

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

PC MATRIMONIAL APPEAL NO.04 OF 2021

(Arising from the decision of the District Court of Geita in Matrimonial Appeal No. 07 of 2020. Originating from Nyankumbu Primary Court, Matrimonial Cause No. 51 of 2019)

MOSY KITAMBO APPELLANT

VERSUS

GLAD SEBASTIAN RESPONDENT

JUDGMENT

Date of last Order: 15.04.2021

Date of Judgment: 19.04.2021

A Z. MGEYEKWA, J

MOSY KITAMBO, the appellant and GLAD SEBASTIAN, the respondent respectively, were husband and wife. They were formally married in 2010 and were blessed with two children. When the matter was before the trial court the first born was eight years old and the second born was four years old. Out of that union, they owned some

properties including the matrimonial house. It appears their marriage went on well all along until the year 2020 when the relationship started to go sour. Feeling that she could not stomach an unfaithful relationship any longer, the respondent filed a petition for divorce before Nyamkumbu Primary Court in Matrimonial Cause No.51 of 2019. The respondent also claimed for division of matrimonial properties, custody of children.

On 09th March, 2020 the respondent successfully petitioned for divorce at Nyankumbu Primary Court. In its findings, the trial court found that the two were not married thus the properties were not subjected to division. The trial court also placed the first born child under the custody of the appellant and the second born child was placed under the custody of the respondent.

The respondent was not happy with the decision of the trial court, hence she filed an appeal at the District Court of Geita at Geita. The first appellate court decided the matter in favour of the respondent and placed both children under the custody of their mother, the respondent.

Undeterred, the appellant decided to the instant appeal whereas the appeal is predicated on one ground of grievance; namely:-

- 1. That, the first appellate court erred both in law and fact by granting custody of one child to the respondent without properly re-evaluating the evidence and finding of the trial court and take to account the best interest of the child.*

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the hearing was conducted via audio teleconference, the appellant and the respondent were remotely present.

Prosecuting this appeal, the appellant urged this court to allow the appeal. The appellant argued that he was dissatisfied by the decision of the first appellate court hence he opted to file the instant appeal. He claimed that at the first appellate court did not consider the evidence adduced at the trial court. He claimed that the trial court considered three things which include the Law of the Child Act of 2009 specifically section 4 (2) and section 125 (2) of the Law of Marriage Act, Cap.29 [R.E 2019] the evidence and documentary evidence such as KU7 and KU9; school fees receipt and NHIF cards.

The appellant did not end there, he strongly argued that the trial court reached a fair decision after considering the basic needs and the welfare of the child thus it ordered the first born who is 10 years to be placed in the custody of her father. He added that the trial court also ordered the appellant to provide maintenance of the children. He faulted the first appellate court decision that the court did not want to disturb the children without asking the preference of the child as to whom he wants to stay with. He blamed the first appellate court for failure to involve the welfare officers to determine whether the child was living in conducive environment.

On the strength of the above, the appellant beckoned upon this court to allow the appeal and uphold the decision of the trial court.

Resisting the appeal, the respondent stated that the District Court decided rightly that both children be placed to their mother. The respondent claimed that she was providing food, shelter and medical expenses to both children. She valiantly argued that the appellant is brutal and he once abandoned her with her children. The respondent lamented that the appellant tendered forged receipts to convince the

court that he paid school fees while she is the one who is paying school fees. She lamented that the appellant is staying alone and working in the mines therefore he has no time to stay with his children. The respondent further claimed that the appellant is forcing her to move out from the matrimonial house.

The respondent did not end there she claimed that she tried to visit her child at the appellant's house but the respondent chased her away. She went on to claim that the father is obliged to care for his children. To fortify her submission she referred this court to section 129 of the Law of Marriage Act, Cap.29.

On the strength of the above argumentation, the respondent urged this court to dismiss the appeal with costs and grant any other reliefs.

In his short rejoinder, the appellant reiterated his submission in chief. He said that he is not brutal and insisted that he is taking care of his children and paying school fees. The appellant insisted that he is staying with his wife and children.

In conclusion, he urged this court to go through the trial court evidence and documentary evidence and sustain the trial court decision.

Having gone through the trial court record, grounds of appeal, and their rival submissions of both parties, the issue for determination is ***whether the appeal is meritorious.***

I wish to state at the very outset of my determination that this being a second appeal, the Court is only entitled to interfere with the concurrent findings of fact made by the courts below if there is misdirection or non direction made by the courts below on the evidence. The same was held in the case of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR. In my determination of the appeal, I shall be guided by this principle.

The only issue for consideration in this appeal is the custody of the children. It is worth noting that what matters in the custody of a child is the best interest and welfare of the child. The law under Section 125 (1) (2) of the Law of Marriage Act, (supra) clearly states that, in determining the issue of custody, the paramount consideration shall be on the welfare of the child. The same was held in the case of **Celestine Kilala and Halima Yusuf v Restituta Celestine Kilala** (1980) TLR 76, the Court of Appeal of Tanzania stated that:-

“ ...the court's paramount consideration is the welfare of the child more than anything.”

In addition, Tanzania has ratified the UN Convention on the Welfare of the Child, (CRC), 1989 and domesticated the same by enacting the Law of the Child Act, No. 21 of 2009. The main objective of this Act, among others, is to stipulate the rights of the child and promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child. Section 4 (2) of the Law of the Child Act, (supra) provides that:-

“ The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies.”

Based on the above authority and provision of law, it is my considered opinion that in accordance with the law the child can stay with either of the parents depending on the circumstances of the case. Therefore, I will determine the evidence on record to find whether the trial court was correct to place the first born child under the custody of his father, the appellant,

Gathering from the record and the parties' submission, it is clear that both parents are employed. The record reveals that the appellant is working in mines and the respondent is a public servant. It is clear that the custody of children needs joined efforts of both parents and both have a duty to participate in upbringing the children. The appellant is claiming that he is the one who is paying school fees and medical insurance in exclusion of the respondent. In my considered view, these are the responsibilities of a father, the law requires the father to maintain his children and pay their school fees as stated under section 129 (1) of the Law of Marriage Act, Cap.29 [R.E 2019], and section 26 of the Law of the Child Act, No.21 of 2009. Section 129 (1) of the Act state that:-

“129 (1) Save where an agreement or order of court otherwise Duty to maintain provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, children 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."

Pursuant to the above provisions of law, the appellant is ordered to provide for their children's maintenance which includes education, health, food, and clothing. Therefore the appellant's ground cannot hold water.

Additionally, section 125 (2) of the Law of Marriage Act, Cap. 29 [R.E 2019] provides that the child who is above 7 years can opt as to who she/he wants to stay with. Section 125 provides that:-

" 125.-(1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.

The Law of Marriage Act, Cap. 29 [R.E. 2019].

(3)

*(4) Where there are two or more children of a marriage, **the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.***"

The trial court was in a position to ask the child as to whom she wanted to stay with and also the court was in a position to place the children in the custody of one parent. I have considered the circumstances of the case that the children apart from food, shelter, and education, they need conducive surroundings such as the presence of their parent and the relatives who are surrounding them. I have considered that the appellant is working in the mines thus most of the time he is not with his child. Additionally, the appellant is living with another woman, a fact which the appellant did not dispute in court. In the context of child custody cases, focus on the child's best interest

means that all custody arrangements are made with the ultimate goal of caring for and encouraging the child's happiness, security, mental health and emotional development into young adulthood. I have considered the age of the child; she/he is 9 years old, the child of this tender years needs the care of her/his mother compared to his father.

Moreover, there is no evidence on record that the respondent failed to take care of her children. It should be noted that it is clear and natural bifurcation between 'care giving' and 'bread winning' and that men do the latter while women do the former thus my take if a mother is in a better position to care for her child instead of placing the child to the father who is working and leaving the children behind with other relatives. In that regard, I find that that the children's mother (the respondent) is in a good position and a fit parent to care for her children.

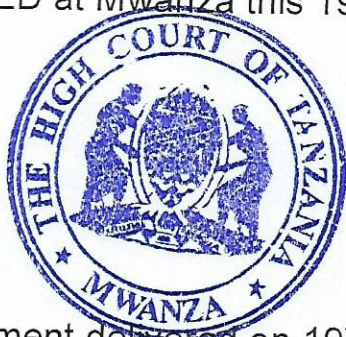
In the upshot, I am satisfied that the respondent stands better chance to care for her own children than the stepmother. On the other hand, the appellant is entitled and is accorded with the right to see, visit, and stay with his children during weekends and holidays. However, in

case of changes of circumstances that render the respondent unfit to have the custody of the child, the appellant may move the court to rescind its order. Until such time the trial court order on the custody.

That said and done, I hold that in the instant appeal there are no extraordinary circumstances that require me to interfere with the first appellate court findings. Therefore, I proceed to dismiss the appeal without costs.

Order accordingly.

DATED at Mwanza this 19th April, 2021.



A.Z.MGEYEKWA

JUDGE

19.04.2021

Judgment delivered on 19th April, 2021 via teleconference whereby the appellant was remotely present.

A.Z.MGEYEKWA

JUDGE

19.04.2021

Right to appeal fully explained.