

TANZANIA / JUDGMENT

final judgment GODLOVE ELINISARIA Tanzlii

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26 March 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF MOSHI AT
MOSHI CIVIL APPEAL NO. 11610 OF 2024 (Appeal from the decision of the District Court of Hai at
Hai dated 26th March 2024 in Matrimonial Appeal No. 1 of 2023 which originating from the
decision of Bomang'ombe Primary Court in Matrimonial Cause No. 15 of 2023) GODLOVE
ELINISARIA TARIMO.....APPLICANT VERSUS UNICE ELIMWARIA
MASAWE.....RESPONDENT

JUDGMENT

19th & 23rd December, 2024. A.P. KILIMI, J.: This is a second appeal wherein the appellant hereinabove is aggrieved with the decision of the first appellate court after it sustained the trial court decision. The factual background of this matter gleaned from the court records may be recapitulated briefly as follows, the appellant and respondent became husband and wife when contracted Christian marriage on 8/12/2007, the union which blessed them with one issue of their marriage. Their union initially was happiest moment between them but later slowly it become unpleasant to the respondent when she grasped that the appellant is failing to consummate their marriage. She opted to file a case at the Bomang'ombe primary court 'the trial court' in 1 Matrimonial cause No. 15 of 2022, the respondent therein petitioned for divorce, division of matrimonial property and maintenance of their children. At the trial court, the appellant denied the claims which led the case to proceed to a full trial. Upon a full trial, the trial court issued a divorce and ordered the maintenance of the Child to be Tsh 80,000/= per month for the appellant herein, it further placed the child under the custody of the respondent herein. The trial court also made division of their matrimonial properties wherein inter alia their matrimonial house situated at Nkwansira- Machame be divided between the respondent and appellant at 45% and 55% respectively. Being aggrieved with the trial court decision, the appellant appealed to the District Court of Hai at in Matrimonial Appeal No. 1/2023 on the grounds that the trial court erred in both law and fact by ordering the division of the house which was not a matrimonial property since the appellant had owned the same house before the existence of their marriage and two that, the trial court grossly erred in law and fact by ordering that custody of the child be placed under the respondent. 2 The first appellate court upheld the trial court decision hence this appeal which is centered in the following grounds as depicted in the amended petition of appeal as

follows;

1. That, the learned trial magistrate erred in law and fact by ordering that the appellant should provide maintenance of their child to the tune of Tsh.80000/= without considering the appellants income.
2. That, the learned Magistrate erred in law and fact by ordering the division of the house which was not a matrimonial property to the tune of 45 and 55 percent between the appellant and respondent since the house belonged to appellants brother one Elinganya Elinsaria Tarimo and that the parties were tenants in that house and the appellant has owned the same house before the existence of the marriage between him and the respondent. When this appeal was placed before me for hearing, the respondent had the representation of Ms. Omegah Yusuph Semmy learned advocate whereas respondent enjoyed the service of Mr. Fred Kimaro learned advocate, with the leave of this court it was agreed this appeal be disposed by way of written submissions. Submitting in support of the appeal for the first ground, Ms. Semmy submitted that the appellant had no permanent job to provide maintenance of Tshs. 80,000/= per months for his child as he had a day worker job which sometimes he even fails to pay his own expenses. Thus, the first appellate court erred in law and fact by ordering the payment without considering the appellant income. Ms. Semmy was of the view that the appellate court ought to consider the appellant earning at his work in order to see whether he was capable in maintaining his child. Thus, the counsel asserted that he was not given the right to be heard as per article 13(6)(a) of the Constitution of United Republic of Tanzania. Regarding the second ground, Ms. Semmy submitted that the house was erred distributed as a matrimonial home whilst it was not. She was of the view that the fact that the respondent found the appellant in the said house after marrying her, it didn't mean he owned the said house. The learned advocate submitted that the said house did not belong to the appellant rather to the appellant' brother one Elingaya Tarimo and that the parties were only tenants. She then concluded that the division of matrimonial property to the percentage of 45 to 55 were wrong since the respondent found the appellant already possessing the termed matrimonial house and what she did was a mere normal and little innovation compared to the appellant. Thus, the house did not belong to the appellant neither to the respondent but to the brother of the appellant. In reply Mr. Kimaro refuted the appellant claim and argued for the first ground that it was totally misconceived and ought to be disregarded as it was a new fact raised at the appellate stage without being raised at 4 the petition of appeal. He was of the view that the amount ordered by the trial court was very minimal compared to the uses of the child per month. He further argued that as a father of the child, is bound duty to maintain his child. The counsel went on arguing that the allegation that the appellant had no money to pay so it was baseless as he was even able to hire the advocate to defend his case at hand. To cement his point, he referred to article 27(2) of the Convention on the Rights of the Child, Article 20(1) of the African Charter on the Right and Welfare of the Child, section 129 of the Law of Marriage Act Cap 29 R.E 2019 and section 8(1) of the Law of the Child Act. The counsel emphasized that the appellant raised new facts and grounds which were never raised at the 1st appellate Court contrary to what the law

provides. He cited the decisions of Galus Kitaya vs. Republic (Criminal Appeal No. 196/2015

[2016] TZCA 301. Arguing against the second ground, Mr. Kimaro said that the argument that the matrimonial house belonged to the appellant brother was a new ground raised at the appeal level as it was never raised at the first appeal or at the trial court. He submitted that even if it was true the house belonged to his brother, he had a duty to call him at the trial court as a witness as raising it on appeal it was an afterthought. He finalized his argument by quoting the decision of the case of Paulina 5 Samson Ndawavya vs. Theresia Thomasi Madaha (Civil Appeal No. 45 of 2017) [2019] TZCA 453 on the principle that the one who alleges has to prove his allegation. In her brief rejoinder, Ms. Semmy added that the point of introducing new facts in the submissions did not carry any weight to destroy the appellant's good intention of seeking justice before this court. She expounded further that the child maintenance order did not favour the appellant since he was not afforded right to be heard on the amount ordered to maintain his child every month. She submitted that the appellant prays the amount be reduced compared as the appellant was jobless. She added that since this court ordered amendment of a petition of appeal to be affected on 26th August 2024, the addition of new ground at the appellate court was not fatal as per order VI Rule of the Civil Procedure Code CAP 33 RE 2019. I have dispassionately considered the submissions of both parties, the records of the trial and first appellate court, I wish to point out before I proceed with the merit of this appeal that, this being the second appellate court. It is a trite law that where there are concurrent findings of facts by two courts, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been a miscarriage of justice or violation of some principle of law or procedure as it held in the case of Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H Jariwallatla Zanzibar Hotel [1980] TLR 31 and Bushanga Ng'oga vs. Manyanda Maige [2002] TLR 335. Principally, the issue for determination before me is whether the appeal has merit. Now commencing with the first ground of appeal that the trial magistrate erred in law and fact by ordering that the appellant should provide maintenance of their child to the tune of Tshs. 80,000/= per month without considering the appellant's income. The argument by the appellant is that he was not afforded right to be heard at the trial court as it failed to inquire first about his income before placing the duty of maintaining his child to that tune. . The respondent's argument is that this ground of appeal was not raised nor discussed at the trial court, thus it was an afterthought and forbidden by the law. Indeed, according to deduction from the court, I am aware as a second appellate court, cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court, for instance see cases of Abdul Athuman vs. Republic [2004] T.L.R 151 and Samweli Sawe 7 vs. Republic, Criminal Appeal No. 135 of 2004 (both unreported). I have perused the trial court records and the impugned decision, it reveals that at the trial court three issues were drafted, whether the marriage was irrepealably broken, custody and maintenance of the child. I am mindful Section 129 of the Law of Marriage Act Chapter 29 Act places the duty to maintain the children to the man/father, but with regard to his means of life and station. The evidence reveals that the

respondent herein when cross examined by the appellant at page 11 of the trial court proceedings, she had this to say concerning maintenance; “Huwezi kunitumia 50,000/= kwa mwezi ikatosha matumizi ya nyumbani na wakati nyumbani hakuna chochote” Further at page 18 of the trial court proceedings the appellant when cross examined by the respondent herein had this to say; “..Huwa nakutumia 50,000/= ya matumizi na kodi ya pale nyumbani wala sihusiki nayo nilikuachia wewe kwa ajili ya matumizi yako.. Siwezi kupanga matumizi ya mtoto, Yule ni wa kwangu na ninaishi kwangu hilo suala labda kama ungekuwa hamwishi kwangu..” 8 In my view of the above evidence, the appellant had time to clarify his income by showing how he managed to give maintenance of his child and the mother for the amount of Tshs. 50000/= per months as quoted above. However, himself he said that respondent had another source which is the rent that is why he was reluctantly to give more, but under the situation where the said other source is stopped inference is drawn that the same might not be enough. Therefore, under the said circumstances suggests that the appellant usually was able to sent Tshs 50000/= to the respondent, thus I think it was justified by the trial court to increase under the coming situation after divorce to the awarded amount for maintenance of his child as evaluated at page 11 of the typed trial court judgment. Therefore in lieu of the evidence tendered by the appellant himself as quoted above, the argument that he was not accorded the right to be heard and that he was not asked on how much he earns was misplaced. Thus, I am of settled view and I see no fault of the first appellate court findings on the amount ordered to the appellant as maintenance to his child, consequently I find the first ground has no merit and is hereby dismissed forthwith. Moving to the second ground of appeal that the trial court erred in terming and distributing the house belonging to the appellant brother as 9 a matrimonial house. In my view without further ado this ground also lacks merits with the following reasons. First, the said issue that the said house was owned by appellant’s brother was never discussed nor determined at the trial court. I wish to refer the akin situation observed by the court in the cases of Hassan Bundala @Swaga v Republic Criminal Appeal No.386 of 2015 and Hamisi Bushiri Pazi & 4 Others vs Saul Henry & 4 Others Civil Appeal No.166 of 2019 (both unreported). In Hamisi Bushiri Pazi & 4 Others (supra) the Court of Appeal of Tanzania at Dar-es-Salaam at page 18 observed that; “It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court on appeal” What I deduce from the above authority is that this court lacks jurisdiction to entertained this matter raised at appellate courts that the said house belonged to appellant’s brother, thus what the appellant has endeavored as above remains an afterthought. Moreover, to cement this stance I may say even at the trial the appellant did not bring any evidence whether tangible or in person of the said brother to prove the same. 10 Secondly, in respect the division of the said Matrimonial house, the power of the Court to divide the matrimonial assets under section 114

- (1) of the Law of Marriage Act (supra) can only be invoked when the following conditions exist: first, when the court has granted or is granted a decree of divorce or separation. Second, when there are matrimonial or family assets which were acquired by the parties during the marriage; and third, when the acquisition of such assets was brought about by the joint efforts of the parties. Furthermore, when one spouse is responsible to the welfare of the family, he/she duty is contributory to any wealth accumulated by other spouse as a matrimonial property. In case of *Bi. Hawa Mohamed v. Ally Seif* (1983) T.L.R. 33 it was held that: "Since the welfare of the family is an essential component of Economic Activities, it is proper to consider the contribution of a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets. The joint effort and work towards the acquiring of the assets have to construe as a joint effort for domestic effort of work of husband and wife." 11 However, in resolving the issue of extent of contribution the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution. Therefore it is the burden for a party alleging contribution to prove the extent of contribution in terms of section 110
- (1) of the Evidence Act Cap. 6 R.E 2022 which provides the duty to prove for the one who alleges. In that regard let me check whether there was misapprehension of evidence tendered by the parties. According to the trial court typed proceeding at page 9 the respondent said on the status immediately after the marriage and for ease of reference, let me quote the said passage featuring evidence uttered by the respondent at the trial court; "Katika ndoa yetu pindi ananiao hakuwa na chochote alikuwa anafanya kazi kwa mzungu mimi ndiyo nilikuwa kama nyota yake, tulikuwa tunashauliana. Alijenga nyumba ya room 3 lakini hakuwa amekamilisha, haikuwa na Baraza, tiles, rangi, haikuwa na madirisha mazuri, ilikuwa na madirisha ya mbao mpaka komba jamii ya tumbili walikuwa wanaweza kuingia ndani kiasi kwamba hata ukiweka mafuta hapo wanamwaga. Haikuwa na umeme wala gypsum. Ilikuwa na jiko la fito, tukajenga jiko zuri lenye tofali na stoo tukaongeza. Tulijenga frame yenye vyumba 02, butcher, ukuta wenye geti 02, chooni 12 wala bafuni hakukuwa na tiles na vishamba viwili nulinunua naye (moja linaukubwa wa nusu na lingine $\frac{3}{4}$), mali zote zipo Nkwansira. Kuna nyumba Arusha ambayo walikuja wakageuza kuwa ni kiwanja na pikipiki ambayo ipo huko Dar-es-Salaam. Na kwa taarifa nilizonazo huko Dar-es-Salaam anajenga ila sijui ni wapi." The appellant did not dispute this evidence in cross examination or summon any witness to challenge the respondent evidence. It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness (see: *George Maili Kemboge vs. Republic*, Criminal Appeal No. 337 of 2013, *Damian Ruhele vs. Republic*, Criminal Appeal No. 501 of 2007 and *Athumani Rashidi v. Republic*, Criminal Appeal No. 264 of 2016. It was when asked by the court at page 19 the appellant said he had unfinished house at the time of marriage and was silent on the above evidence of the respondent that they were together on building Morden Kitchen, store, the house having two rooms (fremu), a butcher, and a fence wall with two gates. Furthermore, another evidence which was not refuted by the appellant was at page 6 the trial court proceeding when the respondent 13 said she used to cook food for masonry personnel during elevation

of their matrimonial buildings and also, she cared their child. According to section 114 (3) of the Law of Marriage Act, assets acquired during the marriage includes 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. (see also Anna Kanungha vs Andrea Kanungha [1996] TLR 195), when this court held that any personal property is liable for distribution in terms of the provisions of section 114(3) of the Act when such property has been substantially improved during the marriage by the joint efforts of the spouses. The above evidence shows how the trial court apprehended the evidence in reaching the just decision by considering the activities done by the appellant in developing and improving the said house, thus in that regard I am of the settled view that respondent contributed to development of matrimonial assets which existed but also new ones developed. Nevertheless, the general principle underlying division of matrimonial property is premised on compensation, I have considered the domestic duties done by the respondent and the matrimonial assets obtained during the marriage, thus when equated to the division of all 14 matrimonial assets made by the trial court to the appellant and respondent, inference is drawn that the same is justified. Therefore, I am satisfied that there is no misapprehension of evidence by the trial court and the first appellate court to make this court to vary the concurrent decisions of the two court below. All said and done, I find and hold that there no reason to fault the findings of the trial court and the first appellate court. Consequently, I find no merit in this appeal and I accordingly dismiss in its entirety. In the circumstances of this matter, I grant no order as to costs. It is so ordered DATED at MOSHI this 23rd day of December, 2024. X JUDGE Signed by: A. P. KILIMI Court: Judgment delivered today on 23rd day of December, 2024 in the presence of Mr. Dennis Maro advocate holding brief of Ms. Omega Yusuph Semmy advocate for the appellant, and respondent present in person. Sgd; A. P. KILIMI JUDGE 23/12/2024 15 Court: Right of Appeal duly explained. Sgd; A. P. KILIMI JUDGE 23/12/2024 16

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Prepared on 14 October 2026 · Esheria