

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

CIVIL APPEAL NO. 14 OF 2019

(Arising from a Ruling and Orders of the Juvenile Court of Tabora in Misc. Civil
Application No. 9 of 2019 dated 1/08/2019 (Hon. A. T. Millanzi, R.M)

HUGO S/O MALYA.....APPELLANT

VERSUS

MAIMUNA D/O OMARY.....RESPONDENT

.....

JUDGMENT

.....

Date of Last Order: 25/06/2021

Date of Delivery: 30/07/2021

AMOUR S. KHAMIS, J:

Maimuna Omary applied to the Juvenile Court of Tabora for an order of maintenance against Hugo Malya in respect of two children, Josephat Hugo and Karim Hugo.

The Juvenile Court among others, made orders for payment of Tshs. 50,000/= per month as maintenance and Tshs. 40,000/= annually towards purchase of clothing in respect of the child Josephat Hugo.

The trial Court ordered DNA to be conducted as regards to the second child, Karim Hugo.

Aggrieved by the Ruling and Orders of the trial Court, Hugo Malya petitioned this Court to revisit the impugned decision on three (3) grounds, namely:

1. That the trial Court erred to order the appellant to produce Tshs. 50,000/= per month in respect of the child Josephat Hugo without assessing financial status and capacity of the appellant to produce such amount per month.
2. That the trial Court erred to compel the appellant to pay Tshs. 50,000/= per month for food to Josephat Hugo without directing its mind that the appellant agreed to pay Tshs. 20,000/= per month for Josephat Hugo at Social Welfare Office On 23rd day of April 2019 and the respondent consented to it.
3. That the trial Court erred to make order that Josephat Hugo to be under custody of the respondent while the said Josephat Hugo is eleven years of age as such supposed to be under custody and supervision of the appellant.

Both parties were unrepresented and appeared by way of video conference. Hearing was conducted through written submissions.

Whereas the appellant timely filed submissions, the respondent did not abide by the schedule set by the Court. The only document

filed by the respondent was a Reply to the Petition of Appeal which can shed light as to what she intended to communicate to the Court.

I have read the submissions on record and where necessary, relevant contentions will be referred to in the course of addressing the grounds of appeal.

In the first and second grounds of appeal, Hugo Malya faulted the trial Court for failure to assess his financial capacity to pay Tshs. 50,000/= per month towards maintenance of the child and for failure to consider parties' agreement concluded before the Social Welfare Office.

He contended that the trial Court ought to have carried out an inquiry to assess whether he could pay such amount of money per month and in support of the contention, relied on ***FESTINA KIBUTU V MBAYA NGAJIMBA (1985) TLR 42.***

In the Reply to the Petition of Appeal, Maimuna Omary asserted that the trial magistrate properly assessed the appellant's financial position and found out that he could reasonably raise Tshs. 50,000/= per month because he owned a shop which generates sufficient money to raise the decreed sum.

In the case of ***JEROME CHILUMBA V AMINA ADAMU (1989) TLR 117***, this Court held that in a case of maintenance, it is important for a trial Court to find out the income of the person sued in order to be able to decide the amount to be paid.

In ***RAMESH RAJPUT V SUNANDA RAJPUT (1988) TLR 96*** the Court of Appeal held that the sum fixed as maintenance was manifestly excessive and was not supported by any evidence.

Section 44 of ***THE LAW OF THE CHILD ACT, CAP 13, R.E 2019*** provides that in making a maintenance order, the Court should consider the income and wealth of both parents of the child or of the person legally liable to maintain the child, any impairment of the earning capacity of the person with a duty to maintain the child, the financial responsibility of the person with respect to the maintenance of other children, the cost of living in the area where the child is resident and the rights of the child under the Law of the Child Act.

Proceedings in the lower Court show that the trial magistrate did not address himself on the financial capacity of the parties.

However, records show that a social inquiry report prepared by the social welfare officer and lodged in the trial Court addressed the issue of the appellant's financial capacity.

The report prepared under Rule 72 (1-6) of the Child (Juvenile Court Procedure) had two parts. The first part consisted of a statement by Maimuna Omary and the second fragment was a statement by Hugo Malya.

The report dated 5/07/2019 show that Maimuna Omary prayed, among others, for:

"Kwa kila mtoto apewe Shilingi 50,000/= kila mwezi ili ziweze kutumika kwa ajili ya mahitaji yote ya mtoto yaani

chakula, nguo, malazi, na matibabu na kama Hugo Malya atatoa pesa hii hatampigia simu au kumfuata dukani kwake kudai matumizi ya watoto.”

In a reply to those allegations, Hugo Malya stated that:

- “8. *Walipofika ofisi ya Ustawi wa Jamii kwa ajili ya shauri la matunzo ya mtoto mjibu maombi alianza kutoa pesa kwa ajili ya matunzo ambapo tangu waingie mkataba wa matunzo siku ya tarehe 23/04/2019 Mkataba Namba TMC/SWO/FO.5/MKT/MAT/CASE/2019/124 amekwisha toa pesa kwa awamu mbili jumla ya Shilingi 40,000/= lakini anashangaa kuona mlalamikaji anasema hatoi matunzo.*
9. *Pamoja na kutoa matunzo kwa mkataba bado amekuwa akitoa huduma zingine za matunzo moja kwa moja kwa kumpa mtoto mwenyewe na tangu mtoto ameondoka kwake amekwisha mpatia mahitaji mengine kama vile nguo na vifaa vya shule, nguo za sikukuu na huduma za matibabu. **Huwa yupo tayari kutoa matunzo yote ya mtoto shida ni kwamba mawasiliano kati yake na mama wa mtoto siyo mazuri.***
10. *Anachoomba ni kwamba:*
 - a) *Mtoto aendelee kuishi kwake kama ilivyokuwa hapo awali.*

- b) *Mama wa mtoto asiwe anafika katika eneo lake la biashara na kufanya fujo.*
- c) *Mama aache tabia ya kupandikiza chuki kwa mtoto kwani siyo jambo zuri.”*

The trial Court was moved by way of chamber application which expressly indicated that the order sought was for maintenance of the children at the rate of Tshs. 50,000/= for each child.

Proceedings show that on 17/06/2019, Hugo Malya was granted leave to file a counter affidavit.

In a counter affidavit filed on 20th June 2019, Hugo Malya stated that:

“5. That the contents of Paragraph 5 of the affidavit are vehemently contested by the respondent. He further submits that he did not abandon his son Josephat Hugo as he has always been responsible to provide all basic needs to him since he was born till today. The matter was referred to the Social Welfare Office by the applicant on the 23rd day of April 2019 where the respondent agreed to take care of his biological son Josephat Hugo only and denied to be responsible to Karim Hugo because he believed the said child is not his.....”

Apart from the parties’ statements, the Social Welfare Officer in the Social Inquiry Report made recommendations which include that

the father, the appellant herein, should pay Tshs. 50,000/= per month as maintenance for each child.

From these records, it is evident that throughout the lower Court's proceedings, the appellant did not allege inability to pay Tshs. 50,000/= per month which was expressly pleaded by the respondent and recommended by the social welfare officer.

To the contrary, the appellant expressed willingness and readiness to maintain the child Josephat Hugo and alleged that his good intentions were frustrated by the respondent who allegedly impeded his activities at the business area.

I have also considered a contention that the trial magistrate overlooked parties' agreement concluded at the Social welfare Office.

To that end, I inspected the alleged parties' agreement dated 23rd April 2019 whose terms reads:

- "1. Bwana Hugo Malya amesema wazi mbele ya ofisi ya ustawi wa jamii kwamba amezaa motto mmoja tu na Bi Maimuna na motto mwingine sio wake na ana ushahidi kwamba mtoto sio wake.*
- 2. Mlalamikiwa amekubali kutoa matumizi kwa mtoto wake aitwae Josephat Hugo kila mwezi kiasi cha Shilingi 20,000/= na mahitaji mengine atahusika kama endapo mtoto ataugua au kwenda shule.*

3. *Tumejaribu kuwashauri lakini imeshindikana na ndipo ofisi ya ustawi wa jamii ikachukua jukumu la kuandika Rufaa kuja huko mahakamani kwa msaada zaidi wa kisheria ili kutatua mgogoro baina ya hawa watu wawili. Hivyo tunalileta shitaka hili kwenu kwa msaada wa kisheria.”*

The wording of the complaint form from the Social Welfare Office which the appellant referred to as the parties’ agreement and reproduced above, indicates that the alleged agreement was not conclusive.

Whereas the appellant agreed to pay Tshs. 20,000/= per month, he was ready and willing to cater for additional expenses such as medical bills and educational expenses.

Furthermore, the form put forward the respondent was discontented with the sum suggested by the appellant and sought further intervention by the Court.

This fact is also reflected in the respondent’s Reply to the Petition of Appeal wherein she stated that she refused to accept the sum of Tshs. 20,000/= since it was too little for maintaining the child.

Section 112 of **THE EVIDENCE ACT, CAP 6, R.E 2019** provides that the burden of proof to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.

Section 115 of **THE EVIDENCE ACT** (supra) provides that in civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

In the present case, the appellant's financial status is within his personal knowledge and therefore, he had a duty to prove contrary to what was pleaded by the respondent.

In the circumstances, the trial magistrate correctly made an order for payment of Tshs. 50,000/= per month as maintenance in respect of the child Josephat Hugo.

Consequently, the first and second grounds of appeal fails.

In the third ground of appeal, Hugo Malya faulted the trial magistrate for making an order for custody of the child Josephat Hugo in favour of the respondent.

He contended that the child was eleven years old and was supposed to be under the father's custody.

He indicated willingness to assume custody of the child as previously did.

In the Reply to the Petition of Appeal, Maimuna Omary stated that:

"3. That the contents of Paragraph 3 are strongly disputed. The respondent further state that the trial Court was right not to order the appellant the custody of one Joseph Hugo since by the time the appellant

was staying with the said Josephat Hugo he failed to take care of him and to provide him with necessities of life and that is why the said Josephat Hugo on his own volition decided to quit the appellant's home and came back to his mother now the respondent."

It is trite law that in considering custody of the child the Court should observe the best interest of the child.

Section 39 (1) of **THE LAW OF THE CHILD ACT** provides that apart from the best interest of the child, the Court should consider the importance of a child being with his mother.

Other factors to be considered in consideration of a child's custody are listed down under Section 39 (2) of **THE LAW OF THE CHILD ACT**, namely: the rights of the child under Section 26, the age and sex of the child, that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents, the views of the child if have been independently given, that it is desirable to keep siblings together, the need for continuity in the care and control of the child and lastly, any other matter that the Court may consider relevant.

In the trial Court, Maimuna Omary testified that the named child ran away from the appellant's house because:

"....he was not getting good care as he was not getting food and good treatment from the respondent. Because of that

my first child has bad behaviour....He looks like a street boy....”

The respondent further testified that she suspected the child was sexually abused.

In his testimony, the appellant Hugo Malya stated that:

“.....It is true that our child has bad behavior including that of stealing and that was caused by age groups and fellow students who have bad behavior....”

Records show that the child’s unpleasant behavior was unfortunately developed while under custody of the appellant.

In ***RE THE ESTATE OF ROSE ATIENO ASIRI, HIGH COURT OF KENYA, MISCELLANEOUS APPLICATION NO. 11 OF 1997*** (unreported) it was held that in a matter involving custody of the child, the paramount consideration is the welfare of the child.



Applying that test in the present case, it is evident that the respondent depicted more sense of responsibility towards the child than the appellant who failed to detect the child’s unwelcome habits at the earliest opportunity.

This is reflected in the trial Court’s Proceedings (see page 3 and 4 of the typed proceedings) wherein the respondent recounted on the steps employed to rescue the child’s health and behavior after return from the appellant’s house.

In the circumstances, I found nothing substantial to fault the trial magistrate on this aspect of the decision. The third ground of appeal equally collapses.

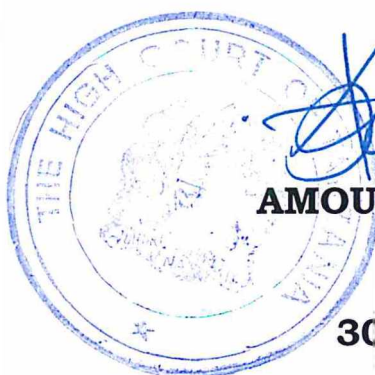

For the aforesaid reasons, the trial Court's decision is upheld and the entire appeal is hereby dismissed with no order for costs.

It is so ordered.



AMOUR S. KHAMIS
JUDGE
30/07/2021

Judgment delivered in Chambers in presence of the appellant in person and absence of the respondent. Right of Appeal fully explained.



AMOUR S. KHAMIS
JUDGE
30/7/2021