

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

HC CIVIL APPEAL NO. 48 OF 2021

(Appeal from the decision of the District Court of Nyamagana at Mwanza-Hon.

Ryoba, RM, dated 26/08/2021 in Juvenile Case No. 07 of 2021)

PACIFICUS JOSEPH RUTAKUMILIRWA..... APPELLANT

VERSUS

MARIAM ALLY KIHELELO..... RESPONDENT

JUDGMENT

10/05/2022 & 5/8/2022

ROBERT, J:-

Before the District Court of Nyamagana (Hon. Ryoba, RM), the abovenamed respondent lodged an application to have the order made by the Resident Magistrate Court at Mwanza (Hon. Sumaye, RM) in respect of custody of a child named ATULINDA GLORY, varied. The reasons for seeking variation were contained in an affidavit filed in support of the said application. She successfully applied for sole custody of the said child. The appellant was not pleased and is now before this court challenging the said decision. The following are the grounds upon which the appeal is preferred;

court, Hon. Ndyekobora, RM (extended jurisdiction) which blessed the decision of the RMs Court. It was after the decision of this court in Matrimonial Appeal No. 01 of 2019 when the respondent filed the application which resulted into the impugned decision subject of this appeal.

The learned counsel submitted further that initially he had filed two grounds of appeal but prayed to consolidate and argue them jointly thus; **the learned trial Magistrate was not justified in varying the order of custody because there were no sufficient reasons for doing so.**

It was his argument in support of the consolidated grounds that after being aggrieved by the decision of this court in Matrimonial Appeal, the respondent had two remedies which are first, to appeal to the Court of Appeal against the decision of this court in Matrimonial Appeal No. 01 of 2019 and secondly, to make an application for variation of the order for custody before the same court that granted the previous order.

He cited the case of **Halima Kahema vs Jayantilal G. Karia** (1987) TLR 147 (TZHC) to buttress the argument that the respondent was supposed to file an application for variation before the Resident Magistrates Court of Mwanza and not the District Court of Nyamagana. He further argued that the said application for variation ought to have been

made under section 133 of the Law of Marriage Act [Cap. 29 RE 2019] which empowers courts, among other things, to vary the order for custody or maintenance of a child upon application by an interested person where it is satisfied that the order was based on misrepresentation, mistake of fact or where there has been a material change in the circumstances.

He maintained that, the court referred to in the cited section is any court having jurisdiction under section 76 of the Law of Marriage Act (supra) which includes the High Court, Resident Magistrates Court, District Court and Primary Court. Accordingly, he was of the view that the District Court of Nyamagana lacked legal competence to vary the order made by the Resident Magistrates Court of Mwanza which was later upheld and further modified by the High Court.

He submitted further that, although the provisions of Rule 79(1) of the Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 empowers Juvenile Courts to vary orders made by the court, they can only exercise that power to orders which have been made by a Juvenile Court as established under section 97 of the Law of the Child Act.

On the last issue regarding the reason advanced by the respondent in her application for variation of the order for custody, which raised a concern on the medical condition of the child, it was his argument that

the said concern was never raised during the hearing of the Matrimonial Cause No. 03 of 2018 where the said child was past five years. It was thus an afterthought. He concluded by praying that the appeal be allowed and the impugned decision be quashed and set aside.

In reply, the learned counsel for the respondent submitted that, the appellant's submissions on the issue of competence of the Juvenile Court to vary an order for custody which arose out of Matrimonial Cause No. 03 of 2018 was argued in contravention of the provisions of Order XXXIX Rule 2 of the Civil Procedure Code [Cap. 33 R.E. 2019] as there was no any leave to add it as a ground of appeal. However, her reply to the said issue is that the Juvenile Court had jurisdiction to vary the order for custody and that even section 133 of the Law of Marriage Act (supra) is inapplicable as the order for custody which arose out of Matrimonial Cause No. 03 of 2018 was not based on misrepresentation, mistake of fact and there was no any material change between the parties.

It was her argument that, the application for variation was made for only two reasons which were, the wishes of the child herself and the health condition of the child which required the Social Inquiry Report from the Social Welfare Officer and that the same could not be done except by the Juvenile Court. Also, that under Rule 79(1) of the GN No. 182 of 2016

it is the Juvenile Court which has been given powers to vary any order of the court as to custody if there is any sufficient reason to do so.

She further submitted in respect of the impugned order for variation that, the Juvenile Court was right as it made such variation after considering the best interest of the child after taking into consideration the health condition of the child which requires more attention of the respondent than the appellant.

Lastly on the issue of failure to raise the health concern during the appeal, she argued that, the same was not possible as no new facts are to be raised during appeal so the only way was to file an application before the Juvenile Court to seek for variation of the previous order for custody.

She concluded by praying that the appeal be dismissed with costs and the impugned decision be upheld.

In rejoinder submissions, the learned counsel for the appellant stated that he did not raise any new ground of appeal in his submissions in chief as what he did was to paraphrase the two grounds and argue them jointly. He maintained that, the concern raised is related to failure by the Juvenile Court Magistrate to evaluate the evidence on record and he was of the view that evaluation could not have been done without addressing the competence of the court to entertain the matter.

He reiterated his submissions concerning the competence of the Juvenile Court to vary the order given by the Resident Magistrates Court and maintained his argument that GN No. 182 of 2016 could not be invoked to vary the order made under the Law of Marriage Act (supra).

He concluded by praying that the appeal be allowed and the decision complained of be quashed and set aside.

That being the summary of the submissions from counsel for both parties regarding the appeal, this court is at this point invited to determine the merit or otherwise of the appeal.

Form the records, the appellant raised a single ground of appeal the gist of which was that the Juvenile Court was not justified in varying the order of custody given by the Resident Magistrates Court of Mwanza in RM Matrimonial Cause No. 03 of 2018. He held a strong view that the respondent could not approach the Juvenile Court with a request to vary the order for custody, which order was given by the court of a Resident Magistrate in a matrimonial cause. He contended further that the said order having being given under the provisions of the Law of Marriage Act (supra) could not be varied by the provisions of the GN No. 182 of 2016.

He submitted that there were only two options available to the respondent which are first to appeal to the Court of Appeal against the

decision of this court in Matrimonial Appeal No. 03 of 2019 or second to lodge an application to vary the order for custody in the same court that gave the previous order.

On the part of the respondent, it was her submission that the Juvenile Court was right when it heard and gave an order varying the one given earlier on by the Resident Magistrates Court. It was argued so because in reaching to the conclusion regarding the issue of the child's health condition, the Court needed a social inquiry report from the Social Welfare Officer something which can only be done by the Juvenile Court. It was further argued that because the law does not allow new facts to be raised on appeal, the only way was to make an application for variation of the previous order for custody in a Juvenile Court.

I must state on the outset that I fully subscribe to the argument put forward by the learned counsel for the appellant that the Juvenile Court which gave the impugned decision was not justified to entertain the application for variation of the order for custody which was given by the Resident Magistrates Court in Matrimonial Cause No. 03 of 2018.

It can be gleaned from the records of the appeal that the respondent herein was aggrieved by the decision of the Resident Magistrates Court of Mwanza, which among other things, gave the order for custody in favour

of the appellant. She lodged her appeal to this court before Hon. Ndyekobora, RM (extended jurisdiction) in Matrimonial Appeal No. 01 of 2019 which upheld the decision of the RMs Court with regards to the custody of the two children. This Court is of the considered view that, if the respondent herein was not satisfied with the outcome of the appeal, she was supposed to process her appeal to the Court of Appeal of Tanzania.

However, the records reveal that what prompted the respondent to lodge an application before the District Court of Nyamagana, was the fact that she wanted to have the previous order for custody varied for the reasons *inter alia*, that the younger child had developed health conditions which required attention and help from her rather than the appellant. For that I cannot fault the respondent for not choosing to appeal because then the Court of Appeal would not have been a proper forum to have her application for variation entertained. This is due to the fact that the law under section 133 of the Law of Marriage Act (*supra*), provides for powers of the court to vary orders for custody or maintenance. For ease of reference, it is reproduced as hereunder;

*"The court may, at any time and from time to time,
vary or rescind, any order for the custody or*

*maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or **where there has been any material change in the circumstances**". [emphasis is mine]*

It has to be noted that "the court" referred to in the above provision of the law is any court having original jurisdiction in matrimonial proceedings which in the instant case was the court of a Resident Magistrate which according to the record of this appeal, is the one which entertained matrimonial proceedings between the parties herein and gave the order for custody in favour of the appellant.

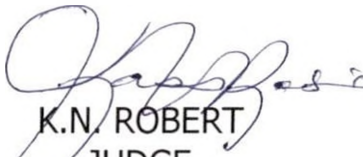
Thus, considering that the cited provision empowers the court which heard matrimonial proceedings and consequently made an order for custody of children, to vary the said order, upon an application and where it is satisfied *inter alia*, that there has been any material change in the circumstances, this Court can safely arrive at a conclusion that it was not proper for the respondent to lodge an application for variation of the custody order before the District Court of Nyamagana. The proper Court to lodge the said application was the Resident Magistrates' Court which gave the order for custody of the children in the first place. The

Nyamagana District Court lacked competence to entertain the application to vary an order it did not make.

In the circumstances, I find merit in this appeal and I proceed to allow it accordingly. As a consequence, the impugned decision of the District Court of Nyamagana and orders made therefrom are hereby quashed and set aside. The order for custody remains the same until varied by a court competent to do so. Considering the nature of the matter, no order as to costs is made.

It is so ordered.




K.N. ROBERT
JUDGE
5/8/2022