

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 95 OF 2019

*(Arising from Kinondoni District Court Civil Appeal No. 75 of 2018 Originating from
Manzese/Sinza Primary Court Matrimonial Cause No. 293 of 2016)*

MAULID ABDALLAH APPELLANT

VERSUS

ZAINABU ABDALLAH RESPONDENT

JUDGMENT

11th and 31st August, 2020

BANZI, J.:

The appellant and the respondent celebrated Islamic marriage on 5th January, 2007, which was finally dissolved by the Primary Court of Manzese/Sinza upon being satisfied that, the marriage was broken down irreparably. Consequently, the appellant was given the custody of one child whereas the respondent was given the custody of the other child with the order of handing him over to the appellant upon attaining the age of 7 years. In addition, the appellant was ordered to maintain that child while under the custody of the respondent.

Dissatisfied with the decision of the trial court, the respondent appealed to the District Court of Kinondoni, which after quashing the trial court's decision, granted custody of both issues to the respondent with a visitation right during vacation or holiday seasons to the appellant. Further, the appellant was ordered to maintain his children by paying Tshs.100,000/=; to pay school fees and to hand over NHIF insurance cards to the appellant. Discontent with the decision of the District Court, the appellant lodged the appeal before this Court containing three grounds as follows;

- 1. That the Magistrate erred in law and fact in holding that the appellant should maintain the children at a tune of 100,000/= Tshs without considering his financial ability.*
- 2. That the trial Magistrate erred in law and fact in holding that the appellant should pay for the school fees of the children without considering the status of the school respondent took them and financial ability of the appellant.*
- 3. That the trail Magistrate erred in law and fact in holding that appellant should handover the NHIF insurance card of respondent without considering that they are already divorced and he has children to be insured.*

At the hearing of this appeal, both parties appeared in person and unrepresented. The appeal was argued orally. Arguing in support of the first ground, the appellant submitted that, the maintenance order was issued in disregard of his financial ability as he is just a security officer at Government Procurement Service Agency (GPSA) with two families to maintain including a wife, children and his retired mother. For that reason, he prayed for the amount to be reduced up to Tshs.50,000/= per month. In respect of the second ground, it was his argument that, the respondent has enrolled their first born at a private school which he cannot afford to pay the fees. According to his financial status, he can only afford the fees for public schools which, on his view his child can get better education. Lastly, he challenged the order of the first appellate court in respect of handing over the NHIF insurance card of the respondent who is no longer amongst his beneficiary following the divorce. Hence, it was his prayer that, the respondent be ordered to return her card so that he can hand over to the relevant authority in order to replace her with rightful beneficiary. To conclude, he prayed for the appeal to be allowed.

In her reply, the respondent submitted that, the appellant is financially able to pay as per order of the District Court although since the divorce, he has never maintained his children. Further, it was her argument that, the

appellant could not have re-married and reproduced other issues if he has no financial ability. It was her view that, the Magistrate did not err as she made that order after considering the circumstances of the case and after hearing the wishes of the children. In respect of the second ground, she insisted that, the appellant has financial ability to pay the school fees in private school where their son is studying. She added that, throughout the time, she was paying the fees herself. So far as the last ground is concerned, she contended that, as a mother to his children, and since he doesn't maintain them, she has all rights to benefit the health insurance from him. Thus, she prayed for the appeal to be dismissed.

In his short rejoinder, the appellant claimed to maintain his children but he stopped after being involved in an accident. He further insisted about inability to pay school fees at private schools. It was also his submission that, he got married not because of financial ability but as a matter of his right after being divorced. He further submitted that, according to NHIF rules, his beneficiaries are wife and four children. Since the respondent is no longer his wife, he prayed that she should be ordered to surrender her card so that he can replace with his lawful beneficiary.

Having thoroughly considered the evidence on record and arguments for and against the grounds of appeal, the issues for determination are; **one**, *whether the maintenance amount of Tshs.100,000/= for two children is excessive*, **two**, *whether the order of payment of school fees was made without considering the appellant's means* and **three**, *whether the respondent is entitled to benefit with appellant's health insurance.*

It is worthwhile noting here that, according to section 29 (1) (a) of the Law of the Child Act [Cap. 13 R.E. 2019], any child following the divorce of his parent has a right to maintenance and education of the quality he enjoyed immediately before his parents were divorced. It is also prudent to note that, according to section 129 (1) of the Law of Marriage Act [Cap. 29 R.E. 2019] ("the LMA") generally, the duty to maintain the child is vested to the man following the divorce of his parent. The section reads as follows;

*"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". (Emphasis supplied).*

Likewise, in certain circumstances, a woman is also vested with the duty of maintaining her child as provided under section 129 (2) of the LMA which reads as follows;

*"Subject to the provisions of subsection (1), **it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.**"* (Emphasis added).

What I gathered from the provisions above is that, the duty to maintain the children lies on the man but in certain circumstances, if he is unable to maintain them, it is upon the woman to do so or to contribute to the maintenance.

Starting with the first issue which is the gist of the first ground, according to the appellant's submission, his contention is not about the duty to maintain his children but rather the amount of Tshs. 100,000/= ordered by the first appellate court. According to him, the said amount was set without considering his financial ability. As stated herein above, the duty of maintenance of children after the divorce is vested in the man by providing them with accommodation, clothing, food and education as may be

reasonable having regard to his means and station in life. That being the case, it is the duty of the appellant to maintain his two children who are under the custody of their mother, by providing them with accommodation, clothing, food and education. The amount of Tshs.100,000/= can either be inadequate or excessive depending on circumstances of each particular case. In the circumstances of this case where the appellant is claimed to be a security officer at the government agency, the amount of Tshs.100,000/= for maintenance of two children is reasonable and not excessive. In that regard, the first appellate court was right to order the said amount. Thus, I find no speck of merit on the first ground.

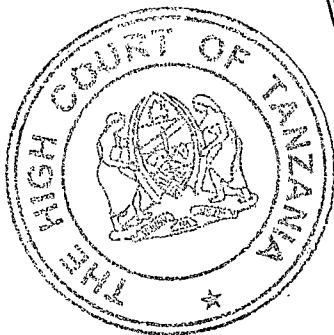
Reverting to the second issue concerning the order of payment of school fees, it was also his contention that, the said order was made without considering his financial ability and the status of school where the respondent enrolled his children. As stated earlier, according to the provisions of section 129 (1) of the LMA, it is the duty of the man to maintain the children by providing them with education among other things. Also, under the Law of the Child Act, the child has a right to education of the quality he enjoyed immediately before his parents were divorced. In the instant matter, the evidence on record does not reveal the quality of education the two children were enjoying before the divorce of their parents.

It is the contention of the appellant that, the respondent enrolled their children in private school which he cannot afford to pay the fee. Nevertheless, there is no evidence on record concerning the quality of education his children were enjoying before the divorce. Although the evidence on record shows the appellant is working but his monthly was not revealed. Since the order of the first appellate court was too general, and considering job status of the appellant, I find it prudent to specify the amount to be paid by the appellant regarding the school fees for his children. In the considered view of this court, such amount shall not exceed 50% of his salary. Thus, the second ground is partly allowed.

Reverting to the third ground, the records reveals that the trial court did not make the order of maintenance of the respondent after dissolving the marriage in question. Likewise, the District Court on appeal did not make such order. On that basis, I do not see the need for the respondent to benefit from the health insurance under the name of the appellant who was not ordered to maintain her. Therefore, the order of the District Court should be specific to the cards of two children who are under the custody of the respondent.

That being said, the appeal is partly allowed to the extent explained above. The order of District Court of Kinondoni concerning maintenance of children of Tshs.100,000/= is upheld. On the other hand, the orders in respect of payment of school fees and handing over of NHIF insurance cards are hereby varied. Thus, the appellant is hereby ordered to pay school fees whenever it comes due at the amount not exceeding 50% of his salary. The respondent is also ordered to return her NHIF insurance card to the appellant. Owing to the nature of the matter, each party shall bear its own costs.

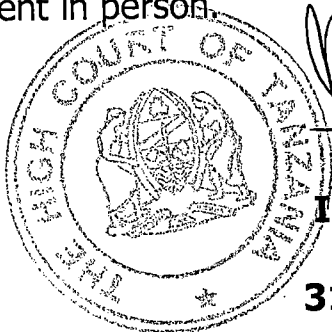
It is so ordered.



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**I. K. BANZI
JUDGE
31/08/2020**

Delivered this 31st August, 2020 in the presence of the appellant and the respondent in person.



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**I. K. BANZI
JUDGE
31/08/2020**