

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

CIVIL APPEAL No. 18 OF 2020

*(Originating from Kahama District Court in Juvenile Misc. Civil Application No.
23/2020)*

LUCAS KEYA.....APPELLANT

VERSUS

MARRY BURULE MWITA.....RESPONDENT

JUDGMENT

8th July, 2022

MATUMA, J;

The parties herein though not married, are biological parents of one Glory Lucas Keya.

They litigated at the Juvenile Court of Kahama at Kahama for maintainance of the said child whereas the trial Court ordered the Appellant to pay to the Respondent Tshs. 120, 000/= monthly as maintainance for the child.

The appellant is aggrieved on the ground that his income and earning ability was not ascertained and therefore unfairly condemned. Mr. Bakari Chubwa Muheza learned advocate submitting on such complaint argued that as the parties did not adduce evidence as to their income, the social inquiry Report was necessary to help the Court in reaching to a just decision. He therefore prayed that the ruling of the trial Court be vacated and an order be made to the effect that a social Inquiry Report be made and a new ruling be composed by the trial Court. The learned advocate cited to me the cases of ***Mwantumu Hamis Kitemo V. Abdulkadri***

Mushi, Juvenile Civil Appeal no. 1/2020, High Court at Kigoma and that of ***Veronica Agostino Shirati V. Issa Ramadhan Kisibo, Civil Appeal no. 9/2020, High Court at Musoma*** to the effect that the complainant has a duty to give evidence of income of the respondent and the need to have a social Inquiry Report when no such evidence.

On the other hand, the Respondent argued that the evidence relating to the income of both parties is missing because they were not heard fully.

That when the matter started at the trial Court the appellant disputed paternity of the child and thus the Court ordered for a DNA test with the view that after the result of the DNA, they will be heard. Unfortunately after the report, the trial Magistrate pronounced the ruling without according them opportunity to be heard. She thus asked this Court to nullify the proceedings and quash the ruling so that they can be heard.

Mr. Bakari learned advocate in his rejoinder disputed the argument of the respondent that the parties were not heard. He was of the argument that the records shows that both parties were heard and what remained was just a DNA report. He maintained that the trial Court should not hear the parties afresh but order for a social Inquiry report and proceed to make a ruling by considering such report.

Without much ado, both parties are in agreement that the trial Court's ruling is not tenable for it was reached without considering the earning capacity of the parties and more so the income of the appellant who was condemned to pay a monthly maintenance of the child.

As rightly argued by Mr. Bakari learned advocate for the appellant, the trial Court did not determine the dispute within the guidelines under

section 44 (a – (e) of the law of the child, Act no. 21 of 2009 which provides for among other considerations before ordering maintainance; *the income and wealth of both parents of the child, financial responsibilities of a person against whom maintainance order is to be made, and the cost of living in the locality of the child's residence.*

In fact, the trial Magistrate could not do the requisite determination because there was no evidence or facts on record which could assist her to reach on a just decision.

It is upon that circumstances, I am inclined to agree with the respondent that the parties were not afforded opportunity to be heard on their financial capabilities.

Mr. Bakari tried to convince this Court to believe that the parties were heard fully but the respondent failed to establish the financial status of the appellant. I am for away to agree with Mr. Bakari learned advocate because; **one**; It would have been awkward for the trial Court to hear the parties on the merits or otherwise of the application without resolving the corner stone dispute on the paternity of the child.

I believe that the respondent Marry Burule Mwita submitted the truth to the effect that the paternity dispute stopped the hearing on merit to await the DNA results. Unfortunately when the DNA results came out, the trial Magistrate proceeded to pronounce the Ruling without calling the parties to continue the hearing on merits.

Two, the records which the learned advocate relies to convince me that the parties were heard fully does not support such argument.

The opening statement of the respondent at such purported hearing is; ***"The respondent is a biological father of my child. We were in***

relationship for a long time until 2017 when I gave birth after he asked for."

Thereafter she started to narrate the history of their dispute.

The Appellant in his reply ended calling for a DNA test as he was disputing the paternity. The DNA results revealed that he is the biological father of the child.

In the circumstances, the issue upon which the parties concentrated was the paternity of the child. It was not the merits or otherwise of the maintenance application. That is why there is no even prayers upon which the trial Court relied to decree Tshs. 120, 000/= against the Appellant.

Three, even if I would have to agree with the learned advocate that the parties were heard, then they were just beating about the bush. They did not concentrate on the matter before the Court.

Under the circumstances, the trial Court was obliged to lead and direct them on the issue under scrutiny so that they give evidence on it more so when both are lay people who were not represented. That would assist the Court to adjudicate the matter properly and justicely.

In the case of ***Patrick s/o Eznon versus The Republic, (DC) Criminal Appeal no. 51 of 2020, High Court at Kigoma***, I had some observations which I find relevant to this case and I thus repeat them here.

I held;

"I call upon trial Magistrates to be curious to justice. They should inquire into every fact that transpires to them as a detriment to justice. They should not stand as mere observavors but as administrators of justice."

In the instant matter, no doubt, the learned trial magistrate did not discharge her duty. She stood as an observer to the litigation between the parties instead of standing as an administrator of justice.

As a result she found herself decreeing the respondent Tshs. 120, 000/= against the appellant from unknown facts. That is to say she adjudged on speculations that the appellant could pay such amount without hindering him to other financial responsibilities. To do so was wrong as it was held in the case of ***Denis Elias Nduhiye versus Lemina Wilbad, Juvenile Civil Appeal case no. 1/2019 High Court at Kigoma*** that;

"Speculative views have no room in Civil trials and the trial Magistrate in this case erred to rest this case on his speculative views"

In the case of ***Athumani Omary Athumani versus Kashindi Hamis Zaidi, consolidated (PC) Matrimonial Appeal no. 3 & 4 of 2021, High Court at Kigoma***, this Court (myself so to speak) observed that the core duty of the judicial officer like the Magistrate is to administer justice and not to stand as a mere observer to litigations. I further made reference to section 176 (1) of the Evidence Act, Cap. 6 R.E. 2019 which confers power to the Court to put some questions to the parties so that it is acquainted with all those material facts necessary for determination of the real question in controversy between the parties. The section reads;

"The Court may, in order to discover or obtain proper proof of relevant facts, ask any question it desires, in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document

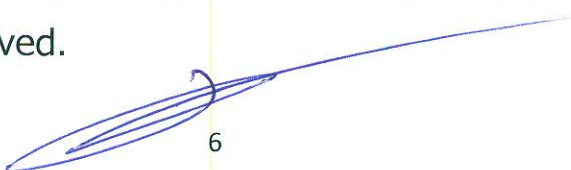
or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order nor, without the leave of the Court, to cross examine any witness upon any answer given in reply to any such question."

In that regard, the trial Magistrate could have not adjudged the maintenance of the issue without facts and evidence relating to the earning ability of the appellant, nor could throw away the application by the respondent for lack of such evidence or facts without having first required the parties to give evidence on that account, more so when the litigants are lay persons like in the instant case.

It is upon such observation I find that even if I would have to agree with the learned advocate Mr. Bakari, still I would have found that the trial Magistrate did not discharge her duty as a judicial officer as I once held in the case of ***Angelina Reubeni Samsoni and Another versus Waysafi Investment Company Ltd, DC Civil Appeal no. 04 of 2020 (High Court) at Kigoma*** that;

"Judicial officers who stands as mere observers of trials without reminding the parties to adhere to certain requirements of the law for their proper presentations of their respective cases would not be discharging their duties for the administration of justice, and if that is to happen then good technical litigants would always be using the Courts to win cases to the detriment of justice."

In the instant case as I have repeatedly stated, both parties were lay, they ought have to be properly directed to adduce evidence relating to financial status, earning ability, financial responsibilities e.t.c so that the real dispute is resolved.



I therefore invoke revisional powers of this Court and proceed to quash the impugned ruling of the trial Court. Consequently the Drawn Order thereof is set aside.

I direct that both parties be heard on the merits or otherwise in relation to the maintenance of the child.

In case there is contention between the parties in relation to their financial status and financial responsibilities, the trial Court will have to order for a social welfare Inquiry under the provisions of section 45 of the Law of the child supra to assist it in reaching to a just decision.

To that end this appeal is allowed without costs.

It is so ordered.



A. MATUMA
JUDGE
08/07/2022