence on record shows that respondent supervised the family business while appellant was busy with his employment at TBS.

On the second ground, Mr. Sisty Mramba was surprised as to why the appellant's counsel is challenging the PF3 while it was not objected when it was tendered at the trial court. Mr. Sisty Massawe went on to



submit that, the trial court made a correct finding of dissolving the marriage upon the proof of the evidence of cruelty tendered before it. He claimed that, Exhibit P2 which is the PF3 aimed to introduce a patient to hospital for her to get treatment for the injury suffered and that it is the medical report or discharge form which shows that a particular person was injured and the same was proved by Exhibit P3. Finally, he reiterated his prayer for the appeal to be dismissed for lack of merit.

In the rejoinder submission Mr. George Msangi mainly reiterates what he submitted in the submission in chief. He added that it was the duty of the respondent to prove as to where she got money to establish business since the evidence on record is clear that appellant got the money from his employer, TBS. The appellant's counsel also said that, respondent is duty bound to prove her resignation as a primary school teacher.

Having heard the parties and examine the records of the lower court, the main issue for determination is whether the appeal is merited. In determining the above issue, I will determine the grounds of appeal as presented. I shall start with the first and fourth ground which will be determined jointly while the second ground will be determined separately.

To begin with, I am aware with the fact that this is the first appellate court. It is trite law that a judge in the first appeal should

reappraise the evidence on record because an appeal is in effect a rehearing of the case. That the first appellate court has the duty to re-evaluate the entire evidence on record and subjecting it to a critical scrutiny. In the case of **Tom Morio v Athumani Hassan** (suing as the administrator of the Estate of the late Hassan Mohamed Siara and 2 others), Civil Appeal No 179 of 2019) the Court of Appeal observed that:

"The most basic things we shall be looking at would be the evidence and conclusion arrived at. If there is no evidence to support a particular conclusion, or if the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has gone wrong that is where we can intervene. However, once the issue of concern is witness credibility which is the domain of the trial court, we rarely interfere. "

Again, is also a trite law that in civil cases, the burden of proof is on the one who alleges and the standard of proof is on the balance of the probability. That means, a party who has a legal burden also bears the evidential burden. (See the case of **Registered Trustees of Joy in the Harvest v Hamza K. Sungwa**, Civil Appeal No 149 of 2017).

I am fortified the above principle of law in view of the provisions of sections 110 and 111 of the Law of Evidence Act, **[Cap. 6 R.E 2019]** which provides that: -

"110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence

of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."

Now, guided by the above principles of law, after wholistically re-evaluate the evidence on record, I noted that the controversy on the division of matrimonial assets is centred on the share awarded to respondent in respect of her contribution in the acquisition of the matrimonial properties. Appellant believed that he contributed more than respondent because he earned income from his employer, TBS which was used to establish business which enabled them to acquire plots and houses which form part of the matrimonial properties.

In opposing, respondent believed that she is entitled to equal share as awarded by the trial court because she contributed in the acquisition of the matrimonial properties as she was once employed as a primary school teacher before she resigned following the consensus reached by appellant that she should resign in order to have ample time to run family business. She thus wanted this court to believe that, her income earned from being a primary school teacher was used to establish family business and her good supervision resulted their business to flourish which facilitated them to acquire plots, houses and other properties which are part and parcel of the matrimonial properties.



Going through the record, it is undisputed that appellant worked for gain at TBS and he resigned on 2016 as reflected in the trial court's proceedings at page 14. And this is one among the testimony of the respondent who testified that appellant was employed at TBS and at some point they were living at TBS staff quarter as reflected on page 19 of the trial court's proceedings. The disputant issue is whether the respondent worked as a primary school teacher before she resigned as it was alleged.

I have gone through the record where in paragraph 11 of the amended petition, respondent stated that she resigned as a primary school teacher in the year 2002 after she contracted marriage with appellant for her to get more time to supervise business. This assertion was disputed by an answer to the petition as was replied under paragraph 8. Insisting, when she was cross examined, as it is reflected on page 22 of the trial court's proceedings, respondent said that she was employed as a primary school teacher, however she did not tender any evidence to prove her employment or resignation as a primary school teacher.

Moreover, from the evidence on record, it is clear as crystal that respondent failed to prove that she was employed as a primary school teacher and therefore it is difficult for this court to believe if the income earned for being a primary school teacher was used to establish family business as alleged. If at all it is true that respondent was employed as a



primary school teacher, she was expected to have at least a proof of appointment letter or resignation letter or any other document to that effect. In absence of any other proof apart from her mere words, it is questionable if at all she was employed as a primary school teacher. Therefore, considering the evidence on record, I am satisfied that respondent was neither employed nor resigned as a primary school teacher. Thus, the trial court's finding that she contributed in acquisition of the matrimonial property through her income as a primary school teacher fall short of truth.

Further to that, it is in record that most of the plots were acquired during the subsistence of the parties' marriage. But upon going through Exhibit D2 which is the farm of Kimara Temboni, the record shows that the said farm was bought on 15/07/2000 before parties contracted marriage. However, the appellant through his testimony wanted this court to believe that the house of Kimara Temboni was built in 2001 before he contracted marriage with respondent, but this assertion is unsupported with evidence.

Additionally, the evidence on record shows that respondent was supervising the business at the time when appellant was fully employed by TBS. This fact is not disputed. Therefore, it is my firm view that respondent contributed in acquisition of the matrimonial assets during the



subsistence of marriage in terms of works which is formal work through supervised the family business and domestic work by rearing a child. However, the question which tasked me is whether respondent deserved to get half share to each property acquired during the subsistence of the marriage.

Certainly, in order to uphold the decision of the trial court on division of the matrimonial properties or otherwise, I believe, it is vital to appreciate the settled position of law in regards to the division of the matrimonial properties.

The Act under section 114 of the Law of Marriage empowers the court to order division of matrimonial properties upon dissolution of a marriage. This section also provides for factors to be considered by the court when exercising this power that is, it should consider the extent of contributions made by each party in money, property or work towards the acquisition of the properties. Section 114(2)(b) of the Act is to that effect.

Nevertheless, division of matrimonial properties includes also those assets which were acquired by one party but substantially improved during marriage by other parties or by their jointly efforts. For ease of reference let me reproduce provision which addresses division of matrimonial properties, that is, section 114 of the Act, which 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 the 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.

These principles were also stated in the case of **Yesse Mrisho vs Sania Abdul**, Civil Appeal No. 147 of 2016, when the Court of Appeal held that;

Section 114 of the LMA provides for division of properties acquired by parties by their efforts during the pendency of matrimony, and it requires the courts, when considering the issue, to ensure that the extent of contribution of each party is the prime factor.

Now, coming back to the first and fourth ground, as I have earlier on stated, the trial court awarded the respondent a share of 100% of the house at Malamba Mawili while appellant was awarded a share of 100% of the house of Kimara Temboni. The trial court also divided equally the remaining matrimonial properties as shown above.

As per the record, it is evident through Exhibit D2 that the farm in which the house at Kimara Temboni was built was acquired by appellant before she contracted marriage with respondent. Admittedly, the respondent had contribution in the construction of the house as a wife who took care the family and as a supervisor of family business which generated money that facilitated parties to build a house. For that reason, I don't think if it is fair to award her a share of 100% of the said hose and left appellant get nothing from it. It is my humble view that based on the principle of contribution in acquiring the asset, appellant contributed more than respondent. Contribution of appellant can be seen on acquiring the farm before he married respondent, his income from TBS that was used to establish business where through its proceeds enabled them to get income to construct a house. For that reason, my mind is settled that justice demands appellant to get a share of 70% of the value of a house of Kimara Temboni and respondent is entitled to get a share of 30% of the value of the said house. Thus, the distribution of the house of Kimara



Temboni done by the trial court is hereby quashed and the same is revised to the extent explained therein.

As shown above, the available record also revealed that all matrimonial properties acquired by the parties were registered in the name of the appellant. I understand that, the Act under section 60 (a) is very clear when it states: -

60. Where during the subsistence of a marriage, any property is acquired-

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

In our case at hand, considering the above provision it is apparent from the evidence on record that this presumption was rebutted by the respondent when she testified that properties of the parties were acquired during the existence of their marriage. Even the appellant did not dispute that fact in his submissions but his argument is on the extent of respondent's contribution in the acquisition of the said matrimonial properties.

It is important to note that the Court of Appeal in **Asile Ally Said vs Irene Redentha Emmanuel Soka and**

Another, Civil Appeal No. 80 of 2020 (Unreported) at page held

that;



...a property acquired during marriage is matrimonial property because, even if the same is purchased and registered in the name of an individual spouse, it is taken to be matrimonial property because it was acquired through the joint efforts of a husband and wife.

Now, considering the evidence on record, it is my conviction that, respondent is entitled to a share of 40% and appellant is entitled to a share of 60% of each and every of the remained matrimonial properties divided by a trial court to wit; a house located at Malamba Mawili Mbezi within Ubungo Municipality, the motor vehicle make Toyota Coaster with Registration Number T 658 BJM, a Toyota Carina with Registration Number T 990 DDD, a pharmacy located at Kibangu Ubungo Municipality, the plot located at Msingwa , Singida Street and the household furniture.

As indicated above, I reached the above decision based on the fact that, appellant induced capital in the establishment of the business where its source was an income earned through his employment at TBS and his first shop business located at Sinza in which during trial, respondent admitted that appellant had only one shop and through her supervision, the business flourished and established a number of business which enabled them to acquire houses, plots and motor vehicle. For sure, the respondent's contribution in the acquisition of the matrimonial properties cannot be undermined. Apart from the fact that she was a wife but also



she worked in supervised the family business. Therefore, it is my humble view that 40% of the value of each property mentioned above is a fair share to her. In that regard, these grounds of appeal are allowed to the extent explained therein.

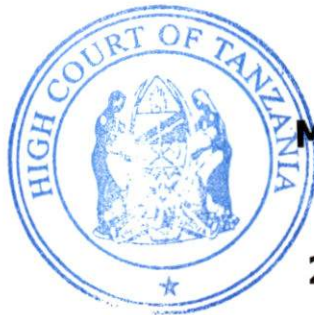
Coming now to the second ground, the appellant complained that the trial court wrongly dissolved the marriage based on the evidence of cruelty which is not proved. He claimed that Exhibit P2 and P3 does not show if respondent's uterus was removed based on the alleged cruelty of the appellant towards the respondent.

I have gone through the available record, as it was rightly submitted by the counsel for respondent, I fail to understand as to why the appellant raised this ground while he is not disputing the decree of divorce. It is in record that in the trial court appellant also supported the decree of divorce to be issued. For that reason, I don't think if this issue need to detain me much. Looking at Exhibit P2 it is clear that the said exhibit shows that respondent was beaten by appellant. This piece of evidence is supported by respondent's testimony that appellant used to beat her. Though appellant denied, but it is illogical to assume that what is written in the PF3 was untrue. Therefore, to my view, the evidence of cruelty is proved because beating is one among the act which constitutes cruelty. The allegation that respondent uterus was removed due to

beating lacks proof since Exhibit P3 does not show if respondent uterus was removed. It could be true that the same was removed, but I cannot agree the same was removed due to appellant's cruelty since evidence on record is silent. Therefore, this ground is allowed to the extent explained therein.

Consequently, this appeal is partly allowed to the extent explained therein. Since the parties were couple I make no orders as to costs.

Right of appeal explained to the parties.




M.MNYUKWA

JUDGE

26/06/2024

Court: Judgment delivered in the presence of parties' counsels.


M.MNYUKWA

JUDGE

26/06/2024