

**IN THE HIGH COURT OF TANZANIA**

**PC CIVIL APPEAL NO.2 OF 2008**

**(Originating from District Court Tanga Civ.App. No. 8 of 2009)**

**Org. Civ. C.17 of 2006 of Urban Primary Court)**

**SALIMU AMIRI ..... APPELLANT**

**Versus**

**HIDAYA MOHAMED I .....RESPONDENT**

**JUDGEMENT**

*Date of last order: 5/5/2010*

*Date of Judgment: 4/6/2010*

**Teemba, J.**

This is a second appeal. The appellant filed a civil suit no. 17 of 2006 before the Tanga Urban Primary Court claiming for custody of his child. The respondent had denied him custody of the child on the ground that the appellant was not the father of the child. The Primary Court, after hearing a number of witnesses from both sides, decided the matter in favour of the appellant that, he is the father of the child. An appeal was preferred by the respondent Hidayah Mohamed against the decision. The District Court of Tanga confirmed the decision of the Primary Court that the appellant is the father of the child. As regards the custody of the child, the District Court decided that the issue was premature as their marriage was still subsisting. That, the appellant should petition for divorce praying for among other things, the custody of the child. The appellant was aggrieved by this decision and has appealed to this Court.

The appeal is based on four grounds. One, that the learned Resident Magistrate erred in law and fact for not deciding that the appellant be given the custody of the child after a finding that he is the father. Two, that the District Court misdirected itself in both law and fact

in deciding that the appellant should file a petition for divorce in order to claim custody of the child after having found out that the couple separated way back in 1994. Three, that the learned Resident magistrate erred in law and fact in its decision that the suit before the Primary court was not determined. The last ground is just a repetition of the first ground.

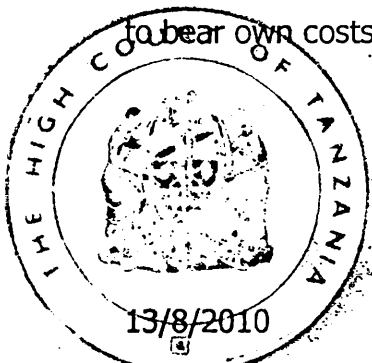
The appeal was opposed and the respondent filed a reply to Petition of Appeal. During the hearing of this appeal, the parties agreed to argue their grounds by way of written submissions. The appellant was represented by Mr. Komeye, learned advocate; who filed the submissions in support of the appeal. The respondent appeared in person but she was assisted by the Para-Legal Aid Scheme for Women and Children, Tanga who prepared for her submissions.


There is no doubt that the parties once lived together and they are now separated. The dispute between the parties as it appears in this appeal is, who among the two parties, should be granted custody of their issue of marriage. The trial court decided that the child – Mwamtumu Salim, is the appellant's daughter. Although the respondent denied the appellant to be the real father for the child, she had changed her mind following the judgment of the Primary court which was confirmed by the District Court – on appeal. As stated earlier in this judgment, the appellant's argument is to the effect that since the two courts below have conceded that he is the father of the child in dispute, then he should have been granted the custody of the said child.

I agree with the learned Resident Magistrate that the issue of custody was not determined by the trial court. The claim before the trial court was "*Kudai kupewa mtoto*" which in my literal translation means claim for custody of child. The trial court addressed itself on the issue of paternity only and left out the issue of custody. From the submission filed by the respondent, it comes out clearly that there are claims for expenses

incurred for the child's maintenance, medical bills, school fees and other necessary needs for the child. These are new issues/claims which were never presented to the trial court. Likewise, the District court did not decide on this issue. In my considered opinion, the first appellate Court was right because there was no evidence on record to act upon. It is important for me to reiterate the mandatory provisions of **section 125 of the Law of marriage Act Cap. 29 R.E. 2002** on the importance of courts to consider the best welfare of the child in deciding in whose custody a child should be placed. There is no doubt that evidence is required for a court to decide on this issue. The parties are therefore at liberty to pursue their right regarding the custody of their child before a court of competent jurisdiction.


In the upshot, this appeal is allowed to that extent. I have considered the circumstances of this appeal and I hereby order each party to bear own costs. it is so ordered.



  
**R.A. TEEMBA, J.**  
**4/6/2010**

Coram: R.A. Teemba, J.  
Appellant: Present  
Respondent: Present  
c/clerk: Daki

**Court:** The judgment is delivered today in the presence of both parties.

  
**R.A. TEEMBA, J.**  
**13/8/2010**