IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

JUVENILE CIVIL APPEAL NO. 01 OF 2022

(Arising from Juvenile Court of Kigoma in Civil Application No. 05 of 2021)

KURUTHUM MOSHI RASHID.....APPELLANT

VERSUS

AMOS WAMBURA SERIKALI .....RESPONDENT

JUDGEMENT

11/07/2022 & 19/08/2022

MANYANDA, J.

Kuruthumu Moshi Rashidi, the appellant, is distressed by the ruling and drawn order of the Juvenile Court of Kigoma (trial court) in Civil Application No. 05 of 2021 dated 19/07/2021 which dismissed with costs her application for maintenance of her child. She filed the application against the respondent, Amos Wambura Serikali, a man whom she claimed to have conjugal relationship and begot him a daughter namely Jeniffer Amos who was born on 19/06/2019. The respondent admitted

the conjugal relationship but denied to impregnant her and therefore he is not the biological father of the child.

The trial court after hearing both parties, dismissed the application following a finding that the appellant failed to prove fatherhood of the child by the respondent. She has raised a total of five grounds of appeal namely: -

1. *That the trial court erred in law and in facts in dismissing the application for child maintenance a child of three years old merely because of being begotten b the parties out of their respective marriages;*
2. *That since it was not disputed that the appellant's husband Salum Mohamed Mwalau left the matrimonial home in Uvinza to Kahama in 2011 thereby deserting/separating from the appellant to date and in the course, parties indisputably started conjugal relations whose fruits is the suit child, then that the trial court erred in law and in facts in dismissing the application for maintenance against the respondent, a biological father in terms of section 43(1) and 35(b) of the Law of Child Act No. 02 of 2009;*
3. *That the circumstances of this case, the trial court erred in law and in facts in applying the presumption under section 121 of the*

Tanzania (sic) Evidence Act, [Cap. 6 R. E. 2019] against Salum Mohamed Mwalau who separated from the Appellant in 2011 to date while the child was born in 2019,

4. *That, since the respondent had partly denied parentage of the suit child, then that the trial court erred in law and in facts in not complying with Rule 61(1 to 5) of the Law of the Child (Juvenile Court Rules), 2016 as well as Rule 85(2) on the Social Welfare Inquiry Report procedure thereby vitiating the proceedings; and*
5. *That, generally, the trial Resident Magistrate erred in law and facts in the analysis and evaluation of the evidence, oral and documentary adduced by the parties thereby occasioning a failure of justice on the part f the appellant.*

At the oral hearing, the appellant was represented by Mr. Ignatus R. Kagashe, learned Advocate, and the respondent enjoyed representation services of Mr. Daniel Lumenyela, learned Advocate.

Arguing in support of the appeal Mr. Kagashe combined grounds one and two submitting that it was wrong for the trial court to order maintenance of the suit child by the appellant's husband who is not responsible with her birth. The Counsel argued that such a holding is discriminatory and violative of the provisions of section 5(2) of the Law

of Child Act, No. 2 of 2009 [Cap 13 R. E. 2019] (LCA) which prohibits discrimination of children based among others "birth". Then the Counsel summarized the evidence by the appellant that it was proved the respondent is the biological father of the suit child. He cared from her pregnancy to the age of two years and gave her name. The Counsel was of the view that under section 8(1) of the LCA put mandatory obligation to parents to care their children they bear in their conjugal exercises. He cited section 43(1) of the LCA also puts for order of maintenance to be issued. The Counsel added that proof of parentage may be proved from the name registered in the birth and death register as provided by section 35(b) of the LCA.

Arguing in support of ground three, the Counsel submitted that it was wrong for the trial court to apply the provisions of section 121 of the Evidence Act presuming the child was a product of marriage even if appellant didn't have conjugal contact with her husband who had deserted her for a long time.

In ground four, the Counsel argued that the trial court ought to have directed DNA tests after the respondent denying fatherhood of the suit child as provided by Rule 61(1 to 5) of the Law of the Child (Juvenile Court Rules), 2016. He pointed also that there no inquiry

report by a Social Welfare Officer as required by Rule 85(1) and (2) of the same Rules.

In respect of ground five, Mr. Kagashe submitted generally that the trial court did not properly evaluate the evidence which, according to him, it established on balance of probabilities that the respondent is the biological father of the suit child, hence liable of maintaining it.

He prayed the appeal to be allowed with costs. In alternative relief, he prayed this Court to order the trial court gather additional evidence of DNA and then deliberate the case.

On the other side, Mr. Lumenyela argued opposing the appeal by submitting that the trial court rightly found that the child of the appellant was not born out of wed lock because the appellant conceded to be a wife of a man known as Salum Mohamed Mwalau with whom she had two other children. Further to that, their marriage been not legally nullified or separated, and that she is living in her husband's house and leased part of it; proceeds from which she is maintaining the child, therefore, the appellant and the suit child are under the care of her husband.

Then the Counsel dealt with the issue of difference of names of the respondent which is different from what the appellant mentioned.

The appellant said the name of the respondent is "Ben" not the respondent. The clinic card also named one "Jimmy" not the respondent whose name is "Amos Wambura Serikali".

Mr. Lumenyela dismissed the issue of birth certificate because there was no evidence to that effect. He further denied any the allegations of maintaining the appellants during pregnancy and after birth of the suit child. He vehemently dismissed the contention of payment of Tshs. 205,000/= as maintenance of the child but the respondent was compelled by police.

Moreover, the Counsel supported the finding by the trial court on application of section 121 of the Evidence Act that the child was born within marriage of the appellant and her husband, therefore it is the liability of the husband to maintain it. On the requirement of a Social Welfare Officer's inquiry report, the Counsel argued that the same was tendered in court.

As to the last ground on the complaint that the trial court failed to evaluate the evidence, Mr. Lumenyela argued that the same was duily evaluated. According to the Counsel, it was clear that the respondent who admits to cohabit with the appellant in 2017 said that he stopped

the same year therefore, he could not have impregnated the appellant who bore the suit child in 2019.

As regard to the request of DNA test, the Counsel took no issue other than stating that the same was not raised before the trial court.

He prayed for the appeal to be dismissed, However, he pointed out that the question of costs, since this a family issue costs are not necessary.

In rejoinder, Mr. Kagashe, for the appellant, reiterated his submissions in chief and added that adultery allegations are irrelevant as long as the respondent is a biological father of the suit child, he is liable for its maintenance.

Those were the counsel's submissions, they have discharged their duty, it is now my turn to determine this matter.

Let me start with the complaint in ground three of appeal because the trial court disposed the application basing on the rebuttable presumptions provided under section 121 of the Evidence Act.

From the submissions by the counsel for both sides, it is not disputed that the appellant is married to a person called Salum Mohamed Mwalau. That the marriage was contracted in 2004 and both the appellant and the said Salum Mohamed Mwalau lived at Uvinza. The

evidence of the appellant is that her husband left their matrimonial home in 2011 and went to live at unknown place in Kahama in 2011. She has no contact with him to date. Hence in 2017 started cohabiting with the respondent. The respondent admits this allegation that he started conjugal relationship with the appellant in 2017.

According to the appellant's Counsel, in the course of that conjugal relationship with the respondent she got pregnancy and was delivered of a baby girl, the suit child, in this matter. That the appellant named the respondent as a responsible man with the pregnancy. Hence a biological father of the suit child. That the respondent admitted the pregnancy and maintained the appellant even after delivery and that he is the one who gave a name to the suit child as Jenifer Amos.

The respondent's counsel conceded that the respondent had conjugal relationship with the appellant in 2017. However, he argued that the same survived for a short time as the respondent terminated it in the same 2017 after discovering that she was married to the said Salum Mohamed Mwalau and the marriage was not legally dissolved or separated. That since the conjugal relationship started in 2017 and ended in the same year, then, the respondent cannot be a biological father of the suit child who was born in 2019.

In its ruling, the Juvenile Court, held that the respondent is not liable to maintain the suit child because she was born in the appellant and Salum Mohamed Mwalau's wedlock due to existence of marriage between them. As stated above, it relied on the provisions of section 121 of the Evidence Act which provides that a person born in continuance of marriage or within 280 days after dissolution is taken to be born in wedlock of that marriage. It reads as follows: -

> *"121. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall raise a rebuttable presumption that such person is the legitimate son or daughter of that man."*

The complaint by the appellant is that the trial court misapplied that provision of the law to facts of this case.

I have gone through the ruling of the trial court and the records of this matter, and found that the trial court did not go into the nitty gritty of the matter and find whether the respondent is a biological father of the suit child. After finding proof of continuance of marriage between the appellant and a man called Salum Mohamed Mwalau, the trial court went on ruling that the suit child, who was born ten (10) years later

after stoppage of conjugal contacts between the appellant and her husband ceased, is born in wedlock.

I think this complaint is valid. I say so because section 121 presumes that conjugal contacts took place during the subsisting marriage and puts a grace period of 280 days on anticipation of delivery of a child conceived during the conjugal contacts that took place during marriage before dissolution. Therefore it cannot be applied where there is no evidence of conjugal contact for about ten years.

The evidence, as rightly, submitted by the counsel for the appellant, the conjugal contacts between the appellant and her husband stopped in 2011 when the said Salum Mohamed Mwalau deserted her. In my firm views such a desertion is a constructive separation and in such a situation, the suit child could not be presumed to be born in the wedlock of Salum Mohamed Mwalau. I say so because, it is my strong view, that the interpretation by the trial court that any child born in wedlock, even where conjugal contacts ceased beyond the 280 days set by section 121 of the Evidence Act, is absurd. In this matter, for instance, such a long period of ten (10) years since cessation of conjugal contacts between the appellant and her husband Salum Mohamed

Mwalau is far beyond the application of the rebuttable presumption under the provision of the law in issue.

The trial court's interpretation goes with the Swahili saying that "kitanda hakizai haram", meaning a wedlock bed does not breed bastard children. Such construction, with due respect, is to read the law upside down and leads to absurdity and repugnant to the laws of this land. It is unacceptable. Ground three has merit.

The next question is whether the evidence adduced proved on the balance of probabilities that the respondent is the biological father of the suit child. This covers grounds one, two and five of which complaint is basically on analysis of evidence.

In her testimony, the appellant stated that she started sexual relationship with the respondent in 2017 after her husband deserting her since 2011. That she conceived and the respondent accepted the pregnancy to be his. He maintained her during pregnancy and continued after delivery of the child whom he named as Jenifer.

The respondent admitted having conjugal contacts with the appellant starting in 2017. He contended that he ceased in the same year, while the appellant contended that he did not cease until the child was born and went on caring and maintaining her until a dispute arose

between them which culminated at police station where the respondent gave the appellant capital money Tshs. 205,000/=.

As it can be seen, here are two witnesses conflicting each one. It is their credibility that can make the court find reliability in either testimony. Unfortunately, the trial court which saw them testifying did not analyze their evidence is this issue. However, credence may be gauged by looking at coherence of their testimonies.

My perusal of the evidence in this matter shows that the appellant gave coherent evidence starting from contraction of her marriage with the said Salum Mohamed Mwalau and his desertion to her in 2011, later on in 2017 developed conjugal relationship with the respondent. She named the respondent in the clinic card (Exhibit P1) as being the father of the child. She was steady to her testimony in cross examination by the respondent. The testimony of the respondent is basically denial based on differences of names and conjugal relationship period.

In her testimony, the appellant named the father of the child to be Amos Jimmy Wambura Serikali, which are names of the respondent she knew after been so told by the respondent himself . Moreover, in cross examination by the respondent, she explained how a name Beny came in. That it was the respondent who sent a person called Beny to escort

her to the clinic. The reason is not far fetched, clinical services need a companion for registration of pregnancy. In this matter the respondent been also married man, it is expected of him to disguise the conjugal relationship with the appellant. So, the name of Jimmy, in my view, followed the suit. The respondent contended that his name is in the NIDA identity which is Amos Wambura Serikali, in my view the appellant could have not dreamt about the names in the NIDA identity of the respondents, she used a name given to her by the respondent.

In addition to that, the respondent agreed to provide maintenance of the suit child by giving Tshs 205,000/= as capital to the appellant to start a business that would generate income for sustainable maintenance of the suit child. He made the said payment within 24 months after birth of the suit child. The respondent alleges that he paid the same under duress before police, but evidence shows that he wired that money via M-PESA and there is no evidence that he was forced to do so.

Under section 43 of the LCA, a man is presumed to be a biological father of the child where he has, within 24 years after birth, paid money for its maintenance. Moreover, it is a rebuttable presumption of the law

that a man named by the mother of the child is presumed to be the biological father of the child.

In my firm opinion, the evidence by the appellant, which is partly admitted by the respondent, is straight, coherent and reliable. She proved on the balance of probabilities that the respondent is the biological father of the child. Her act of naming him and reporting his name in the clinic card using names which, as stated above given by the respondent himself confirms the finding of this Court that the biological father of the suit child. I find that there is merit in grounds one, two and five.

As regard to ground four, the Counsel for appellant submitted that a report of social welfare was needed, but the same was absent, that its absence vitiated the proceedings. In reply Mr. Lumenyela submitted that such a report was produced in court.

I have read the ruling and found the same makes a reference to a report of a Social Welfare Officer at pages 3 and 4. Upon my perusal of the records I found the said Social Welfare Officer's Report, the same was tendered as Exhibit P2. Therefore, this complaint has no merit.

In the upshot, for reasons stated above, it is the findings of this ourt that the appeal has merits as explained above. Consequently, I ıake the following orders: -

1. The appeal is allowed;
2. The trial Juvenile Court ruling dated 19/07/2021 is hereby quashed and the drawn order set aside;
3. The respondent is hereby declared a biological father of the suit child namely, Jenifer Amos;
4. The respondent is ordered to provide maintenance of the suit child Jenifer Amos to the tune of Tshs. 150,000/=; and
5. This been a family matter, I make no order as to costs.

It is so ordered.

Dated at Kigoma this 19th day of August, 2022

MANYANDA

JUDGE