IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 60 OF 2021

(Arising from the decision of the Juvenile Court of Dar es Salaam at Kisutu, in Civil Application No. 02 of 2021, by Hon. J. Mushi-RM dated 27th day of January, 2021)

MOSES WILLIAM MLAGULA.....APPELLANT

VERSUS

VERONICA CELESTINE MBUGA.....RESPONDENT

JUDGMENT

29th August, 2022

ITEMBA, J.

This appeal arises from the decision of the Juvenile Court of Dar es Salaam at Kisutu, in respect of Civil Application No. 02 of 2021. At stake, in the said proceedings was an issue of maintenance of the three issues born as the result of intimacy between the parties herein. The said proceedings were instituted at the instance of the respondent who moved the trial Court to order maintenance of the said children. The Court acceded to the prayer and ordered the appellant to provide Tshs. 150,000/= in each month to the respondent as maintenance allowance. The trial Court decision relied on the fact that, the respondent was a businessman earning up to Tshs. 20,000/= as well as to the appellant's

salary slip, which underscored that he was earning Tshs. 343,097.60 monthly. The trial Court, went on to rule out that Tshs. 150,000/= has to be paid monthly by the appellant for maintenance of his children and the same was ordered to paid at the Social welfare office of Kisutu Juvenile Court.

The decision by the trial Court did not relish the appellant. He then preferred this appeal comprised of three (3) grounds, namely; -

1. *That the learned trial magistrate erred in fact and law by proceeding to entertain the application which did not properly move the trial Court.*
2. *That, trial magistrate erred in facts and law by not giving an appellant an adequate right to be heard.*
3. *That the trial magistrate erred in fact and law by considering only the responded on arriving at the monthly maintenance of the children allowance without considering an income of the appellant.*

At the hearing of the appeal, neither of the parties was represented.

The parties while fended for themselves, they prayed to dispose of their appeal by way of written submissions and the Court sacred their request, justly, I am grateful for the compliance made by the parties to the Court's schedule.

In submitting, the appellant prayed to abandon the 1st ground of appeal, in which he remained with two grounds, that to say the 2nd and 3rd ground.

In respect of the 2nd ground of appeal, the appellant contended that he was not given an opportunity to explain on his income. The appellant further explicated that since the children are over 7 years of age, he had requested the trial Court to give him the custody but the trial magistrate neither wrote in the proceedings nor considered the said prayer at all. He then insisted that, the respondent is cohabiting with another man for more than 5 years, thus, the trial magistrate did not want to hear. To propel up his arguments, he cited the case of **Deo Shirima and 2 Others vs. Scandinavian Express Services Ltd,** Civil Application no. 34 of 2018 (Unreported) in which the upper bench had insisted on the importance of affording right to be heard to the parties of a case in which failure vitiates proceedings.

In respect of the 3rd ground of appeal, the appellant contended that the appellant has prayed to pay Tshs. 50,000/= as maintenance allowance and even requested the Court to have custody of the issues whom are above 7 years but the Court had ignored all the facts and

proceeded to order him to pay Tshs. 150,000/= per month as maintenance allowance.

In rebuttal, the respondent argued that; as to the 2nd ground, the appellant before the trial Court did not object that he was not maintaining the three children. She further stressed that the appellant is an employee and in reply to the application for maintenance of children, the appellant had attached a salary slip bearing figures at Tshs. 343,097.60 per month, thus, it was lucid from the salary slip to indicate the amount of the appellant's income. As to the applicant's prayer of custody, she accentuated that the appellant was supposed to file application to that effect. She then emphasized that the case of **Deo Shirima and Two Others** *(supra)* is distinguished.

In respect of the 3rd ground, the respondent eloquently argued that, **One**, the parties being the parents are legally duty bound to take care of the children as per section 9(3) of the Law of the Child Act, Cap 13 R.E 2019. **Two**, it is the duty specifically of a man to maintain his children by providing accommodation, clothing, food and education as may be reasonable having regard to his means and situation in life. According to her, the duty is enshrined under section 129 (1) of the Law of Marriage Act, [Cap 29 R.E: 2019]. Also, it was her submission

that, the Court cannot decide on what amount for maintenance a party should pay without making an inquiry as to the means of both parents. To bolster on the argument, she cited the case of **Festina Kibutu vs. Mbaya Ngajima** [1985] T.L.R 42 in which the Court had held that:

> *"In deciding what amount of maintenance should be paid, the Court should hold an inquiry as to the means of both parents in order to arrive at a just decision; where applicable the court should take into account the customs of the parties and the conditions prevailing at any particular time."*

According to the respondent, the trial Court had inquired the means of income of either party, and the appellant did not contest on means of income of the respondent. Thus, it arrived to a just decision.

The respondent further accentuated that, the appellant had prayed to pay Tshs. 50,000/- per month as maintenance allowance for three children for the reason that the children have their health insurance which he pays, however according to her, the appellant did not assert any facts or put in evidence why he cannot pay maintenance allowance of Tshs. 150,000/= with a salary of Tshs. 343,097.60. It was the respondent's contention that the appellant's argument as to the presence of children health insurance for him to pay Tshs. 50,000/= was too narrow.

In his rejoinder, the appellant had nothing new to explain, but rather he reiterated what he had submitted prior in chief.

The parties' contending view breed two key issues for determination by the Court.

1. *Whether the trial magistrate did not afford the appellant right to be heard.*
2. *Whether the maintenance allowance ordered by the trial Court at a tune of Tshs. 150,000/= per month was just.*

Starting with the first issue, I do not wish to spend much time here as things are ***res ipsa loquitur*** (things speaks for themselves) basing on the following; **First,** the application before the trial Court from which this appeal emanates indexed as *Juvenile Civil Application no. 2 of 2021*, was in respect of maintenance of three issues. The Chamber application by the applicant (herein the respondent) didn't hint anything concerning custody. The fact that the respondent (appellant herein) was enthusiastic to have custody, he ought to have followed the procedure for making an application for custody under **rule 63 (1)** of the **Law of the Child (Juvenile Court Procedure), GN. 182 of 2016.** For better understanding, the said provision reads that: -

> *"63. (1)* ***An application for custody*** *or access by a parent, guardian or relative who is caring for the child* ***shall be made by filing JCR Form No. 8 set out in the Third Schedule of these Rules."*** [Emphasis added]

Under the premises, the appellant as the records stands, he never filed the above prescribed form which brings me to the stance that, he never made an application for custody of the three issues.

Second, it has been contended by the appellant that he was not afforded right to be heard as he was never given opportunity to explain about his income. But again, he stressed that the respondent lives with another man and all these were never recorded by the trial court. I would like to make it here vibrant that, **One,** a Court record is a serious document, it cannot be rightly impeached by mere words. There is always a presumption that a court record accurately represents what happened. See the cases of **Halfan Sudi vs. Abieza Chilichili**, CAT-Civil Reference No. 11 of 1996 and **Flank Alphonce Masalu @ Singu & 4 Others vs. Republic,** CAT-Criminal Appeal No. 366 of 2018 (both Unreported). In this matter, I am of the opinion that the so allegations pertaining the trial magistrates' neglect to record the transpired proceedings, have not been proved to the satisfaction to rebut the said presumption.

Two, factors to be considered by the juvenile court in granting a maintenance order are specified under **section 44** of the **Law of the Child Act, [Cap. 13, R.E: 2019]** and **rule 84 of Law of the Child (Juvenile Court Procedure), GN. 182 of 2016.** They include, the wealth and income of both parents and the impairment earning capacity of the person liable to maintain the child. Section 44 reads as follows;

> *"44. The court shall consider the following matters when making a maintenance order;*
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
> *(b) any impairment of the earning capacity of the person with a duty to maintain the child;*
> *(c) the financial responsibility of the person with respect to the maintenance of other children;*
> *(d) the cost of living in the area where the child is resident; and*
> *(e) the rights of the child under this Act."*

The above factors are the ones required to be considered by the Juvenile Court to order for maintenance. The issues as to who the respondent lives with as her husband are totally the extraneous matters differing to what the law requires. For that reason, I believe the salary slip by the appellant could be so sufficient to be considered

basing on the circumstances which surround the instant case. Of course, I am alive with the importance of involving a social welfare officer in matters of maintenance for purpose of ascertaining the ability of the parents and the accuracy of the statements in respect of income, but the law is very clear under **section 45** of **the Law of Child Act** (supra) and **rule 85** of **GN. 182 of 2016** that, it is not a mandatory procedure as the provision is not coached in a mandatory term as it says the court 'may' order a social inquiry report. Under the circumstances of this case and based on the evidence produced, I find that the trial magistrate was not obliged to rely on the social inquiry report. The engagement of the social welfare officer depends on the circumstances of each case. [See the case of **Veronica Agostino Shirati vs. Issa Ramadhani Kisibo**, (Civil Appeal No. 09 of 2020) [2020], TZHC 814 (05 June 2020), the case has also been reported in the ***Compendium of Child Justice*** **cases by the Institute of Judicial Administration Lushoto** at page 75]. Henceforth, the 1st issue is disposed negatively.

Embarking to the second issue, as to whether the maintenance allowance ordered by the trial Court at a tune of Tshs. 150,000/= per month was just, I believe as the trial Court did rely on the salary slip,

from what the same underscores, the appellant receives Tshs. 343,097.60 per month as salary. I accord to the respondent's submission to the extent that, section 129 (1) of the Law of Child Act gives duty to a father to maintain his children whether they are in his custody or the custody of another person. Count on the circumstances of the matter at hand, the prudence is quite clear that, so long as there is a health insurance for the all issues, some costs which are likely to be incurred by the respondent in respect of medical treatments for the children have been covered. But again, it is a good law that an order of maintenance should be logic and reasonable basing on the circumstances of each case.

I have keenly considered the earning capability of both parties basing on the records. The logic appears to me that Tshs. 150,000/= as maintenance allowance from the salary of Tshs. 343,097.60 is excessive. I am therefore strongly inclined to rule out that at least payment of Tshs. 100,000/= per month is reasonable as maintenance allowance which is almost 1/3 of the monthly salary of the appellant.

To put it certain, in case of any changes of circumstances in future, the respondent is entitled by virtue of rule 88 of **of Law of the Child**

(Juvenile Court Procedure), GN. 182 of 2016 to apply for variation of this maintenance figure before the trial Court.

In the event, this appeal is partially allowed to the extent explained. Each party to bear its own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th day of August 2022.

I. Itemba

JUDGE