

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(KIGOMA SUB-REGISTRY)**

**AT KIGOMA**

**PC. MATRIMONIAL APPEAL NO. 3 OF 2023**

**JENITHA HUSSEIN HINYULA ..... APPELLANT  
VERSUS**

**STEVEN KALENGE LUBEZAGI ..... RESPONDENT**

(Appeal from the Judgment and decree of the District Court of Kasulu at Kasulu)  
(I. D. Batenzi, SRM)  
Dated 27<sup>th</sup> day of March 2023  
In  
(Matrimonial Appeal No. 3 of 2022)

**JUDGMENT**

Date: 09/05/ & 28/06/2024

**NKWABI, J.:**

In this appeal, none of the parties is interested in salvaging the ill-fated marriage between them. The appellant got out of the matrimonial home because of accusations by the respondent that she was committing adultery with different men. Indeed, it is in evidence that there is a civil suit lodged in the district court of Kasulu about adultery where the offending parties were found liable and ordered to pay compensation to the respondent in this appeal. The High Court, (Manyanda, J.) in an appeal, on the 19<sup>th</sup> day of August 2022 confirmed general damages to the respondent in this appeal at the tune of T.shs 10,000,000/= with costs against the 2<sup>nd</sup> appellant therein namely Marko Mpolenkile for adultery

with the appellant in this appeal. The judgment of this Court in DC. Civil Appeal No. 1 of 2022 is available on TanzLII.

Be that as it may, this is an appeal from the decision of the district court which overturned the decision of the trial court which divided the matrimonial assets half by half to the parties. The first appellate court instead ordered the division of the matrimonial assets jointly acquired by the parties 30% to the appellant and 70% to the respondent. That piqued the appellant and that is the main grievance in all 7 grounds of appeal that were filed in this Court, she holds a stance that she is entitled to division of the matrimonial assets each one to get half of the assets.

The appeal was heard by oral submissions. Both parties appeared in person, unrepresented. Each party stood to their stand view and left to the Court to decide.

The law as to division of the matrimonial assets acquired by joint efforts to the parties to a marriage is legendary just as cited by the first appellate court. I may add one of them for easy of reference, and this is not other than the decision in **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."*

Now, the points that appear to have skipped the first appellate court are **first**, that courts of law are not there to assist a party to prove their case.

That is as per **Barka Saidi Salumu v. Mohamedi Saidi**. [1970] H.C.D.

No. 95 Hamlyn, J. where he held that:

(1) *"I fully agree with the opinion of the District Magistrate that **it is for a party to present his or her own case to the Court and not for the Court to make a case for the litigant.** ... This clearly is not so, and the litigant should produce*

*what evidence there is to establish her case. It is only rarely that a court will, of its own motion, in cases such as this seek to clarify an issue by requiring an additional witness."*

Secondly, it is the one who would fail who has the duty of proof and not the defence, see **Barelia Karangirangi v. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017, CAT (unreported) where it was underlined that:

*"It is similarly that in civil proceedings, the party with the legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."*

It was the respondent (as the plaintiff in the trial court) who was duty bound to prove his extra contribution towards the acquisition of the matrimonial properties as opposed to that of the appellant. See also **East African Road Services Ltd v. J.S. Davis & Co. Ltd.** [1965] E.A. 676

*"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant."*

Thus, it is my strong opinion that the first appellate court had no sufficient ground for receiving additional evidence. This is because, the respondent himself, who was the plaintiff in the trial court, said the appellant was

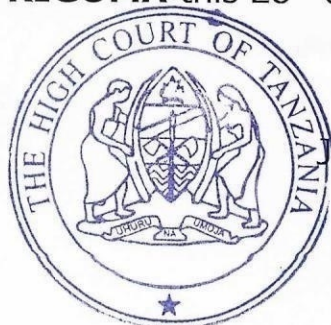
supervising the business of the family. He even indicated, in evidence in chief, that the appellant was staying at the business until 08:00 pm or 10:00 pm. My stand view, I hope is well supported by the decision of this Court in **Michael Kombere v. Kone Parosoi** [1970] H.C.D. No. 115. (PC) Bramble J., held inter alia that:

*(1) "There is nothing on the record to show that additional evidence was necessary to clear up any point ... These facts were never in dispute at the trial. An appeal to a District Court is not a retrial and the appellate court in this case was clearly wrong to act as it did." (2) Appeal allowed.*

In the upshot, I allow the appeal because it is merited. The decision of trial court is restored while that of the district court is quashed. Further the orders of the district court are set aside. Each party shall bear their own costs on account of the fact that this is a family matter.

It is so ordered.

**DATED** at **KIGOMA** this 28<sup>th</sup> day of June, 2024.



*F. Nkwabi*  
**F. NKWABI**  
**JUDGE**