IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 46 OF 2022

(Arising from Matrimonial Cause No. 28 of 2021 at the District Court of Temeke at Temeke).

ASHURA ALLY MKWASU ..... APPELANT

VERSUS

SAID ABDALLAH SIMBA ..... RESPONDENT

JUDGMENT

Date of last order: 05.07.2022
Date of Judgment: 26.07.2022

OMARI, J.

The parties in this matter celebrated their marriage in the Islamic form in 1990. They lived in harmony until 2011 when problems began in their marriage. In 2021, the Appellant decided to file for divorce at the Temeke District Court praying for divorce, division of matrimonial assets as well as the custody of the children on the basis of cruelty by the Respondent. Having found the couple's marriage had been irreparably broken down the trial court further ordered that the three houses in Mzambarauni, Majimatitu, Kiburugwa and one car were not matrimonial properties while the two houses at Mbagala and Vingunguti were matrimonial assets subject to

division. The court granted a share of 35% to the Appellant and 65% to the Respondent in both houses. Custody and maintenance of the issues of the marriage was given to both parties. The Appellant was not pleased with the decision of the district court, so she filed this Appeal raising six grounds to wit:

1. That the trial magistrate erred in law by declaring the three houses with bar and guest house and motor vehicle (car) not matrimonial properties.
2. That the trial magistrate erred in law and fact for failure to distribute the three houses, bar and guest house and the car which were matrimonial properties acquired by the spouses in their joint efforts during subsistence of the marriage.
3. That the trial magistrate erred in law and fact for failure to analyze the contribution of the Appellant hence awarded 35% of the two houses.
4. That the trial magistrate erred in law and facts for failure to evaluate the evidence of the PW1, PW2 and PW3 who testified that the Appellant and the Respondent acquired together their matrimonial property during subsistence of their marriage.

5. That the trial magistrate erred in law and fact for failure by composing and pronouncing the judgment which does not reflect the testimonies of the petitioner's witnesses thereto adduced during the trial as reflected in the certified proceedings transcript hence reaching into unfair, erroneous finding and decision.
6. That the trial magistrate erred in law and fact for failure to recognize that at the time the Respondent obtained the three houses, bar and guest houses he was at the age of the minority who could not have capacity to build a house or earning profit.

The Appellant is therefore praying that this court allows this Appeal and quash the whole judgment and decree of the District Court of Temeke, declare that the three houses, bar and the guest house and the car were matrimonial property and be distributed to the parties equally and any other reliefs this court deems fit and proper to grant.

At the hearing of this Appeal the Appellant enjoyed legal aid through Tanganyika Law Society and the Respondent was represented by Faraji Ahmed, learned advocate. This matter was disposed by way of written submissions.

Beginning with the first ground of appeal, the Appellant explained that the three houses together with the bar and the guest house and motor vehicle are matrimonial properties as testified by the Appellant and her witnesses in the trial court. She argued that the parties started marriage life by renting at Manzese as testified by the Respondent's sister. Also, at page 19 of the proceedings and page 4 of the trial court's judgment the Respondent testified that he owned the other properties since 1981, 1985 and 1989. The Appellant contended that the properties were acquired by both parties during the subsistence of their marriage but the Respondent wants to deny the Appellant's her rights as the court did.

Replying to the first ground of appeal the Respondent's counsel submitted that the Appellant was the one who petitioned for divorce on the ground of harassment and quarrels with the Respondent but she did not bring witnesses to corroborate her evidence. On the other hand, the Respondent brought a witness (a ten cell leader) who testified that they have never solved any case between the parties. However, the trial magistrate granted the divorce despite the fact that she was not convinced by the Appellant's evidence, but the court could not compel her to live with the Respondent.

On the second ground of appeal the Appellant submitted that the trial magistrate failed to distribute the three houses, bar and guest house and the car as they were matrimonial properties acquired during the subsistence of the marriage. She averred that the magistrate was biased as the Respondents' sister testified to the effect that the properties were acquired during the subsistence of their marriage and she was the only witness to be trusted by the trial court as stated by the Respondent in the cross examination that he had no any misunderstandings with his sister. It is also shown in the typed proceedings at page 24. She further argued that the Respondent had also admitted that he started living with his wife at Manzese showing that the parties started from zero but the trial magistrate failed to distribute all matrimonial properties so that each party could get what he has contributed.

Disputing this ground of appeal the Respondent's counsel submitted that at trial the Appellant did not mention the five houses. Also, in her submissions she did not mention where the houses are, to enable the court to determine that they belong to the Respondent or the Appellant. Furthermore, she did not mention the block numbers for the house and the bar, therefore this court should satisfy itself that the alleged properties belong to the parties

having been acquired jointly with proof of documentation. He submitted further that the three houses were acquired before the marriage and it was not houses but a plot with no building, and as for now the Respondent has disposed the said land (plot) when he was suffering from *diabetis mellitus.* Counsel also argued that the Respondent had confirmed at the trial court that the two houses at Kiburugwa were constructed in the subsistence of their marriage but with his other wives.

It is the contention of the Respondent's counsel that the issue of matrimonial properties as governed by section 114(1) of the Law of Marriage Act, Cap 29 RE 2019 (the LMA) insists on the properties which were jointly acquired by joint efforts. Thus, the houses distributed by the trial court are the ones which were acquired in joint efforts, he then prayed this court to confirm the decision of the trial court and dismiss the grounds of appeal.

On the third ground of appeal the Appellant submitted that the trial magistrate erred in law and in fact for failure to analyse her contribution hence awarded her 35% of the two houses. The Appellant asserted that during trial she testified that she used to sell ice cream, buns/pastries, charcoal, juice and other commodities as part of her small business. Through which she managed to contribute to the construction of the 5 houses, bar

and guest house and purchase of the motor vehicle. At that time, she had invested her money in *upatu*, thereafter she received a lot of money and assisted the Respondent to buy cement, sand and shingle. Moreover, the Respondent testified that during the acquisition of these properties he was doing small businesses as seen at page 23 of the typed proceedings. Thus, they had equal income or nearly the same, and the Respondent's testimony that the houses were obtained in 1981 when he was a minor should be ignored.

The Respondent's counsel on the other hand submitted that the two houses were confirmed by the Respondent that they were matrimonial properties acquired jointly with the Appellant's co-wives. He argued that, according to section 114(1) of the LMA the court granted the Appellant 35% of the two houses by virtue of a mere allegation that she was selling buns/pastries with no proof, hence this court cannot award the same and allow this appeal.

The fourth ground of appeal is based on the assertion that the trial magistrate failed to evaluate the evidence of the PW1, PW2 and PW3 who testified that the parties acquired their matrimonial properties together. The Appellant stated that during trial the witnesses being the Respondent's sister and the Appellants' brother testified that the parties started their lives at

Manzese by renting a room and to date they have succeeded to obtain the said properties. However, the trial magistrate did not consider the weight of their evidence and declared the two houses as matrimonial properties and awarded the Appellant only 35%. The Appellant further argued that the Respondent and his witness failed to dispute that the said properties belonged to the Respondent before the marriage hence misdirected the court that he owned the properties since 1981 when he was a minor. The Appellant then referred this court to the case of **Hemedi Said v. Mohamed Mbilu** (1984) TLR 113 and stated that her evidence was heavier than that of the Respondent in that respect.

In response the Respondent's counsel stated that the trial court evaluated the evidence adduced by the parties with all care it deserves and that is why it reached in the fair decision. He referred to the case of **Stanslaus Rubaga Kasusura and The Attorney General v. Phares Kabuye** (1982) TLR, 33 where it was held that a court should evaluate the evidence of each witness assess their credibility and make a finding in the contested facts in issue. Counsel then proceeded to submit that looking at the evidence by the Appellant and her witness there was no marriage which was broken down beyond repair as PW2 and PW3 were not living with the Appellant for them

to be competent witnesses and referred to the decision in **Martha Michael Wejja v. Hon. Attorney General and three Others** [1982] TLR 35. Counsel contended that the subsisting marriage was not broken down beyond repair since there was no a single act to suffice that there was a cruelty. The Respondent pleaded that this court make its own analysis and come up with its own conclusion to dismiss this appeal.

Submitting on ground number 5 of the appeal the Appellant contended that the trial magistrate erred in law and fact in composing and pronouncing a judgment which does not reflect the testimonies adduced during the trial by the witnesses of the Petitioner hence reaching into unfair, erroneous findings and decision.

It was the Appellant's assertion that the trial magistrate wrote the judgment in favour of the Respondent without considering the evidence by the Appellant and her witnesses so she prayed the whole judgment to be quashed and divide the matrimonial properties equally for each party to get his/her right without denying the other party's right. On his part the Respondent's counsel submitted that the Appellant failed to convince the trial court on the properties acquired jointly, that is why the court reached into that fair decision.

The sixth ground of appeal is cantered on the assertion that the trial magistrate failed to recognize in 1981, 1985 and 1989 when the Respondent claimed he acquired the houses, he was still a minor who could not be able to buy a plot and build a house, the assertions were a mere statement not supported by documents.

According to the Appellant, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts as per section 110 of the Law of Evidence Act, Cap RE 2022 (the TEA). This was also propounded in the case of **Abdul Karim Haji v. Paymond Nchimbi Alois and another,** Civil Appeal No 99 of 2004(unreported). Moreover, it is a fundamental principle of the rules of evidence in civil litigation that the burden of proof is discharged on the balance of probabilities as per section 112 of the TEA and as decided in **Pauline Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 and **Antony M. Masanga v. Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No. 118 Of 2014(Unreported). Furthermore, the Respondent has failed to prove that his elder brother was under the control of the said properties and failed to bring him to testify as it was stated in the case of **Hemedi Said vs. Mohamed Mbilu** that where

a party fails to call a material witness then the court can draw inference that the said witness would have testified contrary to the party's interests.

In reply, the Respondent's counsel submitted that the Appellant was just complaining that the Respondent was a minor when he testified that he acquired the properties in 1981, 1985 and 1989. He claimed that at his age the Respondent was above 20 years since he was born in 1960. Also, at that time he did not buy the house but a mere bare land while he was doing business. The counsel invited this court to refer to the time the parties got married in 1990, that if the Respondent was a minor in 1989 they could not contract a marriage in 1990. According to him this is not a matter which needs a degree to think out and rule the same, thus, the appeal should be dismissed with costs.

In her rejoinder the Appellant reiterated what she has submitted in the submission in chief and prayed for the court to allow this appeal.

Having considered the submissions from each party and the trial court's records the question for determination is whether this appeal has merit. Before going there I would like comment on two things. The first is that I am aware that this is a first appeal thus I have to be guided by among others,

the decision of the Court of Appeal in the case of **Faki Said Mtanda v. Republic**, Criminal Application No.249 of 2014 (Unreported) where the Court cited the decision of then East African Court of Appeal in the case of **R.D.Pandya v. Republic** [1957]EA 336 quoting the same where it was stated that:

> *'It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion'*

That being the case, I am mandated to go back to the evidence that is available on the record, to re-evaluate the same and arrive at a conclusion, see also **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another,** Civil Appeal No. 421 of 2021.

The second thing is the Respondent's counsel averments that the marriage has not broken down irreparably. In his submission counsel has repeated that averment several times, alluding that the court should have not granted a divorce decree as there was no evidence that the marriage has irreparably broken down. This is neither a ground of appeal or a matter submitted by the Appellant, however, since the Respondent's counsel has made the

allegation I find it prudent to put it to rest. I have read the trial courts judgment and at page 5 of the same the learned magistrate had the following to say:

> *'The first issue is "whether the marriage is irreparably broken down" the Petitioner informed this court that, from 2011, thorns of problems arose due to serious misunderstandings including lack of conjugal rights and love affairs, verbal abuses (sic), physical abuses (sic) and wilful neglect of the respondent to maintain the petitioner.'*

The learned magistrate then went on to explain that the Petitioner submitted the matter to the Marriage Conciliatory Board which failed to reconcile the two. The Respondent denied all the allegations in the trial court and attributed jealously on the part of his wife for he had taken two other wives. The magistrate then went on to invoke the provisions of section 107 (2) (e) and took account of the testimony of PW4 to find that the parties had constructively separated for almost 10 years. The learned magistrate then went on to explain separation in the context of a marriage contracted in the Islamic form and referred to section 107 (1) (b) of the LMA before going on to talk of the court not wanting to compel the two to live together and declaring the marriage as irreparably broken down as alleged by the Respondent's counsel. Simply put, the Respondents counsel was misleading

the court by alleging that there was no evidence or consideration of the issue of the marriage being broken down irreparably let alone the fact that it is not a ground of appeal and his client did not file a cross appeal. Now that this is put to rest I will segue to the actual grounds of appeal.

In the first ground of appeal, the Appellant submitted that the district court erred by declaring that the three houses, including the bar & guest house and the car, are not matrimonial assets. It was argued by the Respondent that the Appellant never mentioned the said houses at the trial court in her submissions. He claimed that the Respondent got them in 1985 before his marriage to the Appellant in 1990, also they were not houses as alleged by the Appellant but the plots and as for now the plots have been disposed of by the Respondent when he fell ill.

It is a requirement of the law that who alleges must prove. The principle is founded in sections 110 and 111 of the TEA, see also the case of **Habiba Ahmadi Nangulukuta and 2 others v. Hassan Ausi Mchopa and Another** (Land Appeal No. 7 of 2018) [2020] TZHC 4045 (16 October 2020) [2020] TZHC 4045. In this appeal, it is the Appellant who claims the three houses and a motor vehicle are matrimonial properties, hence burden of proof lays on her side.

In the trial court's records, the Appellant testified at page 6 of the proceedings that they lived at Manzese since 1990 until 1996 when they moved to their matrimonial house which they had built in Mbagala. She also mentioned the properties they acquired in the course of their marriage in testimony as shown on page 6 of the trial courts typed proceedings:

> *'...when ewe continue to live with my husband we succeeded to get the following properties: 1.One house located at Mbagala kwa Zomboko 2.One house located at Kiburugwa Mbagala 3.Bar and guest located at Mbagala Kiburugwa 4.One house located at Mbagala Maji Matitu 5.One house located at Maji Matitu Nyumba Nyeupe 6. Lastly house located at Vingunguti kwa Samba 7. One motor vehicle Suzuki T. 966(I don't remember very well).'*

She stated further that when they got married, the Respondent had a bed, a wardrobe and a mattress and she started doing small business by selling ice cream and juice. They continued with the marriage life and they managed to get the assets she has mentioned.

Pursuant to the provision and the case cited above, it is the duty of the Appellant to prove to the court that the three houses are matrimonial properties acquired in the subsistence of the marriage through their joint efforts.The district court considering the testimony adduced by the parties

reached a decision that the Appellant failed to prove that the three houses located at Mzambarauni Majimatitu and Kiburugwa are matrimonial properties.

The law is settled that a party will be granted a share in matrimonial property upon proof that the purported property is a matrimonial asset acquired during the marriage by the joint efforts of the spouses. Section 114(1)(a) of the LMA states that:

> *'The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of* ***any assets acquired by them during the marriage by their joint efforts*** *or to order the sale of any such asset and the division between the parties of the proceeds of sale.'*

The principle was also explained in the case of **Shomari Matambo v. Shamila Ally,** Civil Appeal No. 149 of 2019.

At the trial court the testimony of PW2 who shows the parties acquired properties which are houses located at Vingunguti kwa Simba, Matitu, Mtaa wa Nyumba Nyeupe, Kwa Zomboko, Kiburugwa and a car. Moreover, PW3 testified that the parties acquired five houses and one motor vehicle. At page 15 of the trial court's proceedings PW3 is recorded to have said:

'they are blessed with five houses, one motor vehicle and one bar, one house located at vingunguti, maji matitu, nyumba nyeupe and zomboko kiburugwa house and other are guest and bar.'

In granting and order for division of matrimonial assets a court should also satisfy itself on the extent of contribution to the acquisition of matrimonial property as per 114(2) (b)of the LMA which states:

'In exercising the power conferred by subsection (1) the court shall have regard; ...(b)To the extent of the contributions made by each party in money, property or work towards the acquisition of the assets...'

The Appellant testified that she was running a small business, also as the wife she was taking care of the family while the Respondent was at work. The Respondent disputes the assertion that the said houses are matrimonial properties. He testified that he built three houses before he married the Appellant in 1891, 1985 and 1989 at page 19 of the typed proceedings. In his submissions he stated that the alleged houses were bare lands as they did not have any buildings and that he has disposed them of. Considering the Respondent's testimony at the trial court it is not on the record that the said plots they were bare lands. There is also no evidence regarding the disposition of the same (sale agreements) to indicate that the plots were

sold. Similarly, on page 19 of the proceedings, the Respondent testified that he has three houses he has built by himself, alleging that the Appellant has hidden the documents. By referring to the Respondent's testimony in the trial court and his submissions, there is contradicting and conflicting averments. He did not also testify that the plot was a bare land and has already been sold, this has been stated as new facts through his submissions. It is also on record that the responded was assisted by his brother to build the house. At page 23 of the proceedings the Respondent stated that:

> *'when I built my first house I was 17 years old, my first house, I built when we sold our shamba my brother assist me.'*

As far as section 110 of the TEA is concerned there is no proof from the Respondent or his witnesses regarding matrimonial assets. As regards the motor vehicle, the Appellant stated that it is one of their matrimonial assets. PW2 testified on the same matter. The Respondent on the other hand did not object to the existence of the car.

Consequently, the three houses and the motor vehicle are matrimonial assets acquired during their marriage life through their joint efforts, so based on the circumstances stated I am of the position that the district court made an error by stating that three houses with a bar and a guest house as well as a

motor vehicle are not matrimonial properties, hence I find merit in this ground of appeal.

On the second ground it was argued by the Appellant that the trial magistrate failed to distribute the three houses bar, a guest house and the car as they were matrimonial properties acquired by them during the subsistence of their marriage. The Appellant contended that the magistrate was biased because the testimony of the Respondent's sister evidenced that the houses are matrimonial assets and she is the only witness to be trusted by the court. Likewise, the Respondent stated he is not in conflict with her. On his part the Respondent's counsel maintained that at the trial the Appellant did not mention the five houses and in her submission, she did not state where the houses are located so that the court could determine whether they belong to the Respondent or the Appellant. Also, she did not mention the block numbers for the house and the bar.

I have already determined all the contentions through the determination of the first ground of appeal that three houses and the car are matrimonial assets acquired through the joint efforts of the spouses. It is the contention of the Respondent's counsel that Appellant did not mention the houses.

However, at page 6 of the trial court's proceedings the Appellant mentioned all assets they acquired and how she contributed in its acquisition.

Therefore, the Respondent's assertion that the Appellant did not mention the properties or explain where they are is unfounded as the records clearly show stated that the properties were mentioned. I agree with the Appellant that the trial court failed consider her evidence and that of the witnesses thus, leading to a unfair distribution of the matrimonial assets. Based on the above explanation I find this ground of appeal has merit hence, it is sustained.

On the third ground the Appellant asserted that the trial magistrate failed to analyse her contribution and awarded her 35% of the two houses when she testified that she was selling various commodities at that time she invested her money in *upatu* where she got a large amount of money helped the Respondent to buy building materials. Moreover, even the Respondent has admitted that he was also doing small business, so they all had the same income.

The Appellant relied on section 114(1) of the LMA which gives the court the power to divide the matrimonial assets after issuing a decree of divorce or

separation. She has also referred to section 114(2) (a) of the LMA which states that in using such power the court must consider the contribution of each party in acquiring the assets. He has also claimed that the court, after dissolving the marriage and issuing a divorce decree, failed to divide the matrimonial properties equally, which is against the law of marriage Act. The Appellant referred to the case of **Bi. Hawa Mohamed vs. Ally Seif** [1983] TLR 132 where it was stated that:

> *'...with regard to the principle stated under paragraph (b) of subsection 3 of section 114, it is evident that the extent of the Appellant's contribution is indicated by her "efforts" in looking after the matrimonial home as against the Respondent's performance part of domestic obligations toward the Appellant...'*

The Appellant therefore contends that the court ignored the contribution of the Appellant and gave her only 35% in the two houses without considering her contribution. Relying on the case of **Vumilia Mwakilasa v. Vitus Rupeche** PC Civil Appeal No. 4 of 2021 the Appellant prayed for this court to distribute the five houses, bar & guest house and a motor vehicle fairly. The Respondent submitted that the court considered section 114(1) and gave the Appellant 35% in the two houses, so no further evidence is needed.

That the court will not be able to give her 50% for the mere allegation that she was selling pastries without proof.

It is undisputed that the two houses are matrimonial properties acquired through the joint efforts of the parties. The Appellant is challenging the 35% given to her on the ground that the amount is small as compared to her contribution in the construction of the houses. Evidence gathered from the trial court shows that even the Respondent was engaged in small business.

Therefore, the question here is on the extent of each party's contribution in the acquisition of the said properties and whether the amount allocated to the Appellant is reasonable as compared to her contribution.

The Appellant's contribution is realized through her engagement in small businesses such as selling charcoal, ice cream, juice and pastries. As for the Respondent, he admitted the houses are matrimonial assets but he has not given an explanation on the extent of his contribution to the acquisition of the same. Despite averring that he used to do small business the Respondent did not clarify on the type of business to enable the court to evaluate and determine the extent of his contribution, then divide the properties basing on each party's contribution. However, records show that he was working.

According to the Appellant's testimony on page 6 of the proceedings, the Respondent used to work while she was taking care of the family as well as selling juice and ice cream.

As previously explained, the question of division of matrimonial assets needs proof of the extent of the party's contribution to the acquisition of the property. The contribution of the Appellant in the acquisition of the two houses is realized through her involvement in small businesses, that is what the district court considered and ruled out that she deserves a share in the two houses.

A parties' contribution in the acquisition of matrimonial properties is determined in terms of money, property, or work as provided under section 114(2)(b) of the law of marriage act. Additionally, the performance of domestic chores and duties by a spouse suffice as an entitlement to a share in matrimonial assets. This position was established in the case of **Bi Hawa Mohamed vs. Ally Seif** (supra). In the case of **Eliester Philemon Lipangahela v. Daudi Makuhuna,** Civil Appeal No. 139 of 2002, HC at DSM (unreported) this court had this to say:

> *'The Appellant's contribution towards the acquisition of matrimonial assets was in terms of work; that is*

including household chores, bearing and rearing of children, making the home comfortable for the Respondent and issue. In addition to her domestic duties, the Appellant engaged herself in the sale of bans and vegetable.'

It is undisputed that the Appellant was running a small business but at the same time she was playing her part as a wife and mother of the family. If anything, her contribution could have been equal if not greater than that of the Respondent. In view of the position above, and in the absence of evidence regarding the Respondent's extent of contribution and in consideration of the Appellant's contribution I agree with the Appellant's claim that the trial magistrate failed to consider the extent of contribution of the parties while making the order for division.

Therefore, distribution of the trial court in the two houses located in Mbagala and Vingunguti is annulled and order that the houses should be shared by 40% to the Appellant and 60% to the Respondent.

On the fourth ground of appeal the Appellant asserted that the trial magistrate failed to evaluate evidence of the Appellant's witnesses. according to the Appellant the witnesses testified to the effect that the parties acquired five houses and a motor vehicle but the trial court failed to consider the weight of their evidence hence awarded the Appellant 35% of

the two houses. Similarly, the Respondent and his witnesses failed to prove that he owned the properties before he married the Appellant, therefore the Appellant's evidence was heavier than that of the Respondent. The Appellant supported her argument by the decision in the case of **Hemed Said v. Mohamed Mbilu** [1984] TLR 113 where it was held that the persons whose evidence is weightier is the one who must win as there are no ties in a suit.

The Respondent's counsel argued that the court evaluated the evidence and reached to a decision that the marriage between the parties was not broken down beyond repair. That PW2 and PW3 are not competent witnesses as they were not living with the Appellant to know that there was harassment and cruelty in the marriage.

According to the Respondent's counsel, the Appellant's witnesses testified before the district court, specifically in relation to the matrimonial assets. PW2 explained that the parties started living in Manzese and later moved to Mbagala, they have also acquired five houses and one car. PW3 gave the same testimony. The facts at page 3 of the trial court's judgment supports the Appellant's testimony regarding their matrimonial properties. However, in her findings the trial court magistrate while determining the issue of the division of matrimonial assets did not reflect on their testimonies. It is

evident that the learned magistrate reached into her decision without considering the witnesses' testimony. On the Respondent's contention that there was no evidence as to the breaking down of the marriage I have already addressed this matter so I will not allow it to detain me. I also find this ground of appeal has merit hence it is sustained.

The fifth ground of appeal is on the contention that the trial court judgment does not reflect the testimonies adduced by the Petitioner's witnesses as a result it reached into unfair, erroneous findings and decision. Referring to page 8 of the judgment the Appellant argued that the cited laws and decisions were supposed to be in her favour as the witnesses' testimony was heavier. Likewise, the Respondent failed to prove that the three houses were not matrimonial assets. He also testified that at the time he built the houses he was a minor and his brother was in control of the house but he failed to bring him to testify. The Respondent on the other hand argued that the Appellant failed to convince the trial court on the properties acquired jointly, that is why the court reached into that decision. Looking at the challenged judgment, particularly page 8 which is quoted by the Appellant, the learned magistrate relied on section 3(2) of the TEA which obliges party to a suit to bring a material witness. According to the learned magistrate the cited

provision was also clarified in **Jones v. National Coal Board Co** [2957] ALL ER. The trial court also referred to the decision given in the case of **Hemed Sadick vs. Mohamed Mbilu** (supra) and explained that failure to bring material witness, the court will draw an inference that if the witnesses were called, they would have given evidence contrary to the parties' interest. Section 110(1) of the TEA is also reflected and the court clarified that the alleging part must prove. In respect of the law and the cases relied on the trial magistrate explained further that there was no evidence on the part of the Petitioner to prove that the motor vehicle is matrimonial property since she did not bring the registration number or testify where they bought the car. In the Appellant's testimony regarding the car at page 6 of the proceedings the Appellant mentioned the car as one of the matrimonial assets. She partially indicated the number of the car make Suzuki with Registration No. T. 966, but could not remember the rest. Moreover, PW2 and PW3 both mentioned the car in their testimonies, and the same was not disputed by the Respondent hence he contradicted with his testimony that the car is matrimonial property.

Regarding other assets the court clearly explained that the party alleging on the existence of certain facts must prove the same exist. As already

explained the Appellant mentioned the assets and testified on how she participated in acquiring them. The Respondent objected and stated that the properties are not matrimonial because he acquired them before he married the Appellant. For that reason, the burden of proof shifted to the Respondent.

In his testimony at the trial court the Respondent stated that he built the houses in 1981, 1985 and 1989 with the help of his brother. It was his duty to bring evidence to prove his claim. The court clearly explained that the Respondent disputed that the three houses were matrimonial assets hence the same needed proof. The judgment shows further that the Appellant only mentioned the properties without presenting any documents, explaining the year they were built or bringing a witness who built them while the Respondent testified that he bought the plots and built the houses before he married his wives.

In the end the court ruled the assets were not matrimonial without justifying how it reached on that decision. The judgment is in contradiction with the testimony adduced by the Respondent that he bought the land and built the said house. In the proceedings the Respondent testified that he had contracts for the purchase of the plots but the documents were rejected by

the court because the Respondent's failure to serve the Appellant and to address the court on his intention to use those documents as additional evidence. Basing on the given clarification I agree with the Appellant that the trial court's magistrate did not consider the testimony of the Appellant in relation to their matrimonial assets, thus leading to a biased decision on the part of the Respondent. This ground of appeal is also sustained.

On the last ground of appeal the Appellant asserted that the trial magistrate failed to recognize that at the time the Respondent obtained the properties he was a minor hence incapable to build a house or earning profit. The Respondent on other the other hand challenged the Appellant's assertion that he was a minor, while he was above 20 years since he was born in 1960. He further questioned on the possibility of him entering in marriage in 1990 if he was a minor in 1989.

As earlier stated it is settled law that whoever wants the court to give a decision in his favour must prove. The Appellant argued that in the years 1981, 1985 and 1989 when the Respondent has claimed to have bought the said houses he was young so he could buy land and build a house. He also failed to tender a written evidence to prove it. She stressed that the Respondent is duty bound to prove in accordance with section 110 of the

evidence act and the case of **Abdul Karim Haji v. Raymond Nchimbi Alois and another**, Civil Appeal No. 99 of 2004. She has also referred to section 112 of the evidence act which states that the burden of proof is to be discharged in balance of probabilities. It is undisputed from the records that the parties were married in 1990. The Respondent testified to the effect that he bought the houses in 1981, 1985 and 1989 assisted by his brothe. The Appellant disputed that at that time the Respondent was still young, so he was unable to own properties.

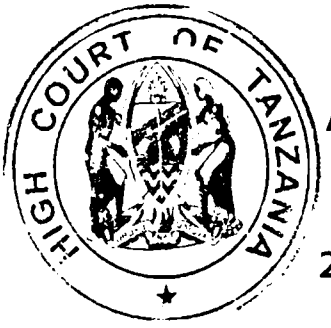
The testimony adduced at the trial court by the Respondent does not dispute that he built his first house at the age of 17 years with the help of his brother, thus confirming the Appellant's assertion that he was a minor at that time. However, based on the trial court's records, the issues of the Respondent's age was not an issue during trial and cannot be entertained by this court. Therefore, I find this ground is baseless hence it is dismissed.

Consequently, this appeal is allowed to the extent stated. For avoidance of doubt, the following orders are hereby issued:

1. The houses located at Mbagala and Vingunguti the Appellant to get 40% and the Respondent 60%

2. That the three (3) houses bar and guest house and the car are matrimonial properties to be distributed to the tune of 40% to the Appellant and 60% to the Respondent.

Given the nature of the matter there is no order on costs. It is so ordered.



A.A. OMARI

JUDGE

26/07/2023

Judgment delivered and dated 26th day of July, 2023.

A.A. OMARI

JUDGE

26/07/2023