

**IN THE HIGH COURT OF TANZANIA  
AT MWANZA**

**PC.MATR. CIVIL APPEAL NO.01 OF 2010**

*(Originating from Nyamagana D/Court Matr.  
App.No.3/2009 arising from Mwanza Urban  
Court Civil Case No.120/2008)*

**ALNASHIR ESMAIL.....APPELLANT**

**Versus**

**MEHRUN HASSANALY.....RESPONDENT**

**JUDGEMENT**

9/11&7/12/2010

**Sumari, J**

After the appeal was filed respondent engaged an advocate to represent her. This is Mr. Njelwa, advocate, and the appellant is represented by Mr. Magoiga, advocate. On 07/9/2010 Mr. Njelwa informed this court that he has lost contact with his client, the respondent so he requested for leave of the court to disqualify himself from representing the respondent for lack of instruction, which leave I granted. As such Mr. Magoiga, learned counsel requested for substituted service and thus respondent was duly served by way of substitution in the Mwananchi newspaper dated 14/9/2010. Despite the substituted service respondent declined to appear so the matter proceeded ex-parte.

As for the first ground of appeal, it is submitted that according to the Indian Customs and usage, children are named and considered to belong to the father and therefore whenever there is a dispute, then children remains in the father's custody.

The only reason for the trial magistrate to neglect this was that the customs are not codified. It is Mr. Magoiga's contention that, that issue alone can not warrant the Court not to consider the state affairs of the parties. He insisted that there are known customs which are not codified and are taken into consideration.

As for the 2<sup>nd</sup> ground he submitted that, the appellant is a business man in Arusha and he stays with his sister, and he has two workers who are taking care of the children, and the children were schooling in Arusha. So the respondent in Mwanza, had no job and even if she had job, still she had no one to take care of the children. Had the trial Court considered this, could grant the appellant's prayers.

As to where the children schooled Mr. Magoiga submitted that, it is not true that children are schooling at Mwanza. Respondent is not working with Masumin Traders as stated. She moves around Mwanza, Dar es Salaam to Kilimanjaro and that's why her advocate could not trace her. So the life the respondent is living is said to be a clear life of no survivor. That being the case it is argued that, such movements and life style tends to spoiling the children's life including education.

As for ground 4 he submitted that, there was no prove of the job and there is no evidence that she is working. And in-fact, she is not living in Mwanza currently. The children's life is thus in jeopardy if left with the respondent.

As for grounds 5 and 6, Mr. Magoiga submitted on the same vain that the trial court ordered that the appellant should maintain

the children. In his view this is a contradiction because that could not be an issue if the respondent had a good job to enable her means to care the children. He maintained that respondent had no means and the fact that the separation sought is for two years which are about to expire, he prayed the court to order the custody of children be in their father who stays in Arusha to carry on their education.

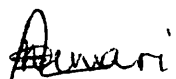
As for ground 7 he submitted that the issue that the respondent and his brother are said to have a good house, so she can take care of the children, was not an issue at the trial and therefore that was the trial magistrate's speculation which she wrongly based in her findings. He thus prayed the appeal be allowed, District Court's decision be quashed and set aside.

My careful reading of the record has revealed that the respondent sought in the primary court to have a temporary separation with her husband, the appellant which separation was granted for two years, a period which is about to end.

One question I've asked my self is the where about of the respondent who has failed without notice to attend to court knowing clearly that she had a case, a sensitive case involving herself and her children's affair if not the husband inclusive. This has prompted me to believe that the life she is leaving is in jeopardy with her children's life. I am however, not satisfied with the finding of the District court that because the respondent and his brother are said to have a good house, so the respondent can take care of the children, as a good ground to default the trial court's decision. As correctly put by the appellant's counsel that was not addressed at the trial magistrate court so that was just a speculation by the district court on it's

appellate jurisdiction. Even if that was an issue still that would not be a justifiable ground to grant respondent's prayer. I don't see any justification for appellant's children to be cared by the brother in law while himself is able and willing to care his own children. The appeal is allowed, the District Court's decision is quashed and set aside. I thus restore the trial primary court's decision. I further order whoever, in custody of the said child to immediately release and hand over the child to the appellant.

The appeal is allowed and no order for cost.

  
A.N.M. Sumari  
JUDGE

