

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC.MATRIMONIAL APPEAL NO.07 of 2019

(Arising from Matrimonial appeal No.3 of 2019, Bariadi District Court, Original matrimonial cause No. 127 of 2017 Mkula Primary Court.)

MAKOYE FINIAS.....APPELLANT

VERSUS

MARIAM JACKSON.....RESPONDENT

JUDGMENT

27/02 & 20/3/2020

G. J. Mdemu, J.;

This is a second matrimonial appeal. In the Primary Court of Mkula, the Respondent one Mariam Jackson filed a matrimonial suit for divorce against her husband one Makoye Finias. It was registered as matrimonial cause No.127 of 2018. On 13th of December 2018, the Primary Court of Mkula ordered divorce of the two couples and placed custody of the two issues of marriage to the Appellant. The Respondent was not happy on the custody of the two children to the Appellant.

The Respondent did not appeal and instead, on 31st of December 2018, she lodged a complaint in the same primary court claiming custody of the two children and that, the Appellant herein to provide maintenance. The court heard the parties and adjourned the matter for decision to 7th of January 2019. The decision got pronounced on 28th of January 2019. The court again on this date decided that, the two children be under the custody of the Appellant. This devastated the Respondent and she appealed successful to the District Court in Matrimonial Appeal No.3 of 2019.

In its judgment dated 8th of July 2019, the District Court of Bariadi (Mrio SRM) quashed the decision of the trial Primary court and placed custody of the two children to the Respondent and ordered further that, the Appellant to provide maintenance of Tshs.100,000/= monthly. On top of this, the Appellant was also ordered to pay school fees for the two children. This decision aggrieved the Appellant, thus, appealed to this court by filing the following grounds of appeal:

1. *That the Appellate District Court in ordering the Appellant to pay to the Respondent compensation for maintenance failed to note and to appreciate the woman cannot claim compensation for maintaining the child she had willfully removed from her father's custody. The Appellant will rely on the case of **Ramadhani Omari vs. Fatuma Mahumbi (1983) TLR 227***
2. *That, Appellate Magistrate erred in law to order the Appellant to pay to the Respondent Tshs.100,000/= per month for maintenance while in fact the Respondent in her fourth ground of appeal No.3/2019 to the District Court Bariadi which is the subject matter of the present appeal, declared to have good business which the Respondent can use to provide daily needs for the children*
3. *That the Appellate Magistrate erred in law to order the Appellant to pay to the Respondent Tshs.100,000/= per month for maintenance while in fact was not disputed during trial that it is the Respondent who willfully removed the children in dispute from the Appellant's custody.*

4. *That the Appellate Magistrate erred in law to order the Appellant to pay to the Respondent Tshs.100,000/= per month for maintenance without considering at all Appellant's income.*
5. *That the Appellate Magistrate erred in law by placing the children in dispute under the Respondent's custody on one ground that it was not disputed during hearing of the case that they stayed with their aunt while in fact the Appellant openly disputed that fact and proved staying with the children at their matrimonial home.*
6. *That the Appellate Magistrate erred in law in placing the children under the Respondent's custody on one ground that they are staying with their aunt and not with the Appellant while in fact the Respondent called no even a single witness to prove that fact.*
7. *That the Appellate Magistrate failed to note and appreciate that the trial court followed the law by placing the children in dispute under the Appellant's custody upon satisfying himself that the Respondent had no permanent residential home to stay with the children in dispute for their welfare*

This appeal came for hearing on 27th of February 2020 whereby both the Appellant and the Respondent appeared in person arguing the appeal. The Appellant first prayed adoption of all his grounds of appeal as part of his submission. He then submitted jointly in all the grounds of appeal that, him being a peasant is unable to raise Tshs.100,000/= monthly for maintenance of the two children out of his custody. He added that, there is no proof that he has failed to

take care of the two children and therefore there was no basis for the District Court to order custody of the two children to the Respondent. He was of the view finally that, he be given the custody of the two children as they are all in Primary School.

In reply, along with her prayer to adopt the reply to the petition of appeal, the Respondent submitted that the Appellant should provide maintenance as ordered by the court. She stated further that, prior to order of the court to let the two children in her custody, they were living with the Appellant in their house. She concluded that, as of now she has rented a house in which she will stay with the two children. As she has no means to maintain them, the Appellant should continue to provide maintenance as ordered by the court. She could therefore find no merit to the instant appeal.

The Appellant rejoined briefly that, the Respondent stated to court to have the requisite financial capacities to take care of the two children as she is a businesswoman. To him, that was the sole ground relied by the court on appeal to grant an order for custody of children to the Respondent. This was all from the parties.

Before I determine the grounds of appeal as raised by the Appellant, there is one procedural issue that I need to comment on it. In the court of first instance, there are two orders regarding custody of the two children. The first order was made on 13th of December 2018 in which it was ordered that the custody of two children be under the Appellant. The Respondent did not do anything to challenge this decision and instead, on 31st December 2018, he complained to the same court being dissatisfied by the order of the court aforesaid. The trial Primary Court entertained the complaint by hearing both the Appellant and the Respondent. The record however is silent on how the complaint regarding

custody and maintenance of children reached to court. Nevertheless, on 28th of January 2019, the trial primary court placed custody of the two child to the Appellant.

In my view, the court was not supposed to determine the matter on custody of children as it had already decided the same on 31st of December 2018. The court so to speak was *functus officio*. The Respondent was to appeal against the decision of the trial primary court much as the decisions in the two sittings of the court is the same.

Reverting to the appeal, it is not disputed that on 13th of December 2018, the Primary Court of Mkula issued a divorce order dissolving the marriage between the two couples. It is further not disputed that, the Appellant was given custody of the two issues of marriage and also that, prior to the dissolution of marriage, the two issues of marriage resided in the matrimonial home and soon after the dissolution thereafter. What is at issue is whether there was any justification to the Appellate court to grant custody of the two children to the Respondent and ordering the Appellant to provide maintenance of Tshs.100,000/= per month.

As the parties did, I will resolve all the grounds of appeal jointly. On the complaint of the Appellant regarding claiming compensation for maintenance, the record is silent on this. What the Respondent complained at the trial primary court, illegal though, was custody and maintenance of children. At page 5 of the trial court's proceedings, the record partly reads:

MDAI:Nimemwita mdaiwa hapa mahakamani ili anikabidhi watoto wetu wa ndoa niendelee kuishi nao na yeye aendeleo kutoa matumizi kwa watoto hao

This, in my view, has nothing to do with compensation. In that stance, the case of **Ramadhani Omari vs Fatuma Mahumbi (1983) TLR 227** cited by the Appellant in the first ground of appeal on claiming compensation for maintaining a child willfully taken by the complainant is thus distinguishable. This first ground of appeal therefore fails.

As to the order of custody of children, I am in all fours with the two courts below regarding application of the principle of the best interest of the child that the same be considered when granting the order as to custody of children. On this, the trial primary court made the following observation as at page 3 of the decision:

“Swali ambalo mahakama ilikuwa nalo ni kuhusu matunzo ya watoto. Mahakama imeona kuwa watoto wa ndoa ya mdai na mdaiwa wataendelea kuishi na baba yao (mdaiwa) sababu mdaiwa ndiye mwenye jukumu la kuwatunza watoto wa ndoa. Mahakama imeona hivyo kwa kuzingatia maslahi ya hao watoto. Hayo yameelezwa katika kifungu cha 125(2) cha Sheria ya Ndoa Na.5/1971, sura ya 29.....”

In the appeal to the District court of Bariadi, when quashing this findings, the Appellate court at page 2 observed that:

*Whenever there is a dispute between the couples then the **best interest is to be placed on the welfare of the children. The children deserve parental care and other matters. I was asking myself on the question that if the custody of the children was placed to their father, why did he take them to live with their***

***aunt?** This kind of evidence shows that their father is not in a position to take care of them under his parental care. **I also noted that the children are under age** and since their mother is still alive and there was no evidence to show that there was something wrong with their mother. (emphasis added)*

As I stated above, in both decisions, the principle regarding best interest of the child has been taken into account, though conclusion is not one and the same. In analyzing the two positions, I noted inconsistencies and contradictions on the testimony of the Respondent regarding the place the two issues lived prior to divorce and custody orders. At the trial Primary court, the proceedings reads as hereunder as at page 2:

***MDAI:**Matunzo ya watoto ni juu ya mdaiwa ambaye ni baba yao. Hata hivyo watoto wanaishi na bibi yao ambaye ni mama yangu.*

***MDAIWA:**Matunzo ya watoto wetu wa ndoa ni juu yangu na watoto hao naishi nao mimi.*

Later at page 5, on what I termed as unusual and irregular, the Respondent made the following version:

***MDAI:**Nimemwita mdaiwa hapa mahakamani ili anikabidhi watoto wetu wa ndoa niendeleo kuishi nao na yeye aendeleo kutoa matumizi kwa watoto hao,sababu anaka mbali na watoto.Yeye anaishi kijiji cha Butiama wilaya ya Butiama mkoa wa Mara na watoto wanaishi kijiji cha Lamadi wilaya ya Busega mkoa wa Simiyu na wanasoma shule ya Itongo wilaya ya Busega mkoa wa Simiyu,mwingine ni chekechea Lamadi Busega, na mimi naishi Lamadi.Kwa sasa watoto wanaishi na shangazi yao ambaye ni dada*

yake na mdaiwa anayeishi kijiji cha Lamadi wilaya ya Busega mkoa wa Simiyu.

Yet, in the course of hearing this appeal, the Respondent made another unrelated version on the very same issue that the two children lived with their father in their matrimonial home. There are three versions. **One**, that the two children lived to their grandmother. **Two**, she later changed that they were living with their aunt and **three**, that they were in their matrimonial home living with their father. All it tells is that, the Respondent cannot be trusted. Had the learned Appellate magistrate made this analysis, could not have trusted the Respondent and instead, could have observed, as I hereby do, that the two issues of marriage were with their father before custody and maintenance order got pronounced. The Appellant stated that in the trial primary court. The trial court was therefore justified to hold that, the best interest required the children to be under custody of the Appellant as was decided in the case of **Gladness Jackson Mujinja vs Sospeter Crispine Makene, Matrimonial Appeal No.4 of 2014**(unreported),at page 22, the court stated that:

“But I should put it clear here that, it is the duty of the man to maintain his children whether they are in his custody or in the custody of any other person, by providing them with accommodation, clothing, food, and education.”

As stated by both the Appellant and the Respondent, the two issues resided in the matrimonial home where the Appellant resides. The Respondent in her own words at the hearing of this appeal stated that, she has rented a house somewhere where she will live with the two children. In my considered view, best interest of the child would require the two children to live in the matrimonial home where their father lives and not to the rented unknown house where the

Respondent mother live. In fact, at the trial court, there is no evidence to indicate where the Respondent will live when custody of the children given to her. This rented house just came by the way in submission at the bar which is not evidence.

I have also taken into account that, as the two issues are in primary school, meaning that, both are of and above the age of seven years, given the requirement of enrollment of standard one pupils to be of the age of 7 years. However, there is no specific proof of their age in evidence. I therefore hold grounds 5, 6 and 7 of the appeal in the affirmative.

As to maintenance of Tshs. 100,000/= ordered by the Appellate court to be given to the Respondent by the Appellant monthly, the Appellant complained in grounds 2, 3 and 4 of the appeal. The main complaint, which the Appellant also submitted during the hearing is that, he has not failed to take care of the children and that the court did not take into account of his financial status. In prescribing this order, the learned Appellate magistrate made the following version as hereunder:

“From the above findings, I hereby find that the Appeal has merit. I allow the appeal with no cost. I quash the trial court’s decision and orders. The custody of the two children to place to the Appellant. The Respondent to pay Tshs.100,000/= each month for their maintenance and to make sure that he pays the school fees”

In the above findings, there is no where the learned magistrate on appeal inquired into the financial position of the Appellant to be able to discharge each month, from his pocket Tshs.100,000/= and also incur for school expenses such as school fees and the like. The Appellant both in his evidence and also

submission at the bar stated to have not failed taking care of his two children and also that he can do that precisely when in custody of his children. In this, I share his concern and also that, as his financial position was not inquired, one cannot fault him that he cannot raise Tshs.100,000/= monthly as maintenance of his two children. In **Gladness Jackson Mjinja** (supra), at page 23 of the judgment, the court observed as hereunder:


“The respondent is a businessman. I assess and direct him to pay a monthly allowance of Tzs.75,000/= for food and up keeping of Teresa. This amount is intended to cover food and all other aspects but does not cover education. All other children shall remain with the Respondent. The Respondent is directed to ensure that, all children receive education and all the essentials of life. The parties are given free access to the children at all times provided there is a reasonable notice. The children are given free movement to their parents without restriction.”

In my view, this was the proper procedure to be deployed by the learned Resident Magistrate before an order as to maintenance of the two issues of marriage was to be issued. There was no assessment of the Appellant’s financial position and more so, his financial engagement as to raise the sum of Tshs.100,000/= monthly for upkeep of the two issues of marriage. Again, there is want of analysis on the spending that, the said Tshs.100,000/= ordered as monthly allowance will cover for what.

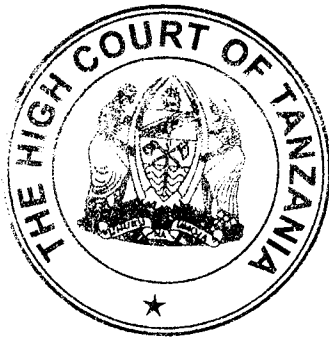
Having that observation in mind, in the circumstances of this matrimonial dispute, the best interest of the child require that, the two children be under the custody of the Appellant for proper up keeping of them and also for taking care of their education. It is the duty of the Appellant to ensure that the said obligation is


executed diligently. The Respondent is at liberty, for reasonable notice, to visit her children, much as the two children are allowed to visit their mother.

All said, I do find merits in the instant appeal and is hereby allowed. Each part to bear own costs. It is so ordered.


Gerson J. Mdemu
JUDGE
20/03/2020

DATED at SHINYANGA this 20th day of March, 2020.




Gerson J. Mdemu
JUDGE
20/03/2020