

Substantive equality for women in distribution of matrimonial property: Uganda's contribution-based approach

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ABSTRACT

This article explores the potential for a contribution-based approach to the division of matrimonial property by drawing on Uganda's approach. Uganda lacks a legislative framework for dividing matrimonial property upon divorce, leaving courts with the discretion to determine distribution. In the 2022 Court of Appeal decision in *Ambayo v Aserua*, the Court established several key principles: marriage does not guarantee an automatic half-share in matrimonial property; a spouse's share depends on their contribution; homemakers' contributions should be valued based on comparable market services; and contributions towards a spouse's education during marriage should be deducted from the beneficiary spouse's total claim. This decision requires parties to demonstrate the extent of their contributions to matrimonial property. However, the historical undervaluation of homemaking and the difficulty in proving such contributions raise concerns about the protection of homemakers, often women, in property distribution upon divorce. This article examines key rulings in *Ambayo* to assess the potential for achieving substantive equality for women under this regime. The unique contribution of this article is its use of the *Ambayo* rulings to develop strategies that leverage a contribution-based approach to promote substantive equality while also highlighting limitations. It concludes that while Uganda's contribution-based approach shows promise for achieving substantive equality, several obstacles persist. These include the lack of tangible proof for certain homemaking roles, the low market value assigned to care and domestic work, and the difficulties in valuing unquantifiable aspects of care and domestic tasks.

KEYWORDS: Homemaker, Contribution, Matrimonial Property, Divorce, Uganda, Women, Substantive Equality

I. INTRODUCTION

Ensuring substantive equality for women upon divorce presents several challenges. One major issue is the historical undervaluation of non-financial contributions, such as homemaking

and caregiving. Traditionally, these roles have been seen as less valuable compared to financial contributions, leading to an imbalance in the division of matrimonial property. Courts often struggle to quantify the economic value of domestic work, which can result in unfair settlements for women who have primarily been homemakers. This undervaluation perpetuates gender inequality, as it fails to recognize the significant impact of unpaid labour on the household's overall well-being and economic stability. Consequently, women may find themselves at a financial disadvantage post-divorce, lacking the resources and recognition they deserve for their significant contributions to the marriage. The way a country's legislation and courts handle the distribution of matrimonial property is crucial as it can significantly influence whether gender equality is promoted or hindered.

In Ugandan traditional societies, women did not enjoy property rights in the context of marriage. They were considered minors, and even equated to property which could be passed on upon the death of a husband.¹ The division of matrimonial property in Uganda was historically governed by African customary law which was derived from the customs and practices of the people. Since it developed during a patriarchal era, most customary laws, including those pertaining to property ownership and distribution, were not on par with the notion of equality between men and women. Regarding the distribution of matrimonial property upon divorce, women, who were mostly homemakers, had no share in property.²

Over the years, Uganda has ratified several international treaties that guarantee the right to freedom from discrimination on multiple grounds including sex and other status.³ It has also ratified treaties specific to the rights of women including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), both of which place an obligation on it to eliminate discrimination against women in all matters relating to marriage and its dissolution.⁴ The Maputo Protocol, for example, makes specific mention of the right to 'an equitable sharing of the joint property deriving from the marriage' between men and women.⁵ In its General Comment on the right to matrimonial property, the African Commission on Human and Peoples' Rights (African Commission) has stressed that substantive equality between men and women must be ensured in dealing with matrimonial property.⁶

Different countries apply the principles of equality and non-discrimination differently. Some lean towards a partnership model while others invoke the contribution-based model.⁷ Even with the differences in approach, the aim across countries has been to ensure a fair sharing of matrimonial property. The principles of equality and non-discrimination have led

¹ L. Khadiagala, 'Negotiating Law and Custom: Judicial Doctrine and Women's Property Rights In Uganda' (2002) 46 (1) *Journal of African Law* 1–13; D. Acidri, 'Women's Rights to Land Ownership in Uganda: Policy and Practice' (2014) 6 *Critical Social Thinking* 185–203, 185.

² *Ibid.*

³ See e.g. article 26 of the International Covenant on Civil and Political Rights 1966, article 2 of the African Charter on Human and Peoples' Rights 1981; article 2 of the Universal Declaration of Human Rights 1948.

⁴ Article 16 United Nations Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW), article 7 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003.

⁵ Article 7 Maputo Protocol (n 4).

⁶ African Commission on Human and Peoples' Rights, General Comment No. 6 On The Protocol To The African Charter On Human And Peoples Right On The Rights Of Women In Africa (Maputo Protocol): The Right To Property During Separation, Divorce Or Annulment Of Marriage (Article 7(D), Adopted at the 27th Extra Ordinary Session of the African Commission on Human and Peoples' Rights, held from 19 February to 4 March 2020 in Banjul, Gambia (General Comment No. 6).

⁷ Under the partnership model, the key partnership features of the union are the main determinants or the basis for measurement of a spouse's share in matrimonial property. To establish one's entitlement, there is no need to establish a link between what the spouse has done and the value of the property. In a contribution-based model, a spouse's share in matrimonial property is dependent on their contribution to the matrimonial property. In terms of examples, the UK applies a partnership model while Uganda applies a contribution-based model.

to the recognition of homemaking as a worthy form of contribution for purposes of division of matrimonial property. This has been pivotal for women considering that in most family settings, women conduct a massive portion of care and domestic work.⁸ To give effect to the right to equality, Uganda applies the contribution-based approach to distribution of matrimonial property. This was clarified in the *Ambayo* case, a decision handed down by the Court of Appeal in November 2022.⁹ In this case, the Court mapped out the contours of the contribution-based approach in Uganda by holding that: (i) marriage does not guarantee a party an automatic half-share in matrimonial property, (ii) a share in matrimonial property is dependent on a spouse's contribution to it, (iii) in assessing the contribution by homemakers, consideration is to be given to the value of similar services on the market, and (iv) where one party contributes towards the education of the other spouse during marriage, such contribution should be deducted from the beneficiary spouse's total claim. Based on *Ambayo*, a share in matrimonial property is not based on marriage but the quantum of contribution by each spouse to the matrimonial property.

The automatic half-share approach that had been applied in some of the previous Ugandan cases meant that homemakers were guaranteed a share in matrimonial property regardless of their contribution. Its demise means that homemakers now have to prove their contribution. In the *Ambayo* case, while *Ambayo* (the husband and breadwinner) had receipts to prove payments made towards the construction and maintenance of matrimonial property, *Aserua* (the wife and homemaker) had none to prove her contribution. This highlights a significant limitation of a contribution-based approach, as it can disadvantage homemakers who lack tangible evidence of their contributions, underscoring the need for a more equitable system that invokes a relaxed approach to rules of proof and evidence.

Considering the historical tendency to disregard homemaking as a contribution to matrimonial property and the challenges of proving homemaking, a question arises as to the extent to which a contribution-based approach protects homemakers, often women, in the distribution of matrimonial property upon divorce. The purpose of this article is to assess whether there is scope for attaining substantive equality for women under Uganda's contribution-based model. The discussion is divided into four parts. The second part following this introduction engages with the development of Uganda's contribution-based model. The third part unpacks the rulings in *Ambayo* to identify opportunities for substantive equality for women in a contribution-based regime, while the fourth part concludes the discussion.

II. THE HISTORY AND DEVELOPMENT OF UGANDA'S CONTRIBUTION-BASED MODEL

Uganda's approach to matrimonial property upon divorce can be traced back to the colonial era. As a former British colony, Uganda's laws were influenced by English law which found its way in former British colonies such as Uganda through colonialism. During the colonial era, the laws applied in England were applied in Uganda directly. English law at the time did not pay attention to gender equality and by implication, the law received in Uganda made no provision for women's right to matrimonial property upon divorce.

⁸ Office for National Statistics, 'Women shoulder the responsibility of 'unpaid work' (2016) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldtheresponsibilityofunpaidwork/2016-11-10>> (accessed 27 April 2024); UN WOMEN, 'Forecasting Time Spent In Unpaid Care and Domestic Work' (2023) 1–21, <<https://www.unwomen.org/sites/default/files/2023-10/technical-brief-forecasting-time-spent-in-unpaid-care-and-domestic-work-en.pdf>> (accessed 27 April 2024); Soraya Seadat and Marta Rondon, Women's wellbeing and the burden of unpaid work, *BMJ* 2021; 374 doi: <<https://doi.org/10.1136/bmj.n1972>>.

⁹ *Ambayo v Aserua*, Civil Appeal No. 0100 of 2015 (15 November 2022) (*Ambayo* case).

The property rights of those married were at that time governed by the Married Property Act of 1882 of England.¹⁰ Uganda adopted this Act and all its persuasive interpretation and application by the courts in England. A major development by the Married Women's Property Act was the alteration of the common law notion of coverture, among others, granting wives the right to own and deal with property in their names. Despite these developments, the Married Property Act of 1882 was silent on the non-monetary contributions to matrimonial property. This silence entrenched discrimination against women in the distribution of matrimonial property upon divorce.

Uganda got independence in 1962. However, subsequent developments in English law remained persuasive in Uganda's legal system.¹¹ Meanwhile, in England, the law governing married persons continued to go through legislative amendments. The Married Women's Property Act 1882 was repealed save for a few provisions including section 17. In terms of this section, if there is a dispute between a wife and husband regarding the possession, share of or entitlement to property, either party can make an application to court for a decision on the share. Other legislative developments in this regard pertained to the enactment of The Matrimonial Homes Act of 1967, The Matrimonial Proceedings and Property Act of 1970 and The Matrimonial Causes Act of 1973. Despite these legislative developments in England, Uganda continued to apply the received Married Women's Property Act 1882, thus failing to cater for changing times. This was the case until Uganda enacted the Constitution of 1995.

In line with Uganda's commitment to gender equality as evidenced by its ratification of key international treaties such as the CEDAW and the Maputo Protocol, Uganda amended its national legal framework through various legal enactments some of which have been entrenched in the Constitution. The current Constitution of Uganda came into force in 1995, and it is the supreme law of the land.¹² The Constitution's supremacy means that all laws that are inconsistent with it are invalid.¹³ A peculiar feature of the Constitution is its recognition of fundamental rights and freedoms. Many of these rights are identical to those contained in various international human rights instruments including the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, the African Charter on Human and Peoples' Rights of 1981, the CEDAW and the Maputo Protocol.¹⁴ One of the rights guaranteed in the Constitution is the right to equality and freedom from discrimination on various grounds including sex.¹⁵

Under article 31, the Constitution makes explicit recognition of 'equal rights at and in marriage, during marriage, and at its dissolution'.¹⁶ In addition to this, it guarantees several rights pivotal to the realization of spousal rights, among these, protection from deprivation of property, rights of the family, and affirmative action in favour of marginalized groups based on historical disadvantage.¹⁷ There is also a specific provision on the rights of women which mandates the government to accord women equal and full dignity, ensure their equal treatment with men in all areas, and create opportunities necessary to enhance their

¹⁰ Married Property Act of 1882 of England.

¹¹ See e.g. recent decisions including 2022 case of *Ambayo* case (n 9) page 8, where reference is still made to English cases such as *Chapman v Chapman* [1954] AC 429 and *Falconer v Falconer* (1970) 3 ALLER 449.

¹² Article 2(1) of the Constitution of the Republic of Uganda, 1995.

¹³ *Ibid.*

¹⁴ Chapter Four of the Constitution of the Republic of Uganda, 1995. This chapter of the Constitution is devoted to 'Protection and promotion of fundamental and other human rights and freedoms.' It guarantees rights similar to those in various international instruments. Notable are the right to equality and freedom from discrimination, dignity, property rights, life, personal liberty, and freedom from torture.

¹⁵ Article 21(2) of the Constitution of the Republic of Uganda, 1995.

¹⁶ Article 31(1) of the Constitution of the Republic of Uganda, 1995.

¹⁷ See generally, Chapter Four of the Constitution of the Republic of Uganda, 1995.

welfare.¹⁸ The Constitution also prohibits 'laws, cultures, customs and traditions which are against the dignity, welfare or interest of women'.¹⁹

By granting spouses equal rights in marriage and its dissolution, the Constitution did away with the history of discrimination of women in various areas including property distribution upon divorce. However, the notion of equality in the distribution of matrimonial property has not been elaborated upon through legislation. The Divorce Act,²⁰ which is the law that deals specifically with dissolution of marriages in Uganda, makes no provision for distribution of matrimonial property. Section 27 of the Act empowers the court to vary antenuptial or postnuptial settlements made on the parties and make orders regarding the whole or part of the property for the benefit of the husband or wife or the children. However, this section does no more than empower courts to vary such agreements at dissolution of a marriage. It provides no guidance on distribution of matrimonial property upon divorce let alone direction on the implication of non-monetary contributions for distribution of matrimonial property. Precisely, Uganda does not have a legislative regime on matrimonial property. In the absence of clear guidance on distribution of matrimonial property, courts have stepped in to give meaningful content to the existing general constitutional provision on equality and non-discrimination. To foster equality in the distribution of matrimonial property upon divorce, courts use 'contribution' as the basis for sharing matrimonial property. The commonly cited court decisions are briefly discussed to demonstrate how the contribution-based approach has evolved over the years.

The notion of contribution in Uganda's case law can be traced back to the High Court decision in the case of *John Tom Kintu Muwanga v Myllicious Gafabusa Kintu (Kintu case)*.²¹ The facts are that Kintu Muwanga and Myllicious Kintu entered a marriage under the customary laws of Uganda in 1958 and had four children together. They remained married until the petitioner, Myllicious Kintu, petitioned for divorce in 1989. One of the issues the Court had to resolve was whether the petitioner was entitled to a share in matrimonial property and if at all, what portion that would be. In arriving at her decision, Bossa J started by giving meaning to the term matrimonial property. She ruled that:

Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should, in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to.²²

At the heart of Bossa J's definition is the requirement of a contribution by both parties for property to be categorized as matrimonial property. An issue that remained unresolved at this stage was the meaning of the term 'contribution'. Tom Kintu, the respondent and husband in these proceedings, submitted that Myllicious Kintu made no contribution to the matrimonial property as she made no monetary deposit to its purchase. In debunking the respondent's submission, Bossa J. referred to the Kenyan decision of *Kivuitu v Kivuitu* which interpreted the term contribution in broad terms.²³ The Court endorsed the views of

¹⁸ Article 33 of the Constitution of the Republic of Uganda, 1995.

¹⁹ Article 33(6) of the Constitution of the Republic of Uganda, 1995.

²⁰ Divorce Act, Chapter 249 Law of Uganda, 1904.

²¹ *John Tom Kintu Muwanga v Myllicious Gafabusa Kintu*, In the High Court of Uganda, Kampala, Divorce Appeal No. 35/1997, decision delivered in 2001 (*Kintu case*)

²² *Ibid* page 12.

²³ *Kivuitu v Kivuitu* No.26 of 1985 (CA).

Omollo J in *Kivuitu v Kivuitu* who ruled that ‘a wife does contribute to a family in a thousand ways including childbearing, looking after the family, etc.’²⁴ Bossa J also ruled that to determine the wife’s share in matrimonial property, ‘the court would have to assess the value to be put on the wife’s non-monetary contribution.’²⁵ Comparative insights from Kenya were relied on to give recognition to non-monetary contribution. The decision in the *Kintu* case makes it apparent that a share in matrimonial property upon divorce is dependent on contribution. In addition, where the contribution of a spouse is homemaking, the value of homemaking must be assessed. However, the Court did not discuss how valuation or assessment should be conducted.

The decisions of both the Court of Appeal and the Supreme Court of Uganda in the case of *Julius Rwabinumi V Hope Bahimbisomwe*²⁶ also provide insight into Uganda’s contribution-based approach. In this case, the appellant and respondent entered a monogamous marriage in 2003. The marriage was solemnized in church on 30 August 2003. Before the marriage ceremony, the parties had been cohabiting. The couple developed misunderstandings, and the respondent petitioned for divorce in 2005. One of the issues for resolution was whether the respondent was entitled to a share in matrimonial property. In contention too was the effect of article 31 of the Constitution regarding equality on distribution on matrimonial property during dissolution of marriage.

Before the Court of Appeal, it was held that the respondent was entitled to a 50 per cent share in matrimonial property and that article 31 of the Constitution justifies the distribution of matrimonial property on a 50:50 basis between the husband and the wife. Twinomujuni J, who delivered the Court of Appeal majority judgment, ruled as follows:

My understanding of the [marriage] vows is that at the time the bridegroom and the bride become husband and wife, all the property they own become joint property. All the property they acquire during the subsistence of their marriage is theirs to share equally in unity and love ... I do not see why the issue of contribution to the property should arise at all. The property is theirs—Period. In 1995, for the first time in our history, the Constitution of Uganda clearly put into reality the equality in marriage principle contained in Genesis Chapter 2 verse 24 (supra) and what those who choose to contract marriages under the Marriage Act undertake to practice. My conclusion is that matrimonial property is joint property between husband and wife and should be shared equally on divorce, irrespective of who paid for what and how much was paid. Very often, the woman will find a husband who is already wealthy and has a lot of property. If that property belongs to the man at the point of exchanging the vows in Church, that property becomes joint property.²⁷

Contrary to the decision in the *Kintu* case, where the Court emphasized that a share of matrimonial property is dependent on a spouse’s contribution, Twinomujuni J’s ruling in the *Rwabinumi* case took a turn by introducing the notion of automatic half-share in matrimonial property. It is also evident from the Court of Appeal decision that contribution did not matter in the distribution of matrimonial property. In the Court’s view, merely making marriage vows automatically entitled a spouse to equal share.²⁸ One also gathers that the notion of equality under article 31(1) of the Constitution of Uganda of 1995 was interpreted literary

²⁴ *Kintu* case (n 21) page 12.

²⁵ *Kintu* case (n 21) page 15.

²⁶ *Rwabinumi v Bahimbisomwe* (Civil Appeal No. 30 of 2007) [2008] UGCA 19 (19 June 2008), Court of Appeal decision handed down on 19 June 2008, page 12–13 (*Rwabinumi 1* case) and *Rwabinumi v Bahimbisomwe* [2013] UGSC 5 (20 March 2013). (*Rwabinumi* case).

²⁷ *Rwabinumi 1* case page 12–13.

²⁸ *Ibid* page 12.

to mean a 50:50 ratio in the distribution of matrimonial property. In this case, article 31 provided basis for the Court of Appeal's conclusion that marriage justifies an automatic half-share in matrimonial property.²⁹ Evident in a holistic reading of the Court of Appeal decision is the fact that apart from citing the Constitution and the Bible, Twinomujuni J did not articulate how the interpretation of the various constitutional provisions led to the conclusion of an automatic half-share in matrimonial property.

On appeal before the Supreme Court,³⁰ the appellant (husband) in *Rwabinumi* case submitted that the share in matrimonial property should be based on the contributions made. The Supreme Court reversed the decision of the Court of Appeal in which equality under article 31 was equated to an automatic half-share in matrimonial property. In its decision, the Supreme Court took into account the role of all contributions including non-monetary contributions.³¹ The Court referred to previous cases, including the *Kintu* case, which gave recognition to contribution (including homemaking) as a basis for distribution of matrimonial property.³² Having referred to these decisions, the Supreme Court arrived at the same conclusion as the Court of Appeal regarding the ratio of distribution of matrimonial property (50:50).³³ The Supreme Court buttressed contribution as a basis for distribution of matrimonial property and although it did not state it explicitly, apparent in the decision is the fact that the notion of equality under article 31 of the Constitution is not synonymous with equal proprietary entitlements and does not give a spouse an automatic half-share in matrimonial property. The Supreme Court decision, however, confirmed that depending on the contribution of spouses, a contribution-based model can result into a 50:50 share of matrimonial property.

Up to this point in Uganda's jurisprudence, there were no guidance on how contribution, particularly homemaking, should be assessed. The decisions of courts indeed acknowledged non-monetary contributions, including homemaking, as a form of contribution to matrimonial property. However, there was no guidance on how the homemaking contribution should be evaluated for purposes of distribution of matrimonial property upon divorce.

The decision in *Ambayo*³⁴ represents the first attempt by Uganda's courts to provide guidance on how the homemaking role should be assessed. The case arose from an appeal lodged by Ambayo (husband) against his wife (Aserua). Ambayo and Aserua started cohabiting in 1989 when Aserua was nineteen and Ambayo was twenty-four years old. The couple had four children together during this period of cohabitation. At the start of the couple's cohabitation, Aserua had no formal education. During the marriage, she enrolled in school and went on to obtain a certificate in tailoring, a diploma in design and driving skills, all of which were sponsored by Ambayo. Ambayo was at the time employed and the breadwinner of the home while Aserua was juggling homemaking and formal education. While cohabiting, the couple bought land and Ambayo was registered as the sole purchaser. Ambayo contributed to the purchase of the vacant land and the family home was constructed on it. Ambayo was the main financier of the construction project including its supervision. Ambayo also personally installed water and electricity in the matrimonial home. He was also responsible for the general house expenses including school fees for their four children. Aserua made some

²⁹ Ibid page 11–12.

³⁰ *Rwabinumi* case (n 25).

³¹ Ibid page 11–12.

³² *Sempiga v Sempiga Musajjawaza*, High Court Divorce Cause No. 007 of 2005 (Unreported); *Chapman v. Chapman*, [1969] All E.R. 476; *Muthembwa v Muthembwa*, [2002] 1 EA 186; *Kagga v. Kagga*, High Court Divorce Cause No. 11 of 2005, (unreported); *Kintu* case (n 21).

³³ Ibid page 13.

³⁴ *Ambayo* case (n 9).

meagre monetary contribution towards the purchase and construction of the matrimonial property.

In 2005, Ambayo and Aserua solemnized their marriage in accordance with the marriage laws of Uganda. The marriage was dissolved in 2012 and at this time, Aserua was self-employed as a seamstress and baker while Ambayo was employed as a technician. The High Court awarded Aserua 50 per cent of the matrimonial property, reasoning that the property in contention belonged to the couple jointly in equal shares.³⁵ In arriving at the 50 per cent share between the spouses, the High Court made no analysis of how the wife's input, both as a homemaker and through monetary input, contributed to the acquisition of the matrimonial property to justify the 50 per cent share in it. The High Court operated on the premise that equality in terms of article 31 of Uganda's Constitution was synonymous with an automatic half-share in matrimonial property. Dissatisfied with this decision, Ambayo appealed in the Court of Appeal. It was Ambayo's submission that the High Court erred in finding that Aserua contributed to the acquisition of the matrimonial property.

The Court of Appeal reversed the decision of the High Court, finding that Aserua was only entitled to 20 per cent of the matrimonial property based on her contribution to its acquisition. The Court of Appeal held that:

- i) Marriage does not give a spouse an automatic half-share in the matrimonial property.
- ii) A spouse's share in the matrimonial property is dependent on their contribution to it.
- iii) Contribution can be monetary, non-monetary, or both.
- iv) In determining the value of homemaking, the market value of similar services should be considered.
- v) Where one party contributes towards the education of the other spouse during marriage, such contribution should be deducted from the beneficiary spouse's total claim for homemaking.³⁶

The Court of Appeal repudiated the notion of 'equity is equality', considering it a misconception of article 31 of the Constitution.³⁷ In departing from the 50 per cent share awarded to Aserua by the High Court, the Court explained comprehensively how the homemaking role impacted on the acquisition of matrimonial property and how that contribution justified Aserua's 20 per cent share in this property.³⁸ As opposed to finding that marriage automatically entitled the wife to a 50 per cent share in matrimonial property, the Court of Appeal took detailed stock of the nature and scope of Aserua's contribution and concluded that the scope of her homemaking activities and monetary contributions did not justify a 50 per cent share in the matrimonial property.³⁹ The Court engaged with several pieces of evidence including the fact that a significant portion of care and domestic work was carried out by two live-in house helps who were paid by Ambayo.⁴⁰ The evidence also showed that Aserua's schooling commitments made it impractical for her to engage in full-time unpaid care and domestic work.⁴¹ The Court noted that while Aserua made some monetary contributions to the matrimonial property, these were generally meagre compared to the value of the matrimonial property.⁴²

³⁵ *Ambayo Joseph Waigo v Aserua jackline*, 2014 in High Court Divorce Cause No. 10 of 2012.

³⁶ *Ibid.*

³⁷ *Ambayo case* (n 9) page 25

³⁸ *Ambayo case* (n 9) page 13–28.

³⁹ *Ibid.*

⁴⁰ *Ambayo case* (n 9) page 14.

⁴¹ *Ibid.*

⁴² *Ambayo case* (n 9) page 19.

Worth observing is that the automatic half-share approach by the High Court resulted into a 50 per cent award to Aserua while the contribution-based approach by the Court of Appeal brought it down to 20 per cent. With the demise of the automatic half-share approach resulting in a reduction in Aserua's share in the matrimonial property, a question arises as to the extent to which a contribution-based approach fosters substantive equality for women. Not surprisingly, following the *Ambayo* decision, some commentators were of the opinion that the demise of the automatic half-share approach is against the principles of equality, non-discrimination, and retrogressive given the progress Uganda has made in protecting the rights of women.⁴³ Others consider the decision a bad precedent that rolls back the progress made in recognizing homemaking as a contribution to matrimonial property in Uganda's matrimonial property regime.⁴⁴ There are, however, concerns that an automatic half-share undermines the equitable division of matrimonial property.⁴⁵ These divergent views raise the question: can a contribution-based approach foster substantive equality for women? The next section answers this question by engaging with the key rulings in *Ambayo* on contribution to explore if there is scope for substantive equality for women in a contribution-based approach to the distribution of matrimonial property.

III. IMPLICATION OF AMBAYO FOR WOMEN'S SUBSTANTIVE EQUALITY

Substantive equality places emphasis on equality of outcomes for marginalized and disadvantaged individuals or groups in society. It demands that laws, decisions, and policies are analysed based on their outcomes, ensuring that they alleviate rather than maintain inherent disadvantage for marginalized groups, in this regard women.⁴⁶ The focus is 'the nature of the impact of particular laws or their application on women's lives and their ability to access and enjoy their human rights fully and on an equal basis'.⁴⁷ In its General Comment on the rights of spouses in marriage, the African Commission noted that 'the notion of substantive equality recognizes that equality can only be achieved if the relevant government interventions respond to the historical, social, religious, political and economic conditions that affect the exercise and enjoyment of rights by individuals as part of communities to which they belong'.⁴⁸ The question therefore is whether the demise of an automatic half-share, recourse to market value to assess homemaking contributions, and deduction of education fees from homemaking contributions foster substantive equality.

⁴³ See e.g. J. Tamale, 'Marital property share decision by the appeals court, in part misstates the law', Daily Monitor, 17 November 2022 <<https://www.monitor.co.ug/>> (accessed 30 April 2024). See similar criticism in the context of Kenya in M. Gayoye, 'Why Women Judges Really Matter: The Impact of Women Judges on Property Law Outcomes in Kenya' (2022) 31 (1) *Social and Legal Studies* 72–98, 98. See also S. Mabaso 'The equitable division of the matrimonial home violates women's rights in their matrimonial homes upon divorce: A critical analysis of the current legal approach in the division of the matrimonial home registered in the husband's name upon divorce and how it violates women's rights' (2018) 2, <<https://searclw.ac.zw/wp-content/uploads/2023/09/MabasoShingai18Q16.1Z.pdf>> (accessed 7 October 2024).

⁴⁴ P. Kwagala 'She cooks, cleans and cares ... so why is a woman in Uganda worth only 20% of divorce assets?' The Guardian, 10 February 2023, <<https://www.theguardian.com/global-development/2023/feb/10/woman-uganda-divorce-assets-worth>> (accessed 8 October 2024).

⁴⁵ See e.g. V. Grainer, 'What's Yours Is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand' (2002) 11 *Pacific Rim Law & Policy Journal* 285; J. Grigienė et al 'Unequal Contributions: Problems within the Division of Shares in Joint Community Property' (2020) 13(1) *Baltic Journal of Law & Politics* 24–50.

⁴⁶ General Comment No. 6 (n 12) page 11.

⁴⁷ General Comment No. 6 (n 12) paragraph 40.

⁴⁸ Ibid.

1. Demise of automatic half-share and substantive equality for homemakers

To reiterate, the Court of Appeal in *Ambayo* held that article 31(1) of the Constitution which guarantees equal rights at the dissolution of marriage is not synonymous with an automatic half-share in matrimonial property between spouses. Rather, share is dependent on one's contribution.⁴⁹ Drawing insight from the Kenyan Court of Appeal decision in *PNN v ZW*,⁵⁰ Uganda's Court of Appeal cited Judge Kiage's ruling in the case of *PNN v ZW* which was as follows:

Does this marital equality recognised in the Constitution mean that matrimonial property should be divided equally? I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.⁵¹

To conclude whether departure from an automatic share fosters substantive equality for women, it is vital to understand the scope and nature of homemaking. Homemaking involves unpaid care and domestic work. It takes different forms and varies from one household to another. Obvious examples include caring for sick family members, elderly, children, household chores like cleaning, laundry, cooking, grocery shopping, cooking, gardening, and child-bearing. The International Labour Organisation (ILO) estimates that 'unpaid domestic and care work would equal a substantial portion of global gross domestic product if given an equivalent monetary value.'⁵² Of this contribution to gross domestic product, women, and girls contribute up to 76 per cent of total daily hours on unpaid care and domestic work.⁵³ Oxfam reports that '[women] carry out 12.5 billion hours of unpaid care work every day. When valued at minimum wage this would represent a contribution to the global economy of at least \$10.8 trillion a year.'⁵⁴

Studies have established that the work of a homemaker often encompasses endless demands and depending on the size and nature of a home, a homemaker may work over 98 hours per week.⁵⁵ Data from a 2019 Salary.com survey established that if homemakers were to be paid, we would be looking at an average annual salary of \$178,201.⁵⁶ This figure is not exaggerated and could even be an underestimation as some homemakers work around the clock by rendering services of teachers, private chefs, drivers, counsellors, house cleaning, laundry, child care, recreational therapy, network administration, therapists, personal coaches, among others. The responsibilities increase when young children are involved as tasks often include late-night and early morning meal preps, night-time feeding, and attending to morning risers.

⁴⁹ *Ambayo* case (n 9) page 17.

⁵⁰ *PNN v ZWN*, Civil Appeal No. 128 of 2014 [2017] eKLR (*PNN* case).

⁵¹ *Ibid*. Note that Article 45(3) of the constitution of Kenya, 2010 on marital equality is similar in content to Article 31(1) of the constitution of Uganda 1995.

⁵² International Labour Organisation, 'Why Measuring Unpaid Domestic and Care Work Matters' 2024 <<https://ilostat.ilo.org/topics/unpaid-work/measuring-unpaid-domestic-and-care-work/>> (accessed 27 April 2024).

⁵³ *Ibid*.

⁵⁴ Oxfam International, 'Not All Gaps Are Created Equal: The True Value of Care Work' <<https://www.oxfam.org/en/not-all-gaps-are-created-equal-true-value-care-work>> (accessed 29 April 2024).

⁵⁵ P. Morgan 'How Much Is a Stay-at-Home Parent Worth?' (2022) <<https://www.investopedia.com/financial-edge/0112/how-much-is-a-homemaker-worth.aspx#citation-3>> (accessed 29 April 2024).

⁵⁶ Salary.com. 'How Much Is a Mother Really Worth?' <<https://www.salary.com/articles/mother-salary/>> (accessed 29 April 2024).

Moreover, women from low-income countries like Uganda shoulder an even greater and disproportionate responsibility for unpaid care and domestic work as these countries do not have working national programs on childcare and social security. The poor infrastructure in developing countries has also meant that women suffer the brunt of failures of government. Oxfam reports that ‘inadequate water systems, fuel and cooking facilities result in women and girls having to make long and backbreaking daily trips to collect water and firewood, while under-funded health services mean many must walk miles to get medical care for their families.’⁵⁷

Studies have also established that there are more women taking up employment outside the home.⁵⁸ While historically, women were entirely excluded from the workforce, there is undisputed evidence of women in the workforce, with some even taking on the role of breadwinner. According to the ILO, globally, the labour force participation rate of women stood at 47.4 per cent in 2022.⁵⁹ However, evidence suggests that even with women entering the workforce, the imbalance in unpaid care and domestic work remains unredressed. In the UK, for example, studies reveal that 45 per cent of female breadwinners still do most of the unpaid care and domestic work compared to just 12.5 per cent of male breadwinners.⁶⁰ These studies have also established that the average female breadwinner spends the equivalent of an entire working day taking care of the house on top of their full-time job.⁶¹ According to the United Nations, globally, women perform most of the unpaid domestic and care work, having to spend three times more hours per day than their male counterparts.⁶² In Uganda, the rate of participation of females in the labour force is 67.6 per cent.⁶³ This confirms that there are more women taking up employment outside the home in Uganda and by implication working a double or even triple shift as they are having to do this alongside executing most if not all the care and domestic work in the home.

For a woman engaged in both wage-earning employment and unpaid domestic and unpaid care work, limiting the share of matrimonial property to a 50:50 share would not only marginalize and disadvantage her further, but also lead to unfairness in the distribution of matrimonial property. Why? In addition to shouldering the burden of unpaid care and

⁵⁷ Oxfam, ‘Unlocking Sustainable Development In Africa By Addressing Unpaid Care And Domestic Work’ Oxfam Policy Brief, February 2020, page 3, <<https://oxfamlibrary.openrepository.com/bitstream/handle/10546/620939/bp-sustainable-development-africa-ucdw-030220-en.pdf;jsessionid=7D2B8790380C10E4FEBD79EF2149B2EC?sequence=1>> (accessed 30 April 2024).

⁵⁸ World Economic Forum, ‘When More Women Join the Workforce, Everyone Benefits. Here’s Why’, 4 December 2018 <<https://www.weforum.org/agenda/2018/12/economic-gains-from-gender-inclusion-even-greater-than-you-thought/>> (accessed 29 April 2024); Institute for Fiscal Studies, ‘The Rise and Rise of Women’s Employment in the UK’ 27 April 2018 <<https://ifs.org.uk/publications/rise-and-rise-womens-employment-uk>> (accessed 29 April 2024); A. Twinomujuni ‘Women Working Outside the Home Challenge Gender Roles in Uganda: Nearly 80 Percent of Women Participate in Uganda’s Workforce’ 14 April 2013, *Global Press Journal*, <<https://globalpressjournal.com/>> (accessed 29 April 2024).

⁵⁹ Statement by Gilbert Hougbo Director-General International Labour Organization 107th Meeting of the Development Committee April 12, 2023 Washington, DC, <<https://documents1.worldbank.org/curated/en/099041223183521981/pdf/BOSIB01183ea62057082c90f4f72ff8d001.pdf#:~:text=Globally%2C%20the%20labour%20force%20participation%20rate%20of%20women,economically%20inactive%20man%20there%20are%20two%20such%20women>> (accessed 30 April 2024); R. Atieno ‘Explaining Female Labour Force Participation: The Case of Kenya’s Informal Sector and the Effect of the Economic Crisis’ (2010), Paper Presented to the 2010 Annual IAFFE Conference, Buenos Aires, Argentina; F. Namuggala ‘Exploitation or Empowerment? Adolescent Female Domestic Workers in Uganda’ (2015) 6 (4) *International Journal of Child, Youth and Family Studies* 561–580.

⁶⁰ Institute of Epidemiology & Health Care, ‘Women Still Doing Most of the Housework Despite Earning More’, 21 November 2019, <<https://www.ucl.ac.uk/epidemiology-health-care/news/2019/nov/women-still-doing-most-housework-despite-earning-more>> (accessed 30 April 2024); The Guardian, ‘Almost Half of Working-Age Women in UK do 45 Hours of Unpaid Care A Week—Study’, 31 March 2022, <<https://www.theguardian.com/world/2022/mar/31/almost-half-of-working-age-women-in-uk-do-45-hours-of-unpaid-care-a-week-study>> (accessed 30 April 2024).

⁶¹ Ibid.

⁶² United Nations Economic and Social Council, ‘Special Edition: Progress towards the Sustainable Development Goals’, Report of the Secretary-General (2019) <<https://unstats.un.org/sdgs/files/report/2019/secretary-general-sdg-report-2019-EN.pdf>> (accessed 30 April 2024).

⁶³ World Bank Group ‘Gender Data Portal -Uganda’ <<https://genderdata.worldbank.org>> (accessed 27 September 2024).

domestic work, this woman is also contributing monetarily to the home. Insisting on an automatic half-share is tantamount to penalizing women for the double burden of homemaking and breadwinning. Even assuming that a woman's contribution is strictly homemaking, depending on the circumstances and conditions under which such care or domestic work is conducted, there will be instances where a homemaker's fair estimate of contribution is more than 50 per cent. An automatic half-share leaves courts with no discretion to take these unique efforts into account. A contribution-based approach ameliorates this challenge by basing a woman's share in matrimonial property to the scope of her contribution as opposed to an ambiguous half-share. In line with the ethos of substantive equality, this approach has potential to alleviate rather than maintain inherent disadvantage that women have experienced historically and continue to experience in division of matrimonial property upon divorce.

In *Ambayo*, the Court of Appeal awarded Aserua a share of 20 per cent in the matrimonial property.⁶⁴ Some have argued that the decision went contrary to the precepts of equality enshrined in Uganda's Constitution.⁶⁵ However, viewing this decision through a contribution-based lens, the Court's award was arguably appropriate considering the circumstances of the case. Notably, Aserua employed two live-in house helps. These house helps shouldered a massive portion of the homemaking duties that have traditionally been conducted by homemakers single-handedly. These house helps were paid by Ambayo, the husband in the marriage. Moreover, with Aserua having no formal education at the time she met Ambayo, she spent a sizeable portion of her time pursuing formal education and not performing unpaid care and domestic work. Suffice it to note that her education was also funded by Ambayo. Thus, a 50 per cent share would have undermined the equitable distribution of matrimonial property. Therefore, on the one hand, the contribution-based approach weeds out spouses who would have unfairly benefited from matrimonial property they did not contribute to. On the other hand, it leaves room for women who provide full and valid contribution through homemaking, or, who take on dual roles as homemakers and breadwinners, to get a fair share of matrimonial property upon divorce.

2. Quantification of unpaid care and domestic work based on market value

Decisions prior to *Ambayo* clearly recognized homemaking as a form of contribution to matrimonial property. However, no reported case dealt with quantification of homemaking. The Court of Appeal in *Ambayo* held that in assessing the value of unpaid domestic and care work for purposes of determining contribution and share in matrimonial property, consideration is to be given to the monetary value of similar services on the market.⁶⁶ This entails taking stock of the various homemaking tasks and then measuring them against the market value of similar services. The 'money's worth' of care and domestic work on the market amounts to the homemaker's contribution towards matrimonial property.⁶⁷ Since the purpose of evaluating the homemaker contribution is to value the unwaged domestic and care work that women do in caring for children and homes against market value of similar services, the quality, quantity, and extent of actual performance of the care and domestic tasks become relevant as the economic value of the homemaking contribution is in the tasks performed.

It is to be emphasized that the recognition of unpaid care and domestic work as a contribution to matrimonial property is in line with current international standards on the rights

⁶⁴ *Ambayo* case (n 9) page 28.

⁶⁵ See e.g. Tamale (n 43).

⁶⁶ *Ambayo* case (n 9) page 24 & 25.

⁶⁷ *Ambayo* case (n 9) page 25.

of women including those contained in CEDAW and Maputo Protocol.⁶⁸ The implication of such recognition for substantive equality in the share of matrimonial property cannot be overstated. Recognition of homemaking as a contribution in Uganda means that a sexist economic system that accumulates wealth and power in breadwinners, mostly men, by exploiting the labour of homemakers, mostly women, can be redressed. Women can rely on their contribution in terms of unpaid care and domestic work to make valid claims regarding a share in matrimonial property upon divorce. Recognition of unpaid care and domestic work therefore has potential to promote gender equality. However, would valuing the homemaking role against the market value of similar services foster substantive equality for women in Uganda?

A practical challenge to recourse to market value pertains to the undervaluation of care and domestic work which impacts on market price. As noted, globally, women contribute significantly to matrimonial property specifically through homemaking. Some of their contributions are incalculable.⁶⁹ Unfortunately, most economies accord value to the wealth of breadwinners, who are mostly men, more than the uncalculatable hours that women put in daily towards unpaid care and domestic work. Seedat and Rondon submit that 'unpaid care work is often perceived as low value and is invisible in mainstream economics, underpinned by entrenched patriarchal institutions and national accounting systems that fail to factor in women's total contributions.'⁷⁰ The undervaluation of care and domestic work is institutionalized, and this has a lot to do with the historical roots of this nature work.⁷¹ It is work that was predominantly performed by women in the home with no pay. Yet, studies have established that 'care work is the 'hidden engine' that keeps the wheels of our economies, businesses and societies turning.'⁷² Often, however, the market price appended to most feminine care and domestic work is not a true reflection of the value and worth of such work. The institutionalized undervaluation of care and domestic work often sips into judicial decision making, with one commentator observing that 'non-monetary contribution appears to be a lesser consideration given the ease of proving monetary contributions.'⁷³ The market price, which is often not a reflection of the value of the care and domestic work, has potential to undermine substantive equality for homemakers.

Undervaluation of homemaking is further heightened in countries like Uganda where there is no minimum wage for care and domestic workers. The last minimum wage in Uganda was set in 1984 and remains unrevised. Currently, some domestic workers earn as low as £1 per month.⁷⁴ In 2017, the government made a proposal for the minimum wage for all domestic workers to be set at 136,000 Ugandan Shillings per month.⁷⁵ This is an

⁶⁸ Article 7 Maputo Protocol (n 12), General Comment 6 (n 12), article 16(1)(c) CEDAW (n 12), Committee on Elimination of Discrimination Against Women, General Recommendation No.21: Equality in Marriage and Family Relations, para 32 (CEDAW General Recommendation No. 21).

⁶⁹ *XW v XH* [2019] EWCA Civ 2262, paragraph 243.

⁷⁰ S. Seedat and M. Rondon, 'Women's Wellbeing and the Burden of Unpaid Work' (2021) 374 *British Medical Journal* 1–3 <<https://doi.org/10.1136/bmj.n1972>>.

⁷¹ P. K. Sandberg, M. Törnroos, and R. Kohvakka, 'The Institutionalised Undervaluation of Women's Work: The Case of Local Government Sector Collective Agreements' (2017) 32 (4) *Work, Employment and Society* 707–725. <<https://doi.org/10.1177/0950017017711100>>; CEDAW General Recommendation No. 21 (n 5) paragraph 32.

⁷² Oxfam International, 'Not All Gaps Are Created Equal: the True Value of Care Work' (2024), <<https://www.oxfam.org/en/not-all-gaps-are-created-equal-true-value-care-work#:~:text=Even%20though%20it%20lays%20the%20foundation%20for%20a,treated%20as%20a%20cost%20rather%20than%20an%20investment.>> (accessed 30 April 2024).

⁷³ E. Akech, 'Equitably Assessing the Weight of Non-Monetary Contributions in Kenya' (2023) 8 (1) *Strathmore Law Review* 103–137, 103.

⁷⁴ Mywage.org/Uganda 'Domestic work in Uganda' <<https://mywage.org/uganda/labour-laws/domestic-workers#:~:text=The%20Minimum%20Wage%20in%20Uganda%20was%20set%20in,1.78%29%20and%20Shs%2010%20C000%20%28US%24%204.44%29%20per%20month.>> (accessed 29 April 2024).

⁷⁵ Daily Monitor 'Government Sets Shs130,000 Minimum Wage' 1 June 2017 <<https://www.monitor.co.ug/uganda/news/national/government-sets-shs130-000-minimum-wage-1704038>> (accessed 29 April 2024).

equivalent of £28 per month. This proposal was supposedly intended to address the continued exploitation of care and domestic workers in Uganda, who mostly earn less than 100,000 Uganda Shillings per month (about £20).⁷⁶ This minimum wage was intended to cover house helps who have now taken on most and sometimes all the homemaking duties of most working women in Uganda. They perform tasks ranging from cooking, childcare, gardening, cleaning, laundry, to taking care of the sick and elderly in a home.⁷⁷ The proposal of 136,000 Uganda Shillings is not just problematic, but also a reflection of the institutionalized undervaluation of care and domestic work in Uganda's economy.

The implication of a market value equivalence in Uganda's economy is that the contribution of homemakers to matrimonial property is insignificant because it is based on exploitative and oppressive market prices. Moreover, the fact that it is mainly women who are involved in homemaking means that the challenges of market value equivalence are gendered, with women suffering the brunt of the oppressive market prices attached to care and domestic work in the assessment of contribution to matrimonial property upon divorce. This not only leads to grossly unfair outcomes, but also, maintains the inherent disadvantage historically experienced by women. Moreover, even assuming Uganda had a minimum wage, thus making it probable that homemaking will be adequately valued, when the inquiry of homemaking is a matter of the list domestic tasks executed in the home, practical challenges arise regarding care and domestic tasks that are not quantifiable. For example, there is a mental task tied to all visible care and domestic work. This may take the form of organizing, planning and remembering domestic and caregiving tasks. This is hidden care work that is not factored into homemaking and often has no corresponding market price. Exclusion of such indirect and invisible work places the homemaking contributions on an unlevelled playing field with monetary contributions. In the *Ambayo* case, it is to be conceded Aserua made use of live-in house helps and spent part of her homemaking time pursuing education. Even so, it is hard to argue that her homemaking role coupled with her small financial contribution deserved only 20 per cent share in the matrimonial property. This low award is arguably linked to court's discretion which is largely informed by the culture of undervaluation of care and domestic work.

Based on the above practical challenges, substantive equality for women in a contribution-based regime can only be achieved if care and domestic work in a home is adequately valued and considers both quantifiable and unquantifiable aspects of homemaking. The Court of Appeal in *Ambayo* gave guidance on how this can be achieved without making quantification of homemaking a strict arithmetic exercise involving taking stock of care and domestic tasks and their corresponding market prices. It ruled that:

[Aserua, the wife], having set out in detailed terms the activities which constituted her contribution to the matrimonial property, the trial court, after assessing the credibility of the evidence before it, ought to have borne at the back of its mind the money's worth of such activities while not losing sight of the fact that the dispute involves rights of spouses *inter se* and warrants less strictness than that exercised by a court when considering the dealings between "strangers" which are ordinarily at "arm's length". Then an appropriate discount ought to have been made on that account in conformity with the principle of according less strict consideration of the evidence of proof of contribution and valuation in cases involving spouses *inter se*.⁷⁸

⁷⁶ Mywage.org/Uganda (n 74).

⁷⁷ F. Namuggala 'Empowered Yet Vulnerable: Employers of Housemaids in Kampala' (2016) 31 (2) *Journal of Social Development in Africa* 561–580; F. Namuggala (n 59) 564.

⁷⁸ *Ambayo* (n 9) page 25.

The less strict approach suggested by *Ambayo* has potential to foster substantive equality for women because it takes cognisance of the unique nature of family settings where contributions and agreements are often unwritten based on the assumption that the home is a safe environment where mutual love and trust flourishes as opposed to an arena for counting scores on who does what. This removes women from the precarious position of having to prove every single contribution with concrete evidence. Therefore, the lack of evidence to prove the care and domestic work conducted by the homemaker cannot be a basis for awarding homemakers a lower share of matrimonial property. A less strict approach also makes room for recognition of homemaking contributions which cannot be proved by concrete evidence, particularly the unquantifiable aspects of homemaking.

Overall, there is potential for achieving substantive equality for women by quantifying the homemaking role based on the market value of comparable services. However, this requires an accurate valuation of homemaking and a more flexible approach to demonstrating the nature and extent of care and domestic work performed by the homemaker. Additionally, given that judges have frequently overlooked the value of care and domestic work, there is a risk that applying a discount to the homemaking contribution as evident in the ruling above could diminish the homemaker's share, thereby undermining substantive equality for women.

3. Recognition of contribution to career development and its potential to foster substantive equality for women

There is scope for substantive equality for women where a party's support to a spouse's education or career development is recognized as a contribution to matrimonial property. Such recognition places homemaking support on par with monetary support such as the payment of school fees. The Court in the *Ambayo* case recognized that payment of school fees by *Ambayo* for *Aserua* to receive formal education was a contribution that should be considered in the distribution of matrimonial property. The Court started by recognizing valuable nature of education, noting that:

Education transforms the individual and their world outlook. In the matter before us, the respondent was transformed from an individual who was totally dependent on the appellant at the time they started cohabiting, into an individual who was self-employed as a seamstress, tailor, and baker at the time the marriage broke up.

The Court then went on to state that 'by the appellant investing in the respondent's education, he was in a sense paying her and there by reduced on the quantum of her claim for the unpaid care work.'⁷⁹ It accordingly ruled that the contribution to the wife's education should be deducted from her claim for homemaking.⁸⁰ In the Court's view:

the cost of [education] can be evaluated in terms of the school fees and other money spent by the appellant towards tuition and other scholastic requirements of the respondent. This cost is usually easy to quantify. But the cost or value of the education venture can also be evaluated in terms of what the respondent was disabled from contributing towards the family good as she spent (or invested) her time, presence, and resources at school. This is what economists term as being the 'opportunity cost' of the education venture.⁸¹

⁷⁹ *Ambayo* case (n 9) page 27.

⁸⁰ *Ambayo* case (n 9) page 25–26.

⁸¹ *Ambayo* case (n 9) page 26.

Applying the same principles to homemakers' nonmonetary contributions can promote substantive equality for women. Notably, many women experience setbacks in their career advancement when they assume the roles of wives and mothers.⁸² Their careers often slow down as they support their spouses' professional and educational growth. A study examined college women's expectations regarding marriage, career, and motherhood, revealing a direct correlation between motherhood and lower attainment of advanced degrees among women.⁸³ Initially, career development was a priority for these women in their early twenties. However, seven years later, their career progression had suffered a setback. While marital status did not affect the attainment of advanced degrees or career status, women who became mothers had significantly lower career status and fewer advanced degrees. These findings confirm that motherhood often leads to a slowdown in career development and the pursuit of advanced degrees. This dynamic makes the role of supporting spouses in achieving advanced degrees gendered. In marital relationships, women often assume more household responsibilities, including supporting their spouses' career and educational advancement. By taking on these responsibilities, women create a conducive environment for their spouses to develop their careers and advance their education. Although homemaking is a nonmonetary role, it significantly contributes to their spouse's career and educational progress. In the *Ambayo* case, the payment of school tuition and fees for Aserua was deducted from Aserua's share of the matrimonial property. Similarly, the court should have recognized homemaking as a contribution to Ambayo's career development and compensated Aserua for her sacrifices in the home.

Here, the 2020 Malawian case of *Tawesa v Tawesa*⁸⁴ is instructive. The facts of this case were that the petitioner and respondent were married customarily in 1995 and remained married until 2012. The petitioner was a homemaker and financially dependent on the respondent who was the breadwinner. As a homemaker, the petitioner, was responsible for the well-being of the family and performed tasks such as taking care of their four children, doing laundry, and cooking for the entire family. Earlier in the marriage, the respondent was a primary school teacher. During marriage, the respondent pursued further studies and attained a Diploma and Degree in Education. This catapulted his career from primary teaching to lecturer in one of the colleges in Malawi. Upon completion of tertiary education, the respondent petitioned the Court for dissolution of his marriage to the Petitioner. The Petitioner petitioned court for declarations that:

- 1) There is property in the educational qualifications of the Respondent, namely the Bachelor of Education Humanities and the Diploma in Education.
- 2) The property in the said educational qualifications is family property.
- 3) The petitioner has beneficial interest in the property in the Respondent's Bachelor's Degree and Diploma owing to the significant contribution the Applicant made towards the Respondent's acquisition of the said degree in the 20 years the Applicant was married to the Respondent.
- 4) The said property in the bachelor's degree and diploma be distributed on a 50/50 basis.

⁸² B. Barhate et al 'Career Disruptions of Married Women in India: An Exploratory Investigation' (2021) 24 (1) *Human resource Development International* 401.

⁸³ M. Hoffnung 'Wanting It All: Career, Marriage, and Motherhood During College-Educated Women's 20s' (2004) 50 *Sex Roles: A Journal of Research* 711.

⁸⁴ *Tawesa v Tawesa* in The High Court of Malawi, Matrimonial Cause No.9 of 2012, Judgment delivered on 31 August 2020 (*Tawesa* case).

The Court ruled that ‘the demand to distribute the said property in the educational qualifications in a 50/50 basis is too farfetched.’⁸⁵ However, the Court recognized the qualification as matrimonial property and noted that ‘to ignore the contributions of the sacrificing spouse would be to work an injustice, an unfair advantage to the spouse who has gained the education and degree without obligation. There would be an unjust enrichment of the educated spouse.’⁸⁶ Consequently, the Court ordered the Respondent to compensate the Petitioner financially for her contribution to the Respondent’s educational qualifications.⁸⁷

It is worth noting that in most cases pertaining to distribution of matrimonial property upon divorce, courts tend to ignore the role of the homemaker in freeing up space and creating a conducive environment for the breadwinner for career development or tertiary education. In the *Ambayo* case, Ambayo was a technician while Aserua contributed through homemaking. However, in quantifying the homemaking contribution, the Court paid no attention to the sacrifices that Aserua made to ensure Ambayo’s career stability and success. The contribution to career and education was one-sided, with the court focussing on the financial contribution Ambayo made towards Aserua’s education fees without regard to homemaking as a contribution to Ambayo’s career development. This speaks to the hurdle and tendency of courts to disregard homemaking as a contribution. As pointed out in the case of *Tawesa*, to ignore the homemaking contribution of Aserua would be to work an injustice and an unfair advantage to Ambayo who attained skills and knowledge without obligation. If courts give weight to homemaking as contribution to career development or educational advancement as they do monetary contributions, there is scope for substantive equality for women in the distribution of matrimonial property.

IV. CONCLUSION

In conclusion, while the contribution-based approach to matrimonial property distribution holds potential for fostering substantive equality, several obstacles make this difficult to achieve. This article has examined Uganda’s contribution-based approach to determine its capacity for promoting substantive equality for women. By tracing the evolution of Uganda’s model from the *Kintu* case to the recent *Ambayo* decision, the analysis highlights key rulings in *Ambayo* that suggest some promise for substantive equality in a contribution-based model for distributing matrimonial property upon divorce. First, moving away from the automatic half-share allows for compensation of women for their dual roles as homemakers and external workers, reflecting the reality of many women’s lives today. Secondly, valuing homemaking based on market rates allows competitive market prices for care and domestic work to inform the assessment of women’s contributions. Thirdly, recognizing monetary support for education and career advancements as a form of contribution paves the way for acknowledging homemaking as a contribution to career development or educational advancement. This recognition enables compensation for women who create a supportive environment for their spouses’ educational and career achievements. However, several hurdles undermine the promise of substantive equality. The absence of a minimum wage in Uganda complicates the valuation of homemaking against market rates, as homemaking is often compared to exploitative wages. Additionally, applying a discount to the market value of homemaking, as suggested in *Ambayo*, further diminishes the homemaker’s share. Furthermore, the lack of tangible proof for the homemaking role can lead to exclusion of some roles from the valuation process. Finally, practical challenges remain in valuing unquantifiable care and domestic

⁸⁵ *Tawesa* case (n 84) page 13.

⁸⁶ *Tawesa* case (n 84) page 11.

⁸⁷ *Ibid.*

tasks, which continues to disadvantage homemakers in their share of matrimonial property. In summary, while Uganda's contribution-based approach offers a framework for recognizing and compensating women's multifaceted roles, significant challenges must be addressed to achieve true substantive equality in matrimonial property distribution.

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