

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC: MATRIMONIAL APPEAL NO. 04 OF 2020

*(Arising from Matrimonial Appeal No.11 of 2019 Originating from Nyamagana
Primary Court in Civil Case No. 48 of 2019 Matrimonial Appeal)*

MNYONGE IDRISA APPELLANT

VERSUS

KIUMBE HUSSEIN RESPONDENT

JUDGMENT

Last Order: 01.06.2020

Judgment date: 04.06.2020

A.Z.MGEYEKWA, J

The appellant Mnyonge Idrisa has lodged this appeal to challenge the decision of the Nyamagana District Court delivered on 14th November, 2019 in Matrimonial Appeal No.11 of 2019.

For purposes of understanding the gist of this appeal, it is necessary to give the following background. The appellant and respondent contracted an Islamic marriage and blessed with four issues. The record reveal that the appellant and respondent lived a peacefully and harmonious life until 2018, when misunderstandings between the started. The main reason for their misunderstanding is due to the fact that the appellant was due to have a baby thus she went to his parents' house until delivering when she returned home she found that the respondent was living with another woman and his husband gave the appellant a divorce letter.

Aggrieved, the appellant decided to file a Petition for Divorce before Nyamagana Primary Court, after a full trial the trial court was of the view that the marriage between the appellant and the respondent had irreparably broken down and granted a divorce thereto. The trial court further ordered the respondent to provide Tshs. 50,000/= each month as maintenance of children and 15% of matrimonial properties was awarded to the appellant and the respondent was awarded 85% of matrimonial properties and the trial court ordered the children to stay with the respondent.

Being aggrieved by Nyamagana District Court decision, the appellant filed the instant appeal, which consists of four grounds of appeal as follows:-

- 1. That considering the contribution of the appellant towards the acquisition of a Matrimonial house award of 30% to the appellant by the 1st appellate Court was not reasonable.*
- 2. That the 1st appellate Court erred in law by failing to take into consideration the provision of section 125 (2),(b) of the law of Marriage Act, Cap. 29 (R.E 2002) when ordering custody of 3 children to the respondent.*
- 3. That the 1st appellate Court verdict did not finally determine the rights of the parties hence its decree cannot be executed.*
- 4. That the 1st appellate Court erred in fact by failure to order division of other properties apart from the matrimonial house left to the respondent.*

Following the global outbreak of the Worldwide Covid- 19 pandemic (Corona virus), the hearing was conducted through audio teleconference, the appellant enjoyed the legal service of Mr. Mwanaupanga, learned counsel and the respondent fended by himself.

Mr. Mwanaupanga, opted to start to submit on the 2nd ground of appeal, he stated that the appellant's and respondent's children testified in court that they want to stay with their mother (appellant). He added that three children are above 7 years old. He went on to submit that the court did not consider the children's prayers while the law clearly stated that, the children's opinion be considered thus that section 125 (2) (b) of the Law of Marriage Act was not complied with. Mr. Mwanaupanga argued that the trial had to consider the circumstances of the case that their parents are divorced and their father is living with another woman thus the children's prayer was genuine because they were not ready to stay with their stepmother knowing that living with a stepmother is not easy.

He continued to submit that the first appellate court in its judgment acknowledged that the children prefer to stay with their mother, the appellant but the court ignored the children's wishes.

In respect to the second ground of appeal, Mr. Mwanaupanga argued that the matrimonial distribution is not fair considering that the appellant and the respondent were married for a long time and they bought a plot together in 2009. The learned counsel for the appellant

forcefully stated that it was proved that the matrimonial properties were acquired at the time when the couple was living together. He went on to submit that the evidence on record reveals that the appellant was a housewife and the law acknowledges the housewife efforts as a contributory factor in acquiring matrimonial properties. Mr. Mwanaupanga fortified his submission by referring this court to the case of **Bi. Hawa Mohamed v Ally Seif** (1983) TLR 32.

Mr. Mwanaupanga valiantly argued that in the instant appeal, the first appellate court awarded the appellant 30% shares of the matrimonial assets but the 30% shares were unfair compared to the contribution made by the appellant. He went on to state that they think that a 45% share will suffice. He urged this court to revise the percentage and find that a 45% share is reasonable.

Concerning the 3rd ground of appeal, Mr. Mwanaupanga argued that the Decree of Nyamagana District Court cannot be executed, he referred this court to section 3 of the Civil Procedure Code Cap.33 [R.E 2019] and argued that a Decree requires to determine the rights of parties to its finality, but the court did not elaborate how to acquire the 30% since the two are living apart. He went on to state that the

court could have ordered to sell the matrimonial property or one party to compensate the other party.

Mr. Mwanupanga, the learned counsel for the appellant abandoned the 4th ground of appeal.

In conclusion, the learned counsel for the appellant prays this court to allow this appeal, allow the children to live with the appellant, and order the respondent to provide maintenance.

Responding, the respondent opted to start with the 2nd ground of appeal, he argued that he loves his children and lamented how the appellant mistreated him. He went on to state that if the court will order the children to stay with the appellant then the appellant should provide all the necessities.

With respect to the 1st ground of appeal, the respondent argued that the appellant did not make any contribution to acquire the matrimonial properties. He complained that even 75% which is awarded to him is not enough. He lamented that the 30% which was awarded to the appellant is more than what he expected because he is the one who cares for the children.

In relation to the third ground of appeal, he submitted that it is a legal matter thus he urged this court to determine this ground of appeal and do justice.

In his brief rejoinder, the learned counsel for the appellant reiterated his submission in chief and insisted that the division of property was not fair therefore, they pray this court to award a 45% share to the appellant. Mr. Mwanaupanga further argued that if this court will order the children to stay with the appellant then the respondent be ordered to provide maintenance. In conclusion, he prays this court to allow the appeal.

Having digested the parties' submissions, and the record of the case, I am settled that, the main issues for determination at this juncture are *whether the subordinate court correctly determined the custody of children and division of properties.*

I have decided to resolve the 1st and 2nd grounds of appeal jointly, dissatisfied by the decision of both lower courts the appellant filed this appeal and on her behalf, his Advocate prays this court to grant

custody of the three children to the appellant and order the respondent to provide maintenance to the children.

Revisiting the trial court proceedings, I have found that the trial court determined the matter and ordered among others that the children to stay with their father for the reasons that he can provide maintenance for them.

When it comes to the issue of custody of children the law clearly stated that the court needs to consider the best interest of the child when granting an order as to the custody of the child. The trial court determined this matter and ordered the children to stay with their father, the respondent because they were residing with their father and the infant was placed in the hands of her mother. The court also ordered the respondent to pay Tshs.50.000/= each month for maintenance of the child. When the matter was before the first appellate court, the court summoned the children in accordance with section 21 (1) (b) of the Magistrate Court Act, Cap.11 [R.E 2019] to record additional evidence to certify itself more before determining the issue of custody of children.

Having obtained the children's opinion, the children stated that they want to stay with the appellant. The court ended up ordering the three children who are above 7 years old to stay with their father for the reason that he considered the welfare of the children in forms of shelter, education, and medical facilities. The best interest of the child is not only about food, shelter, and schooling. The best interest standard can be hard to define in some situations, but the court of law needs to consider other factors which are common in the best interest analyses in most custody situations such as; age and sex of the child, wishes of a child, if old enough to capably express a reasonable preference, love, and affection, cultural considerations, need for continuation of a stable home environment, support, and opportunity for interaction with members of an extended family of either parent. To mention a few. If the surroundings are not conducive that means the welfare of the child was not considered.

Examining the first appellate court's decision I have to say that the Magistrate misdirected himself to place the children under the custody of their father. I am saying so because after collecting additional evidence from the children means he wanted to satisfy himself before

issuing an order. The court was in a position to direct itself to the wishes of the children

I understand that the court will not ordinarily interfere with the judgment of the trial court unless the findings are based on evidence or a misapprehension of evidence or, the trial court acted on the wrong principle in reaching its findings see **Mwangi v Wambugu** [1984] KLR 453. In this case at hand, the evidence of the two children were not considered. The two small girls; Asia D/O Halfani; 13 years old and Hidaya D/O Halfani; 7 years wishes to stay with their mother. In my view when it comes to children's wishes the same should be considered, these are girls of tender age certainly they need the care and guidance of their mother, their wishes should be considered unless exceptional circumstances are shown to deprive a mother of custody. In the record, there are no any allegations towards the appellant that she is unable to care for her children they have their own natural needs even looking at the animal kingdom it is their nature that their young ones remain in the custody of their mother.

I have considered that their father is living with another woman, the fact which he did not dispute in court. The child might have experienced a difficult life living with their stepmother in one roof. In the context of child custody cases, focus on the child's best interest means that all custody arrangements are made with the ultimate goal of caring and encouraging the child's happiness, security, mental health, and emotional development into young adulthood. Therefore, in the instant case, the children's wishes are to live with their mother that is where the assurance of care is thus the first appellate court was required to consider the children's wishes. This first ground is answered in affirmative.

In relation to the division of matrimonial assets, the appellant is lamenting that the 30% shares of matrimonial assets are not enough. In considering this ground, I am persuaded and guided by the principle enunciated by the Court of Appeal of Tanzania in the cited case of **Bi. Hawa Mohamed** (supra) and the case of **Bibi Maulid v Mohamed Brahim** (1989) (HC) TLR 162, that matrimonial properties need to be given wider interpretation to include domestic efforts. In determining contribution towards the acquisition of matrimonial assets every case

must be decided in accordance with its peculiar facts and circumstances. In the circumstances of this case, the couple lived together for approximately 10 years and were blessed with four children. In all those years of matrimonial life, the appellant herein used all her efforts, energy, love and affection to protect and care for the respondent and their children while trusting and believing that the whatever they were doing was for the welfare and future of the entire family but they ended up in frustration. Therefore, saying that the appellant did not contribute anything to acquiring the matrimonial house is untrue. Being a housewife should not be a barrier for the appellant to get a reasonable share since her housework was not worthless.

It has been featured on record that the appellant has contributed in the construction of the matrimonial house. Before the trial court, she has as well summoned witnesses to testify on this matter. I am live to the submission of the respondent that he is the one who did, all the contribution as the appellant was a housewife. In my view, this is a bad motive to deprive the appellant rights and her entitlement to the division of the matrimonial assets.

It is prudent to note that, Tanzania has ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW) and the protocol to the African Charter on Human and Peoples' Rights of Women in Africa, Article 7 of the Maputo Protocol provides clearly that:-

"In case of separation, divorce or annulment of marriage, women, and men shall have the right to an equitable sharing of the joint property deriving from the marriage." [Emphasis is added]

Guided by the above provision of law and considering that the house was acquired and constructed during the subsistence of marriage by joint efforts of the parties, I am satisfied that the appellant is entitled to a reasonable share of the joint property deriving from the marriage. As long as I have determined that the children are placed in the custody of their mother that means they need a shelter apart from other necessities. The respondent is required by the law to maintain the children and pay for their school fees as stated under section 129 (1) of the Law of Marriage Act, Cap.29 [R.E 2019], and section 26 of the Law of the Child Act, No.21 of 2009. Section 129 (1) of the Law of

Marriage Act, Cap.29 the father is responsible to provide maintenance to his children. Section 129 (1) of the Act state that:-

"129 (1) Save where an agreement or order of court otherwise Duty to maintain provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, children either by providing them with such accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."

In pursuant to the above provisions of law, the respondent is ordered to provide for their children's maintenance which includes education, health, food and clothing.

In the circumstances and for the foregoing reasons I allow the appeal and issue the following orders:-

1. The custody of children is placed under the appellant, the respondent is accorded right to visit his children, unless such arrangement interferes with their school calendar.
2. The respondent to pay Tshs. 250,000/= per month for maintenance of his three children.

3. The respondent to continue to pay for school fees of his children as per section 129 of the Law of Marriage Act, Cap.29 [R.E 2019].
4. For the interest of the children, the matrimonial house be retained, the same is placed to the appellant for custody of the children until the children attain 18 years old then one part to compensate the other party.
5. I make no order as to costs.

Order accordingly.

DATED at Mwanza this 4th June, 2020.


A.Z.MGEYEKWA

JUDGE

04.6.2020

Judgment delivered on this 4th June, 2020 and both parties were in remotely presence.


A.Z.MGEYEKWA

JUDGE

04.06.2020

Right to appeal is fully explained.