

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 36 OF 2019

**(Originating from Misc. Civil Appl. No 12 of 2019, Juvenile Court of Maji ya
chai at Maji ya Chai –Arumeru)**

MATHAYO LOISHIYE.....APPELLANT

VERSUS

VERONICA BAYNIT.....RESPONDENT

JUDGMENT

27/08/2020 & 13/11/2020

GWAE, J

The appellant, Mathayo Loishiye was the respondent in a case which commenced at the Juvenile Court of Maji ya Chai (to be referred as “the trial court” henceforth) and the respondent was the applicant, the two are couples. The respondent, Veronica Baynit in her application sought for an order of the court for maintenance of the children against the appellant. The trial court gave its decision in favour of the respondent.

The respondent's account was that the appellant is the father of three children and that they have been married for 21 years however in 2018 they

separated but not with an order a court of law and the respondent left the matrimonial home and is currently living with the children in a single rented room. The appellant is alleged for not maintaining his family, the main reason that made the respondent leave the matrimonial home. The respondent's claims that the appellant has not been paying school fees, medical expenses, food and clothes to his children and all that was left to the respondent. She thus wanted the appellant to be compelled to contribute towards maintenance of their children's welfares.

The appellant's assertion was that he has been maintaining his children by paying school fees, he urged the respondent to go back to their matrimonial home together with the children so that he can be able to maintain them while there.

The trial court ruled in favour of the respondent on the account that the appellant was responsible for maintaining his family and upon deliberation he was ordered to pay a total of Tshs. 70,000/=monthly for the maintenance of his children and his wife (respondent). Tshs 60,000/=being maintenance of the children and 10,000/= for maintenance of the respondent. I wish to quote part of the ruling;

"The court agrees with the social welfare report that according to the wealth and income of both parties then the respondent herein is

ordered to pay 60000/=per month plus 10000/= for the maintenance of his wife until she gets married to another man if they divorce or they are already divorced. Also, the court orders the respondent to pay the fees for his children until they complete their studies and the health insurance."

The appellant was aggrieved by the decision and appealed to this Court with a total of three grounds of appeal which in its totality the appellant is basically challenging the order of maintenance by the trial court which will also form the basis for my determination of this appeal.

Both parties appeared in person, unrepresented, and argued the appeal orally. In fact, the parties were lay persons therefore they had little to contribute to the arguments on this appeal. The appellant insisted on loving his children together with his wife, and he wanted them back to their matrimonial home so that he can be able to closely take care of them. On the other hand, the respondent stated that the appellant does not take care of his family and that is why she left the home.

I have dispassionately considered the trial court records together with the grounds of appeal raised by the appellant; I am of the view that the point for determination is whether the order of the trial court is justifiable in the circumstances.

The Law of Marriage Act Cap 29 R.E 2002 under Section 129 (1) is very precise that it is the duty of a man to maintain his children, whether they are in his custody or custody of any other person. For clarity the section is hereunder reproduced;

"129.-(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."

Despite the fact that duty to maintain children was customarily imposed to males but with an enactment of the Law of the Child Act, Cap 13 Revised Edition 2019 the duty is now casted to both mother and father of a child. Section 8 (1) of the Act reads and I quote;

8.-(1) It shall be the duty of a parent, guardian or any other person having custody of a child to maintain that child in particular that duty gives the child the right to-

- (a) Food;
- (b) Shelter;
- (c) Clothing;
- (d) Medical care including immunization;

- (e) Education and guidance;
- (f) Liberty; and
- (g) Play and leisure.

Pursuant to the above provision of the law, I find that the trial court was justifiable to order the appellant to maintain his children who are now living with the respondent since the duty is parental notwithstanding their informal separation and placement of the custody of the children. More so I am of the considered view that the appellant's assertion that he shall not maintain his children because they are not under his custody but that of the respondent is not logical in the circumstances. Therefore, the appellant cannot escape the liability for the reason that the children are not in his custody or that he is only liable to maintain them if they are under his custody.

In line with the order for maintenance of the children the trial Magistrate gave an order of maintaining the respondent. This order if read carefully, itself is unclear and contradictory as the trial Magistrate is also not sure of whether the parties are divorced or not and if at all they are divorced the respondent should be maintained until when she is married, which is not the case here. The trial court order is therefore unjustified and I think the trial Magistrate ought to have directed himself to matters that were before him, in the first place the respondent did not seek for her maintenance in her application what she sought

was maintenance for her children. Secondly, I don't see the reason for the order of maintenance to the respondent as the couples are not divorced nor are they under judicial separation in fact the respondent has her own means of earnings to look at her well-being. This was a total misdirection on the part of the trial Magistrate, the order for maintaining the respondent is hereby revised and set aside.

In granting maintenance some factors have to be taken into consideration including the wealth and income of both parents and the impairment earning capacity of the person liable to maintain the children. See; Section 44 of the Law of the Child Act Cap 13 R.E 2019. And in doing so the Juvenile Court may engage the social welfare officer to prepare a social enquiry report before granting the order for maintenance. See Section 45 of the Law of the Child Act and Rule 855 (1) of the Law of the Child (Juvenile Court Procedures), 2016.

In the matter at hand, the social welfare was rightly and vividly engaged. It was the social welfare officer who made an inquiry to both parents and prepared a report which was taken into consideration by the trial court. The report reveals the following; the appellant is a security guard at K.K Security and a photographer, he is living in a mud house together with his old father. Whereas the respondent is living in a single rented room together with her two sons, and she is a tailor. The report further suggested that the appellant was to

pay school fees to his children until they complete their studies, pay Tshs. 60,000/= for maintenance of the children and to pay for health insurance of his children. The respondent was to provide for clothing to the children. The trial court sided with the report and granted the maintenance.

I have revisited the report and I concur with it to the extent that the appellant to pay for the school fees of his children until they finish school, he should also look for a medical insurance of his children, however I disagree to the payment of Tshs. 60,000/= per month as maintenance of the children. If I have carefully gone through the proceedings of the case the appellant never chased the respondent from his matrimonial home, it was the respondent at her own willingness who left the home and even when the appellant requested her to return back the respondent was not ready which to my view would have been the best option and would have reduced the costs on the part of the appellant maintaining two families at once.

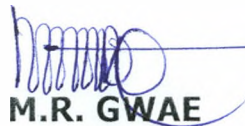
In fact, the appellant insists on loving his wife and want her back home. Perhaps the respondent has good reasons best known to her. I think Courts should be fair enough in granting orders for maintenance to ensure that it does not become a punishment to the person liable for maintaining at the interest of the part seeking for the sought order. Having said the above I find it reasonable and justly for the appellant to pay maintenance of his children in the tune of

Tshs. **40,000/=** per month till they either complete their studies or attain the age of majority or both instead of Tshs. 60,000/= ordered by the trial court. Maintenance order does not exonerate the respondent from her statutory duty to maintain children as a biological mother. This court's maintenance order is in line with payment of school fees together with medical insurance to the children.

Accordingly, this appeal succeeds to the extent explained above with no orders as to costs taking into account the relationship between the parties.

It is so ordered.




M.R. GWAE

JUDGE

13/11/2020