

TANZANIA / JUDGMENT

# STANLEY SIMON SENDEU VS MARTHA WILSON ZAKAYO

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA MATRIMONIAL  
APPEAL NO. 30235 OF 2024 (Arising from the Judgment of District Court of Kongwa in  
Matrimonial Appel No 19455 of 2024) BETWEEN STANLEY SIMON SENDEU .....  
APPELLANT VS MARTHA WILSON ZAKAYO .....RESPONDENT

## JUDGMENT

Date of the last Order: 03/04/ 2025 Date of Judgment: 09/04/ 2025. LONGOPA, J.: The appellant and respondent were husband and wife since 1996 blessed with five issues and three grandchildren who enjoyed the life together until 2024 when the decree of divorce was granted by the Primary Court of Kongwa at Kibaigwa. The issue of contention is the division of matrimonial assets acquired or improved during subsistence of the marriage. The Primary Court of 1|Page Kongwa ordered that division of matrimonial assets be divided into at the rate of 60% and 40% for husband and wife respectively. The same percentage was also upheld by the District Court of Kongwa though it reduced one house by stating it to be not part of the matrimonial assets. It declared that house to be property of the appellant's children of the previous marriage prior to the marriage between the appellant and respondent. On 29th November 2024, the appellant being dissatisfied by the decision of the first appellate court preferred an appeal on three main grounds namely:

1. That, the Honourable Magistrate erred in law and in fact for deciding in favour of the respondent by maintaining division of 60% to 40% without considering that the properties were only acquired by appellant's effort and were not acquired together with the respondent.
2. That, the Honourable Magistrate erred in law and in fact for deciding in favour of the respondent by maintaining division of 60% to 40% without considering 2|Page that the respondent has no contribution in acquisition of the divided properties.
3. That, the Honourable Magistrate erred in law and in fact for granting division of 60% to 40% basing on the facts that properties were acquired during marriage. On 3rd April 2025, the parties appeared in person fending on oneself. The appellant stated to have appealed against the decision of the District Court of Kongwa as he was contesting the division of

matrimonial properties that was ordered by the Court. It was the appellant's submission that prior to this marriage, he was working as military personnel at the Tanzania People's Defence Force at Makutupora and had acquired land with mud house at Msalato in Dodoma which was measuring two acres which he sold in 1996 immediately before the marriage with the respondent. According to the appellant when he went back home at Mtanana in Kongwa where the parents advised him to get married to the respondent. It was the story of the appellant that he married the respondent in 1996 3|Page while he was constructing a mud house at Kibaigwa. Both the appellant and respondent started living at Kibaigwa. Immediately before the marriage, the appellant stated to have had bought about twenty (20 acres) and about four (4) Plots. It was reiterated that that as the production in the farming activities was not that good the appellant and respondent sold some of the properties including the 20 acres land and some of the plots whereas the proceeds were spent by the duo jointly. It was further averred that after the decree of divorce was granted, the trial Primary Court had ordered all the properties to be divided to the appellant and respondent including the two houses in the land together with a church land that is sized  $\frac{3}{4}$  acre. The trial magistrate ordered the same be sold and share of the proceeds be divide in 60% to 40% where the appellant was entitled to 60 percent and the respondent 40 percent. According to him, on appeal against the decision of the primary court whereas the District Court of Kongwa which ordered the land to be sold and the mud house as well for the proceeds to be shared. It was the decision of the first appellate court that the block-built house was declared 4|Page to belong to appellant alone. The appellant reiterated that he did not agree to include the land which is belonging to the church and the percentage that was given to the respondent as that percentage is big, she was not entitled to the whole 40 percent. The appellant stated that there is contribution of the respondent in the matrimonial assets but not to the extent of 40 percent as stated by the Court. According to the appellant, the respondent can only be entitled to some percentage which is about 20 percent. The respondent stated that it is true that the appellant and respondent got married in 1996. The parties have been produced together at the farm and acquired the matrimonial assets together that are located at Kibaigwa and they were contested at Kibaigwa Primary Court. It was contended that applicant and respondent built a mud house together with total of five rooms and a sitting room. It was the respondent's view that they cultivated together at the farm and purchased three different plots of land at Kibaigwa whereas some of them were sold later on. The remaining 5|Page assets are the two houses including block house and mud house located at the same plot. According to the respondent, there are two houses and a plot measuring  $\frac{3}{4}$  acre which is empty located at Karume Street in Kibaigwa which has remained the joint property of the appellant and the respondent. The assets or matrimonial properties were acquired through joint agricultural activities. Both subordinate courts have heard and found that the land sized  $\frac{3}{4}$  acre was never at any time given to the church. According to the respondent, the land was still the property of matrimonial nature between the appellant and respondent. It is all those properties that have been acquired by the respondent together with the appellant during the subsistence of the marriage. The respondent refuted the claims that the appellant acquired the properties before the

marriage but the properties were acquired by joint efforts of the parties. On short rejoinder, the appellant observed that there are some things that are not correct stated by the parties at this court. The appellant stated that he was ready to allow the respondent to take the properties 6|Page and willing give the block house which is finished so that respondent can leave the mud house and the bare land to me. The appellant reiterated that in the appellant's view the respondent could only be entitled to 20% of the assets as the rightful share of the matrimonial assets. Having heard the rival submissions of the parties, this Court is enjoined to determine the validity of the appeal. It underscores the validity of the appeal this court is guided by the available records of the two subordinate courts, legal principles applicable to the division of matrimonial assets and the submissions of the parties in light of the grounds of appeal. The parties to matrimonial proceedings should demonstrate the contribution towards acquisition of matrimonial assets. In the case of Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo (Civil Appeal 102 of 2018) [2020] TZCA 31 (20 February 2020), at pages 12-13, the Court of Appeal of Tanzania stated: 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 7|Page 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. It was expected for him to adduce evidence showing his extent of contribution on each and every property but such evidence was not forthwith coming. The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property. Also, in the case of in the case of Yesse Mrisho vs Sania Abdul (Civil Appeal 147 of 2016) [2019] TZCA 414 (7 November 2019), at page 12 the Court of Appeal reiterated that: The principle drawn from Bi Hawa Mohamed vs Ally Seif (supra) is unambiguous, stating that the efforts made towards acquisition of the said matrimonial property 8|Page must be assessed and determined, and as also discussed in Bibie Maulid vs Mohamed Ibrahim (supra), the contribution granted should not necessarily lead to 50% share each, since it is dependent on a party's contribution which is the determining factor of what share one should receive and each case has to be considered on its own circumstances. The evidence before the trial court was that parties were married in 1996 and they have acquired properties jointly. At the time of the dissolution of marriage, there two houses at Mpakani Kibaigwa one being a mud-built house, the second was a block-built house in the same plot of land they have been living since 1996. Also, there is a  $\frac{3}{4}$  acre land at Karume Street that is plain. According to evidence on record these were acquired jointly since 1996 by the parties through farming activities. In the case of Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo (Civil Appeal No. 102 of 2018) [2020] TZCA 31 (20 February 2020) (TANZLII), at page 9, the Court of Appeal reiterated that: 9|Page The definition given is not far from what this Court stated in the famous case of Bi Hawa Mohamed v. Ally Sefu

- [1983] TLR 32 when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated:- "The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section
114. In our considered view, the term "matrimonial assets" means the same thing as what is otherwise described as "family assets": Under paragraph 1064 of Lord Hailsham's HALBURY'S LAWS OF ENGLAND, 4th Edition, p. 491, it is stated: "The phrase "family assets" has been described as a convenient way of expressing an important concept: it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts
- (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife. It is on record of the trial Court, the Primary Court of Kongwa at Kibaigwa that the evidence of the respondent herein who was the petitioner was not challenged at all. The respondent in her evidence on acquisition of matrimonial assets stated that: ...mali tulizochuma pamoja ni nyumba moja ya udongo ina vyumba vitano iko Mpakani Kibaigwa. Kuna nyumba nyingine ya block tumejenga ina vyumba sita iko Mpakani Kibaigwa. Eneo lina ukubwa wa karibia ekari moja huwa tunalitumia kulima liko mtaa wa Karume na tuna samani za ndani. The proceedings reveal further that the appellant was afforded opportunity to cross examine but he never examined 11 | Page anything with regard to the joint acquisition of the matrimonial assets. It was only on the respondent's evidence where the appellant stated that the house at Kibaigwa which is built with blocks was still under construction during the pendency of the marriage but the source of funding was from his children of the former marriage. However, in appellant's evidence there is no dispute that such construction of the block house was done during subsistence of the marriage. It is also not disputed that such house is built on the land where the appellant and respondent have been using since 1996 when they got married bordering the mud house. There is no evidence at all that money to construct the block- built house in the same land owned and used by the parties since 1996 was obtained from the appellant's children. Such evidence is conspicuously lacking in the proceedings of the trial court. Given the fact that evidence of the appellant did not cross examine the evidence of the respondent that all the properties were acquired during the subsistence of the marriage, this District Court was not enjoined to find 12 | Page out the block-built house was not matrimonial asset. There was nothing on record to warrant such deviation from the findings of the trial Primary Court of Kongwa at Kibaigwa. The effect of failure to cross-examination on important matter amounts to the admission of the evidence on that aspect. In *Paulina Samson Ndawavya vs Theresia Thomasi Madaha* (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) (TANZLII), at page 20, where the Court of Appeal of Tanzania stated that: More often than not, the Court has held that failure to cross-examine a witness on a particular important

point may lead the court to infer that the cross-examining party accepts the witness' evidence and it will be difficult to suggest that the evidence should be rejected. For instance, in Shadrack Balinago vs. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General, Civil Appeal No. 223 of 2017 (unreported) it stated: "As rightly observed by the learned 13 | P a g e trial judge in her judgment, the appellant did not cross- examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross- examine the first respondent amounted to acceptance of the truthfulness of the appellant's account." It is lucid that as the appellant failed completely to interrogate the respondent on the acquisition of matrimonial assets what remained as intact evidence is that such properties were acquired through joint efforts as the parties have been married since 1996. In Marcel Kichumisa vs Mery Venant Kabirigi (Civil Appeal 52 of 2020) [2023] TZCA 218 (4 May 2023) (TANZLII), at pages 8-9, the Court noted that: ...meaning of matrimonial property to refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives 14 | P a g e and used for the benefit of the family as a whole. What is apparent, as held by this Court in Bi Hawa Mohamed (supra), the power of the Court to divide assets is derived from section 114 (1) of the LMA that: "the assets envisaged thereat must firstly be matrimonial assets/ and secondly, they must have been acquired by them during the marriage by their joint efforts" [Emphasis added] As the evidence in record from the trial court is intact that properties were jointly acquired by joint efforts, there was nothing to warrant the first appellate to deviate from the position taken by the trial court. As the evidence of the respondent herein (petitioner in the trial court) on joint acquisition was never challenged during cross examination, the appellant cannot be heard in appeal pretending that the same was not jointly acquired. Indeed, the judgment and decree of the first appellate court was erroneously arrived as there was nothing on record to exclude the block- built house in the same plot the appellant and respondent have acquired 15 | P a g e and used throughout their joint matrimonial life since 1996. I shall overrule the grounds of appeal on account that they are unmerited. At this juncture, it is ruled that all the three grounds of appeal have no merits at all. The available evidence on record is that all the assets were acquired by the parties jointly during subsistence of the marriage. The appeal against the finding of the trial and first appellate court that properties were jointly acquired. As it is found that the first appellate court overstepped its powers unjustifiably by excluding the bloc- built house, the decision of the first appellate court is shall be upheld with the following directive that save for improperly exclusion of the block -built house, the decision is quite in order. In respect of the finding excluding such property by first appellate court, it is decision of this court that he decision of the Primary Court of Kongwa at Kibaigwa on assets to be included is reverted. In totality, the properties that form part and parcel of the matrimonial assets are: (1) one mud house at Mpakani in Kongwa; (2) block-built house at Mpakani 16 | P a g e Kongwa and (3) a three-quarter (3/4) acre land located at Karume Street in Kibaigwa Dodoma. These properties shall all be subjected to order of division of matrimonial assets. With respect to the percentage the parties are entitled to, it is certainly that both the trial Primary Court of

Kongwa at Kibaigwa and the District Court of Kongwa have arrived at the similar percentage of shares between the parties, this court has nothing to change. It is settled law of this land that where there are concurrent findings of two courts below the second appellate court, such latter court is limited to change that position unless there are circumstances that are so necessary to do so. For instance, in circumstances where the subordinate courts have violated explicit principles of law. In *Martin Kikombe vs Emmanuel Kunyumba* (Civil Appeal 201 of 2017) [2020] TZCA 224 (13 May 2020) (TANZLII), at page 6 where the Court of Appeal stated that: It is settled law that a second appellate court's power to interfere with concurrent findings of the courts below is limited to situations where it is plain that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. The same position was reiterated in the case of *Helmina Nyoni vs Yeremia Magoti* (Civil Appeal No. 61 of 2020) [2022] TZCA 170 (1 April

2022) page 8-9 the court stated that: It is trite law that second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. See for instance; *Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel* [1980] TLR 31 and *Neli Manase Foya v. Damian Mlinga* [2005] T.L.R 167 cited in *Martin Kikombe v. Emmanuel Kunyumba*, Civil Appeal No. 201 of 2017 (unreported). In *Neli Manase Foya* (supra), 18 | Page the Court had the following to say: " ...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact" As such, as both trial and first appellate court ordered the share to be 60% for appellant and 40% for the respondent, this court shall not disturb such share of division as succinctly ordered by both the trial and first appellate court. The appeal against the decision of the District Court of Kongwa is hereby overruled for being unmeritorious. The appeal is therefore dismissed for being unmerited. This court orders that the division of the 19 | Page matrimonial assets shall entail all the three items that the Primary Court of Kongwa at Kibaigwa had ordered. Each party shall bear its own costs of the appeal as the appeal originated from matrimonial proceedings. It is so ordered. DATED at DODOMA this 9th day of April 2025. E.E. LONGOPA JUDGE 09/04/2025. 20 | Page

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