

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.385 OF 2021

*(Originating from Civil Application No. 408 of 2001 in the
Juvenile Court of Dar es salaam)*

MARYSIA FESTO KESSY..... APPELLANT

VERSUS

LUDOVICK VICENT KESSY.....RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2022

Date of Judgment: 06/10/2022

Kamana, J:

The Appellant one Marysia Festo Kessy is before this Court by way of an appeal after being aggrieved by the decision of the Juvenile Court of Dar es Salaam at Kisutu in Civil Application No. 408 of 2021 to award her, among other things, Tshs.200,000/= as monthly maintenance allowance for her child instead of Tshs.400,000/= which was in her prayers.

In view of that, she advanced the following grounds of appeal which are verbatimly reproduced hereunder:

1. That, the trial Court erred in law and fact in ordering the Respondent to contribute Tshs.200,000/= without considering the special needs of the child.

2. That the trial Court erred in law and fact in failing to properly analyze the evidence adduced.
3. That the trial Magistrate erred in law and fact for believing the testimony of the Respondent that he earns a salary of Tshs.972,814.15 without any proof to substantiate.
4. That the trial Magistrate erred in law and fact for failure to require further evidence in the assertion made by the Respondent that he has a family.
5. That the trial Magistrate erred in law and fact for not considering and awarding the outstanding school fees balance from June, 2021 to December, 2021 which the Respondent neglected to pay.
6. That, the trial magistrate erred in law and fact by awarding costs in relation to clothes and shelter to be contributed by the applicant without having regard to the financial status of the Applicant, being unemployed.
7. That, the trial Magistrate erred in law and fact for not giving weight to the child's sickness that is Cloacal Exstrophy which is rare and complicated to which it is

not only physical but also psychological and that the child requires extra attention and needs compared to other children.

At this juncture, I think it is pertinent to, albeit, briefly, provide background that led to this Appeal. The Appellant and Ludovick Vicent Kessy were paramours. Out of their love, the duo was blessed with a child named XX (name withheld to conceal his identity). The child was born on 29th June, 2017 at the Muhimbili National Hospital, Dar es Salaam.

At a certain point in time, the relationship between the Appellant and the Respondent turned sour and they parted ways. Since then, the child remained in the custody of his mother, the Appellant. It was alleged by the Appellant that the Respondent was not providing adequate maintenance for his child since January, 2021.

It is against that background, the Appellant filed an Application in the Juvenile Court against the Respondent seeking orders for:

1. Payment of maintenance allowance for the child to the tune of Tshs.400,000/= a month.

2. Payment of arrears of maintenance allowance of Tshs.400,000/= per month from January, 2021.
3. Enrollment of the child into the National Health Insurance Fund (NHIF) or any other suitable health insurance agreed by the parties and further continue to pay subscriptions annually.
4. Provisions of contribution towards child's education costs including but not limited to school fees; school uniforms and other clothing items; expenses for sports and/or cultural and other extra curricula activities including but not limited to school trips.

Responding to the prayers of the Appellant, the Respondent told the trial Court that he is ready to maintain his child but not to the extent prayed by the Appellant. He averred that according to his station of life is ready to provide Tshs.150,000/= as monthly allowance for the maintenance of the child. In substantiating this position, the Respondent submitted that he is paid Tshs.972,814.15/= a month as a salary and he has other family with two children and his family depends on him as his father is

late. However, it was the contention of the Appellant that Tshs.150,000/= is not enough since the child has so many needs.

Having heard both parties and in consideration of the Social Enquiry Report submitted by the Social Welfare Officer pursuant to the provisions of section 45 of the Law of the Child Act, Cap.13, the trial Court ruled that the Respondent should provide a monthly allowance for the child of Tshs.200,000/=. Further, the Respondent was ordered to pay school fees to a school he can afford and furnish a child with health insurance. It was also the order of the trial Court that the Appellant be responsible for clothes and shelter as a mother and custodian of the child.

Aggrieved by the decision of the trial Court, the Appellant preferred this Appeal. At the hearing, both parties were unrepresented. It should be noted at this juncture that for the purpose of this appeal, I will delve into third and fourth grounds since they are sufficient enough to determine this appeal.

Arguing for the third ground, the Appellant submitted that the trial Court misdirected itself for holding that the Respondent earns a salary of Tshs.972,814.15 a month. She submitted that in holding that there was no proof submitted before the Court to prove the Respondent's salary.

On the other hand, the Respondent contended that his gross salary is Tshs.2,260,000. He averred that after statutory and other deductions he remains with Tshs.1,096, 000 per month. He further stated that after servicing loans, he is left with Tshs.888,000/= a month. However, he admitted that during the trial he did not remember to have tendered salary slip to prove his earnings in terms of salary.

With regard to fourth ground, it was submitted by the Appellant that the Respondent did not furnish any evidence that supports his testimony of having another family. She averred that the trial Court misdirected itself for believing the testimony of the Respondent that he had another family without requiring him to produce a certificate of marriage and birth certificates of children.

Responding to that ground, the Respondent reiterated his position in the trial Court that he has two children outside the wedlock and another child with his wife. He submitted that he does not have birth certificates of his children though he has a certificate of marriage.

Having heard the rival arguments of both parties and upon perusal of the records, the issue for determination of this Court is whether the trial court considered the following:

- (a) The income and wealth of both parents of the child;
- (b) The financial responsibility of the person with respect to the maintenance of other children.

With regard to consideration and wealth of both parents of the child, it is my considered view that the trial Court did not properly address that issue. According to section 44 of the Law of the Child Act, Cap.13, before issuing a maintenance order, the Court is required to take into consideration the income and wealth of both parents of the child.

According to the records, the trial court concluded that the Respondent earns Tshs.972, 814.15 a month. However, the records are silent as to how the Court arrived at such conclusion that the earnings of the

Respondent are Tshs.972,814.15. It should be noted that during the trial, there is no record that the Respondent had submitted a salary slip or a letter of appointment that depicts his earnings with a view to enabling the Court to ascertain his wealth as per the requirements of section 44(a) of the Law of the Child Act.

In this regard, I am alive that the trial Court, pursuant to the provisions of section 45 of the Act, requested the Social Welfare Officer to prepare a Social Enquiry Report. According to that section, the Court is required to consider the Report before issuing a maintenance order.

Further, according to rule 85(1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 (GN No. 182 of 2016), the Social Enquiry Report is prepared for the purpose of providing an assessment with regard to the ability of parents to provide for the maintenance and care of child and ascertainment of any statements in respect of income and liabilities.

The rule reads:

'(1) The Court may, before granting an order for maintenance in accordance with section 45 of the Act, request a social welfare officer to prepare a social enquiry report for purposes of:

- (a) *assessing the ability of parents to provide for the maintenance and care of the child;*
- (b) *ascertaining the accuracy of any statements relating to income and outgoings and liabilities.'*

After a close examination of the records, it is the finding of this Court that neither the trial court nor the Social Welfare Officer did a comprehensive assessment with regard to the ability of the parents, particularly, the Respondent to provide for the maintenance and care of the child. This is due to the fact that the Report does not depict the assessment of wages, salaries, commission, bonus and allowances including other considerations as provided under rule 84 of the Law of the child (Juvenile Court Procedure) Rules, 2016.

This Court had the opportunity to stress on the importance of assessing the income of the person who is sued for maintenance of the child. In the case of **Jerome Chilumba v. Amina Adamu**, TLR,117 it was held that:

'In a case for maintenance, it is important for a trial court to find out the income of the person sued in order to be able to decide the amount to be paid.'

Briefly, in the cited case, the Primary Court in a suit for maintenance of a child born out of wedlock ordered the Appellant to pay the Respondent Tshs.1,000/= per month in maintenance. On appeal, the District Court increased the monthly payments to Tshs.1,200/=. The High Court found both lower courts to have erred in arriving at those rates without finding the income of the sued person.

In the absence of proof as to the Respondent's salary and other incomes, I am of the settled mind that the trial Court could not arrive at a rational decision with regard to the Application before it. In that case, I found merit in the third ground of appeal.

Regarding the fourth ground, it was the contention of the Appellant that the trial Court did not receive evidence as to the family status of the Respondent other than his testimony that he has a wife, three children and a family to support. In her view, this was an error which prejudices her rights. In his submission, the Respondent conceded that he does not

have birth certificates to prove his case other than a certificate of marriage.

It is trite law as per section 44 of the Law of the Child Act that in cases involving maintenance of the child, courts should consider the financial responsibility of the person regarding the maintenance of other children. Since it was the defence of the Respondent that he has other children to maintain, the trial Court was supposed to verify the truthfulness of that defence by tasking the Respondent to prove his case. This Court is of the position that a mere testimony without documentary proof as to the existence of other children and marriage is insufficient to decide the matter in relation to maintenance of a child. In that case, I hold that the fourth ground is meritorious.

In concluding, I allow this appeal basing on the two grounds. Consequently, I order that this matter be remitted to the Juvenile Court of Dar es Salaam before another Magistrate. Bearing in mind the nature of this appeal, I order no costs.

It is so ordered.

Right to appeal explained.

DATED at DAR ES SALAAM this 6th day of October,2022.



KS KAMANA

JUDGE



Delivered at Dar es Salaam in Chambers this 6th day of October, 2022 in
the presence of both Parties.