

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 259 OF 2021.**

*(Originating from Misc. Civil Appl No.33 of 2021 In the Juvenile Court of Dar es Salaam at
Kisutu before Hon. D.J. Msoffe RM dated on 2nd July,2021)*

YVONNE JANE ABRHAMS.....APPELLANT

VERSUS

SAPHARY FREDRICK NGUREY.....RESPONDENT

JUDGMENT

25th October & 26th November 2021

ITEMBA, J.

This is an appeal from the Juvenile Court of Dar es Salaam at Kisutu. The background towards this appeal as can be traced from the records is that; the appellant and the respondent were in an intimacy relationship since 2009. In 2010, they were blessed with a girl child named CGS hereinafter, 'the child'. In 2013, the said relationship went sour and the two broke up. In 2017, the appellant travelled to Europe with the child and returned to the country in 2019. The appellant applied for the child's custody before the Juvenile Court in January 2021. The application was successful as she was granted with custody whereas the respondent was granted access to the child during her school holidays.

Shortly thereafter, the applicant applied for maintenance order for the child. She prayed before the court that the respondent should pay monthly contribution of **Tshs 350,000/=** However, the court ordered the respondent to pay **Tshs 100,000/=**, to enroll the child in health insurance (NHIF) and to facilitate the child to attend a Public School. The appellant being dissatisfied by the said decision, applied for variation of Court orders of maintenance, the application which was dismissed on 5th of July 2021.

The appellant was still not amused with such decision hence this appeal. To back up her appeal, she has filed 3 grounds as follows; -

- 1. That, the Juvenile Court of Dar es Salaam erred in law and in facts for ordering the Respondent to pay only Tshs. 100,000/= as monthly maintenance allowance for the child named CGS, female aged 10 years old without considering situation of life of the Respondent and contrary to the best interest of the child.*
- 2. That, the Juvenile Court of Dar es Salaam erred in law and in fact for failure to consider that that the Respondent is a man of means and he has good income as via his TIN No. 107028552 he is engaging in various business including a car wash and motor vehicle maintenance business located at Mwenge Lufungila area, he still running a business of selling cultural products at Mwenge vinyago area, he owned a bank account at ABS Bank (formerly*

known as Barclays Bank) employed and thus he is capable maintaining the child by providing Tshs. 350,000/=.

3. That, the Juvenile Court of Dar es Salaam erred in law and in fact for failure to order the Respondent to tender his bank statement, business license, TIN Certificate and other related document for his businesses so as to prove this source of income.

At the hearing of the appeal, both parties were unrepresented. The appellant expounded her grounds of appeal collectively by stating that the court did not consider the life situation of the respondent and the best interest of the child. She mentioned about the two business owned by the respondent; the car wash and selling of sculptures at Mwenge area. She also stated that the Juvenile court would have ordered the respondent to bring his bank statement as proof of income. She further submitted that the maintenance amount ordered by the court of **Tshs. 100,000/=** is too low because the child's needs per month goes around **Tshs. 245,000**. She gave the breakdown of the said amount to include meals; which costs Tshs. 180,000/= and water; which costs Tshs. 45,000. The appellant further insisted that the child is young and she need uniform, food and clothes which is more than Tshs 100,000/= that the child is almost reaching puberty she might have more needs.

The appellant further complained that the court did not order the respondent bank statement as she requested; and the court did not order for areas of maintenance at the time when she was staying with the child. To support her argument that the respondent is well-off, she stated that

the respondent has three cars, therefore he can afford to pay **Tshs 350,000** per month as she requested. It suffices to state that the appellant was quite vague in her argument as she went way beyond her grounds of appeal.

In reply, the respondent admitted to have the businesses as mentioned by the appellant but he maintained that his income is between **Tshs 300,000** and **Tshs 400,000** per month. He stated that he was ready to stay with the child at a lower cost. He gave an example that he does not need to buy water for **Tshs 45,000/=** per month as he can use DAWASA which is only Tshs. 1,600 per 1,000 litres but the respondent did not want the appellant to stay with the child. As for the details of his bank account at Barcklays Bank, he stated that the account is closed and he showed the proof before the Juvenile Court. He further defended himself that he has been paying Tshs 35,000 via mobile money transfer named 'tigopesa' and he kept supporting the child despite the appellant taking the child to overseas without his consent. The appellant stated that he sold the two cars and he only have one car. The sculpture business at slipway was closed for being not profitable.

Upon being probed by the court, the respondent admitted to own a second bank account at CRDB bank as alleged by the appellant and that he did not submit the details of the said account because he was not asked for the same. Understanding that this fact would reveal some details about the respondent income, under Order XXXIX rule 27 of the Civil Procedure Code Cap 33 R.E 2019, the court inquired the respondent to avail the current CRDB bank statement of which he complied with.

The court appreciates both parties' submissions and Juvenile's court records. The issue is whether this appeal has merit. In other words, was the Juvenile court justified by not varying the orders of maintenance issued against the respondent?

To start with, factors to be considered in an application for variation of maintenance order are mentioned in Rule 88 (1) (2)(a)(b)(c) of Law of the Child (Juvenile Court Procedure) GN No. 182, herein rule 88.

The said rule states that:

*88.-(1) A parent or person who has custody of a child or any other person legally liable and appointed to maintain the child may make an application to the court as the format set out in JCR Form No.11 in the Third Schedule III of these Rules to **vary** or **discharge** the maintenance orders on **the grounds of a change of circumstances.***

(2) In determining whether to grant an application to vary or discharge a maintenance order under section 49 of the Act the court may consider the following factors-

*(a) any **substantial** and **material** change of circumstances since the making of the order;*

*(b) the **reasonable needs** of the child; and*

*(c) **the ability** of each parent to pay towards the maintenance of the child.*

Therefore, in order for the court to issue a variation order, the appellant was supposed to establish before the court that there is a material change of circumstance from the time when the said violation order was made; that is March 2021. These changes may include changes of income of the parties or changes in cost of living. Other reasons to consider are if there are any special or reasonable needs of the child and parents' ability to maintain the child.

In dismissing the application for a variation order, the Juvenile court was guided by the principles under Rule 88(1) (2) (a)(b)(c) of the Law of the Child Act. (See page 2 of the said ruling). The trial magistrate stated that the appellant first filed the application for maintenance and its ruling was issued on 13th March 2021. Thereafter, the appellant filed an application for variation of the maintenance order on 5th May 2021. The court was of the view that the period between the time when the maintenance order was issued and the time when the application for variation of the said order was filed, that is one month and few weeks, was very short for any substantial changes to happen. The court also ruled out that there was no proof that the respondent owns any of the business as claimed by the applicant.

Being guided by the same Rule 88 (1) (2)(a)(b)(c) of the Law of the Child Act and having gone through the applicant's petition of appeal, I am convinced that the appellant in her application for a variation order, did not show any changes in circumstances which will enable the court to issue a variation order, as required by the law. Although substantial changes can happen to anyone at any time, in this matter, the same circumstances existed before and after the appellant made an application for maintenance. The fact that the child needs to eat, drink, buy uniform and

clothes and that she is almost entering puberty and the fact that the respondent had a business were not new to the appellant. They are not facts which were learnt by the appellant after the court had issued maintenance order. Actually, the same facts were relied by the trial magistrate in reaching her decision and issuing maintenance order.

However, the respondent's bank statement which was supplied as additional evidence during appeal, reveals different information regarding the respondent's income. It shows that the bank account is active and covers the period between May and October 2021. The respondent explained that the money in this account is from his business. The transactions in the said account shows that within one month, respondent has been depositing an amount between Tshs. 50,000/= and Tshs. 100,000/= in different instalments. In an average, the said instalments total up to Tshs. 1,000,000/= per month as deposits.

After considering the additional evidence. It reflects that the respondent has an income of more than Tshs 350,000 – 400,000 per month as claimed. This fact is a change in circumstance as provided for under rule 88 and it empowers the court to issue a variation order for maintenance.

Nevertheless, before making the said variation of maintenance order, the court has also considered that the respondent has both his parents as dependants and has started a new family. He has also proved before the court that he has registered the child with Health Insurance, namely NHIF.

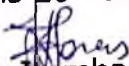
Based on the above, the maintenance order by Juvenile Court is hereby varied to the extent that instead of the respondent paying

Tanzanian shillings One Hundred Thousand (**Tshs. 100,000/=**) per month, the respondent will be paying Tanzanian shillings One Hundred and Fifty Thousand (**Tshs 150,000**) per month.

This appeal is partially allowed to the extent explained. Each party to bear its own costs.

It is so ordered.

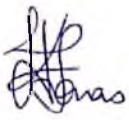
DATED at DAR ES SAALAM this 26th day of November, 2021.


L. J. Itemba

JUDGE

26.11.2021

Right of the parties explained.

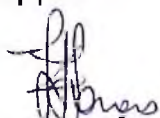

L. J. Itemba

JUDGE

26.11.2021



Judgement delivered under my hand and seal of the court in chambers in presence of the appellant and in the absence of the respondent.


L. J. Itemba

JUDGE

26/11/2021

