

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 06 OF 2022

*(Arising from Civil Revision No. 03 of 2021 of Karagwe District Court and Originating from
Matrimonial Cause No. 07 of 2020 of the Nkwenda primary Court)*

TUMAINI NTAMBI----- APPELLANT

VERSUS

PRAXEDA TUMAINI-----RESPONDENT

JUDGMENT

Date of Last Order: 23/03/2022

Date of Judgment: 08/04/2022

Hon. A. E. Mwipopo, J.

The appellant herein namely Tumaini Ntambi filed Matrimonial Cause No. 07 of 2020 in Nkwenda Primary Court praying for dissolution of marriage with respondent herein Praxeda Tumaini and custody of three children they had together. The trial Court in its decision dissolved the marriage, ordered a total of shillings 380,000/= which the respondent gave it to the appellant for the purpose of acquiring properties has to be returned to the respondent, one child has to be

in the custody of the appellant and the second and third children to remain in the custody of the respondent. Also, the appellant was ordered to pay each month 50,000/= to the respondent for maintenance of two children in the custody of the respondent. The appellant was aggrieved by that decision and he filed Civil Revision No. 03 of 2021 in the District Court of Karagwe at Kayanga. The District Court revised the decision and the orders of the trial Primary Court and it ordered two children namely Halein Tumaini and Asante Tumaini to be placed in the custody of the appellant and the last born namely Atosha Tumaini to remain under the custody of the respondent. The District Court ordered the appellant to provide for the maintenance of the child in the custody of the respondent by paying shillings 25,000/= per month, school fees, uniform and treatment expenses. The Court also ordered the appellant to pay shillings 380,000/= to the respondent as it was ordered by the trial Primary Court. The appellant was not satisfied once again and he appealed to this Court.

The Petition of Appeal filed by the appellant in this Court contains six grounds of appeal as follows hereunder:-

- 1. That, both trial Courts grossly erred in law and facts for failure to take into consideration that the appellant has a great chance to provide children necessities and care compared to the respondent who is living in the bar and has no any economic status to provide necessities to their issues hence wrong decision.*

2. *That, both trial Courts grossly erred in law and facts for failure to take into consideration the principle of the best interest of the child during the determination of the case which is causing the respondent to stay with the appellant's one child in the bar contrary to the morals of the society hence wrong decision.*
3. *That, both trial Court's Magistrate did wrong to refuse the appellant's prayers of living with all children since the respondent is living in the bar by selling alcohol as well as sleeping in the same bar with the appellant's one child called Atosha Tumaini contrary to the Law of the Child.*
4. *That, both trial Courts grossly erred in law and facts for failure to know that the learned District Magistrate did wrong to act on hearsay evidence adduced by the respondent without any written agreement of shillings 380,000/= which was not tendered in both trial Courts hence wrong decision.*
5. *That, both trial Courts erred in law and facts for failure to recognize that there was no intention to create legal relations regarding to the contract of shillings 380,000/= with the respondent hence wrong decision.*
6. *That, both trial Courts grossly erred in law and facts to decide the case against the watertight evidence adduced by the appellant who proved the case beyond balance of probability.*

In order to understand the story behind this appeal, the evidence adduced in the trial Court will suffice. Briefly, the testimony of the appellant who testified as SM1 in the trial Primary Court is that he was in relationship with the respondent from 2013 to 2017 whom they had 4 children together. One child died in March 2017 and the child was buried in appellant's land. From there on their relationship

went sour and that he want the custody of his children. In her testimony, the respondent who testified as SU1 said that they had relationship the appellant who found her selling local brew known as lubisi. They agreed to have children together and the appellant was taking care of the children. During that time the respondent was living to his parents' house. The respondent had the 3rd children who passed away and was buried in the appellant's farm. The appellant rented a room for her and a quarter of the acre for farming. The appellant promised her to buy a farm and built a house her as result she gave him a total of 280,000/= for purpose of buying a farm and house. The respondent had another child and the appellant called her Atosha Mungu. After their last child reached 3 months the appellant stopped taking care of the respondent and her children. The only thing which the appellant was doing is to pay for the rent of the room he hired for her. SU2 who is a mason testified that he was paid shillings 40,000/= by the appellant to remove the roof from unfinished house which the appellant told him he was constructing for the respondent. This is all evidence available in record.

On the hearing date, the appellant appeared in person and the respondent was absent. The Court ordered the hearing to proceed in absence of the respondent after the appellant prayed for the hearing to proceed in absence of the respondent. The Court was satisfied that the respondent was served with the

summons to appear on hearing, the summons which was endorsed by Mabira Village Executive Officer on 12th March, 2022.

The appellant being a lay person had no much to say. He said on the first ground of appeal that he pray to be given the child in custody of the respondent as he is in a better position to provide for the child. The respondent is living in a bar and has no stable source of income. The respondent does not want him to take the child to boarding school as result the child is denied a better education. On the second ground of appeal, the appellant said that the District and Primary Court ordered him to pay shillings 25,000/= monthly for maintenance of the child which he is not capable of affording.

The appellant submitted on the third ground of appeal that he was ordered by the trial Primary Court to pay the respondent shillings 380,000/= without knowing the reason for paying the said amount. He said that there is no agreement or anything which shows that the respondent owe him the said amount. Thereafter, the appellant prayed for the Court to consider all grounds of appeal in his petition of appeal.

In determination of this appeal the Court will consider all grounds of appeal in the petition as it was the prayer of the appellant in his submission.

The appellant said in the 1st, 2nd and 3rd grounds of appeal in the petition of appeal that the respondent was living in a bar for that reason it is not for the best

interest of the child and morals of the society and that the respondent is sleeping with the child in the same bar which she is selling alcohol and he is capable of providing child necessities and care compared to the respondent. As these first three grounds of appeal are interrelated, I'll determine all of them together. The law is settled that the best interest of the child shall be the primary consideration in any event concerning the child. This is provided in section 4(2) of the Law of the Child Act, Cap. 13, R.E. 2019. The said section provides as follows:-

"4 (2) The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies."

This Court was of the same position in the case of **Glory Thobias Salema v. Allan Philemon Mbagu**, Civil Appeal No. 46 of 2019, High Court at Arusha, (Unreported).

The Law of the Child Act provides further about the best interest of the child in consideration of the custody of the child in section 39. The said section provides as follows:-

"39.- (1) The court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody or access.

(2) Subject to subsection (1), the court shall also consider-

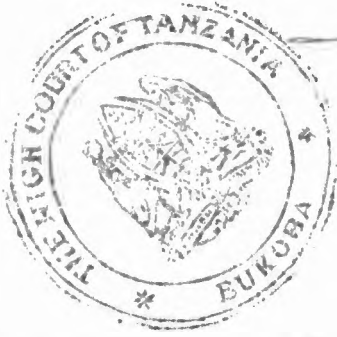
(a) the rights of the child under section 26;

(b) the age and sex of the child;

Primary Court and the District Court rightly held that the appellant has to pay the respondent the said money in full.

On the last ground of the appeal the appellant said that the evidence he adduced is watertight to prove his case on balance of probabilities. As it has already been discussed herein there is no evidence whatsoever to prove that the respondent is not capable of taking care of the child or has no economic status to provide necessities to the child or was living in a bar. The District Court erred to hold that the respondent's style and environment is not convincing for the reason that she was residing in a bar, the same place she is conducting business of selling alcohol until midnight. I do not know from where the District Court did get such facts as evidence available in the record of the trial. Primary Court says something else. This is the reason the District Court granted custody of two children to the appellant and left only one child in the custody of the respondent. As there is no appeal against such a decision of the District Court filed by the respondent, I'm not going to revise the said holding of the District Court and the orders made therefrom.

Therefore, I find that all grounds of the appeal in this case are devoid of merits. Consequently, the appeal is hereby dismissed for want of merits. It is so ordered accordingly.



A.E. Mwipopo

Judge

08.04.2022

The Judgment was delivered today, this 08.04.02022 in chamber under the seal of this court in the presence of the appellant and in the absence of the respondent.



A. E. Mwipopo

Judge

08.04.2022