

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MATRIMONIAL APPEAL NO. 3 OF 2021

(Originating from the decision of the District Court of Mbeya Matrimonial Appeal No. 16 of 2020 which also Originates from Matrimonial Cause No. 354 of 2020 before Mbeya Primary Court)

ROSE HARUN SOGOD APPELLANT

VERSUS

DOMINIC GODFREY SHAYO RESPONDENT

JUDGMENT

Date of last order: 06/10/2021

Date of Judgment: 05/11/2021

NGUNYALE, J.

The facts giving rise to this second appeal may simply be narrated to make sense in this way, that, the parties to the case were couples dully married in kind according to civil rite in a monogamous union on 25th day of October 1991 before the Registrar of Marriage Kinondoni District. The couples had happy marriage while in Dar es Salaam, and in the courses of the marriage they were blessed with three issues namely Emanuel

Dominic (27), and twins Angelina Dominic (19) and Aaron Dominic (19). A farm of two acres and a house were among the blessings in their marriage located at Mlandizi **Pwani** Region. The marriage started to go sour when the respondent was alleged to have extra marital sexual intercourse and later cohabited with another woman when they were transferred to Mbeya in 2018. The union with the concubine was blessed with one issue. The respondent deserted the family and engaged new life with the concubine. The emergency of cohabitations resulted to unending matrimonial misunderstandings until on 21st day of July 2020 when the respondent appeared before the registry of Mbeya Urban Primary Court seeking divorce on grounds that **one**, *hatuelewani ndani ya nyumba*, **two**, *ananituhumu kuwa mimi ni mchawi* and **three**, *Mapenzi yamekwisha*. Before the trial primary Court, the appellant was ready for divorce as she stated on 29th July 2020 that: -

"Nipo tayari kuvunja ndoa na kupewa talaka kwa sababu Mdai amevunja mkataba wa ndoa muda mrefu anamwanamke nje ya ndoa na mtoto wa nje."

Thereafter, the trial Magistrate entered an order of divorce on the same day on 29th day of July 2020 as she stated: -

"Kwakuwa mdaiwa amekiri kuvunja ndoa KK 44 ya kanuni za uendeshaji madai katika Mahakama za mwanzo GN 310/1964, Mahakama hii inavunja

ndoa ya wadaawa kf 110 (1) la Sheria za Ndoa S. 29 Marejeo ya 2010, kuanzia leo sio mke na mme tena."

The Court after pronouncing an order of divorce, conducted hearing in respect of the matrimonial properties of the parties. Conclusively, it ordered equal distribution of the properties. The house be sold and the proceed be equally divided between the couples and the farm be divided equal to both couples and the respondent to continue maintaining the children for upbringing, shelter, cloths and food.

The respondent was aggrieved with the decision of the trial Court, he preferred the first appeal before Mbeya District Court disputing distribution of matrimonial properties and maintenance of over 18 years children. The first appellate Court on 21st day of October 2020, decided in favour of the respondent by ordering equal responsibility in maintenance of the children. In the course of entering its decision, the first appellate Court said in part: -

"Thus, from the circumstance of this case it deemed prudent and just that the matrimonial assets be divided equally. As the matrimonial assets divided equally both parents have to be responsible equally in maintenance of the children."

Aggrieved, the appellant preferred this 2nd appeal, according to the memorandum of appeal she preferred six grounds of appeal; -

1. *That the 1st appellate court erred both in law and fact when held that both parents should unite and provide maintenance to their off springs for not comprehending that she has been accommodating the children all the period since dissolution of their marriage without any assistance from respondent.*
2. *That the 1st appellate court erred both in law and fact for not putting into consideration that the evidence adduced by the child before the trial court that the respondent had refused to send them to school for education and to provide them with basic needs.*
3. *That the magistrate erred both in law and fact when held that there was no evidence to prove that the respondent was refused to send children to school for not understanding that the evidence of the children and their mother was solely enough to prove the truth.*
4. *That the 1st appellate court erred both in law and fact when held that the trial court magistrate was wrong to order equal distribution of matrimonial assets when at the same time ordered the respondent to provide full maintenance for not comprehending that the respondent is an employee of Tanzania Revenue Authority in Tanzania while she is jobless woman with no income.*
5. *That the 1st appellate court failed to understand the nature of the dispute led to the dissolution of their marriage and the existing conflict mostly effected from debts arisen at home before their marriage has been dissolved of which the respondent had a burden to carry it but refused.*
6. *That in general the decision by the 2nd appellate court was unjust.*

Having in mind the history of the case, the grounds of appeal and the rival submission I am settled to answer two important issues namely; -

- (a) *Whether it was lawful for divorced couples to continue with equal maintenance of their children who are above 18 years old.*

(b) Whether the trial Court and the first appellate Court dealt properly with the debts faced the family during matrimonial misunderstanding.

The appellant submitted that the respondent deserted her with the children at the rented house for more than five months without providing then with food, cloths and accommodation. She referred the Court to section 63 of the Law of Marriage Act Cap 29 R. E 2019 which provides that: -

"Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court. (a) It shall be the duty of every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life."

She submitted that the respondent could not provide them with anything during the time he deserted the family. The children were in secondary school and she had no means of gaining or earning for necessities of life. She was compelled to get a loan which the trial court had decided that they will equally pay the same to the creditors. And on appeal the District Court has ordered both parents to be responsible equally in maintenance of the children. She was of the view that the respondent is still duty bound to maintain her and the family.

The respondent strongly contested the appeal, firstly he submitted that the dispute was referred to conciliation board at Mabatini Ward Council

which failed to reconcile the dispute between them. The board issued a letter dated 21st July 2019 certifying that the council has failed to solve the dispute between the parties. Maintenance to the children of over 18 years old he said it is not proper and he cannot maintain the appellant who they have already divorced.

It is not in dispute that the children currently are above 18 years old. Regarding maintenance of the children above 18 years old, I wish to consider section 48 of the law of the Child Act, Cap 13 R. E 2019 which is clear as it reads: -

"Notwithstanding the provisions of section 47, the court may continue to enforce a maintenance order after a child has attained eighteen years if the child is engaged in a course of continuing education or training"

The first appellate Court considered the issue of maintenance of the children and ended with the position which falls under the quoted provision above. The trial Resident Magistrate said in granting the said order.

"Matunzo na malazi ya Watoto Mdai atawajibika kuwasomesha, kuwatunza kimalazi, mavazi chakula na elimu."

The first appellate Court considered the above position and qualified it by imposing a duty of maintenance of those children to both parties to the case. One would ask, is it proper in a patrilineal society a woman to take

such responsibility? I think no! As rightly submitted by the appellant the duty of maintenance of the children remains to the father, he is to provide necessaries of life. The first appellate Court erred to impose such duty to the appellant, the appellant may contribute in her wish and not under the order of the court. section 129 (1) of the Law of Marriage Act Cap.29 [R.E 2019]. Section 129 of the Law of Marriage Act, which provides that: -

"... it shall be the duty of a man to maintain his children whether they are in his custody or the custody of any other person, 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 costs thereof"

In another development, the appellant has no certain income as it is to the respondent who is employed by Tanzania Revenue Authority as submitted by the appellant. It is a rule of Court practice that in determining who to provide maintenance it is necessary to consider financial ability of the parties. In the case of **DENIS ELIAS NDUHIYE V. LEMINA WILBAD**, Civil Appeal No. 1 of 2019, High Court of Tanzania at Kigoma (unreported) it was observed that courts should consider financial status of both parents in maintenance orders. In the case at hand in ascertaining financial status the respondent as a definite income compared to the appellant.

I revert to section 48 of the Law of the Child quoted above. The respondent is responsible to take such responsibility in case the said children are engaged in education. I interrogated the parties about the current status of the children during hearing of the appeal. It was said that both of them are not studying, Angelina Dominic is working as a casual labourer around the city of Mbeya and Aaron Dominic migrated to the city of Dar es Salaam where he is self-employed. Such status cannot be taken as true status, still proof is needed. The executing Court when it will be enforcing the order of maintenance in favour of those adult children of the parties hearing is necessary to establish whether the beneficiaries are engaged in training or they need training. The first appellate Court considered at length the issue of maintenance of children who are above 18 years old.

The first appellate Court scrutinize whether the adult children are entitled to maintenance or not. The learned Resident Magistrate in dealing with the said issue of maintenance she referred the case of **TAUSI SHABAN VS MAFTAH HAMIS**, Matrimonial Appeal No. 06 of 2020, High Court of Tanzania at Mwanza (unreported) where it was stated:

"I have a different view when it comes to the maintenance of the other two children who are above 18 years old in cases where the parents are separated or do not live together. I understand that a child above 18 years

does in certain situations have a legal right to be maintained even though the Law of Child Act, No. 21 of 2009, and the Law of Marriage Act, Cap. 29 [R.E 2019] stipulates that maintenance is payable until the age of 18 years old. Following the legal position, circumstances of the case and the lifestyle of many families whereas, some children above 18 years are still schooling; some of them are in boarding school or day school and they are living with their parents waiting to be employed at that time they need to be maintained. The law is silent on this, but I think it is prudence to consider the children over 18 years old who solely depend on their parents. 8 In the instant appeal, these two young children who are above 18 years might depend on their parents they are in their early twenties; that is why the appellant is claiming for their maintenance they might be unemployed and have no shelter. Now, I am asking myself who should take care of them and in case all parents are neglecting them, where should they go? The bottom line in a situation like this, these children also need shelter and food. Parents should come forward and make sure that these two young children though the law does not cater for their necessities, but parents cannot run away from maintaining them. In my view, in exceptional cases like this at hand, I think both parents should unite and provide maintenance."

I agree with my sister Judge Mgeyekwa (as she then was) that these children have nowhere to go other than depending to their parents. As I already stated, in the case at hand we cannot forge unit to the divorced couples for maintenance of those adult children. As submitted by the appellant, she was a house wife with no income of her own to date but her husband is a driver employed by TRA. The respondent as an employed husband should take the lead for the benefit of the future of those twins

since he has a definite income, the appellant may support depending on her wish.

On the second issue of debts, it is not in dispute that there were debts as submitted by both parties. The trial Court after being satisfied that there were debts which aroused against the appellant in the course of taking care of the family when the respondent was based to the concubine it ordered the debts to be paid by the parties jointly. The trial Court said on 30th July 2020; '***madeni pia wadaawa wagawane nusu kwa nusu***'.

In this point of debts, I find bound not to detain long because the issue of debts has been well settled by the parties. The respondent as a husband agreed to pay the said debts, he has paid 1,000,000/= to the appellant to settle such debts. The records are very clear in the Court file that on 13th September 2021 the appellant received first instalment of 500,000/= from the respondent and the last instalment of 500,000/= she received on 1st November 2020. That being the position I am inclined to say that the issue of debts has been well resolved by the parties under guidance of the Court to make the appellant remain peaceful from the disturbances of the creditors especially the landlord.

In her submission the appellant submitted that the respondent is supposed to maintain her because she has been taking care of the family

for so long during the matrimonial misunderstandings. The respondent strongly contested the position. He submitted that the marriage was dissolved on 30th July, 2020. Thereafter the appellant should never think that the respondent has a continuous duty to maintain the appellant. It was lawful to provide such maintenance before the day of divorce. At that period, he was providing 100,000/= monthly. I agree with the respondent that there is no legal justification to maintain the appellant after divorce.

Having resolved the issue of maintenance of the twins and the debts which were facing the parties I find it opportune to commend on the matrimonial misunderstand which results to divorce. Emphatically, if the parents could live together in peace and happiness in their marriage it is clear that their twin children would be well cared and get good education. It is ironic that a girl could not complete form four and the young boy could not go further after form four. The father's complaint that the daughter is insulting him is the result of the anger of being deprived of good upbringing because of matrimonial conflicts. Young people entering into marriage should be well prepared and adhere to the principles of marriage to avoid this misery to the fruits of marriage.

As a whole then, and for the analysis made above the appeal succeeds to the extent that the respondent will be responsible in upbringing the twins as correctly found by the trial Court.

Appeal allowed.



D. P. Ngunyale
Judge
05/11/2021

Delivered this **5th** day of **November, 2021** in presence of the appellant in person.



D. P. Ngunyale
Judge
05/11/2021